



Neutral Citation Number: [2021] EWHC 150 (Admin)

Case No: CO/3784/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 January 2021

Before:

THE HONOURABLE MR JUSTICE MORRIS

Between:

THE QUEEN
on the application of
DEMOCRACY NEWHAM LIMITED

Claimant

- and -

LONDON BOROUGH OF NEWHAM

Defendant

Francis Hoar (instructed by **Rahman & Co Solicitors**) for the **Claimant**
Timothy Straker QC and Vivienne Sedgley (instructed by **London Borough of Newham**) for
the **Defendant**

Hearing date: 13 January 2021 with further written submissions received 25 January 2021

Approved Judgment

Mr Justice Morris:

Introduction

1. By this application for judicial review, Democracy Newham Limited (“the Claimant”) challenges the decision of the London Borough of Newham (“the Council”) dated 24 September 2020 (“the Decision”) declaring a petition submitted by the Claimant seeking a referendum to change the governance model of the Council to be invalid. The referendum is sought pursuant to The Local Authorities (Referendums) (Petitions) (England) Regulations 2011 (“the 2011 Regulations”).
2. The application raises a short point of construction of the 2011 Regulations in the context of their amendment consequent upon the Coronavirus pandemic. That amendment is made by The Local Government and Police and Crime Commissioner (Coronavirus) (Postponement of Elections and Referendums) (England and Wales) Regulations 2020 (“the 2020 Regulations”) made under the Coronavirus Act 2020 (“the 2020 Act”).
3. I heard oral argument on this point on 13 January 2021. Following the hearing, and just before circulating my draft judgment, on 20 January 2021, I was informed that on 18 January 2021 the Secretary of State had made further regulations amending the 2020 Regulations (and thus further amending the 2011 Regulations). These are The Local Government and Police and Crime Commissioner (Coronavirus) (Postponement of Elections and Referendums) (England and Wales) (Amendment) (England) Regulations 2021 SI 2021/52 (“the 2021 Regulations”). The 2021 Regulations will come into force on 9 February 2021. At my invitation, on 25 January 2021 the parties provided further written submissions on the effect, if any, of the 2021 Regulations on the issues in the present case. I address this question in paragraphs 91 to 100 below. I first consider the position on the basis of the law as it stood at the time of the Decision and, indeed, as it currently stands.
4. The Claimant is a campaign group and a limited company. Mrs Dhanniya Sugathan is the organiser of the campaign and was, at the date of issue of the proceedings, a director of the Claimant.
5. Ms Althea Loderick is the Council’s Chief Executive. She is the “proper officer” for the purposes of the 2011 Regulations, and also the electoral registration officer and returning officer for all elections in Newham. Mr Daniel Fenwick is Ms Loderick’s deputy, is the monitoring officer and director of law and governance at the Council. He took the Decision, on behalf of Ms Loderick.
6. The Council’s current governance model is the “Mayor and Cabinet” model. This provides for an executive mayor elected by local government electors for a local authority’s area. There has been no referendum on any proposed change in governance since the 2011 Regulations came into force and none of any sort since 2002.
7. On 18 September 2020 the Claimant submitted a petition (“the Petition”) seeking a referendum to change the Council’s governance model to a “Leader and Cabinet”

model. The proper officer has declared the Petition to be invalid because it was presented on a date between 16 March 2020 and 5 May 2021 (being “the relevant period” as defined by the 2020 Regulations).

8. The Claimant seeks a mandatory injunction requiring the Council to verify the signatories to the Petition and to publish a notice declaring that it has received a valid petition and to hold a referendum as requested by the Petition on 6 May 2021. The Claimant also seeks a declaration that the Petition is valid if sufficient signatures are verified and that any resolution by the Council that there should be any referendum as it has proposed was void, if sufficient signatories are verified.
9. This is the rolled up hearing of the claim, following the order of Sir Duncan Ouseley sitting as a High Court judge dated 23 November 2020. In the light of the detailed arguments set out below, I am satisfied that the Claimant’s case is arguable and I grant permission to apply for judicial review.

