IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Claim No: CO/3212/2019

THE QUEEN on the application of (1) THE 3MILLION LIMITED; [redacted]

Claimants

- v -

MINISTER FOR THE CABINET OFFICE

Defendant

CLAIMANTS' SKELETON ARGUMENT
For the hearing on 8-9 December 2020

References take the form "**[*volume/part/page*]**", e.g. **[A2/G/1903]** is PDF Authorities Bundle A page 1903 and the same page in volume 2, part G of the paper version and **[B2/C/1093]** is page 1093 of PDF Hearing Bundle B and the same page in volume 2, part C of the paper version.

Time Estimate: 1 day pre-reading; 2 day hearing.
Suggested Pre-Reading: Skeleton Arguments;
Second Witness Statement of Jakub Jablonowski ("**Jablonowski 2**") **[B2/C/1141–1149]**;
First and Second Witness Statements of John Halford ("**Halford 1**") **[B2/C/1093-1103]**; ("**Halford 2**") **[B2/C/1114-1122]**;
Witness Statement of Monique Hawkins ("**Hawkins 1**") **[B2/C/343-361]**;
Witness Statements of the individual Claimants [redacted];
Witness statement of Peter Lee for the Defendant **[B3/D/1206-1273]**
Reports of the Electoral Commission **[B3/E/2011 – 2028]** and **[B3/E/2029 – 2048]**.

A. SUMMARY

1. This case concerns the mass disenfranchisement of EU citizens during the European Parliament elections held on 23 May 2019 ("**the 2019 Elections**"):

2. Citizens from EU Member States, excluding the UK, the Republic of Ireland, Malta and Cyprus ("**EU24 citizens**") who wished to vote in the 2019 Elections were unable to do

so due to the onerous voting registration requirements and the conduct of the Defendant in the lead up to the 2019 Elections. Of the 2,185,614 EU24 citizens that had registered to vote by 7 May 2019, only 452,113 were permitted to do so (i.e. 20.69%).[1] Those disenfranchised include the Third to Seventh Claimants.[2]

3. The right to vote, and the equal exercise of that right by all citizens, are fundamental to the operation of a democracy. The right of all eligible EU citizens to vote in European Parliament elections is guaranteed by law, and has particular significance as one of the fundamental rights conferred by the EU Treaties as part of EU citizenship.

4. The right to elect Members of the European Parliament ("**MEPs**") underpins the democratic accountability of the EU institutions and ensures that, in line with the Treaties' objectives, decisions are taken as closely as possible to the people. Inherent in that right is the ability of EU citizens who have exercised their rights of free movement to choose where to vote – either in their Member State of origin or their Member State of residence.

5. The 2019 Elections were of particular significance, given their timing in relation to the withdrawal of the UK from the EU. They were especially important to EU24 citizens resident in the UK who were unable to vote in the 2016 Referendum. In particular, the 2019 Elections gave those EU24 citizens an opportunity to elect British MEPs to the European Parliament, who would then carry influence in the ongoing Article 50 withdrawal negotiations.

6. Unlike citizens of the UK, Republic of Ireland, Cyprus and Malta, EU24 citizens resident in the UK are required not only to register to vote but also to indicate their intention to vote in the UK by returning a separate, time-limited, "UC1" or "EC6" form not more than 12 months and not less than 12 days prior to each poll ("**the Declaration Form**" or "**the Form**"). For the purposes of the 2019 Elections, the Declaration Form had to be printed, completed and returned by post in hard copy or, in certain cases, as an email attachment to electoral registration officers ("**EROs**") by no later than 12 days before the election, that is by midnight on 7 May 2019. That was the same day on which the Defendant finally confirmed that the UK would be participating in the 2019 Elections, having previously maintained a firm and public position that the UK would not do so.

7. The use of the Declaration Form as a separate requirement in the election registration process for EU24 citizens has been heavily criticised by the Law Commission, the Electoral Commission and the European Commission since at least the 2014 European

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1 See §51 below.

2 The Second Claimant, [redacted], has withdrawn **[B1/A/249]**.

Parliament elections ("**the 2014 Elections**"). Prior to the 2019 Elections, the Defendant accepted that its requirement for a separate Declaration Form placed a discriminatory administrative burden on EU24 citizens and was in need of reform to prevent disenfranchisement at the 2019 Elections. To this end, the Electoral Commission identified a number of timely and effective modifications to make it easier for EU24 citizens to exercise their right to vote, not all of which required legislation. However, the Defendant abandoned discussions on the necessary reforms. Exacerbating this, he then resisted all requests to begin contingency planning for the 2019 Election in good time. His conduct, including the timing of the announcement of the 2019 Elections and the terms of the instructions given in connection with the election, compounded the problems inherent in the system.

8. Since the issue of these proceedings, the Electoral Commission has published a statutory report into the 2019 Elections and an inquiry report on the registration process for EU24 citizens. The Electoral Commission recognised that the Defendant's conduct of the 2019 Elections adversely impacted on overall public confidence in the electoral process because "*some people did not have the opportunity to vote/had the opportunity taken away*", in particular EU24 citizens **[B3/E/2014]**. It found that it was the Defendant's failure to legislate for improvements in the process, and the continued uncertainty on whether the elections would take place, that resulted in people who were entitled to vote and wanted to vote in the 2019 Elections not being able to do so.

9. This claim is brought on the following grounds:

   9.1. **Ground 1:** The Defendant acted in breach of the directly effective rights of EU24 citizens set out in:

      (1) Article 10(3) of the TEU **[A1/A/18]**, Articles 20(2)(b) and 22(2) of the TFEU **[A1/A/15-16]** and Article 39 of the EU Charter **[A1/A/13]**; and

      (2) Articles 3, 8, 9(1), 9(4) and 12 of the Directive 93/109/EC ("**the Voting Directive**" **[A1/A/6-10]**).

   9.2. **Ground 2:** The Defendant acted in breach of the rights of the Third to Seventh Claimants under Article 3 of Protocol No. 1 ECHR **[A1/B/38]**.

   9.3. **Ground 3:** EU24 citizens were required to satisfy different and more onerous conditions to vote in the 2019 Elections than those in a comparable position, contrary to:

(1) the specific non-discrimination provisions set out in Article 10 TEU **[A1/A/18]**, Articles 20(2)(b) and 22(2) TFEU **[A1/A/15-16]**, Article 39 of the EU Charter **[A1/A/13]** and Article 9(4) of the Voting Directive **[A1/A/8]**;

(2) the general prohibitions against nationality discrimination set out in Article 18 TFEU **[A1/A/15]** and Article 21(2) of the EU Charter **[A1/A/12]** read with Articles 2 and 9 TEU **[A1/A/18]**;

(3) in respect of the Third to Seventh Claimants, Article 14 **[A1/B/27]** read with Article 3 of Protocol No. 1 ECHR **[A1/B/38]**; and

(4) s.29(6) **[A1/C/140]** read with s.9(1)(b) **[A1/C/134]** of the Equality Act 2010 ("**the EA 2010**").

9.4. **Ground 4:** The Defendant acted contrary to the duty to have regard to the matters set out in s.149 of the EA 2010 **[A1/C/143-144]**.

10. The parties have agreed that this hearing should consider the substantive claims against the Defendant, with a view to listing a separate hearing on the claim for damages in the event that judicial review is granted.

B. FACTUAL BACKGROUND

(1) The 2014 Elections

11. Following complaints regarding the disenfranchisement of EU citizens in the 2014 Elections, the Electoral Commission[3] and the Law Commission[4] raised concerns about the adverse effects on EU24 citizens of the additional requirement to complete and return a Declaration Form. The Electoral Commission committed to working with the Government, EROs and organisations representing EU24 citizens to identify what could be done to simplify the system and remove unnecessary administrative barriers to participation ahead of the 2019 Elections.

12. The European Commission also raised concerns that EU citizens were prevented from exercising their voting rights in the 2014 Elections in July 2014 **[B4/F/2234-2237]** and December 2014 **[B4/F/2297-2298]**.

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3 Electoral Commission, *Report on the administration of the 22 May 2014 elections* (July 2014) at §§3.85-3.86 **[B3/E/1472-1473]**.

4 Law Commission, *Electoral Law: An Interim Report* (February 2016) at §§4.71-4.73 **[B3/E/1794]**; *Electoral Law: Equality Impact Assessment* **[B3/E/1723-1735]**.

13. Following the 2014 Elections, the Defendant considered in internal correspondence, and in discussions with the Electoral Commission and other interested groups, whether the system for registration of EU24 citizens should be changed:

13.1. In an internal email in July 2014, with the subject "EPE (Franchise etc) Regs 2001 – can we defend them and do they need to be amended?", Cabinet Office officials noted that "*[a]nother side issue is the fact that Maltese, Cypriot and Irish citizens don't have to complete such a declaration, as they're registered under the wider franchise of British citizen – so there is a potential discriminatory angle, in addition to the fact that we are clearly not following the directive in relation to these citizens*" **[B4/F/2231]**.

13.2. In December 2014, the Electoral Commission attended an initial meeting with Cabinet Office officials to discuss options for resolving this issue, along with members of groups representing EU24 citizens.

13.3. In January 2015, the Cabinet Office officials acknowledged "*instances of EU citizens who wanted to vote at the EP election in the UK but were unable to do so*", adding that the means to address this issue were being considered "*in depth*" **[B4/F/2299-2300]**.

13.4. In February 2015, the Government stated that it had planned further discussions with the Electoral Commission and other stakeholders on the registration process for EU24 citizens. No such discussions were held **[B3/E/2016]**.

13.5. In January 2016, Cabinet Office officials wrote to the Electoral Commission seeking its views on various ways in which the Declaration Form process could be reformed, including making the validity of the Declaration Form indefinite, amending the "invitation to register" forms to incorporate the declaration in the same document, adding the declaration of intention to vote to registration forms[5], and/or requiring EROs to distribute Declaration Forms to EU24 citizens **[B4/F/2394-2396]**.

13.6. The Electoral Commission responded with comments, suggesting that (amongst other things) Declaration Forms be made available for completion at polling stations when votes were cast, which would "*eliminate the necessity for the two-stage registration procedure and reduce the administrative barrier for those EU citizens wishing to cast their vote at European Parliamentary elections*." The Electoral Commission asked whether the Cabinet Office had considered this option and, if so, to explain their reasons for not supporting it **[B4/F/2399]**. In response to the Law Commission consultation, the Electoral Commission suggested challenging the law so that "*EU*

[5] As is common in a number of EU Member States.

citizens are automatically entitled to vote in European Parliamentary elections once registered, without completing any additional declaration at the time of registration" **[B3/E/1794]**

13.7. An updating memo from the Defendant's officials of May 2016 noted they were "*taking forward measures to make it easier for citizens of other Member States to make a declaration of intent to vote in the UK for European Parliament elections, by better integrating the declaration into the usual voter registration process … and to ensure these changes to the existing system make registration easier for citizens of other Member States.*" **[B4/F/2400]**. The Defendant stated that "*it hoped to implement these changes in time for the 2019 European Parliament elections*" **[B4/F/2400]**.

