**Amended Reply to the Detailed Grounds of Resistance under CPR rule 17.1(2)(a) dated 22 June 2020**

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

**Claim No. CO/3212/2019**

**B E T W E E N :**

**THE QUEEN on the application of**
**(1) THE3MILLION LIMITED; (2) KATHRIN DAVIES; (3) SUSANNE STAHL; (4) FILOMENA MEROLA; (5) NELLY ADA LA GRO; (6) ANNA WALCZYŃSKA; (7) CHRISTIANE RÉE**

**Claimants**

**- and -**

**THE MINISTER FOR THE CABINET OFFICE**

**Defendant**

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## CLAIMANTS' REPLY TO THE DETAILED GROUNDS OF RESISTANCE

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**References:** **[CB*x*/*y*/*z*]** where "*x*" is the volume, "*y*" is the tab and "**z**" is the page of the Claimant's Permission Bundle.

**[JH1/*a*/*b*]** where "*a*" is the tab and "*b*" is the page of the exhibit to the first witness statement of John Halford ("**Halford 1**"). Similar referencing is used to refer to Mr Halford's second statement ("**Halford 2**").

**[PL1/*c*/*d*]** where "*c*" is the tab and "*d*" is the page[1] of the exhibit to the first witness statement of Peter Lee ("**Lee 1**").

The Claimants adopt the abbreviations used in their Statement of Facts and Grounds ("**SFG**") unless otherwise stated.

1. This Reply is served as a brief response to the new facts and arguments raised in the Defendant's Detailed Grounds of Resistance ("**DGR**"). It should be read alongside the Claimants' SFG and Reply to the Summary Grounds of Resistance ("**Reply to SGR**").

[1] The exhibit to Lee 1 is not paginated. The pagination used for referencing in this reply is based on a copy created with sequential pagination as filed and served today.

## A. Context and conduct of the 2019 Elections

2. The legal consequence of the UK remaining in the EU during the 2019 Elections was that EU24 citizens who were resident here had a right to vote for their preferred European Parliament candidate that ought to have been meaningful, effective and capable of being exercised here without discrimination. The Second to Seventh Claimants and tens of thousands in similar circumstances could not exercise that right.

3. The Defendant's response is to argue that the scheme he adopted is long-standing, and cannot be open to criticism in itself. He regards the circumstances of the 2019 Elections simply as a reason for excusing the lamentable ineffectiveness that occurred, rather than focus on what those circumstances really were. The context should have caused him to take appropriate, timely and proportionate measures such as those specified in the SFG at §106-111, to ensure that the 2019 Elections would be effective.

4. Taking one aspect of the scheme as an example, the Defendant attempts to defend the requirement to return the Declaration Form 12 working days in advance of the poll on the basis that this is necessary to allow for objections to be raised (DGR §57). But that day, i.e. 7 May 2019, was the very same day on which the Defendant finally announced that the UK would be participating in the 2019 Elections (SFG §23). The Defendant makes no attempt to explain how the fundamental rights of EU24 citizens to vote in the 2019 Elections were nevertheless secured in those circumstances. Patently, they were not.

5. In the DGR, the Defendant maintains that the evidence now served shows that he went to "*considerable efforts*" to ensure that the 2019 Election was "*delivered as effectively as possible, liaising with RROs and the Electoral Commission on a near-constant basis*" (DGR §43) notwithstanding the "*particular*", "*unique*" and "*unprecedented*" context in which the 2019 Elections took place (DGR §§3-4). He also states that the system, and the manner in which it was operated, cannot be open to criticism:

> "*36. … [A]s of 8 April (and 10 April at the latest), all electors wishing to participate in the 2019 Election were able to identify when it would be held, and that it would be held unless a withdrawal agreement was approved and ratified beforehand. All EROs and RROs were aware when the poll would be held, that they would be reimbursed for relevant expenses even if the UK withdrew before the 2019 Election, and were in receipt of Electoral Commission guidance concerning how to encourage EU citizens of whom they were aware to complete the necessary declaration. Cabinet Office officials remained in close and regular contact with the Electoral Commission*

*and RROs throughout March-May to address practical issues concerning preparation for the 2019 Election.*"

6. That is plainly not correct. In fact, five years previously and faced with criticisms by the European Commission and the Electoral Commission (and, subsequently, the Law Commission), the Defendant accepted that the Declaration Form placed a discriminatory administrative burden on EU citizens and the system was in need of reform to prevent disenfranchisement at the 2019 Elections. In consultation with the Electoral Commission, the Cabinet Office then identified a number of timely and effective modifications to make it easier for EU citizens to exercise their right to vote. The Electoral Commission itself proposed further pragmatic changes. Not all of these steps required legislation. However, the Defendant abandoned the discussions, resisted all requests to begin contingency planning for the 2019 Election in good time and did not take any positive action. The actions he did take, for instance the instructions and advice given on distribution of Declaration Forms and the timing of the announcement of the 2019 Elections, compounded the problems inherent in the system.

7. By way of example only:

   (1) Prior the 2014 Elections, Paul Docker, Head of Electoral Administration in the Cabinet Office, formed the view (without subsequent assessment and contradiction of that view within the Cabinet Office) that the Declaration Form was costly and ineffective at preventing double voting and should be *"done away with"* **[PL1/15/182]**. Further examples of the Defendant's position that the Declaration Form does not prevent any risk of double voting are set out in §19(3)b below.