The relevant statutory background

Local authority governance and referendums

The Local Government Act 2000

10. Part 1A of the Local Government Act 2000 (as amended by the Localism Act 2011) (“the 2000 Act”) is concerned with local authority governance arrangements. Under section 9B(1), a local authority must operate executive arrangements, a committee system or prescribed arrangements. “Executive arrangements” may consist of a Mayor and Cabinet executive (an elected mayor and two or more councillors appointed by the elected mayor) or a Leader and Cabinet executive (a councillor elected as leader of the executive by the authority and two or more councillors appointed by the executive leader): see section 9C of the 2000 Act.
11. Chapter 4 of part 1A of the 2000 Act provides for changes to local authority governance arrangements. A local authority may itself change its governance arrangements by changing from one form of governance to another or from one form of executive arrangement to another: see s.9K and 9KA.
12. A change in governance arrangements is subject to a referendum approving the proposals in certain circumstances: section 9M. In so far as is relevant to the present case, there are two ways in which a referendum may be brought about: first by the local authority’s own motion, under section 9MB; and secondly by a valid petition being presented to the local authority under regulations made under section 9MC (headed “Referendum following petition”). The principal relevant regulations made under section 9MC are the 2011 Regulations.

The 2011 Regulations

13. The 2011 Regulations set out the action to be taken by a local authority following receipt of a petition. By regulation 6, a local authority shall hold a referendum where they receive a valid petition. Such a referendum would be on the change in governance arrangements proposed in the petition: see regulation 17. By regulation 7, where a petition is received *after* a local authority has given notice of their intention

to hold a referendum and of the date on which that referendum will be held, the authority is not required to hold a referendum pursuant to that petition. Thus, where such a petition is received *before* the local authority has given notice of their own intention, then, subject to verification, a referendum pursuant to the petition must be held.

Regulation 9

14. Regulation 9 concerns the validity of petitions and is central to the issue arising in the present case. In its unamended form, it provides as follows:

“(1) Subject to paragraph (2) a petition shall be a valid petition if-

(a) it is signed (whether before or after the coming into force of these Regulations) by not less than the number of local government electors for the authority’s area that is the verification number; and

(b) it satisfies the requirements of regulation 10; and

(c) it is presented to the local authority to whom it is addressed on a day other than one which falls within a moratorium period.

(2) A petition shall not be invalid by reason only of a failure to satisfy the requirements of regulation 10(1) or 10(2) if the constitutional change in relation to which the referendum is sought can be ascertained.

(3) Where a person signed a petition but the information referred to in regulation 10(3)(a) is not included, or is not included in a legible form, that person’s signature shall be disregarded in determining whether the petition satisfies the requirements of paragraph (1)(a)

(4) If a person signs a petition more than once, that person’s second or subsequent signature shall be disregarded in determining whether the petition satisfies the requirements of paragraph (1)(a).

(5) Any signature on a petition which bears a date earlier than 12 months before the petition date shall be disregarded in determining whether the petition satisfies the requirements of paragraph (1)(a).”

Regulation 3 defines “moratorium period” as follows:

“Moratorium period”, in relation to a local authority’s area and a petition, means the period of nine years commencing with the day on which a referendum (“referendum A”) was last

held under Part 1A of the 2000 Act in relation to that area, except where -

- (a) *referendum A was held by virtue of an order under section 9N; and*
- (b) *the proposal for the authority to operate a mayor and cabinet executive was rejected.”*

Further relevant provisions

15. Regulation 10 sets out certain formalities of a petition. On each sheet the petition must state the name of the local authority to whom it is addressed and the constitutional change in relation to which the referendum is sought. In relation to each person who signs a petition the person’s first name and surname and address and the date of the signature must be given.

16. Regulation 11 provides for the procedure on receipt of a petition. By regulation 11(1)(b), the proper officer must notify the petition organiser of the petition date; (i.e. the date on which it was received by the authority: regulation 3). Regulation 11(2), provides as follows:

“As soon as reasonably practicable after receipt of a petition, and not later than the end of the notice period, the proper officer shall, subject to paragraph (3), satisfy himself or herself as to the validity of the petition” (emphasis added)

17. Regulation 13 provides for publicity for *valid* petitions in the following terms:

“(1) Where the proper officer is satisfied that a petition is valid, he or she shall, within the notice period, notify the petition organiser-

(a) of his or her conclusion; and

(b) that a referendum will be held.