14. After the EU Referendum in 2016, this initiative was abandoned altogether because, according to Peter Lee, Director of Constitution within Constitution Group in the Cabinet Office, there was "*an organic and common-sense recognition by all involved that prioritization of time and resources required focus to be elsewhere, and that the issue was essentially moot*"(Lee 1 §105 **[B3/D/1240]**).

15. Cabinet Office spokesman, Lord Young of Cookham, also made clear during a House of Lords Debate on 5 May 2019 that the recommendations of the Electoral Commission were not taken forward because "*our policy was to leave the European Union before the end of March 2019 and therefore before the next election was due*" **[B4/F/2898]**.

(2) <u>Preparations for the 2019 Elections</u>

16. Following the 2016 EU Referendum, the Government adopted a public position that the UK would not be participating in the 2019 Elections. However, in 2017, the Defendant was made aware that, if the 2019 Elections were to take place, confirmation would need to be given to EROs well in advance.[6] Paul Docker, Head of Electoral Administration in the Cabinet Office, made clear to the Defendant that EROs would need to start preparing "*18 months out*" and would need "*clarity on participation or a commitment to indemnify them for any nugatory expenditure*" by the end of 2017 **[B4/F/2402]**.

17. On 14 June 2017, Mr Docker made a submission to the Defendant about the risks to the successful delivery of a poll if confirmation that the 2019 Elections were taking place was only given in March 2019 or later:

> *"Ideally, we would have at least 6 months to prepare for the poll, i.e. from November 2018. After this point, there are increased risks to the successful delivery of a poll. Our assessment is that if Returning Officers were required to deliver a poll in 2019 (which*

[6] The exact date of the 2019 Elections was known in advance; such elections have been held between 23 and 26 May on a five yearly basis since 1979.

would be likely to take place in late May or early June) the very last date that they would need to be advised of this would be March 2019; and beyond this it would be very difficult to successfully deliver a poll. However, there are still risks with making such a decision that late in the day." **[B4/F/2430]**

18. On 25 September 2018, Cabinet Office officials advised the Electoral Commission to provide guidance to EROs that they "*should not*" issue Declaration Forms to EU24 citizens for the 2019 Elections and to encourage EU citizens to register to vote in their Member State of origin rather than in the UK **[B4/F/2481]**.

19. On 19 February 2019, Parliamentary Secretary for the Cabinet Office, Chloe Smith MP, made a statement in a House of Commons Debate that the UK would not be participating in the 2019 Elections **[B4/F/2485]**.

20. The position adopted by the Defendant did not change, despite the House of Commons' first rejection of the Withdrawal Agreement on 15 January 2019 and the second rejection of the Withdrawal Agreement on 12 March 2019. The Defendant maintained its position even when Parliament voted in favour of an extension of the UK's membership of the EU on 14 March 2019 – little more than two months before the date of the 2019 Elections.

21. On 13 March 2019, Peter Stanyon, CEO of the Association of Electoral Administrators ("**AEA**"), wrote to the Defendant stating "*[w]e are deeply concerned that time is running out and significant risk will be introduced to the successful delivery of such polls, were they to be required, if steps are not taken now, particularly in areas where local government elections are already occurring on 2 May*". He asked the Cabinet Office to clarify whether EROs were permitted to make contingency arrangements for the possibility that the 2019 Elections would take place **[B4/F/2488]**. An email of 18 March 2019 from the Defendant's private office indicated that a reply should be drafted, but that "*[i]t should not give authority to start contingency planning.*" **[B4/F/2509]** Mr Stanyon sought clarification again on 22 March 2019, having received no response to his first email **[B4/F/2487-2488]**.

22. On 18 March 2019, Mr Docker stated to HM Treasury that they were "*very close*" to a point at which it would be "*irresponsible for [local authorities] not to start preparatory work*" **[B4/F/2496]**. On 25 March 2019, the Electoral Commission wrote to the Defendant highlighting the ongoing uncertainty about whether the 2019 Elections would be held in the UK and the need for reassurances to EROs that they would be reimbursed for any reasonable spending on contingency preparations **[B4/F/2516-2517]**.

23. It was only by letter of 1 April 2019 to the Electoral Commission that the Defendant confirmed that reasonable expenditure by EROs would be authorised, nevertheless stating that "*the Government's position is that it remains the intention for the UK to leave the EU with a deal and not take part in the European Parliamentary Elections in May*" **[B4/F/2520]**.

There was also a targeted restriction on authorised expenditure: EROs were told that they would not be reimbursed for the costs of sending out Declaration Forms to EU24 citizens **[B4/F/2534-2535]**.

24. On 3 April 2019, the Scottish Government warned the Defendant that late confirmation of the 2019 Elections would result in EU24 citizens not having sufficient time to complete and return the Declaration Forms **[B4/F/2557]**.

25. On 4 April 2019, following the Cabinet Office's advice, the Electoral Commission issued guidance to the effect that EROs were not required to send Declaration Forms to EU24 citizens in circumstances where the 2019 Elections had yet to be confirmed:

> *"As there is not yet a confirmed poll, EROs may decide to wait until the order that is required to set the date of the poll has been made before sending out any declarations. Whilst this would lead to a shortened timescale for this activity, it does avoid committing significant resource without certainty that the work is needed, and most importantly would limit the risk of confusion for EU citizens if the poll is not held in the UK. In any case, you should look now at what preparatory steps you will need to take in order to be able to send the declaration forms out at short notice if required."* **[B4/F/2585]**

26. On 8 April 2019, the Defendant laid the European Parliamentary Elections (Appointed Day of Poll) Order 2019 ("**the 2019 Order**") **[A1/C/148-149]**. The Explanatory Memorandum to the 2019 Order stated that it "*remains the Government's intention to leave the EU with a deal and pass the necessary legislation before 22nd May, so that we do not need to participate in European Parliamentary elections*" and that the Order "*does not make these elections inevitable as leaving the EU before the date of election automatically removes our obligation to take part*" **[A1/C/150-152]**.

27. In the following weeks, the Government publicly maintained that the UK would not be participating in the 2019 Elections **[B4/F/2682]** and refused to promote the need for EU24 citizens to complete and return the Declaration Form at least 12 days before the election on 23 May 2019. This uncertainty, as noted by the Chairman **[B4/F/2710]** and Chief Executive **[B4/F/2986]** of the Electoral Commission, made it very difficult for EROs to successfully deliver the election.

28. On 7 May 2019 (at 15:07), the Defendant made a widely reported statement to the BBC that the UK would be participating in the 2019 Elections **[B4/F/2744]**. No changes were made to the deadline for EU24 citizens to return their Declaration Form. That deadline expired on midnight of the same day.

(3) The 2019 Elections

29. The 2019 Elections took place in the UK on 23 May 2019. Shortly after the polls opened, there were a number of social media reports of EU24 citizens being told that they could not vote despite being registered, using the Twitter hashtag, "#DeniedMyVote" (e.g. **[B2/C/472-488]**).

30. By the end of the day, these were widespread in broadcast media and on the internet by national and local news organisations: Hawkins 1 §28-31 **[B2/C/349-350]**. A number of concerns were also raised by MPs **[B2/C/530, 537, 547, 558, 576, and 580]**.

Response of Electoral Administrators

31. By email of 4 June 2019 to Mr Lee, Mr Stanyon of the AEA made clear that EU24 citizens were unable to vote in the 2019 Elections due to the "*failure of Government to listen to concerns and allow contingency planning until it was too late*". He noted the following issues:

> "*The main issues impacting the European polls were:*
>
> - *Election teams told on numerous occasions not to makes plans as "the UK will be leaving the EU on 29 March"*
> - *Even when the tide began to turn, government only confirming on 1 April that reasonable contingency arrangement costs would be covered*
> - *The Prime Minister only acknowledged on 5 April that the election would be legislated for, which then took another five days*
> - *The Minster for the Cabinet Office only confirming on 7 May that polls would go ahead – deadline day for elector registration and for EU citizens to complete an additional form to vote*
> - *The complexity of registering EU citizens - not recognised by government which did not act on Electoral Commission recommendations from 2014 to simplify the process …*
> - *Insufficient capacity across the electoral community to manage a short notice poll just three weeks after local elections in many areas of England and across Northern Ireland*
> - *A lack of resource in local authorities due to ongoing cuts, with electoral services teams often understaffed and under pressure*
> - *The challenges of recruiting polling station and count staff due to the bank holiday weekend, not helped by current government funding system to sufficiently pay them*
> - *An unrealistic expectation that elections will always be delivered regardless of the landscape, timing, funding or capacity of people delivering them."* **[B4/F/2876-2877]**

32. The materials disclosed by the Defendant do not suggest this assessment was rebutted by Mr Lee or his Cabinet Office colleagues.

Response of the European Commission

33. On 21 June 2019, European Commission's Justice Commissioner, Vera Jourová wrote to Chloe Smith MP, stating that EU24 citizens were deprived of the effective exercise of their right to vote during the 2019 Elections due to the same issues that arose five years previously, which the UK had undertaken to remedy in time for the 2019 Elections:

> *"The attention of the Commission has been drawn to a number of difficulties encountered by Union citizens resident in the United Kingdom seeking to participate in elections to the European Parliament which took place last month. Such difficulties are understood to have deprived the Union citizens concerned of the effective exercise of their right to vote as provided for under Union law.*
>
> *The Commission notes that the difficulties encountered were largely reoccurrences of incidents and deficiencies that had previously arisen during the 2014 elections and which the United Kingdom had undertaken to remedy in time for the 2019 elections. …*
>
> *I understand that the UK authorities faced practical challenges in the organisation of the elections to the European Parliament since the United Kingdom was originally due to withdraw from the Union on 29 March 2019 and the need to organise those elections resulted from the European Council Decision taken in agreement with the United Kingdom of 11 April 2019 extending the period under Article 50(3) TEU. Nevertheless, this does not affect the obligation of the United Kingdom to respect the right to vote of EU citizens and to take measures necessary to ensure such voting rights can be effectively exercised."* **[B4/F/2928-2930]**

Response of the Electoral Commission

34. On 8 October 2019, the Electoral Commission published two reports on the conduct of the 2019 Elections: the statutory report **[B3/E/2011–2028]** and an "inquiry report" entitled "The voting registration process for EU citizens resident in the UK for the 2019 European Parliamentary elections held in the UK" **[B3/E/2029–2048]**. The significance of the reports and the key conclusions are summarised at **Halford 2 §§11-14 [B2/C/1120-1121]**.