   (2) Following the 2014 Elections, multiple complaints were made by Ambassadors about EU24 citizens being unable to vote, which was due (in at least part) to the Declaration Form's role in the system **[PL1/17/201-208]**. These complaints were made despite the fact that, unlike the 2019 Elections, the EROs were given 5 months to prepare for the 2014 Elections **[PL1/11/146]** and the Electoral Commission launched a 3-month national multi-media campaign to inform citizens of their rights **[PL1/10/138]**.

   (3) Concerns that EU24 citizens were prevented from exercising their voting rights in the 2014 Elections were formally raised by the European Commission in July 2014

**[PL1/24/410]** and December 2014 **[PL1/29/482]**, which the Defendant was asked to address. In January 2015, the Defendant 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 were being considered "*in depth*" **[PL1/30/484]**.[2]

(4) In internal discussions between the Defendant's officials, it was noted "*that Maltese, Cypriot and Irish Citizens don't have to complete such a declaration … so there is a potential discriminatory angle*" **[PL1/18/206]**. This did not prompt any consideration of the duty under s.149 of the Equality Act 2010 at that time or at any time thereafter.

(5) In January 2016, the Defendant 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, adding the declaration to outline registration forms, and positively requiring EROs to distribute Declaration Forms **[PL1/36/538]**.

(6) The Electoral Commission responded with comments, additionally 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

[2] The Defendant expressly denies that any "undertaking" or commitment was given to the European Commission to remedy the difficulties encountered by EU citizens in exercising their right to vote in the 2014 Elections and to do so in good time before the 2019 Elections. In his view, the UK merely gave a commitment to keep the situation under review. The Defendant's position is set out in Lee 1 §§76-83, 165-169. In particular, Mr Lee contends that "*no unilateral commitment to make changes was given*". The UK merely "*confirmed that the Government was prepared to consider amendments and would give careful consideration to any recommendations made by the Electoral Commission and other stakeholders*" and that if "*we identify any changes to legislation or practice which would be helpful, we will, of course, aim to have them in place before the next EP election in 2019*". It is apparent from the clear terms of the letter from the European Commission's Justice Commissioner, Vera Jourová, to Chloe Smith MP dated 21 June 2019 that the Commission had the impression that UK had undertaken to remedy the defects in time (see SFG §§30-31; **CB2/D/410**). The Commission's letter of 11 March 2015 further supports that its understanding and appreciation, at that time, was that the UK had given a "*commitment to keep under review to see if improvements can be made, also by changing legislation so that, in future, EU citizens do not need to complete an additional form when registering to vote*" **[PL/33/521]**.

Commission asked whether the Cabinet Office had considered this option and, if so, to explain their reasons for not supporting it **[PL1/37/542-544].**

(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.*" **[PL1/38/546]**. The Defendant stated that "*it hoped to implement these changes in time for the 2019 European Parliament elections*".

(8) This initiative was abandoned altogether because, according to Mr Lee, 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*", given the outcome of the 2016 Referendum (Lee 1 §105).

(9) A Ministerial Submission, drafted by Mr Docker, dated 14 June 2017 recorded the fact that the Government "*have made a **commitment** to change the registration form for EU citizens*" (emphasis added), which might require amendments to the 2011 Regulations via s.2(2) Regulations, presumably to bring them into conformity with the EU law. It went on to note that the Cabinet Office now considered that "*in the circumstances that it would not be necessary for the Government to make this change*" [**PL1/48/779**].

(10) Notwithstanding the above, internal correspondence and memoranda between late 2016 and the Summer of 2017 **[PL1/43-48/744-784]** reveals that some officials believed that the UK might still participate in the 2019 Elections. For instance, on 16 November 2016, Mr Docker wrote to colleagues observing, "*I have been tasking DexEU and UKRep and EDS about this to press the point that Returning Officers want to start preparing for the polls around 18 months out and we either need clarity on participation or a commitment to indemnify them for any nugatory expenditure. My thinking is that we need a decision by the end of 2017*" **[PL1/43/745]**. On 14 June 2017, he made a submission to the Defendant about the associated risks if confirmation that the 2019 Election was taking place was only given in March 2019:

> "*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 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.*" **[PL1/48/777]**

(Note, the timetable of actions and associated risks in Annex A to that Ministerial Submission **[PL1/48/778]** highlight the difficulties of a March announcement for an election in the first week of June 2020. One of those highlighted risks was that "*There will be approximately 6 weeks for EU citizens to register before the poll",* when normally EU citizens apply the year before and usually after the annual canvass in November 2018 so they would normally apply between July 2018 and May 2019. In actual fact, that window was shortened further as the Defendant only gave confirmation that it would be participating in the 2019 Elections (set for 23 May 2020 not June) on 7 May 2019, the day on which Declaration Forms were due to be returned: SFG §23).

(11) Despite the request in June 2017 and the recognised risks to successful delivery and legal challenges presented by that (more generous) timetable, Ministers were not asked to make contingency plans (Lee 1 §111). No steps were taken before 7 May 2019 to enable EU24 citizens to vote in an election 16 days later.

(12) On 31 May 2018, the Cabinet Office wrote to the Electoral Commission following reports that they had set aside funding for the European Parliament elections, to stress "*[i]t is the Government's position that it would not be prudent for money to be spent preparing for the elections that the Government is clear will not take place*" **[PL1/53/803]**.