(2) In a case to which paragraph (1) applies, the authority shall, as soon as reasonably practicable after the paragraph (1) requirement has been met, publish a notice which contains a statement-

...

(c) of the petition date;

...

(f) that a referendum will be held.” (emphasis added)

18. Regulation 14 provides for publicity for *invalid* petitions. Regulation 14(1) provides, inter alia, as follows:

“Where the proper officer is satisfied that a petition is not a valid petition, he or she shall, within the notice period, notify the petition organiser (if any) of his or her conclusion and of the reasons for that conclusion.” (*emphasis added*)

By regulation 14(2), where regulation 14(1) applies, the local authority is required, “*as soon as reasonably practicable*” after notifying the petition organiser of that conclusion, to publish a notice setting out a number of matters.

19. The “notice period” referred to in regulations 13 and 14 is the period of one month from the petition date: regulation 3.

The timing of the referendum

20. As regards the timing of a referendum following a valid petition, section 9MC(2)(h) of the 2000 Act provides that the regulations may make provision as to the date *on which* or the time *by which* a referendum must be held. In the 2011 Regulations the latter course was chosen. Regulation 16 is headed “Timing of referendum in consequence of valid petition” and provides, inter alia, as follows:

“(1) Subject to paragraphs (2) and (3) a referendum in consequence of a valid petition shall be held no later than the end of the next ordinary day of election after the petition date.

(2) Paragraph (1) shall not apply where-

(a) the petition date falls 4 months or less before the next ordinary day of election; or

(b) ...

and, in such a case, a referendum in consequence of a valid petition shall be held no later than the end of the period of six months beginning with the petition date” (*emphasis added*)

21. The “ordinary day of election” as used in the 2011 Regulations has the meaning given to it by section 37 of the Representation of the People Act 1983, namely the first Thursday in May.

The 2012 Regulations

22. Further provision for referendums is made by The Local Authorities (Conduct of Referendums) (England) Regulations 2012 (“the 2012 Regulations”). In particular, sufficient advance public notice of the date of the referendum must be given. Regulation 4, headed “Publicity and other information in connection with referendums” provides, inter alia, as follows:

“(1) Subject to paragraph (2), the proper officer must, no fewer than 56 days before the date on which the referendum will be held in accordance with sub paragraph (c)(ii) below, publish in such a manner as he or she considers likely to bring

to the attention of persons who live in the local authority area a notice which contains-

...

(b) *a description of the main features of any proposal;*

(c) *a statement-*

(i) *that a referendum will be held;*

(ii) *of the date on which the referendum will be held*

... ” *(emphasis added)*

The timing of a referendum: summary

23. The position as to the timing of a referendum pursuant to a valid petition is as follows. In general the referendum must be held *on or before* the next ordinary day of election i.e. by the next first Thursday in May. Secondly, where the petition date is 4 months or less before the next first Thursday in May, the referendum must be held *on or before* a period of 6 months from the petition date. Subject to the next point, that means that the referendum could still be held on the next first Thursday in May. Thirdly, and in any event, there must be a period of at least 56 days between the date of the publication of the notice of the date of the referendum and the date of the referendum itself. (In addition the regulations allow a period of one month for validation of the petition). It follows therefore that, in the case of a petition presented in March of any year, the referendum could not be held by the next first Thursday in May, but would have to be held *by* September of that year. On the other hand, a petition submitted in January of any year *could* potentially be held on the next first Thursday in May; and would have to be held by July.

The Coronavirus legislation

The background events

24. On 13 March 2020 the Prime Minister made an announcement concerning the impact of Coronavirus upon elections. He announced that scheduled elections for 7 May 2020 were postponed until 6 May 2021. On 23 March 2020 lockdown restrictions were brought into force. On 25 March 2020 the 2020 Act received the Royal Assent. Then, the 2020 Regulations were made on 3 April 2020, laid before Parliament on 6 April 2020 and came into force on 7 April 2020.

The 2020 Act

25. Sections 59 and following of the 2020 Act deal with postponement of elections, referendums and similar matters. By section 60 elections due to be held on 7 May 2020 are postponed. Section 61 gives the Secretary of State power, by regulations, to postpone certain other elections and referendums. Section 63 gives the Secretary of State power, by regulations, to make consequential, supplementary, incidental, transitional or saving provision in connection with the postponement of elections and referendums.