35. The Electoral Commission concluded that:

> *"Among issues which impacted on people's confidence in the elections, most notable and regrettable were the issues experienced by some citizens of other EU member states living in the UK who wanted to vote in the European Parliament elections in the UK. We highlighted similar difficulties to government after the 2014 European Parliamentary elections and made recommendations for change. It is unacceptable that people eligible to vote should be frustrated from doing so, and deeply regrettable that this was not acted on and resolved by the UK government.*

Any changes to the process would have required the Government to introduce legislation, but the law was not changed ahead of the 2019 election. The difficulties were also exacerbated by government not confirming the position on these elections proceeding until very late in the lead up to May 2019, which meant that Electoral Registration Officers (EROs) had not sent declaration forms to EU citizens in the months before the election, as would usually have been the case."

36. The Electoral Commission identified three main reasons why some EU24 citizens were not able to vote: (1) they had not been aware of the need to complete an additional declaration as well as an application to register to vote; (2) they had not been able to submit a declaration in time before the deadline set in law; and (3) they thought they had submitted a declaration in time, but were still not included on the electoral register and were not able to vote.

37. Whilst comprehensive data available on the number of those affected is not available, the Electoral Commission found that:

    37.1. Around 450,000 (21%) of EU24 citizens who had been included in the May 2019 local government register were also registered to vote in the 2019 Elections, having submitted a Declaration Form in time.

    37.2. Around four in five (1.7 million) EU24 citizens who had previously registered to vote did not submit a Declaration Form in time to be registered to vote in the 2019 Elections. Some of these people may have wanted to vote in the UK but were not able to submit the Declaration Form in time before the deadline.

    37.3. The proportion varied considerably across individual local authority areas. Three quarters of all EROs who returned data to the Electoral Commission reported that only 10% to 30% of EU24 citizens who had been included in the May 2019 local government elections were also registered to vote in the 2019 Elections.

(4) <u>Categories of EU24 Citizens Disenfranchised</u>

38. The Third to Seventh Claimants fall within four categories of EU24 citizens, consistent with those identified by the Electoral Commission, who were prevented from voting in the 2019 Elections:

<u>Category 1</u>

39. EU24 citizens who had registered to vote and who were aware of the requirement to complete and return a Declaration Form, but who were unable to return the Form before deadline on 7 May 2019. This included those who:

39.1. had not received a Form from their ERO but found out about the requirement from another source; had downloaded, completed and submitted the Form by post, but found it had not been received by the ERO before the deadline;

39.2. had not received a Form from their ERO, but found out about it from contacting their ERO regarding other issues but too late to be able to submit the Form;

39.3. had received a Form from their ERO, but had not had enough time to complete and submit it by post to the ERO before the deadline.

40. The Third Claimant, [redacted], is a "Category 1" EU 24 citizen. [redacted] She first registered to vote in 2004 and completed [redacted] Council's annual canvass confirming her details on the electoral register in August 2018. On 13 May 2019, whilst watching an interview on television, it came to her attention that EU citizens living in the UK were required to complete the Declaration Form. She contacted the Council to ask whether she was eligible to vote. She was told that she was on the register and would be able to vote in the 2019 Elections. She conducted further independent research and called the Council once more on 14 May 2019, who then told her that the deadline for completing the Form had passed. On 21 May 2019, she received a letter from the Council dated 13 May 2019 stating that her Form was either not received or received too late. On 23 May 2019, she attended the polling station, saw the "G" code beside her name and was told that she would not be able to vote. She wrote to the Electoral Commission and her MP, [redacted], to express her frustration and concerns. **[B2/C/267-268]**

Category 2

41. EU24 citizens who had registered to vote, but who were unaware of the requirement to complete and return the Declaration Form. This accounted for over half the queries received by the Electoral Commission from EU24 citizens or their family members. This included those who:

41.1. had successfully registered to vote but were not aware of the Form;

41.2. said that the acknowledgement that confirmed they had registered to vote told them that there were no necessary formalities and/or did not inform them of the requirement to complete and return the Form and, therefore, they had assumed that they were also registered to vote in the 2019 Elections;

41.3. had received a Form from their ERO, but were not informed that they needed to complete and return the Form to vote in the 2019 Elections.

42. The Fourth Claimant, [redacted], is a "Category 2" EU24 citizen. [redacted]. She first registered to vote over 10 years ago and has since voted in a number of local elections. Whilst she had voted in previous European Parliament elections in [redacted] via postal vote, she voted in the UK in the 2014 Elections and had intended to do the same in the 2019 Elections. On 24 April 2019, even though she was already registered to vote in [redacted] for local government elections, she re-registered to vote online. She received an email confirming that her application was received, but was not informed of any additional requirements for eligibility to vote.

43. On 6 May 2019, her friend told her about the Declaration Form. She found the Form on the [redacted] consulate website, which said that she was required to print, complete and return the Form by the following day. Aware that she would not be able to do so in time and given that she did not have access to a printer in her home, she decided to go to [redacted] Town Hall that afternoon, but she arrived shortly after it closed. On 7 May 2019, she called the electoral office at [redacted] Town Hall who informed her that her name would be on the register by 1 June 2019. She was told that she could nevertheless vote at the polling station with her ID. On the basis of this information, she did not complete the Declaration Form. On 23 May 2019, she attended the polling station and saw her name written in red and struck through on the register. Despite enquiries on the day, she was not permitted to vote. **[B2/C/288-289]**

44. The Fifth Claimant is also a "Category 2" EU24 citizen. [redacted]. [redacted]. She first registered to vote at least 30 years ago and voted in the 2014 Elections. On 20 April 2019, to be certain that she would be able to vote in the 2019 Elections, she re-registered to vote online. She received confirmation that her application had been received and that [redacted] would contact her within 10 days. On 13 May 2019, having had no further contact from [redacted], she contacted the Electoral Services Office by telephone who confirmed that she was registered and would be able to vote in the 2019 Elections. She was not informed of the requirement to complete and return a Declaration Form or that the Declaration Form she would have submitted in respect of the 2014 Elections had expired. On 23 May 2019, she attended the polling station and was told that she was not able to vote. She wrote to her MP, [redacted] and the Electoral Commission. **[B2/C/297-298]**

Category 3

45. EU24 citizens who had registered to vote and had returned a Declaration Form in the 2014 Elections, but were unaware that the Form expired 12 months after receipt, so did not complete and return a Form for the 2019 Elections.

46. The Sixth Claimant, [redacted], is a "Category 3" EU24 citizen. She [redacted] first registered to vote in [redacted] in around 2009 and registered to vote in [redacted] when she moved in 2011. She has since voted in every local government election and the 2014 Elections. On 9 May 2019, she voted in the local government elections. She did not receive any information about the Declaration Form. She was not aware that the Declaration Form she would have submitted in respect of the 2014 Elections had expired. On 23 May 2019, she attended the polling station and saw her name struck through on the register. She spoke to staff at polling station who told her that she "*could go to Poland to vote*". **[B2/C/320]**

Category 4

47. EU24 citizens who had completed and returned a Declaration Form before the deadline on 7 May 2019, but who were still unable to vote, despite having completed all the necessary formalities. This included those who:

    47.1. had completed and submitted the Form by email or using an online service, but this said that was not accepted by the ERO;

    47.2. had completed and submitted the Form by post before the deadline of 7 May 2019, but said that the ERO claimed they had not received the Form by this date;

    47.3. had completed and submitted the Form by post before the deadline, but said that they were not included in the register of the European Parliamentary electors.

48. The evidence shows that their inability to vote was due, in substantial part, to the uncertainty and operational pressures placed on EROs and Local Returning Officers ("**LROs**") by the Defendant in the circumstances of the 2019 Elections.

49. The Seventh Claimant, [redacted], is a "Category 4" EU24 citizen. She [redacted] first registered to vote in the same year. She has since voted in many local elections and the 2014 Elections. In mid-April 2019, she received the Declaration Form appended to a letter from [redacted] City Council. She completed and returned the Form by hand to [redacted] Town Hall, the address specified on the Form, on around 26 April 2019. On 23 May 2019, she attended the polling station and saw her name struck through in the register. She contacted her MP,

[redacted], who contacted the ERO on her behalf **[B2/C/335].** By letter dated 23 May 2019, the ERO said that her Declaration Form had not been received and, whilst they did not doubt the veracity of her account, "*in previous EP elections, we've had enough time for the forms to be sent out and reminders sent. We did not have that luxury this time.*" **[B2/C/335-336]**

(5) <u>Scale of Disenfranchisement</u>

50. Mr Jablonowski has filed evidence presenting and analysing ERO and voting data. His first statement, which uses the data provided by EROs in response to requests made in the weeks leading up to this claim being filed, is summarised at SFG §88 **[B1/A/56-58]**. His second statement uses the most up to date Electoral Commission and Office for National Statistics data.

51. By way of summary, for the UK as a whole: of the 2,185,614 EU24 citizens that had registered to vote by 7 May 2019, only 452,113 were permitted to vote in the 2019 Elections (i.e. 20.69%): **Jablonowski 2 §10(1) [B2/C/1144].** The remaining 1,733,501 (i.e. 79.31%) registered EU24 citizens were automatically struck off the Combined Register and so were not permitted to vote in the 2019 Elections: **Jablonowski 2 §10(2) [B2/C/1144]**.

52. The Electoral Commission does not gather and publish all of the detailed data that some EROs collect and hold. However, using data from 99 local authorities who supplied it, Mr Jablonowski ascertained that 1.47% of the 475,054 struck off the Combined Register in those authorities, i.e. 9,068 EU24 citizens, had obtained, completed and sent their Declaration Forms to their EROs but were still unable to vote in the 2019 Elections because the EROs considered that their Forms arrived too late. This represented 5.94% of the total forms received by the EROs in those authorities: **Jablonowski 1 §9 [B2/C/717]**.

53. Both sets of figures are represented an appendix to **Jablonowski 2** headed "Table B", **[B2/C/1150–1193]**. The data in Table B is derived from: (1) an Electoral Commission spreadsheet entitled "2019 European Parliamentary Elections administrative data", published on 8 October 2019 **[B2/C/1194–1197]**; (2) the January to December 2019 data set "Population of the UK by country of birth and nationality" published by the Office for National Statistics ("**ONS**") on 20 May 2020 **[B2/C/1198-1205]**; and (3) some of the original Table A data provided with Mr Jablonowski's first statement **[B2/C/731–742]** (**Jablonowski 2 §6 [B2/C/1142-1132]**). Combining these data sets gives a sense of where EU citizens lived, according to the ONS estimates, when the 2019 Elections took place,

how many were registered to vote and how many were actually permitted to vote. Table B ranks the authorities from worst to best performing by reference to the percentage of registered EU24 nationals reported as having been struck from the Combined Register.