(13) On 25 September 2018, the Cabinet Office 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 home Member State **[PL1/56/829]**. That appears to have been because, by then, the Cabinet Office was working on the assumption that the UK would have left the EU and would not be participating in the elections.

(14) That position does not appear to have changed, even after the House of Commons' first rejection of the Withdrawal Agreement on 15 January 2019, the second

rejection on 12 March 2019 and the Parliamentary vote in favour of an extension of the UK's membership on the EU on 14 March 2019 (see chronology at Lee 1 §111).

(15) On 13 March 2019, Peter Stanyon, the 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*" and asked the Cabinet Office to clarify whether EROs and LROs were permitted to make contingency arrangements for the possibility that the 2019 Elections would take place **[PL1/58/842].** 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.*" **[PL1/57/835]** Mr Stanyon sought clarification again on 22 March 2019, having received no response to his first email **[PL1/58/841]**.

(16) On 18 March 2019, Mr Docker made clear that they were "*very close*" to a point at which it would be "*irresponsible for [Local Authorities] not to start preparatory work*" **[PL1/62/856]**.

(17) A draft bulletin on behalf of the Electoral Commission was prepared on 21 March 2019, indicating that the Defendant was not contingency planning in the event that the 2019 Elections might take place and that "*EROs should encourage EU citizens to register to vote at that election in their original member state*" **[PL1/56/830]**. It is not clear if this was sent. The Defendant maintained the position that EROs and LROs did not have authority to start any contingency planning **[PL1/57/835].** It was not confirmed until 1 April 2019 by the Defendant that EROs would be reimbursed for any expenditure on the 2019 Elections **[PL1/67/887-888]**. However, EROs were told that they would not be reimbursed for the costs of sending out Declaration Forms **[PL1/68/884]**.

(18) The Scottish Government warned David Lidington MP on 3 April 2019 that late acknowledgement of the 2019 Elections would result in EU24 citizens not having sufficient time to complete the Declaration Form **[PL1/73/908-909**].

(19) 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.*" **[PL1/74/915]**

(20) Even on 9 April 2019, the day after the order for the approval of the European Parliamentary elections had been laid before, and passed by, Parliament, the Cabinet Office Implementation Working Group (the "**IWG**") recorded that a decision had been taken "*to **not** promote the completion of the UC1. The wording is to make it clear, particularly for European electors, the conditions of voting*" (emphasis added). Moreover, the IWG advised that "*people should not be directed to their local ERO*". Rather than including direct wording on the digital service page, the IWG resolved to provide a link to the 'Your Vote Matters' website instead. [**PL1/80/1000**]. It is clear from those minutes that the IWG was still proceeding on the basis that the elections might well not take place in the UK.

(21) It was also clear that further communications of "lines" were sent by the Cabinet Office to the AEA on 10 May 2019 that the decision not to build additional functionality into the website to allow EU citizens to receive the Declaration Form at the same time as registering to vote through the website was because "*we simply didn't have enough time*". The Cabinet Office also decided not to place additional messaging as part of the "*user journey*" as this would have resulted in all users seeing that messaging when it was only "*relevant to only a minority of EU citizens – about 10% of total applicants*" **[PL1/82/1012]**.

8. After the 2019 Elections, by email on 4 June 2019 **[PL1/108/1213-1214]**, Peter Stanyon, Chief Executive of the Association of Electoral Administrators, summarised the issues faced by EROs/LROs during the 2019 Elections as follows:

> *"- 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.*"

**B. Systemic Breach of Rights**

9. The Defendant suggests the case law on systemic breach of rights is only applicable to challenges to the "*propriety of procedural regimes*" (DGR §58). That is not correct. See, for example, the systems challenges in *R (Howard League for Penal Reform) v. Lord Chancellor* [2017] 4 WLR 92 (challenge to the Criminal Legal Aid (General) (Amendment) Regulations 2013 which removed legal aid funding from decision-making concerning prisoners); and *R (UNISON) v. Lord Chancellor* [2017] 3 WLR 409 (challenge to the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 which introduced fees for issuing claims in the employment tribunal and appeals to the Employment Appeal Tribunal).

10. In any event, the basis for the Defendant's claim that matters relevant to this challenge, i.e., the requirements on EU24 citizens to entitle them to vote including the time-limited nature of the Declaration Form and the failure to ensure that the system has sufficient flexibility to avoid unfairness (see *R (Detention Action) v. First-tier Tribunal* [2015] 1 WLR

5341 at §27(v)), are "*substantive requirements of election law*" rather than procedural hurdles that must be satisfied by EU24 citizens to be able to exercise their right to vote in European Parliament elections is not understood or explained by the Defendant.

11. Whether the complaint of systemic breach is made out on the facts will be determined by the Court. It is not in dispute that a very substantial number of EU24 citizens who had wished to vote in the 2019 Elections were unable to do so (see DGR §44.3). The reports published by the Electoral Commission following the 2019 Elections, a summary of which is set out in Halford 1, concluded that:

    (1) Approximately four in five EU citizens (1.7 million people) who had previously registered to vote did not submit the Declaration Form in time to be registered to vote in the 2019 Elections: Halford 1 §20.

    (2) After the 2014 Elections, the Electoral Commission had raised concerns about the registration and declaration process. In February 2015, the Government had planned discussions with the Electoral Commission and other stakeholders on the registration process, but no such discussions were held **[JH1/1/18]**.