26. The Explanatory Note to the 2020 Act states that the purpose of the Act is “to enable the Government to respond to an emergency situation and manage the effects of the COVID-19 pandemic”, and that the Act aims to support Government in, inter alia, “containing and slowing the virus”. Paragraphs 102 to 107 of the Explanatory Note deal specifically with the postponement of elections. It is there explained that the decision to postpone was taken following advice from the Government’s medical experts in relation to the response to COVID-19 and the advice of those involved with delivering polls.

“The need for the postponement arose from concerns that running a poll will be, at best, inadvisable and at worst, impossible if candidates, campaigners, electors, electoral administrators and those providing supply and support to them are affected by either COVID-19 or the measures around it. Concerns have already been raised by electoral administrators that there would be insufficient staff available to them or their suppliers. Additional risks include polling station safety, the possible demands on Local Authority electoral staff to support other key services, and the impracticability or potential impossibility of campaigning activity.... ”

The Note went on to explain that there was no existing legislative provision allowing for polls to be postponed and that the Act thereby enables such postponement. It stated that the Act “also covers the handling of other elections and referendums (such as by-elections and local referendums) that might arise during the COVID-19 outbreak and may need to be postponed - for public health reasons - in a similar way.”

The 2020 Regulations

27. The 2020 Regulations were made by the Secretary of State for Housing, Communities and Local Government under sections 61 and 63 of the 2020 Act. Regulation 12 of the 2020 Regulations provides as follows:

“(1) A referendum under section 9MB of the 2000 Act (requirement to hold and give effect to referendum) that would otherwise be held, or have been held, during the relevant period is to be held instead on the ordinary day of election in 2021.

(2) A referendum that, pursuant to regulation 16 of the 2011 Regulations (timing of referendum in consequence of valid petition), would otherwise be held, or have been held, during the relevant period is to be held instead on the ordinary day of election in 2021.

(3) In relation to a referendum mentioned in paragraph (2) regulation 9 of the 2011 Regulations (validity of petitions) is to be read during the relevant period as if –

- (a) in paragraph (1)(c) at the end there were inserted, “or within the period beginning with the 16th March 2020 and ending with 5th May 2021”; and
- (b) *the relevant period were to be disregarded for the purposes of calculating the period of 12 months mentioned in paragraph (5).*
- (4) *Paragraphs (1) and (2) do not apply in relation to a referendum that has been held on a day during the antecedent period.*
- (5) *In this regulation “the 2011 Regulations” means the Local Authorities (Referendums) (Petitions) (England) Regulations 2011.”* (*emphasis added*)

By regulation 4 “the relevant period” is defined as “the period beginning with 16th March 2020 and ending with 5th May 2021”. Thus, regulation 12 addresses separately a “section 9MB” local authority referendum and a “section 9MC” referendum following a petition - in regulation 12(1) and 12(2) respectively.

28. The Explanatory Note published with the 2020 Regulations states, inter alia, as follows:

“Regulation 12 provides for postponement of any referendum on a local authority change of governance and extends the period for collation of signatures on a referendum petition.”

29. In addition, there was an Explanatory Memorandum to the 2020 Regulations prepared by the Ministry and laid before Parliament. The Explanatory Memorandum states, inter alia, as follows:

“2.1 These Regulations provide that specified local elections and referendums scheduled to take place after 15 March 2020, or that would otherwise be required before 5 May 2020, are postponed until 6 May 2021. ... The specified referendums are local advisory polls and those relating to local authority governance changes and neighbourhood planning.

...

6.4 *Relevant Referendums include:*

...

- Those relating to changing the governance arrangements of a local authority under section 9MB or by virtue of section 9MC of the Local Government Act 2000, either as a result of a council decision or a petition. If a valid petition is received the

[2011 regulations] requires a council to hold a referendum within 4 months¹, unless conditions are met; ...

7. Policy background

What is being done and why?

7.1 *The COVID-19 pandemic is a severe public health emergency. [... continues by reiterating the points made in the Explanatory Note to the 2020 Act (at paragraph 26 above)].*

...