54. As an illustration of the data in Table B:

54.1. Luton was the worst performing local authority. There was local voter turnout of 27.4%. 16,049 EU24 registered to vote by April 2019, but none of them were sent Declaration Forms between 5 April and 7 May 2019. By the deadline, only 25 Forms were returned, i.e. 0.16% of the registered EU24 citizens. This resulted in 16,024 EU24 citizens being struck from the Combined Register in Luton, which meant that 99.84% of the registered EU24 citizens in Luton were unable to vote. Luton explained the difficulties in a letter of 24 June 2019 to Gavin Shuker MP, emphasising that "*owing to the late announcement of the election, electors were potentially left disenfranchised from the outset …"* **[B2/C/702]**.

54.2. In the worst performing authority that did send out Declaration Forms to EU 24 citizens who had registered to vote, Bedford, only 143 were submitted in time so only 1.3% of registered EU24 citizens were permitted to vote there. Of the remaining 11,023 who had registered to vote, 10,880 were struck from the Combined Register.

54.3. Even in the best performing local authority, North Somerset, where 3,268 Forms were returned from 6,494 registered EU24 citizens (i.e. 50.25%), there were still 3231 EU24 registered citizens struck from the Combined Register (i.e. 49.75%).

54.4. A number of EROs rejected Declaration Forms that were received after 7 May 2019 deadline. Such late returns represented 5.94% of the total forms returned by registered EU24 citizens in the 99 authorities originally surveyed. In some instances, the percentage significantly exceeded 10%. For example, in East Staffordshire **[B2/C/729]**; **[B2/C/732]**, 184 Forms were received after the deadline and not accepted. This represented 3.99% of registered EU24 citizens there and meant that 30.16% of the total number of Forms received by that ERO were rejected. Another example is Northampton **[B2/C/729]; [B2/C/732]**, where 1,774 Forms were received after the deadline and not accepted. This represented 9.19% of registered EU24 citizens there and meant that 46.37% of the total number of Forms received were not accepted by that ERO. A further example is Redbridge **[B2/C/729]; [B2/C/734]** where 1,243 Forms were received after the deadline and not accepted. This represented 6.24% of registered EU24 citizens there and meant that 26.12% of the total number of Forms received were not accepted by that ERO.

54.5. The total figure of 20.69% of EU24 citizens in the UK who were permitted to vote is significantly lower than the proportion of the overall population (which includes those EU24 citizens) that were registered to vote and actually voted, namely 37.1%.

54.6. Finally, using the up to date data:

(1) only 452,113 of the 2.19 million registered EU24 citizens (i.e. 20.69%) were permitted to vote in the 2019 Elections: **Jablonowski 2 §10(1) [B2/C/1144]**;

(2) 1,733,501 registered EU24 citizens (i.e. 79.31%) were struck from the Combined Register: **Jablonowski 2 §10(2) [B2/C/1144]**; and

(3) extrapolating from the data available from the 99 surveyed authorities, of those 2.19 million registered EU24 citizens, 32,042 registered EU24 citizens (i.e. 1.46%) were not permitted to vote because they returned their Declaration Form after the deadline.[7]

55. To ascertain the detail of what happened, the First Claimant also conducted two surveys of affected EU24 citizens, the results of which are discussed in Hawkins 1 §§32-39, 44-53 **[B2/C/350-355]**. By way of summary:

55.1. The first survey was completed by 797 individuals who were EU24 citizens or responding on behalf of an EU24 citizen. Those who provided responses lived in at least 254 (of 382) local authorities around the UK. Of those individuals who completed the survey:

(1) 31 individuals fell within Category 1;

(2) 474 individuals fell within Category 2. Of those 474 individuals, 202 individuals said that they believed there were no further formalities beyond registration. Of those 202 individuals, 15 individuals said they had been told explicitly by their local authority that there was nothing further they needed to do;

(3) 199 individuals fell within Category 4.

[7] Table A, Column J divided by Table A, Column D, multiplied by the number of EU24 Citizens registered to vote i.e. Column D of Table B.

55.2. The second survey was completed by 224 individuals, 221 of whom were EU24 citizens who had been unable to vote in the 2019 Elections. Of those individuals who completed the survey:

(1) 12 individuals (5%) fell within Category 1;

(2) 111 individuals (50%) fell within Category 2;

(3) 6 individuals (3%) fell within Category 3;

(4) 72 individuals (32%) fell within Category 4.

C. OPERATION OF THE EUROPEAN PARLIAMENT ELECTIONS

(1) 2002 Act and 2001 Regulations

56. The arrangements for voting in European Parliament elections are set out in the European Parliamentary Elections Act 2002 ("**the 2002 Act**") **[A1/C/123-126]** and the Elections (Franchise of Relevant Citizens of the Union) Regulations 2001 ("**the 2001 Regulations**") **[A1/C/86-114]**. The 2002 Act and 2001 Regulations purport to give effect to the Voting Directive.

57. Pursuant to s.8(1) of the 2002 Act **[A1/C/124]**, a person is entitled to vote as an elector at a European Parliament election if he is within any of the subsections (2) to (5) **[A1/C/124-125]**. A person is within subsection (5) if he is entitled to vote by virtue of the 2001 Regulations.

58. Regulation 3 of the 2001 Regulations **[A1/C/87-88]** states:

> *"(1) A person is entitled to vote as an elector at a European Parliamentary election in an electoral region if on the date of the poll he –*
>
> *(a) is registered in the region in the register of relevant citizens of the Union entitled to vote at European Parliamentary elections (maintained under regulation 5(2) below);*
>
> *(b) is not subject to any legal incapacity to vote (age apart);*
>
> *(c) is a relevant citizen of the Union; and*
>
> *(d) is of voting age (that is, 18 years or over).*
>
> *(2) A person is not entitled to vote as an elector –*
>
> *(a) more than once in the same electoral region at any European Parliamentary election, or*

(b) in more than one electoral region at a European Parliamentary general election."

59. A "relevant citizen of the Union" is defined in regulation 1 as an EU citizen who is not a Commonwealth citizen or a citizen of the Republic of Ireland.

60. Regulation 4(1) **[A1/C/88]** sets out the conditions for the entitlement of EU citizens to be registered as European Parliamentary electors:

> *"(1) A person is entitled to be registered in the register of relevant citizens of the Union entitled to vote at European Parliamentary elections (maintained under regulation 5(2) below) for part of an electoral region if on the relevant date he –*
>
> *(a) is resident in that part of the region;*
>
> *(b) is not subject to any legal incapacity to vote (age apart);*
>
> *(c) is a relevant citizen of the Union; and*
>
> *(d) is of voting age;*
>
> *and the registration officer has received in respect of him an application and declaration made in accordance with regulation 6(1) and (2) below."*

61. Regulation 5(2) **[A1/C/89]** requires each registration officer to maintain a register of any person entitled to be registered under regulation 4. By regulation 5(3), the register must, so far as practicable, be combined with the registers of parliamentary and local government electors, with entries for persons registered under the 2001 Regulations to be marked to indicate that fact.

62. Regulation 6 **[A1/C/90]** prescribes the form of application and declaration required by regulation 4(1):

> *"(1) An application under this regulation may be made by a relevant citizen of the Union ("the applicant"), shall be signed and dated by him and shall state –*
>
> *(a) the full name of the applicant;*
>
> *(b) the address in respect of which the applicant claims to be registered and whether he is resident there on the relevant date;*
>
> *(d) if the applicant is not resident on the relevant date at the address in respect of which he claims to be registered, whether he has made a declaration of local connection;*
>
> *(e) if the applicant is a merchant seaman on the relevant date, that fact;*
>
> *(f) either that the applicant is aged 18 or over or, if not, the date of his birth; and*
>
> *(g) in the case of an applicant whose application is accompanied by an application for an anonymous entry, that fact.*

(2) An application under this regulation shall include a declaration stating –

(a) the nationality of the applicant;

(b) the applicant's address in the United Kingdom, if different from the address given under paragraph (1)(b) above;

(c) where the applicant's name has been entered in a register of electors in a locality or constituency in the Member State of which he is a national, the name of the locality or constituency where, so far as he knows, his name was last so entered; and

(d) that the applicant will exercise any right which he has to vote at European Parliamentary elections at any such election only in the United Kingdom during the period for which any entry in the register of electors made in pursuance of this application remains in force.

(3) The registration officer shall supply free of charge as many copies of forms for use in connection with applications and declarations under paragraphs (1) and (2) above as appear to that officer reasonable in the circumstances to any person who satisfies that officer of his intention to use the forms in connection with the registration of relevant citizens of the Union as European Parliamentary electors."

63. Regulation 10 **[A1/C/94]** provides for removal of entries from the register. Pursuant to regulation 10(2)(a), EU24 citizens are automatically removed from the register after 12 months of receipt of their declaration:

"(2) A relevant citizen of the Union registered in a register of electors maintained under regulation 5(2) above is entitled to remain so registered until –

(a) the end of the period of 12 months beginning with the date when the entry in the register first takes effect,

(b) the declaration under regulation 6(2) above is cancelled under paragraph (1) above;

(c) the citizen applies for his entry to be removed;

(d) any entry made in respect of him in any other register of electors maintained under regulation 5(2) above takes effect,

whichever occurs first.

(3) Where the entitlement of such a person to remain registered terminates by virtue of paragraph (2) above, the registration officer concerned shall remove the person's entry from the register, unless he is entitled to remain in pursuance of a further application and declaration under regulation 6(1) and (2) above."

64. The requirements in the 2001 Regulations for registering to vote in the European do not apply to citizens of the UK, Republic of Ireland, Cyprus or Malta. Those citizens are permitted to vote with no further formalities beyond registration as an elector for the

parliamentary elections: s.8(2) of the 2002 Act [A1/C/124]; s.4 of the Representation of People Act 1983 ("the 1983 Act") [A1/C/41].

65. British citizens, Commonwealth citizens (including citizens of Cyprus and Malta) and citizens of the Republic of Ireland remain registered on the electoral roll indefinitely, unless they are no longer resident at the address at which they are registered or in other limited circumstances: s.10ZE of the 1983 Act **[A1/C/57]**.

(2) Operation of the System

66. In practice, the system for registration of EU24 citizens in European Parliament elections operates as follows:

66.1. An EU24 citizen must register to vote by completing a voter registration form and submit a Declaration Form in order to be entitled to vote in a European Parliament election.

66.2. EROs maintain a free-standing register of EU24 citizens who have registered to vote. When a European Parliament election is called, that register is combined with any other registers maintained by EROs to create a register of potential voters for that European Parliament elections which comprise registered EU24 citizens as well as registered British, Irish, Maltese and Cypriot nationals ("the Combined Register").

66.3. A Declaration Form must be downloaded, completed and sent by post or, in some electoral regions, a scanned version sent by email. It cannot be completed online. A Declaration Form is valid for 12 months from receipt by the ERO. An EU24 citizen who has submitted a Declaration Form is automatically removed from the register after that period. Accordingly, a Declaration Form completed for a previous European Parliament election would not remain valid for the following European Parliament election.