    (3) The difficulties identified in 2014 were exacerbated by the circumstances leading up to the 2019 Elections. The late confirmation of the 2019 Elections significantly reduced the Electoral Commission's planning and the effectiveness of their campaign to inform EU24 citizens of the conditions for exercising their right to vote. In the 5 weeks available before polling day,[3] EROs were not in a position to send Declaration Forms to EU24 citizens who had registered to vote **[JH1/1/19]** and did not receive the necessary support and funding to do so (see §8 above). It is trite that administrative convenience or costs considerations cannot justify a breach of EU rights.

12. It is notable that the Defendant does not address the Electoral Commission's conclusions above in the DGR or Lee 1 in any detail. The Defendant's attempt to shift blame onto the Electoral Commission and/or EROs/LROs (DGR §44) is addressed (on the facts) in Halford 1 and (as a matter of law) in the Reply to SGR §§12-15. In any event, the Cabinet Office has explicitly recognised that it is responsible for compliance with the Voting

[3] On the Defendant's evidence, the minimum period required to deliver an effective poll is 6 weeks and ideally 6 months: [**PL1/61/850**]

Directive **[PL1/12/154]** and the Government's liability, as the organ of the state under EU law, is indivisible.

## C. Ground 1: Margin of Discretion and Proportionality

13. The Defendant claims that the requirements imposed by 2001 Regulations are a lawful means of implementing the Voting Directive, which is said to leave the precise terms, details and requirements to the wide discretion of Member States. It is also claimed that (1) it is inarguable that having a time limit on the validity of a declaration at all is a breach of EU national's right to vote; and (2) the validity of 12 months is appropriate in the circumstances (DGR §§47-54).

14. First, there is no room for discretion in ensuring the effective protection of citizenship rights conferred in Article 22 TFEU. Those provisions have direct effect and their effective application must be ensured by Member States: Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v. Germany* [1997] 1 CMLR 971 at §§20-22.

15. Secondly, 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 effective and non-discriminatory protection of fundamental citizenship rights protected by the EU legal order and the objectives of the Directive. In *Promusicae* [2008] 2 CMLR 17 at §§67-68, the CJEU set out the relevant principles 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 (see, to that effect, Lindqvist at para 84).*
>
> *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).*"

16. Also, in *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] 2 CMLR 49 at §4 Burton J, in finding that the Employment Equality (Sex Discrimination) Regulations 2005 had not properly implemented Directive 2002/73, held:

> "*Although member states are free to choose how a Directive is implemented, they must 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: von Colson v Land Nordrhein-Westfalen [1984] ECR 1891, 1906–1907, paras 15 and 18. It is inherent in article 249 EC, and is clear from von Colson and later authorities, that a member state is not required to copy out the exact wording of the Directive. It has considerable flexibility in implementation, provided that the requisite result is achieved.*"

17. The objective of the Voting Directive is set out in Article 9(1): Member States are under an obligation to take necessary measures to enable EU citizens residing in their territory who have expressed a wish to vote to be able to do so. That gives them the right to vote "*under the same conditions as nationals of that State*" (Article 22 TFEU). Article 9(4) of the Voting Directive also ensures that EU citizens shall remain on the electoral roll "*under the same conditions as voters who are nationals*", until such time as they request to be removed or are removed because they no longer satisfy the eligibility requirements. Those objectives are frustrated by the requirements imposed on EU24 citizens under regulations 4(1), 6 and 10(2)(a) of the 2001 Regulations, alongside the other features of the system identified in SFG §103(4)-(9).

18. Thirdly, measures implementing a Directive must be appropriate and necessary to achieve the objectives pursed by the legislation; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued: see, e.g., Case C-331/88 *Fedesa* at §13. Article 52(1) of the Charter of Fundamental Rights also provides:

> "*Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*"

19. It is not accepted that the requirement of an additional Declaration Form (separate from registration) is necessary to prevent the risk of double-voting or inadvertent disenfranchisement, or that its 12-month validity is appropriate in the circumstances.

(1) The Claimants refer to the reasons set out in SFG §§106-111 and do not repeat them here.

(2) The Defendant notes in DGR footnote 4 that "*no other Member State has adopted the same approach as the 2001 Regulations*."[4] Some Member States make provision for the declaration to be valid indefinitely (e.g. the Czech Republic, Denmark, Estonia, Finland, Greece, Hungary, Ireland, Italy, Poland, Malta, Slovenia, Spain) or for a long time (e.g. 10 years in Austria). That, in itself, does not render the system disproportionate, but it is evidence that the 12-month validity of the Declaration Form may not be the least restrictive alternative to achieve the objective of preventing double voting.