7.3 *These Regulations postpone electoral events such as local by-elections and governance and neighbourhood planning referendums that had already been scheduled and provide that any local electoral events that would otherwise be required to be held before and on 5 May 2021 are postponed until 6 May 2021....*

...

7.5 *Part 3 of the Regulations postpones local polls and referendums....*

...

7.6 *Councils can decide to hold a referendum to determine whether they should change their governance arrangements, or they can be petitioned to hold such a referendum. The Regulations provide that where a governance referendum has been, or would be, scheduled within the period beginning with 16 March 2020 and ending with 5 May 2021, the referendum must take place on 6 May 2021 instead. The Regulations also provide that the period beginning with 16 March 2020 and ending with 5 May 2021 is disregarded for the purposes of calculating the period of 12 months within which signatures must be collected for a valid governance petition and that valid petitions may not be presented to a council during this period.*
(emphasis added)

Regulation 9 of the 2011 Regulations as amended by the 2020 Regulations

30. Thus, as a result of regulation 12(3), regulation 9(1) of the 2011 Regulations, for the relevant period, reads as follows:

“(1) Subject to paragraph (2) a petition shall be a valid petition if-

¹ This appears to be in error. The 4 months relates on the position under regulation 11(2)(a).

- (a) *it is signed (whether before or after the coming into force of these Regulations) by not less than the number of local government electors for the authority's area that is the verification number; and*
- (b) *it satisfies the requirements of regulation 10; and*
- (c) *it is presented to the local authority to whom it is addressed on a day other than one which falls within a moratorium period or within the period beginning with the 16th March 2020 and ending with 5th May 2021”*

31. Thus the effect of regulation 9(1)(c), *where* it is amended in this way, is that a petition presented between 16 March 2020 and 5 May 2021 cannot be valid. That would include a petition presented on 18 September 2020. (The additional words are to be read as meaning “presented... on a day *other than*... *within* the period beginning with 16th March 2020...”).
32. The 2021 Regulations and their effect upon the 2020 Regulations are addressed at paragraphs 91 to 100 below.

Relevant legal principles

33. As regards statutory interpretation, first, section 12 (1) of the Interpretation Act 1978, headed “continuity of powers and duties” provides as follows:

“Where an Act confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires.”

34. Secondly, it is common ground that in considering a question of statutory interpretation, regard is to be had to the consequences of alternative permissible constructions of the statute. The principle is stated in *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn.) at §11.6 as follows:

“When considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment corresponds to its legal meaning, the court should assess the likely consequences of adopting each construction, both to the parties in the case and (where similar facts arise in future cases) for the law generally. If on balance the consequences of a particular construction are more likely to be adverse than beneficent this is a factor telling against that construction.”

Bennion goes on, in the “comment” to this statement, to refer to a number of judicial statements of principle. Of these, those most pertinent to the present case are as follows:

“a statute cannot be interpreted according to its literal meaning without testing that meaning against the practical

outcome of giving effect to it” per Mustill J in R v Committee of Lloyds, ex p Moran (1982) The Times 24 June

“[the prima facie rule that words have their ordinary meaning] is subject to the qualification that if, giving words their ordinary meaning, we are faced with extraordinary results which cannot have been intended by Parliament, we then have to move on to a second stage in which we re-examine the words...” per Donaldson MR in Re Concrete British Concrete Association’s Agreement [1983] 1 All ER 203 at 205.

35. As regards the position of a proper officer, there is no scope for the exercise of discretion by the proper officer or the Council in the application of the 2011 or 2020 Regulations: see, by analogy, *Begum v Returning Officer for the London Borough of Tower Hamlets* [2006] EWCA Civ 733; *R (De Beer) v The Returning Officer for the London Borough of Harrow* [2002] EWHC 670.