66.4. A Declaration Form must be received by EROs 12 working days in advance of the poll because the inclusion of an EU24 citizen on the Combined Register is treated as an application to, and alteration of, that Register.

66.5. Whilst EROs are encouraged by the Electoral Commission guidance to prepare and issue Declaration Forms to registered voters by second class post, there is no obligation to do so.

66.6. There is no discretion or flexibility built into the system to waive the requirement that a Declaration Form is submitted 12 working days in advance of the poll.

D. GROUND 1: BREACH OF RIGHTS UNDER EU LAW

67. The Defendant acted in breach of the directly effective rights of EU24 citizens set out in:

67.1. Article 10(3) of the TEU **[A1/A/18]**, Articles 20(2)(b) and 22(2) of the TFEU **[A1/A/15-16]** and Article 39 of the EU Charter **[A1/A/13]**; and

67.2. Articles 3, 8, 9(1), 9(4) and 12 of the Voting Directive **[A1/A/6-10]**.

(1) Relevant Legal Principles

Rights under the Treaty and EU Charter

68. Article 10(3) of the TEU **[A1/A/18]** provides:

> *"Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen."*

69. Article 20(2)(b) of the TFEU **[A1/A/15]** provides :

> *"Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: …*
>
> > *(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State …"*

70. Article 22(2) of the TFEU **[A1/A/16]** provides:

> *"Without prejudice to Article 223(1) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State."*

71. Citizenship of the Union is intended to be the fundamental status of nationals of the Member States: Case C-184/99 *Grzelczyk* [2002] 1 CMLR 19 **[A1/D/243-286]** at §§31-33. Article 10(3) TEU and Articles 20(2)(b) and 22(2) TFEU confer rights on individuals and preclude national measures which have the effect of depriving them of the genuine enjoyment of the substance of the rights conferred by virtue of their status as EU citizens: Case C-34/09 *Ruiz Zambrano v Office National de l'Emploi* [2012] QB 265 **[A1/D/610-678]** at §§40-42.

72. Article 39(1) **[A1/A/13]** of the EU Charter states:

> *"Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State."*

73. Whilst Article 52(1) of the EU Charter allows limitations to be imposed on the exercise of the rights under Article 39(1), the limitations must be "*provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, [must be] necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others*": Case C-650/13 *Delvigne v Commune de Lesparre-Médoc* [2016] 1 WLR 1223 **[A1/D/679-714]** at §46.

Rights under the Voting Directive

74. The Voting Directive lays down detailed arrangements for the exercise of the right to vote in European Parliament elections by EU citizens residing in a Member State of which they are not nationals. The importance of ensuring that all EU citizens, whether or not they are nationals of the Member State in which they reside, can exercise in that State their right to vote is recognised in the recitals to the Directive **[A1/A/6]**:

> *"Whereas the Treaty on European Union marks a new stage in the process of creating an ever closer union among the peoples of Europe; whereas one of its tasks is to organize, in a manner demonstrating consistency and solidarity, relations between the peoples of the Member States; whereas its fundamental objectives include a strengthening of the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union; …*
>
> *Whereas the right to vote and to stand as a candidate in elections to the European Parliament in the Member State of residence, laid down in Article 8b (2) of the Treaty establishing the European Community, is an instance of the application of the principle of non-discrimination between nationals and non-nationals and a corollary of the right to move and reside freely enshrined in Article 8a of that Treaty; …*
>
> *Whereas the purpose of Article 8b (2) of the EC Treaty is to ensure that all citizens of the Union, whether or not they are nationals of the Member State in which they reside, can exercise in that State their right to vote and to stand as a candidate in elections to the European Parliament under the same conditions; whereas the conditions applying to non-nationals, including those relating to period and proof of residence, should therefore be identical to those, if any, applying to nationals of the Member State concerned;*
>
> *Whereas Article 8b (2) of the EC Treaty provides for the right to vote and to stand as a candidate in elections to the European Parliament in the Member State of residence, without, nevertheless, substituting it for the right to vote and to stand as a candidate in the Member State of which the citizen is a national; whereas the freedom of citizens of the Union to choose the Member State in which to take part in European elections must be respected, while taking care to ensure that this freedom is not abused by people voting or standing as a candidate in more than one country …"*

75. The Voting Directive enables an EU citizen to have the freedom to vote in their Member State of origin or residence. Article 3 **[A1/A/7]** provides:

> *"Any person who, on the reference date:*
>
> > *(a) is a citizen of the Union within the meaning of the second subparagraph of Article 8 (1) of the Treaty;*
> >
> > *(b) is not a national of the Member State of residence, but satisfies the same conditions in respect of the right to vote and to stand as a candidate as that State imposes by law on its own nationals,*
>
> *shall have the right to vote … in elections to the European Parliament in the Member State of residence unless deprived of those rights pursuant to Articles 6 and 7."*

76. Article 4(1) **[A1/A/7]** states that EU voters must exercise their right to vote in either their Member State of residence or home Member State, and no person may vote more than once at the same election. Article 13 **[A1/A/9]** requires Member States to exchange information to identify double voting .

77. Article 8(1) **[A1/A/8]** provides:

> *"A Community voter exercises his right to vote in the Member State of residence if he has expressed the wish to do so."*

78. Article 9 **[A1/A/8]** imposes obligations on Member States to ensure that EU voters who have expressed a wish to vote in their Member State of residence are able to do so:

> *"1. Member States shall take the necessary measures to enable a Community voter who has expressed the wish for such to be entered on the electoral roll sufficiently in advance of polling day.*
>
> *2. In order to have his name entered on the electoral roll, a Community voter shall produce the same documents as a voter who is a national. He shall also produce a formal declaration stating:*
>
> > *(a) his nationality and his address in the electoral territory of the Member State of residence;*
> >
> > *(b) where applicable, the locality or constituency in his home Member State on the electoral roll of which his name was last entered, and*
> >
> > *(c) that he will exercise his right to vote in the Member State of residence only.*
>
> *3. The Member State of residence may also require a Community voter to:*
>
> > *(a) state in his declaration under paragraph 2 that he has not been deprived of the right to vote in his home Member State;*
> >
> > *(b) produce a valid identity document, and*

(c) indicate the date from which he has been resident in that State or in another Member State.

4. Community voters who have been entered on the electoral roll shall remain thereon, under the same conditions as voters who are nationals, until such time as they request to be removed or until such time as they are removed automatically because they no longer satisfy the requirements for exercising the right to vote."

79. Article 12 **[A1/A/9]** requires Member States of residence to inform EU voters "*in good time and in an appropriate manner*" of the conditions and detailed arrangements for the exercise of the right to vote.

Directly Effective Rights under EU Law

80. The CJEU has consistently taken the view that domestic law implementing a Directive must guarantee the full application of the Directive, so that individuals can benefit from the rights that it creates and in order to ensure the effective application of EU law. In Case C-478/99 *Commission of the European Communities v Sweden* [2004] 2 CMLR 34 **[A1/D/314-333]** at §15, the CJEU held that:

"[E]ach of the Member States to which a directive is addressed is obliged to adopt, within the framework of its national legal system, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective it pursues."

81. In Case C-62/00 *Marks & Spencer plc v Commissioners of Customs & Exercise* [2003] QB 866 **[A1/D/287-313]** at §27 the CJEU made clear that an individual may rely on the provisions of a Directive even where a Member State has enacted proper (but ineffective) implementing legislation:

"[T]he adoption of national measures correctly implementing a directive does not exhaust the effects of the directive. Member states remain bound actually to ensure full application of the directive even after the adoption of those measures. Individuals are therefore entitled to rely before national courts, against the state, on the provisions of a directive which appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise whenever the full application of the directive is not in fact secured, that is to say, not only where the directive has not been implemented or has been implemented incorrectly, but also where the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought by it."

82. The margin of discretion afforded to a Member State in implementing a Directive is not unlimited. It must be exercised in a manner which is consistent with the objective of the Directive and the effective and non-discriminatory protection of EU citizenship rights guaranteed by the EU legal order. In Case C-14/83 *Von Colson* [1986] 2 CMLR 430 **[A1/D/180–205]** at §15, the CJEU held:

"According to Article 189(3): 'A directive shall be binding, as to the result to be achieved, upon each member-State to which it is addressed, but shall leave to the national authorities

the choice of form and methods'. Although that provision leaves member-States to choose the ways and means of ensuring that the directive is implemented, that freedom does not affect the obligation imposed on all the member-States to which the directive is addressed, to adopt, in their national legal systems, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues."

83. The principle was restated by the CJEU in Case C-275/06 *Promusicae* [2008] 2 CMLR 17 **[A1/D/482–528]** at §§67-68 as follows:

> *"67. As to those directives, their provisions are relatively general, since they have to be applied to a large number of different situations which may arise in any of the member states. They therefore logically include rules which leave the member states with the necessary discretion to define transposition measures which may be adapted to the various situations possible. …*
>
> *68. That being so, the member states must, when transposing the directives mentioned above, take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the member states must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality (see, to that effect, Lindqvist at para 87; and Ordre des Barreaux Francophones and Germanophone v Conseil des Ministres (Case C-305/05) [2007] 3 CMLR 731 at para 28)."*

84. Accordingly, where a Member State is implementing measures transposing a directive, the general principles of EU law apply, which include the principle of proportionality (see *R (Lumsdon) v Legal Services Board* [2016] AC 697 **[A2/F/1418–1462]** at §§24- 25 (Lord Reed and Lord Toulson)), the principle of effectiveness and the principle of non-discrimination on grounds of nationality (as to which see Ground 2 below). If the wording of a Directive is open to more than one interpretation, Member States must not rely on an interpretation which renders the provision inconsistent with the Treaties, fundamental rights protected by the EU legal order or the general principles of EU law: see, e.g., C-305/05 *Ordre des Barreaux Francophones et Germanophone v Conseil des Ministres* [2007] 3 CMLR 28 **[A1/D/446-481]** at §28. A Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify failure to observe obligations arising under EU law: see, e.g., C-378/13 *Commission v Hellenic Republic* **[A1/D/665-678]** at §§24, 29.

85. If a measure of domestic law is inconsistent with EU law, the court must decline to give it effect: see, e.g., Case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] 3 CMLR 263 **[A1/D/153-179]** at §§17-18; *EOC v Secretary of State for Trade and Industry* [2007] 2 CMLR 49 **[A2/F/1273–1297]** at §4 per Burton J.

(2) Submissions

86. Articles 3 and 8(1) of the Voting Directive **[A1/A/7 and 9]**, as well as Article 10 TEU **[A1/A/18]**, Articles 20(2)(b) and 22(2) TFEU **[A1/A/15-16]** and Article 39 of the EU Charter **[A1/A/13]**, confer a right on EU citizens who have expressed the wish to vote in a European Parliament election to be able to do so in their Member State of residence. Pursuant to Article 12 of the Voting Directive **[A1/A/9]**, to facilitate the right to vote, EU citizens are also entitled to information on the conditions and detailed arrangements for the exercise of the right to vote in good time and in an appropriate manner.