(3) A time-limited Declaration Form is not necessary to achieve the objective(s) pursued: preventing double-voting and/or inadvertent disenfranchisement.

a. There is no risk of inadvertent disenfranchisement: an EU24 citizen is not removed from the register if they have submitted a Declaration Form in another Member State. Article 4(1) of the Voting Directive prohibits *voting* more than once at the same election. It says nothing about *registering* to vote. This is recognised by the Defendant in the Government's response to a Questionnaire from the European Commission following the 2014 Elections:

> "***Number of your nationals residing in other Member State who were deleted from your electoral rolls on the basis of the information exchange, broken down by Member State?***
>
> *None. UK electoral law does not allow deletion of names from electoral registers of British citizens resident in other EU States who have indicated to the electoral authorities in their country of residence their intention to vote there. It is not an offence to be included in registers in both countries, but it is an offence to vote in both. Consequently, if such British electors apply to an ERO in the UK for a ballot paper the ERO may enclose with the ballot paper a warning that it is an offence to vote in both countries but will not refuse the request, delete the elector's name from the register nor monitor whether or not a vote was cast in the UK (as explained in the answer to Question 2.2, no record is kept of absent votes cast by overseas voters). Furthermore such a warning will only be included if the ERO has time to do so; in practice this is unlikely*

[4] See also email from Philippa Robinson, Cabinet Office, to other employees of the Cabinet Office dated 18 July 2014: "*For those discussing, we'll want to bear in mind the recent publicity around the disenfranchisement of EU citizens at the 2014 EP elections – there's a risk that the 12 month time limit could be latched on to as one of the reasons. I believe we're in the minority (if not the only) Member state that time limits the declaration*." **[PL1/18/206]**

> *ever to happen because of the pressures on electoral administrators engaged in conducting an election*." **[PL1/10/137]**

b. Further, on the Defendant's own evidence, it is acknowledged that there is "*no evidence to show that double voting is a problem*" **[PL1/12/160]** and, in any event, the exchange of information on the receipt of Declaration Forms pursuant to Article 13 of the Voting Directive is not effective in preventing any risk of double-voting. The Defendant has referred on a number of occasions to the inefficacy of information exchange to prevent double voting. See, e.g., the summary of the issues in the Report into the Information Exchange Scheme 2009:

> "*1. There is no certainty that all electors being notified between Member States have completed the necessary declaration. This could mean they are dis-enfranchised if they intended to vote in their Member State of citizenship and have not completed such a form but that Member State is sent a notification as part of the Information Exchange process based on them being on a register in the State they reside in.*
>
> *2. Electoral registration data varies between Member States and in many cases is not specific enough to identify someone with enough certainty to 'remove them from the register' in another Member State for the purpose of these elections. …*
>
> *4. There is no consistent 'cut-off date for transmission of data for the Information Exchange process. Every country has a different time for closing their register and many records are sent too late to be used.*
>
> *5. It is illegal to vote twice in European Parliamentary elections and each Member State should have law that makes doing so illegal and subject to penalties.*" **[PL1/11/150-151]**

See further the Government's response to the Questionnaire following the 2019 Elections:

> "*The UK received approximately 158,121 records of voter registration information in respect of UK citizens residing in other Member States (this number does not include the records contained on corrupt files which could not be accessed by Cabinet Office). Of this number, only 525 records (or 0.33%) were usable, where we could identify the relevant local authority where the individual was registered to vote because we had a full address and/or postcode. For others we received information like 'John Smith, London' which was not sufficient to identify the relevant local authority. …*
>
> *In overall terms the UK continues to believe that the Information Exchange is not an effective system. The quality of the data received was of a lower standard than 2014, with Member States sending large*

> *amounts of data that we were not able to use as it did not contain the necessary information to enable us to identify the local authority area where the individual was registered to vote, and we could therefore not identify them on the UK registers. The percentage of data received that we could forward to the relevant local authority was less in 2019 (0.3%) than in 2014 (1%). It is our understanding that the same issues arise in respect of the data on EU nationals that the UK sends to the other Member States. …*
>
> *In considering whether the Information Exchange is achieving its key objective of preventing double voting across Member States, there needs to be an assessment as to whether double voting is taking place. The lack of evidence does not suggest that at European Parliamentary elections double voting by EU citizens is an issue. Moreover, from our experience, the Information Exchange system is not effective in tackling any attempts at double voting that may arise. If the data is not suitable to identify a person effectively then any register cannot be marked and so the aim is not met. Consequently, the information exchange process cannot achieve its aim of addressing double voting.*" **[PL1/103/1149-1151]**

## D. Grounds 1 to 3: Annual Canvass and Position of the "Special Categories of Voters"

20. The Defendant states that the 12-month validity of the Declaration Form was introduced as a result of, and is justifiable by reason of, the changes made to the Representation of the People Act 2000 (the "**2000 Act**") introducing the annual canvass. The annual canvass does not apply to "*special categories of voters*" listed in DGR §50. Before the Electoral Registration and Administration Act 2013 (the "**2013 Act**"), ss.10 and 10A of the Representation of People Act 1983 (the "**1983 Act**") required EROs to send an annual canvass form to every household for the purpose of ascertaining who was entitled to be on the electoral register and could remove any person who had not returned their annual canvass form from the register. However, as a result of the amendments to the 1983 Act by the 2013 Act, EROs were no longer entitled to remove a person who had not returned their annual canvass form from the register (DGR §§49-54; Lee 1 §§47-58).

21. First, whether or not the 12-month validity of the Declaration Form is "*consistent with the entire scheme of UK electoral law as amended by the 2000 Act*" (DGR §50) is legally irrelevant. The conduct of the 2019 Elections contravened the directly enforceable rights of the Claimants under Articles 38(1), 9(1), 9(4) and 12 of the Voting Directive, Article 10 TEU, Articles 20(2)(b) and 22(2) TFEU, Article 39 of the EU Charter and, in respect of the Second to Seventh Claimants, under Article 3 of Protocol 1 ECHR in breach of section 6(1) HRA.