The Facts

36. The following facts are drawn from the Claimant’s Statement of Facts and Grounds as verified by a witness statement from Saghir Ahmed, the Claimant’s solicitor, and from the witness statement of Ms Loderick and the two witness statements of Mr Fenwick, filed on behalf of the Council.
37. Since 2002 the Council has operated a Mayor and Cabinet executive, the form of governance provided for by section 9C(2) of the 2000 Act. Since the current Mayor was elected in May 2018 the Council has been considering holding a referendum on proposed changes to its governance arrangements. On 16 September 2019 the Council resolved to hold a referendum on its governance arrangements, on a date between June 2020 and May 2021 with an indicative date for 1 April 2021, and further that any timetable must be tightly maintained to guarantee that the implementation of any result took effect from May 2022. Ms Loderick states that, in the normal course, the date of any referendum is in the hands of the Council.
38. On 7 April 2020 the 2020 Regulations came into force. As a result, no referendum may be held during the relevant period i.e. between 16 March 2020 and 5 May 2021.
39. On 22 July 2020 Mrs Sugathan on behalf of the Claimant, informed the Council that the Claimant had started a new petition to change the governance model of the Council to the Leader and Cabinet model and asked for advice about the formalities required. The Council responded that the Claimant would be required to collect at least 11,100 signatures of electors, being 5% of the total electorate of the borough, within a 12 month period.
40. Between July and September 2020 there were email exchanges between the Claimant and the Council. The Claimant contends that at no point did the Council inform the Claimant that there would be any difficulty in submitting a petition within 2020, providing that it contained the requisite number of electoral signatories.
41. The Claimant proceeded to collect signatures to a petition that included on each sheet the following declaration:

“We, the undersigned, being local government electors for the London Borough of Newham, to whom this petition is addressed, seek a referendum on whether the council should be run in a different way by a leader and the Cabinet Model who is an elected councillor chosen by a vote of the other elected councillors.”

The Claimant maintains that this form of words is in accordance with regulation 10(2) and the Schedule to the 2011 Regulations. Mrs Sugathan was named and her address is specified as the person to whom correspondence relating to the petition was to be sent and she was thus the “petition organiser” under regulation 10(4).

The Petition

42. On 18 September 2020 the Claimant hand delivered to the Council in person 12,422 signatures to the Petition in hard copies in support of a change to a “Leader and Cabinet” model. Electronic copies of the Petition were sent to the Council by email on the same day.
43. On 22 September 2020 Mr Fenwick, acting as deputy proper officer, on behalf of the Council wrote to Mrs Sugathan, confirming receipt and that the “petition date” was 18 September 2020 and stating that the validation of the Petition would be completed by 17 October 2020.

The Decision

44. Mr Fenwick explains in his witness statement that, on Ms Loderick’s behalf, he proceeded to consider the validity of the petition under the Regulations. He continues:

“It was observed that the petition had been submitted within the period 16 March 2020 and 5 May 2021 and that [the 2020 Regulations] had altered the 2011 Regulations. Therefore it was determined that the petition could not be valid.”

45. By letter dated 24 September 2020 Mr Fenwick informed Mrs Sugathan that the Council considered that the Petition was invalid, in the following terms:

“On 22 September I wrote to you confirming the petition date of 18th September and that the Chief Executive would discharge her statutory duty to validate the petition under regulation 11 of the Petition Regulations. Regulation 9 sets out the requirements for a valid petition. From [sic] Regulation 9 was amended by the [2020 Regulations] reg.12(3) (a) to add the words identified for your reference in bold and underlined below”.

The letter then set out regulation 9(1) as amended (see paragraph 30 above) and then continued as follows:

“I regret to inform you that your petition cannot be accepted as valid under regulation 9(c) [sic] as it has been presented between 16th March 2020 and 5 May 2021, namely on the petition date of 18th September 2020. The Chief Executive has no discretion in making this decision under the Regulations.”

46. On the same date, the Council published a formal Notice of an Invalid Petition under regulation 14. Paragraph 4 of the Notice stated as follows:

“The petition has been held to be invalid because regulation 9(1) of the Petition Regulations is amended by the Local Government and Police and Crime Commissioner (Coronavirus) (Postponement of Elections and Referendums) (England and Wales) Regulations 2020/395 Pt 3 reg.12(3)(a) to invalidate the presentation of a petition between 16 March 2020 and 5 May 2021. The petition was presented on 18 September 2020.”