87. Under Articles 9(1) and 9(4) of the Voting Directive **[A1/A/8]**, Member States have an obligation to take necessary measures to enable EU citizens to be entered on the electoral roll sufficiently in advance of polling day, and to ensure that they remain on the electoral roll under the same conditions as nationals.

88. It is clear that EU24 citizens, including the Third to Seventh Claimants, who had expressed their wish to vote in the 2019 Elections were unable to do so, in breach of their rights under the Voting Directive, the Charter and the Treaties.

89. That breach was the result of the Defendant:

89.1. failing to take the steps necessary to give effect to the provisions of the Voting Directive in domestic law (contrary, in particular, to the duty of sincere cooperation under Article 4(3) TEU, which includes the obligation to take any appropriate measure to ensure fulfilment of the obligations arising out of the Treaties, and the principle of proportionality); and

89.2. failing to take appropriate measures prior to the 2019 Elections to facilitate the effective exercise of EU24 citizens' voting rights, including acting in a manner which would foreseeably result, and did result, in the disenfranchisement of many thousands of such citizens.

90. More specifically, the breach of the Third to Seventh Claimants' rights was a result of the following disproportionate requirements in domestic law, and / or acts and failures of the Defendant:

90.1. the requirement to complete and return a new Declaration Form within 12 months of each poll pursuant to regulation 10(2)(a) **[A1/C/94]** of the 2001 Regulations;

90.2. automatic removal of EU24 citizens from the electoral register, without their consent, within 12 months of their date of entry, pursuant to regulation 10(2)(a) **[A1/C/94]** of the 2001 Regulations;

90.3. the practice of maintaining the Declaration Form as an additional form which is entirely separate from voter registration pursuant to regulations 4(1) and 6 **[A1/C/88, 90-91]** of the 2001 Regulations;

90.4. the requirement to return the Declaration Form 12 working days before the poll pursuant to s.13B of the 1983 Act **[A1/C/59-61]** and regulation 29 **[A1/C/116]** of the Representation of People (England and Wales) Regulations 2001;

90.5. the decision to delay confirmation of the fact that the UK would be participating in the 2019 Elections until 7 May 2019, the day of the deadline to return the Declaration Form;

90.6. the failure to require the distribution of Declaration Forms to all EU24 citizens registered to vote in the 2019 Elections sufficiently in advance of the deadline on 7 May 2019;

90.7. the failure to enable the completion and submission of Declaration Forms online;

90.8. the failure to provide clear, transparent and comprehensive information on the procedures for registration of EU24 citizens prior to the 2019 Elections, in sufficient time to enable EU24 citizens to comply with the requirements of the system;

90.9. the failure to permit or make arrangements, in a consistent manner, for EROs and LROs to accept Declaration Forms sent by email on or after the deadline on 7 May 2019 or for them to be completed in person at the polling station, particularly in view of the late circumstances in which, and the date on which, the UK's participation in the 2019 Elections, was confirmed;

90.10. the failure to ensure that the system had sufficient flexibility for EROs and LROs to take discretionary measures, in appropriate circumstances, to facilitate the effectiveness of the right to vote and to avoid disproportionate interference with the right to vote or the complete disenfranchisement of large numbers of eligible voters.

91. The Defendant contends that requirements of the 2001 Regulations (and, in particular, the 12 month validity of the Declaration Form) is within the wide margin of discretion afforded to the UK in implementing the Voting Directive (DGR, §§47-54 **[B1/A/182]**).

92. However, the measures in question involve a limitation on a fundamental right guaranteed by the EU Treaties and the Charter and must be scrutinised accordingly. In particular, they must comply with the requirements of Article 52(1) of the EU Charter

including the need to respect the essence of the right, comply with the principle of proportionality, be necessary, and genuinely meet an objective of general interest recognised by EU law.

93. The requirements of EU proportionality are well-known.[8] In summary:

93.1. The measure must be shown to be suitable for achieving a legitimate aim identified under EU law (the test of *suitability*). This includes that there is a "*rational connection*" between the means and the ends;

93.2. The measure must be shown to be reasonably necessary (and not merely desirable). It must be shown that there is no less restrictive or onerous method that could be adopted to achieve the relevant ends (the test of *necessity*, requiring minimum impairment of the right or interest in question); and

93.3. The measure must also be shown to achieve a fair balance of means and ends.

94. The burden lies on the State to demonstrate proportionality and to justify the interference with fundamental rights, including any discriminatory effects produced. Domestic case-law shows that wherever it is possible to do so, such justification must be supported with evidence: see, e.g., *Lumsdon* **[A2/F/1418-1462]** at §§50-56; *Lord Chancellor and Secretary of State for Justice v McCloud* [2019] IRLR 477 **[A2/F/1610-1641]** at §§151-157 and 160- 163. EU case law shows that mere generalisations indicating that a public policy interest is at stake are not sufficient: the justification provided requires "*precise evidence*" and a Member State faces a high burden of proof, particularly when seeking to justify a derogation from the principle of non-discrimination.[9]

95. The Defendant's attempt to justify the requirements imposed on EU24 citizens as consistent with EU law do not withstand scrutiny, for the following reasons.

96. First, it is neither necessary nor proportionate for the validity of the Declaration Form to be time limited, nor is the duration of 12 months appropriate or proportionate. No other EU Member State has adopted such an approach (as is accepted by the Defendant at DGR, footnote 4 **[B1/A/182]**). In other Member States:

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8 See e.g. *De Smith's Judicial Review* (8th ed., 2018) at §11-078.

9 See, e.g., Case C-388/07 *Age Concern England* [2009] 3 CMLR 4 **[A1/D/529-566]** at §§51 and 65; Case C-160/10 *Fuchs v Land Hessen* [2011] 3 CMLR 47 **[A1/D/586-609]** at §§77 and 78; and Case C-161/07 *Commission v Austria* [2009] 2 CMLR 16 **[A1/D/567–585]** at §§36- 37. See also the judgment of the Supreme Court in *Ministry of Justice v O'Brien* [2013] ICR 499 SC at §§44 and 46.

96.1. the declaration is valid indefinitely (e.g. in the Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, the Republic of Ireland, Italy, Poland, Malta, Slovenia and Spain) or for a long time (e.g. 10 years in Austria);

96.2. the declaration can be submitted by an EU24 citizen at any time (e.g. in Austria) or shortly before the poll (e.g. 3 days in Poland); and / or

96.3. there is flexibility built into the system, for example, by way of an exception to the requirement to submit a declaration by the deadline in circumstances where the deadline was missed by no fault of the EU citizen (e.g. in Germany).

97. Prior to the 2019 Elections, the Electoral Commission proposed (amongst other things) that the declaration should be completed in person at polling stations when votes were cast, or that EU citizens be treated as entitled to vote once registered (see §13.6 above). Alternatively, Haringey Council suggested that, in the circumstances of the 2019 Elections, registered EU24 citizens could be treated as if they had expressed an intention to vote in the UK and contacted to ask whether they instead intended to vote in another Member State **[B2/C/317]**. None of these proposals were adopted.

98. Second, a time-limited declaration is not *suitable* or *appropriate* to achieve the objectives pursued (namely, to prevent double-voting and / or inadvertent disenfranchisement); the restrictions on the right to vote do not involve the least onerous method necessary to achieve those supposed objectives; and the burden imposed on those seeking to exercise their right to vote is disproportionate to any benefits secured:

98.1. As the Cabinet Office has previously acknowledged, there is no evidence that double voting is an issue at European Parliament elections in the UK **[B4/F/2295]**.

98.2. In any event, the Declaration Form is unnecessary as it is already an offence in UK law for a person to vote more than once in European Parliament elections under s.9 **[A1/C/125-126]** of the 2002 Act. That is a sufficient deterrent against EU24 citizens voting twice in European Parliament elections, and is so considered in respect of voting in UK Parliament elections under s.61(2) of the 1983 Act **[A1/C/62]**.

98.3. The checks against double voting are only meaningful after the polls have closed and votes have been cast. As the approach of other Member States shows, appropriate checks and compliance with the requirements of the Voting Directive can be carried out proportionately when declarations have been returned, closer to the elections or on the same day as the poll (see §96.2 above).

98.4. Moreover, as is apparent from the Defendant's own evidence, the exchange of information on the receipt of Declaration Forms is not in any event effective in preventing double voting. See, e.g., Report into the Information Exchange Scheme 2009 **[B5/I/3267]** and Government's response to the Questionnaire following the 2019 Elections **[B4/F/2295]**.

98.5. The right of an EU citizen to choose whether to vote in their Member State of origin or their Member State of residence does not give rise to any risk of inadvertent disenfranchisement. An EU citizen cannot be removed from the register on the basis that they have submitted a declaration in another Member State. This was recognised by the Government in its response to a Questionnaire from the European Commission following the 2014 Elections **[B4/F/2284]**. Article 9(4) **[A1/A/8]** of the Voting Directive makes express provision for citizens to remain on the electoral roll until such time as they request to be removed or they no longer satisfy the requirements for exercising the right to vote. Article 4 **[A1/A/7]** of the Voting Directive prohibits voting more than once in the same election, but says nothing about preventing an EU citizen from *registering* to vote in more than one Member State. Indeed, that flexibility and choice is an inherent part of the citizenship and free movement rights that the Directive seeks to promote.

98.6. The purported justifications also have limited force in circumstances where citizens from the Republic of Ireland, Malta and Cyprus are able to vote in European Parliament elections on registration, without any additional requirement to submit a Declaration Form.

99. Third, the Voting Directive must be implemented in a way, and by means, which ensures that it is fully effective in practice and facilitates the objective it pursues. The objective of the Directive – to ensure that EU citizens who have expressed a wish to vote in the European Parliament elections in their Member State of residence are able to do so "*under the same conditions*" as nationals of that Member State – is frustrated by the additional conditions imposed on EU24 citizens, as well as by the other obstructive features of the system identified above, which make the exercise of those rights impossible or more difficult in practice.

100. Fourth, the introduction of the annual canvass by the Representation of People Act 2000 ("**2000 Act**") **[A1/C/77-85]** does not render the system compatible with EU law. Whether or not the time-limited validity of the Declaration Form is consistent with the 2000 Act is legally irrelevant. In any event:

100.1. The annual canvass is not comparable with the system of registration for EU24 citizens. The failure to return an annual canvass form does not entitle EROs to remove an individual from the register.