22. Secondly, the suggestion that EU24 citizens are in the same position as "*special categories of voter*" who are excluded from the annual canvass because they are "*associated with an increased likelihood of a change of circumstances*" (DGR §51) is misleading. Under s.9D(1) of the 1983 Act, EROs are under a statutory obligation to conduct an annual canvass in relation to the area for which they act. Section 9D(6) provides that the annual canvass requirement does not apply to those on remand in prison, patients in mental hospitals, those without a fixed address, service personnel, British citizens resident overseas and those registered anonymously for their safety. Those categories of voter are subject to a separate registration system. The annual cavass does not address the position of EU24 citizens, who are not entitled to vote in UK Parliament elections. There is no basis for eliding the position of the "*special category of voters*", who are subject to a different system of registration, and EU24 citizens.

23. Thirdly, annual canvass is not analogous to the system of registration for EU24 citizens. There is no statutory obligation on EROs to send a Declaration Form to EU24 citizens who have registered to vote, unlike the obligation on EROs to send every household an annual canvass form, and, pursuant to regulation 10(2)(a) of the 2001 Regulations, EU24 citizens are automatically removed from the register 12 months after their Declaration Forms are received.

24. Fourthly, in any event, the annual canvass has no relevance to the system of registration to vote since, pursuant to the amendments by the 2013 Act, EROs can no longer treat a name added to the canvass as an application to be added to the register or remove from the register a person who fails to return the cavass form or whose name is crossed off a canvas form on the basis of that information alone. The rationale for its removal, and the subsequent failure to consider the position in respect of EU24 citizens under the 2001 Regulations is explained in Lee 1 §§51, 54:

> "*51. The Electoral Registration and Administration Act 2013* ***("the 2013 Act")*** *made very significant amendments to electoral law generally. In particular, it introduced and gave effect to the new system of individual electoral registration* ***("IER").*** *It is not necessary to set out in detail the full scope of IER – which was the subject of extensive public consultation – but in summary, it was introduced to address issues of electoral fraud and to make provision for the modernisation of the electoral registration system over time. It moved to a system under which each individual elector was required to register themselves, and could do so online, providing a greater degree of information to allow the verification of their identity, such as their National Insurance number and date of birth. The system of annual canvass whereby a form returned by one member of the household purporting to*

*declare all electors at that address was no longer compatible with IER, and had given rise to concerns about electoral fraud. …*

*54. The 2013 Act did not itself make material amendments to the 2001 Regulations. In accordance with Article 9 of the Voting Rights Directive a EU24 citizen who wished to vote in the UK in a European Parliamentary election was still required to make a formal declaration of that wish: the process for which the UC1 Form was provided, and which operated as both the necessary registration and declaration. The CO was conscious that the move to IER might warrant amendments in due course to the 2001 Regulations – which would be done under section 2 of the ECA 1972 – in advance of the 2019 Election, but that careful thought was needed as to how to do so in compliance with the Voting Rights Directive.*[5] *As this would only have been done for the 2019 Election, further consideration of it fell away after the referendum in 2016.*"

25. Accordingly, there is, at the very least, now no longer any coherence in the "*scheme of electoral law*" (DGR §52) (to the extent that this claim is relevant).

## E. Ground 3: Unlawful Discrimination

26. The Defendant asserts that the proper comparator is a UK national, resident in another Member State voting in a European Parliament election in the UK because "*materially equivalent risks of double voting, inadvertent disenfranchisement etc.*" arise in respect of those individuals. It is said, without full reasons, that it is inappropriate to compare the UK resident, EU24 citizen or a UK resident, UK citizen or Irish, Cypriot or Maltese citizen (DGR §§65-66, 71). As to this:

    (1) The Claimants refer to SFG §§115-120 and Reply to SGR §§18-22, and do not repeat their arguments here. It is notable that the Defendant has failed to engage with the Claimants' point that there are the same risks of double voting and inadvertent disenfranchisement in respect of the proper comparators, i.e. dual resident UK/EU27 citizens or EU citizens from Ireland, Cyprus and Malta resident in the UK, who are not subject to the same requirements as EU24 citizens.

    (2) The Defendant invokes a straw man by suggesting that the Claimants contend that the proper comparator is a UK-resident UK national and those individuals are in a materially dissimilar position because they are only entitled to vote in the UK

[5] This assertion is not understood in circumstances where the Defendant has admitted that "*the Voting Directive neither requires nor proscribes the time-limited nature of declarations under Article 9*": DGR §47.

(DGR §66). That is not correct. The Claimants' chosen comparators (see §26(1) above) are entitled to vote in the UK or another EU Member State.

(3) It is not in dispute that, pursuant to Article 9(2) of the Voting Directive, an EU citizen must declare (amongst other things) that he will only exercise his right to vote in the Member State of residence (cf. DGR §67). However, that requirement could have been satisfied in a manner that did not involve the less favourable treatment of EU24 citizens: e.g., by a declaration made at the same time as the registration to vote which remains valid, unless and until the EU24 citizen informs the relevant authority that he or she has moved or asks to be removed (see SFG §106). It is wrong to suggest that the Voting Directive required the Defendant to operate the system in the manner that he did. The Cabinet Office had also considered that the 12-month validity of the Declaration Form was capable of having discriminatory effects (see §7(3) above). Following the 2014 Elections, it considered other alternative and less restrictive ways that the risks of double voting could be addressed and was being addressed by other Member States (see §7 above).