The Council proposes its own referendum

47. On 21 October 2020 there was a meeting of the full Council attended by the Mayor and councillors and held in public. Following a motion moved by the Mayor, the Council resolved to hold a referendum on a proposed change to a committee system model of governance. The report for that meeting recorded that following the introduction of the 2020 Regulations the referendum could not be held before 6 May 2021. It was resolved to hold the referendum on that date, for reasons set out in the report. Those reasons were that the referendum had to be held before 5 May 2022 and indeed significantly earlier than that date because of the possible need to plan for the implementation of a new model; and further that, if the date was set within 28 days of any other election, it had to be combined with that election, and that the only potential election for combination were the 2021 London elections to be held on 6 May 2021.
48. The effect of a referendum on a change of government as proposed by the Council would be to preclude any other such referendum (by the Council or following a valid petition) for nine years.
49. By pre-action protocol letter dated 12 October 2020 the Claimant asked the Mayor and the Council to acknowledge that the relevant officer had no power to reject the Petition.

The proceedings

50. The claim for judicial review was issued on 16 October 2020. The Claimant applied for urgent interim relief on 19 October 2020. On 20 October 2020 Mr Justice Chamberlain gave directions for expediting the proceedings. On 23 November 2020 Sir Duncan Ouseley sitting as a High Court judge ordered a rolled up hearing to be listed as soon as possible.
51. Following its resolution on 21 October 2020, on 23 December 2020 the Council gave formal notice, under section 9MA of the 2000 Act, of their intention to hold a

referendum and of the date on which that referendum will be held, namely 6 May 2021.

The Issue and the Parties' submissions

The Issue

52. The issue is whether, as a matter of construction and on the facts of the present case, regulation 9(1)(c) of the 2011 Regulations is to be applied as amended by the 2020 Regulations.

The Claimant's case in summary

53. The Claimant contends that the Decision was wrong in law and/or *Wednesbury* unreasonable on two alternative grounds.
54. First, the Claimant contends that in this case, on the basis of the Petition, if accepted, the referendum would be held on 6 May 2021. Accordingly, the referendum would not “otherwise be held or have been held during the relevant period” within the meaning of regulation 12(2) of the 2020 Regulations (i.e. not held between 16 March 2020 and 5 May 2021). It further follows that any referendum pursuant to the Petition would not be “a referendum mentioned in paragraph (2)” within the meaning of regulation 12(3) of the 2020 Regulations. As a result the additional exclusionary words (invalidating certain petitions) inserted by regulation 12(3) of the 2020 Regulations into regulation 9(1)(c) of the 2011 Regulations do not apply to any referendum pursuant to the Petition. Thus the Petition, presented on 18 September 2020, is not invalidated by regulation 9(1)(c) *as amended*.
55. As a matter of construction of regulation 12 of the 2020 Regulations, the amended version of regulation 9(1)(c) applies only if two conditions are satisfied: first, the *petition* is received during the relevant period, and secondly the referendum “would otherwise have been held during the relevant period” (“the second condition”). In the present case, the first condition is satisfied; the second condition is not. The referendum proposed in the Petition would be and will be held on 6 May 2021, i.e. outside the relevant period. The amended version of regulation 9(1)(c) does not apply in the present case; therefore the Petition is valid.
56. Secondly, and alternatively, Mr Fenwick could not exercise his delegated power to reject the Petition without determining the hypothetical question i.e. the question when the referendum “would have been held” but for the 2020 Regulations. Misdirecting himself as to his legal duty, he rejected it on the incorrect basis that he was obliged to do so simply because it had been submitted within the relevant period (i.e. the first condition was satisfied). Mr Fenwick did not in fact examine the hypothetical question, when he rejected the validity of the Petition.
57. The Claimant goes on to submit that the Council may not hold a referendum on its own proposals pursuant to the resolution on 24 October 2020, after a valid petition has been presented. The Council has a duty to verify the signatures to the Petition, and, if sufficient are valid, not to hold another referendum.