100.2. EU24 citizens are not in the same position as the "special categories of voter" identified at DGR §51 **[B1/A/184]**. Those voters, who are excluded from the annual canvass requirements, are subject to an entirely different system of registration for UK Parliament elections. EU24 citizens have no right to vote in those elections. In any event, those voters are either resident overseas; have no fixed abode; or do not want their name and address being added to the electoral register due to concerns about their safety. They are not in the same position as all EU24 citizens, many of whom have been resident in the UK for decades as a result of exercising their rights of free movement (see Part B(4) above).

101. As set out above, the Defendant's acts and failures in the period prior to the 2019 Elections compounded the problems inherent in the system and significantly contributed to the disenfranchisement of tens of thousands of EU24 citizens.

102. The Defendant submits that his conduct in the lead up to the 2019 Elections "*cannot fairly be taken as evidence of illegality*" due to the "*unprecedented and unique context*" (DGR, §55 **[B1/A/185]**).

103. However, the circumstances of the 2019 Election, unique or not, did not affect the legal obligation of the Government to respect the fundamental rights of EU24 citizens and to take all measures necessary to ensure that those rights, including the right to vote, were fully protected and could be exercised effectively (see §84 above). The Defendant was well aware of the problems associated with the system, which had been identified by the Law Commission, Electoral Commission and European Commission from at least 2014. The Defendant nevertheless abandoned discussions with those bodies on the proposals made for reform and took no further initiatives himself. Even when it became clear that there was a real possibility of the UK participating in the 2019 Elections, the Defendant resisted requests to introduce timely contingency planning, delayed taking measures necessary to ensure that the voting rights of EU24 citizens would be protected, and failed to take any positive action to inform EU24 citizens of the requirements conditioning their eligibility to vote. Those acts and failures were themselves contrary to EU law and the directly effective rights of the Third to Seventh Claimants.

E. GROUND 2: BREACH OF RIGHTS UNDER ART 3 OF PROTOCOL NO. 1 OF THE ECHR

104. Further or in the alternative, the Defendant acted in breach of the rights of the Third to Seventh Claimants, who were prevented from voting in the 2019 Elections, contrary to Article 3 of Protocol No. 1 ECHR **[A1/B/38]** as given effect in domestic law by the Human Rights Act 1998 **[A1/C/69-76]**.

(1) Relevant Legal Principles

105. Article 3 of Protocol 1 ECHR **[A1/B/38]** imposes a positive obligation on states to secure free elections, which includes the right to vote:

> *"The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."*

106. The rights guaranteed under Article 3 of Protocol 1 are "*crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law*": *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41 **[A1/E/791-836]** at §57. Universal suffrage is "*not a privilege*" but "*the basic principle*": *id* at §58. As set out by the ECtHR in *Davydov v Russia* (2018) 67 EHRR 25 **[A1/E/954-1053]** at §285, free elections are "*both an individual right and a positive obligation of the state, comprising a number of guarantees starting from the right of the voters to form an opinion freely, and up to careful regulation of the process in which the results of voting are ascertained, processed and recorded*."

107. Any departure from the right to vote "*risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. Exclusions of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3*": *Mathieu-Mohin and Clerfayt v Belgium* (1987) 10 EHRR 1 **[A1/E/715–740]** at §52. Abrogation must be subject to "*tight … scrutiny*": *Davydov* at §286.

108. As set out in *Hirst (No 2)* at §62, whilst Contracting States have a certain margin of appreciation in imposing conditions on the right to vote, the ECtHR must be satisfied that any such conditions:

> *"… are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate. In particular, any conditions imposed must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of people through universal suffrage. … Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the*

underlying purposes of Article 3 of Protocol No. 1 (see, mutatis mutandis, Aziz v. Cyprus, no. 69949/01, § 28, ECHR 2004-V)."

109. In Aziz v Cyprus (2005) 41 EHRR 11 **[A1/E/782–790]** at §28, the ECtHR held:

> *"Although the Court notes that States enjoy considerable latitude to establish rules within their constitutional order governing parliamentary elections and the composition of the parliament, and that the relevant criteria may vary according to the historical and political factors peculiar to each State, these rules should not be such as to exclude some persons or groups of persons from participating in the political life of the country and, in particular, in the choice of the legislature, a right guaranteed by both the Convention and the Constitutions of all Contracting States."*

(2) Submissions

110. The Defendant breached his positive obligation under Article 3 of Protocol No. 1 ECHR **[A1/B/38]** to guarantee the rights of the Third to Seventh Claimants to vote in the 2019 Elections. Those individuals wished to vote, but were prevented from doing so due to the defects identified at §88 above.

111. Whilst the Government has a margin of appreciation in imposing conditions on the right to vote, the requirements on EU24 citizens to vote in the 2019 Elections were excessive and resulted in the effective exclusion of the Third to Seventh Claimants and other EU24 citizens from participating in the 2019 Elections and, therefore, in the choice of the EU legislature which had an important role in agreeing the terms of the UK's withdrawal from the European Union.

112. As the Electoral Commission found, the deficiencies in the arrangements for the 2019 Elections were sufficiently serious as to have "*impacted on people's confidence in the elections*" and to have frustrated voters right in a manner that was "*unacceptable*", although entirely avoidable. This undermined the integrity and effectiveness of the electoral process and undoubtedly had the effect of depriving the Third to Seventh Claimants of the essence of their right to vote.

113. The arrangements and measures that were in place were, moreover, not imposed in pursuit of a legitimate aim, and / or the means employed were disproportionate for the reasons already set out at §98 above.

F. GROUND 3: DISCRIMINATION

114. EU24 citizens were required to satisfy different and more onerous conditions to vote in the 2019 Elections than those in a comparable position, contrary to:

114.1. the specific non-discrimination provisions set out in Article 10 TEU **[A1/A/18]**, Articles 20(2)(b) and 22(2) TFEU **[A1/A/15-16]**, Article 39 of the EU Charter **[A1/A/13]** and Article 9(4) of the Voting Directive **[A1/A/8]**;

114.2. the general prohibitions against nationality discrimination set out in Article 18 TFEU **[A1/A/15]** and Article 21(2) of the EU Charter **[A1/A/12]** read with Articles 2 and 9 TEU **[A1/A/18]**;

114.3. in respect of the Third to Seventh Claimants, Article 14 **[A1/B/27]** read with Article 3 of Protocol No. 1 ECHR **[A1/B/38]**; and

114.4. s.29(6) **[A1/C/140]** read with s.9(1)(b) **[A1/C/134]** of the EA 2010.

(1) Relevant Legal Principles

EU Non-Discrimination Law

115. Article 18 TFEU **[A1/A/15]** and Article 21(2) of the EU Charter **[A1/A/12]** prohibit discrimination on the grounds of nationality.

116. Articles 20(2)(b) and 22 TFEU **[A1/A/15-16]**, as well as Article 9(4) of the Voting Directive **[A1/A/8]**, provide that the right to vote in European Parliament elections must be guaranteed to EU citizens in their Member State of residence under the same conditions as nationals of that Member State.

117. Direct discrimination based on nationality is prohibited and cannot be justified: see, e.g., Case C-85/96 *Martínez-Sala v. Freistaat Bayern* [1998] ECR I-02691 **[A1/D/206–226]** at §§62-64; *Grzelczyk* at §46; Case C-456/02 *Trojani v. Centre Public d'Aide Sociale de Bruxelles* [2004] 3 CMLR 38 **[A1/D/349-374]** at §§42-46. Once adverse treatment and causation have been proved, that is the end of the matter.

Article 14 ECHR

118. Article 14 ECHR **[A1/B/27]**, read with Article 1 of Protocol No 1 **[A1/B/37]**, prohibits inequality of treatment in relation to the right to vote on the grounds of nationality. As set out by Lady Black in *R (Stott) v Secretary of State for Justice* [2020] AC 51 **[A1/D/1642-1719]** at §8, there are four elements in order to establish that a difference in treatment amounts to a violation of Article 14:

> *"First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in article 14 or "other status". Thirdly, the claimant and the person who has been treated differently must be in analogous situations. Fourthly, objective justification for the different treatment will be lacking. It is not always easy to keep the third and the fourth*

elements entirely separate, and it is not uncommon to see judgments concentrate upon the question of justification, rather than upon whether the people in question are in analogous situations."

119. In R (Carson) v SSWP [2006] 1 AC 173 **[A2/F/1239-1272]** at §3, Lord Nicholls held that, once the first two requirements are satisfied:

> "*the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."*

120. As to the fourth requirement, a difference in treatment has no objective justification if it does not pursue a "*legitimate aim*" or if there is not a "*reasonable relationship of proportionality between the means employed and the aim sought to be realised*": Aziz at §34. In Sejdic v Bosnia and Herzegovina (no. 27996 / 06, 22 December 2009) **[A1/E/837–893]** at §§43-44, the Grand Chamber made clear that, where a difference in treatment in relation to the right to vote or stand for election is based on race, colour or ethnicity, objective and reasonable justification must be interpreted strictly:

> *"43. … Racial discrimination is a particularly egregious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment …*
>
> *44. In this context, where a difference in treatment is based on race or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible (see D.H. and Others, cited above, §196). The Court has also held that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures (ibid., §176)."*

121. "*Very weighty reasons*" would have to be put forward before the Court could regard a difference of treatment based exclusively on the grounds of nationality as compatible with the Convention: Andrejeva v Latvia (2010) 51 EHRR 28 **[A1/D/894-953]** at §87.

Equality Act 2010

122. Section 29(6) **[A1/C/140]** of the EA 2010 provides:

> *"A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation."*

123. Section 13(1) **[A1/C/136]**, which covers direct discrimination, states:

> *"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

124. By s.9(1)(b) and (c) **[A1/C/134]**, the protected characteristic of race includes "*nationality*" and "*ethnic or national origins*".

125. Section 23(1) provides that, on a comparison of cases for the purposes of s.13, there must be "*no material difference*" between the circumstances relating to each case. A circumstance will only be "*material*" if it is relevant to the reasons why the complainant received the treatment of which the complaint is made. The relevant circumstances and attributes of an appropriate comparator should reflect the circumstances and attributes relevant to the reason for the action or decision of which complaint is made: *Aylott v Stockton and Tees CC* [2010] ICR 1278 **[A2/F/1356-1378]** at §40; see also *R (Coll) v Secretary of State for Justice* [2017] 1 WLR 2093 **[A2/F/1552-1568]** at §32.