27. The Defendant claims that the Claimants have not clarified the basis on which the EA 2010 are said to apply (DGR §69). That criticism is not understood. By reason of the cumulative features of the system set out in SFG §103, EU24 citizens were required to satisfy different and more onerous conditions to be eligible to vote in the 2019 Elections and were treated less favourably than those in a comparable position. This amounted to direct discrimination on the grounds of nationality in the exercise of a public function, contrary to s.29(6) read with s.9(1)(b) EA 2010 (SFG §§119, 120(3)). The exemptions do not apply for the reasons set out in Reply to SGR §23, which are not repeated here.

## F. Ground 4: PSED and s.31(2A) of the Senior Courts Act 1981

28. The Defendant admits that due regard was not had to the PSED in advance of the 2019 Election (DGR §72). However, he contends that there is no realistic likelihood that the outcome would have been substantially different and that any relief should be refused in accordance with s.31(2A) of the Senior Courts Act 1981 (the "**1981 Act**") (DGR §§73-74).

29. Non-compliance with the PSED is a serious matter, especially where a public authority identifies a discrimination risk, as the Defendant did here (see §7(3) above). The Courts have repeatedly indicated that public authorities will struggle to persuade them that timely discharge of the duty would have made no difference to their decision-making where there is an apparent difference in the treatment of similarly-placed persons, see e.g., *Elias v Secretary of State for Defence* [2006] 1 WLR 3213 at §§131-133 and 274, *R(C) v Secretary of State for Justice* [2009] QB 657 at §39 and *R (HA Nigeria) v SSHD* [2012] EWHC 979 (Admin) at §200. Failure to discharge the PSED also creates a difficulty for any public authority Defendant facing a discrimination claim: *"having to justify something that it did not even consider required justification" ex post facto,* see *R (E) v Governing Body of JFS* [2010] 2 AC 728 at §214.

30. Recent guidance on the high threshold required to satisfy s.31(2A) of the 1981 Act was given by the Court of Appeal in *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 at §273:

> "*It would not be appropriate to give any exhaustive guidance on how these provisions should be applied. Much will depend on the particular facts of the case before the court. Nevertheless, it seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is 'highly likely' that the outcome would not have been 'substantially different' if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law. Furthermore, although there is undoubtedly a difference between the old Simplex test and the new statutory test, 'the threshold remains a high one' (see the judgment of Sales L.J., as he then was, in R. (on the application of Public and Commercial Services Union) v Minister for the Cabinet Office [2017] EWHC 1787 (Admin); [2018] 1 All E.R. 142, at paragraph 89).*"

31. 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 systemic disenfranchisement of EU24 citizens, would have occurred. Discharging his duty under the EA 2010 may or may not have involved amendments to the 2001 Regulations (SFG §130(1)(a)-(d)); confirming that the UK would be participating in the 2019 Elections in good time and informing EU citizens of the conditions and detailed arrangements for the exercise of the right to vote (SFG §130(1)(e)-(g)); permitting EROs and LROs to accept Declaration Forms sent by email

and/or after the 7 May 2019 deadline (SFG §130(1)(h)); permitting EU citizens to submit a declaration on the day of the election or when voting and/or ensuring that the system had sufficient flexibility for EROs and LROs to take discretionary measures to facilitate the effectiveness of the right to vote (SFG §130(1)(i)).

32. Alternatively, it is appropriate to grant relief for reasons of exceptional public interest pursuant to s.31(2B) of the 1981 Act. The Defendant has conceded that "*there may have been some EU citizens who were not able to vote in the 2019 Election when they would otherwise have wished to do so*" (DGR §44.3). Relief should be granted in view of the significance of the denial of this fundamental right to vote as a result of the Defendant's conduct.

## G. Damages

33. As to the claim for Francovich damages (DGR §§81-86):

(1) Section 63(2) of the 1983 Act is not relevant. It provides that no civil liability is incurred by an election officer for breach of official duty. Instead, under s.63(1) of the 1983 Act, if an election officer is guilty of any act or omission in breach of their official duty without reasonable cause, they commit an offence and are liable on summary conviction in England and Wales to a fine of any amount. This claim is not brought against EROs or LROs and does not concern any breach of official duty under the 1983 Act or otherwise.

(2) Francovich damages should be granted on the facts of this claim, where (1) the breach concerns fundamental and directly effective Treaty rights which are part of EU citizens' cultural and legal heritage; (2) the systemic disenfranchisement of EU24 citizens is a serious and repeated contravention; (3) the Voting Directive obliges the Government to take necessary and effective measures to secure (and avoid any measures that might jeopardise) a particular outcome, namely to enable EU citizens residing in their territory who have expressed a wish to vote to be able to do so on the same conditions as UK citizens; and (4) the Defendant had been on notice, by the European Commission, the Electoral Commission and the Law Commission, of the significant defects in the system and the Defendant undertook to consider how best to reform the legislation ahead of the 2019 Election but failed to remedy them: see, by analogy, *Byrne v. Motor Insurers' Bureau* [2009] QB 66 at §45.

(3) *R v. Secretary of State for Transport, ex p Factortame Ltd (No 7)* [2001] 1 WLR 942 does not assist the Defendant. Judge John Toulmin QC at §149 held that damages for injury to feelings were not available for a breach of the rights of establishment under Article 49 TFEU because those particular rights, directed at commercial undertakings, were only intended to lead to damages for economic loss. At §150, the Judge expressly did not reach any conclusion as to the availability of Francovich damages for the breach of individuals' social and political rights, including the right to vote. The Claimants refer to their arguments on the availability of Francovich damages for pecuniary and non-pecuniary loss in SFG §§79-81, 127.

34. As to the claim for damages under s.8 of the HRA 1998 (DGR §§87-88), the Claimants refer to SFG §83, which provides examples of a number of cases where the European Court of Human Rights has awarded compensation for a breach of Article 3 of Protocol 1 of the Convention.

## H. Incomplete disclosure

35. The Claimants had sought disclosure of, amongst other things, correspondence with the European Commission and Electoral Commission on the 2019 Elections. The Defendant has provided an Exhibit to Lee 1 of well over 1,200 pages.

36. However, the Claimants remain concerned that relevant material which is necessary to disclose to ensure the just disposal of this claim has been withheld or not located and considered for disclosure. They have written to the Defendant and will make appropriate applications to the Court if their concerns are not satisfactorily addressed: see Halford 2 at §10.

37. There are three main concerns. First, it is apparent that there were a number of meetings and other "discussions" of changes that could be made to the Declaration Form system both internally in briefings and emails between the Cabinet Office and the Defendant, and between the Government, the European Commission and (separately) the Electoral Commission. The records, minutes and notes of such exchanges are incomplete. Thirteen examples are given in Halford 2. It is unclear whether there were simply no records made, whether searches of officials' electronic notes and memos are incomplete or whether records have been withheld without explanation. Disclosure of this material

is particularly important given the conflicting evidence regarding the nature and extent of the commitment given by the Defendant to the European Commission in the context of "pilot" discussions before the commencement of infraction proceedings and its relevance for the seriousness and significance of the Defendant's non-compliance with EU law, both of which are matters which fall to be considered in assessing both the legality of the Defendant's behaviour and the potential availability of *Francovich* damages.

38. Secondly, the only correspondence that has been disclosed between the Government and the European Commission following the 2019 Elections is a letter from Kevin Foster MP, Minister for the Constitution, dated 30 August 2019 **[PL1/102/1122]**, in response to the letter from Commissioner Jourova dated 21 June 2019: see SFG §§30-31 **[CB1/A/20-21]** and **[CB2/D/420-423]**.

39. Mr Lee states that the UK has not received any further correspondence from the European Commission on the matter (Lee 1 §168). However, on 25 September 2019, the European Commission published a letter that it sent to EU citizens who were unable to vote in the 2019 Elections, indicating that communications between the Government and the European Commission were still ongoing:[6]

> "*According to EU rules (Directive 93/109/EC), Member States are under an obligation to take the necessary measures to enable EU citizens residing in their territory who have expressed the wish to vote to be entered on the electoral roll. National authorities are required to inform EU national voters in good time and in an appropriate manner of the conditions and of the detailed arrangements for the exercise of their right to vote.*
>
> *The attention of the Commission has been drawn to a number of problems encountered by mobile EU citizens who resided in the UK during the 2019 elections to the European Parliament, which in many cases resulted in preventing the EU citizens concerned from exercising the voting rights they are granted by EU law. Certain of the problems observed appear to have been recurrences of issues which had arisen previously during the 2014 elections, following which the UK authorities have informed the Commission of their intention to remedy this situation in time for 2019 European elections.*
>
> *The Commission has written to the UK authorities to ask for further information, as well as an explanation for the apparent lack of measures taken since 2014 to remedy the deficiencies that were previously identified.*

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6 Letter from the European Commission to Complainant(s) dated 25 September 2019, exhibited to Halford 2 as **[JH2/1/9-11]**.

*The Commission will not hesitate to act in its role of the Guardian of the Treaties should it be required.*"

40. In these circumstances, it would be very surprising had there been no further correspondence or meetings at all. Any such correspondence or meeting records are likely to be critical for the just resolution of this claim.

41. Thirdly, the Defendant refers the Article 14(2) of the Voting Directive in support of the proposition that "*[t]he particular status of citizens of [the Republic of Ireland, Cyprus and Malta] is directly recognised and permitted by Article 14(2) of the Voting Directive itself*" (DGR §71). The Defendant has not previously referred to, or relied upon, the derogation contained in Article 14(2) and it is not clear if he is doing so in these proceedings. He has not explained how a derogation (assuming one was actually made) was formulated or implemented. Among other matters, he has also not suggested that a derogation has been notified to, or assented to by, the European Commission in respect of the 2019 Elections or any previous European Parliament Election. In fact, in an email on 18 July 2014 from one of the Defendant's senior officials, it is noted that the Defendant was "*clearly not following the directive in relation to these citizens*" **[PL1/18/206]**. The Claimants have not been provided with any evidence of the Defendant's decision-making in relation to the purported reliance on Article 14(2).

## I. Further evidence

42. The Claimants apply to rely on further evidence in the form of a considered analysis of the statistical material exhibited to Halford 2. The basis of the application is explained in Halford 2 and the accompanying notice.

## J. Conclusion

43. For the reasons given above, along with the SFG and Reply to SGR, the Claimants respectfully invites the Court to grant the relief sought.

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**Blackstone Chambers**

**13 May 2020**