126. In *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1 **[A2/F/1071-1137]** at §§73-74, Baroness Hale set out the test for race discrimination and made clear that, once direct discrimination is shown, there is no defence of objective justification:

> *"73. … The ingredients of unlawful discrimination are (i) a difference in treatment between one person and another person (real or hypothetical) from a different sex or racial group; (ii) that the treatment is less favourable to one; (iii) that their relevant circumstances are the same or not materially different; and (iv) that the difference in treatment is on sex or racial grounds. However, because people rarely advertise their prejudices and may not even be aware of them, discrimination has normally to be proved by inference rather than direct evidence. Once treatment less favourable than that of a comparable person (ingredients (i), (ii) and (iii)) is shown, the court will look to the alleged discriminator for an explanation. The explanation must, of course, be unrelated to the race or sex of the complainant. If there is no, or no satisfactory explanation, it is legitimate to infer that the less favourable treatment was on racial grounds. … If the difference is on racial grounds, the reasons or motive behind it are irrelevant. …*
>
> *74. If direct discrimination of this sort is shown, that is that. Save for some very limited exceptions, there is no defence of objective justification."*

127. Baroness Hale at §§91, 97 also held that, where the alleged discriminator fails to collect evidence on the operation of a high-risk scheme, it is not open to him to contradict the evidence produced by the claimant. The failure to gather evidence is itself indicative of the fact that no steps were taken to ensure that the scheme was applied in a non-discriminatory manner.

128. As to the applicability of the exemptions contained in Schedule 3, paragraph 2(3) or Schedule 23, paragraph 1 of the EA 2010 **[A1/C/146]**:

128.1. As a matter of principle, any provision which purports to exclude or limit the application of the EA 2010 must be construed narrowly: *R (Tamil Information Centre) v SSHD* [2002] EWHC 2155 (Admin) **[A2/F/1054-1070]** at §4.

128.2. Schedule 3 paragraph 2(3) provides that s.29 of the EA 2010 does not apply to the "*preparing, making, confirming, approving or considering*" an instrument which is made under an enactment by a Minister of the Crown. It excludes the court's consideration of the legislative process, not illegality consequent on the acts or failures taken pursuant to secondary legislation: see, e.g., *R (Staff Side of the Police Negotiating Board) v SSWP* [2011] EWHC 3175 **[A2/F/1379-1417]** at §92 (in relation to the predecessor to this provision in the Sex Discrimination Act 1975). See also Equality and Human Rights Commission, *Services, Public Functions and Associations: Statutory Code of Practice* (2011) **[A2/G/1903-2153]** at §11.55.

128.3. Schedule 23, paragraph 1 **[A1/C/146]** provides that a person does not contravene Part 3 of the EA 2010 by doing anything which discriminates against another because of the other's nationality "*in pursuance of*" an enactment, an instrument made by a member of the executive under an enactment or arrangements made by or with the approval of a Minister of the Crown. The predecessor of this provision in the Race Relations Act 1976 was held not to apply where "*there is discretion, or the exercise of judgment is necessary, to determine whether an act which has the effect of disadvantaging an individual on a discriminatory basis should or should not be done*" (*R (Mohammed) v SSHD* [2006] EWHC 2098 (Admin) **[A2/F/1148-1174**] at §69) or to "*policies of the government having no special, or formal, characteristics*" (*R (Al Rawi) v SSFCA* [2008] QB 289 **[A2/F/1298-1355]** at §82).

(2) Submissions

129. EU24 citizens, including the Third to Seventh Defendants, were prevented from voting in the 2019 Elections due to the additional and more onerous requirements imposed on them by the system operated by the Defendant. Those in a comparable position to the EU24 citizens are:

129.1. EU citizens from the Republic of Ireland, Cyprus and Malta resident in the UK; and

129.2. Dual resident UK / EU27 citizens.

130. Those categories of EU citizen are in a comparable position to EU24 citizens because (1) they have exercised rights to reside here; (2) they are entitled to choose to vote in their home or host Member State; (3) there is an identical risk of double voting and / or

inadvertent disenfranchisement; and (4) there is an obligation on the Government to exchange information with another Member State. However, they are not subject to the requirement to complete and return a separate Declaration Form within 12 months of, and at least 12 days before, each poll. The difference in treatment is based purely on the grounds of their nationality. The difference in treatment is direct in character and not capable of being justified under EU law or the EA 2010.

131. The unequal treatment is not objectively justified for the purposes of Article 14 ECHR **[A1/B/27]** either:

131.1. The risk of double voting and/or inadvertent disenfranchisement applies to EU citizens from the Republic of Ireland, Cyprus and Malta resident in the UK and dual resident UK/EU27 citizens, in respect of whom there is no requirement to complete and return the Declaration Form.

131.2. The requirement to complete and return the Declaration Form does not and is not necessary to prevent double-voting and/or inadvertent disenfranchisement, for the reasons set out at §98 above.

132. The Defendant asserts that the proper comparator is a "*UK national, resident in another Member State, who is voting in a European Parliamentary election in the UK*" (DGR, §65 **[B1/A/188]**). That is incorrect:

132.1. The Treaty and the Voting Directive confer the right to vote "*under the same conditions as nationals*" of the Member State of residence. The recitals to the Directive make it clear that the right is "*an instance of the application of the principle of non-discrimination between nationals and non-nationals and a corollary of the right to move and reside freely…*" The relevant comparator is, accordingly, a national of the Member State of residence exercising the right to vote *in that Member State*.

132.2. The fact that the Defendant can identify other categories of individuals (i.e. British citizens resident abroad) who may have been unfavourably treated by the system applicable to them is irrelevant.

132.3. There are in any event material differences between those British citizens and EU24 citizens resident in the UK who wish to vote in the UK. The EU-resident UK nationals to whom the Defendant refers are those seeking to exercise the right to vote *in their Member State of origin*, <u>not</u> in their Member State of residence. Conditions imposed on the right of the UK's own nationals to vote *in the UK* do

not obviously engage considerations of discrimination on the grounds of nationality nor are they the focus of the relevant EU law right.[10]

133. The Defendant is also wrong to contend that there are material differences between EU24 citizens and the relevant comparators identified by the Claimants, which justify the difference in treatment between them:

133.1. "*Historical links*" between the UK and Ireland, Cyprus and Malta are not a factor capable of constituting a legally relevant material difference, since it is in itself discriminatory on grounds of race or nationality (see, e.g., *R (Elias) v SSHD* [2006] 1 WLR 3213 **[A2/F/1175–1238]**).

133.2. In any event such "*historical links*" are not a material circumstance which renders citizens from Ireland, Cyprus and Malta an inappropriate comparator with EU24 citizens.

133.3. The fact that the Defendant purports to rely on the derogation in Article 14(2) of the Voting Directive in respect of those EU citizens is also irrelevant. The Claimants' claim is not directed at the fact that a declaration must be obtained from EU24 citizens (which is required by Article 9(2) of the Voting Directive); it is directed at *how* that requirement has been implemented in domestic law. It is relevant for these purposes that precisely the same risks which are relied on to justify a time limited declaration, as an additional requirement separate from voter registration, arise in respect of Irish, Cypriot and Maltese citizens.

133.4. Case C-145/04 *Spain v UK* [2007] 1 CMLR 3 **[A1/D/375–426]** does not support the Defendant's claim that he is entitled to "*augment the rights*" of one group of EU citizens in preference to another (DGR, §71 **[B1/A/190]**): the CJEU was concerned in that case with whether EU law precluded the UK from according the franchise to non-EU nationals resident in Gibraltar (see §§78-80).

G. GROUND 4: BREACH OF THE PUBLIC SECTOR EQUALITY DUTY

134. The Defendant acted contrary to the duty to have regard to the matters set out in s.149 of the EA 2010.

(1) Relevant Legal Principles

135. Section 149(1) of the EA 2010 **[A1/C/143-144]** provides:

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[10] Although such conditions could impede the exercise of EU free movement rights by those UK nationals.

"(1) A public authority must, in the exercise of its functions, have due regard to the need to –

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."

136. By s.149(3)(c), s.149(1)(b) includes the requirement to have "*due regard, in particular, to the need to … encourage persons who share a relevant protected characteristic to participate in public life.*"

137. The relevant principles were set out by McCombe LJ in *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 **[A2/F/1463–1487]** (approved by the Supreme Court in *Hotak v Southwark LBC* [2016] AC 811 **[A2/F/1720-1757]** at §73) and summarised by the Court of Appeal in *R (Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058 **[A2/F/1758-1819]** at §175:

137.1. The PSED must be fulfilled before and at the time when a particular policy is being considered.

137.2. The duty must be exercised in substance, with rigour, and with an open mind. It is not a question of ticking boxes.

137.3. The duty is non-delegable.

137.4. The duty is a continuing one.

137.5. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required.

137.6. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then it is for the decision-maker to decide how much weight should be given to the various factors informing the decision.

138. At §176, the Court of Appeal added:

"We accept (as is common ground) that the PSED is a duty of process and not outcome. That does not, however, diminish its importance. Public law is often concerned with the

process by which a decision is taken and not with the substance of that decision. This is for at least two reasons. First, good processes are more likely to lead to better informed, and therefore better, decisions. Secondly, whatever the outcome, good processes help to make public authorities accountable to the public. We would add, in the particular context of the PSED, that the duty helps to reassure members of the public, whatever their race or sex, that their interests have been properly taken into account before policies are formulated or brought into effect."

(2) Submissions

139. The Defendant admits that due regard was not had to the factors made relevant by the PSED in advance of the 2019 Elections (DGR, §72 **[B1/A/191]**). He submits that this failure was "*understandable, rational and unsurprising*" in the circumstances of the 2019 Elections and that relief should be refused pursuant to s.31(2A) of the Senior Courts Act 1981 because there is no realistic likelihood that the outcome would have been substantially different, even if he had had due regard to the PSED.

140. Those submissions do not withstand scrutiny:

140.1. The threshold to satisfy s.31(2A) of the 1981 Act is a "*high one*": the courts should be cautious about straying into the assessing the merits of a public decision under challenge and should not lose sight of their fundamental function to maintain the rule of law: *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 **[A2/F/1820-1902]** at §273.

140.2. Had the Defendant had due regard to the PSED in good time, it would not have been highly likely that the outcome, i.e. the disenfranchisement of EU24 citizens, would have occurred. If the duty had been properly discharged (and even if the Defendant's position (which is not accepted) is that amendments to the 2001 Regulations could not have been made), the Defendant would have identified the need to take such steps as: confirming that the UK would be participating in the 2019 Elections in good time and informing EU citizens of the arrangements for the exercise of the right to vote; permitting EROs to accept Declaration Forms sent by email and / or after the deadline; permitting EU citizens to complete and submit a declaration on the day of the election or when voting and / or ensuring that the system had sufficient flexibility for EROs to take discretionary measures to facilitate the effectiveness of the right to vote and avoid voting rights being frustrated.

140.3. Alternatively, in circumstances where tens of thousands of EU24 citizens were denied the right to vote as a result of the conduct of the Defendant, it is appropriate to grant relief for reasons of exceptional public interest pursuant to s.31(2B) of the 1981 Act.

H. CONCLUSION

141. For the reasons set out above, the Claimants respectfully invite the Court to grant the relief sought in the Statement of Facts and Grounds, §130(2) and (3) **[B1/A/73-74]**, and to give directions for the appropriate determination of the claims for damages under EU law, the Human Rights Act 1998 and the Equality Act 2010.

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