The Council's response in summary

58. In its written argument, including its skeleton argument, the Council's case is that the Claimant's primary case is entirely dependent on the proposition that any referendum held pursuant to the Petition would have been held *on* 6 May 2021. However the requirements of regulation 16 are that any such referendum would have been held on a date *no later than* the 6 May 2021; and indeed would have been held earlier. It would have been required to have been held prior to May 2021. Accordingly such a referendum would "otherwise have been held during the relevant period"; it is therefore a referendum mentioned in regulation 12(2) and, as a result, regulation 12(3) applied to the Petition. The petition was presented within the relevant period and thus is not valid, pursuant to regulation 9(1)(c) of the 2011 Regulations, *as amended*.
59. The legislative aim of the 2020 Act is to limit social interaction. The legislative intent of regulation 12(3) of the 2020 Regulations is that petitions are not valid if presented between 16 March 2020 and 5 May 2021. The restrictions should not impede petitions from being presented subsequently but should inhibit the social interaction of compiling a petition within the relevant period.
60. The Claimant's alternative case is unfounded (as explained further in paragraphs 72 and 73 below).

The "hypothetical question"; the arguments in more detail

61. On the basis of these competing contentions, the issue between the parties was formulated on the assumption that regulation 12 required an answer to the hypothetical question posed in regulation 12(2) i.e. whether, but for the postponement of elections, the referendum pursuant to the Petition would have been held (a) before 6 May 2021 or (b) on 6 May 2020. In other words, the parties proceeded on the agreed basis that regulation 12 imposes the second condition. As I explain below, I have concluded that that assumption is wrong. Before doing so, and in order to explain my reasoning for so concluding, I set out in more detail the parties' competing arguments on the second condition (i.e. the hypothetical question).

The Claimant's case in more detail

(1) The principal case

62. The claim is for judicial review of the proper officer's decision to reject the Petition on the grounds that regulation 9 of the 2011 Regulations applied, as amended. The issue is whether the proper officer could reasonably have decided that a referendum consequent upon the Petition (if valid) would have been held on or before 5 May 2021.
63. As regards the approach in principle, the statutory scheme governing the procedure in this case confers on the proper officer duties, rather than discretions. Those duties include determining whether a petition is valid by reference to particular criteria. Many of those criteria allow for only "yes" or "no" answers. For example the number of signatories required; the date on which the petition has been submitted; whether it is received within the moratorium period or not.

64. The proper officer is required to make a decision of fact that allows for a certain answer. It is of importance that there are no discretions and that questions of fact allow for only one determination. The question of when the referendum would have taken place is such a question of fact. The question for the court is whether a reasonable proper officer could have made the decision of fact that was made.
65. Secondly as regards the proper officer's application of his duties in this case:
- (1) Even though regulation 16 provides that the referendum is to be held "not later than" a particular date, it does not follow that the proper officer is permitted to determine an "uncertain question of fact", still less one that is hypothetical.
 - (2) Rather a proper officer must answer this question by determining that a referendum would have been held at a fixed point and the only fixed point available to her or him is the last day of the period within which the referendum could have been held. That this date is the "ordinary day of election" supports this contention. It is not sufficient for the proper officer to decide that the referendum would have been held "by not later than a specific date"; she must decide that the referendum would have been held "on a specific date".
 - (3) It is wrong for the proper officer to be put in a position where she must make an uncertain decision of fact. Even greater uncertainty as to the determination of a hypothetical question is caused by the fact that a council would be unlikely to hold two votes in close proximity. The proper officer would have to decide whether hypothetically the Council would in normal circumstances have held two votes, one, two or three months apart. That is an intensely uncertain question requiring highly political considerations to be taken into account, such as the desirability of running different campaigns and the likely different views of politicians and campaigners. Moreover, it is not a decision that would, in those hypothetical circumstances, have been taken by the executive of the Council, but by its members. The proper officer might be put in the invidious position of making a prediction as to what Council members would have done in a hypothetical situation.
 - (4) The Council's suggested statutory purpose of inhibiting the social interaction of compiling a petition (at any time during the relevant period) is fundamentally undermined by consideration of a petition validated less than 56 days before the ordinary date of election in 2021 – for example a petition submitted in March 2021 (or even one submitted in February 2021, taking account of the one month period to validate). In the case of such a petition, if valid, it could not possibly be held within the relevant period. In that event regulation 9 could not be amended by regulation 12(3)(a) to invalidate such a petition and the proper officer would be obliged to validate it. The social interaction necessitated by the collection of signatures for such a petition would necessarily have been ongoing for weeks, or probably months, before March 2021, all within the relevant period.
66. In oral argument, Mr Hoar accepted that his case is that the relevant words in regulation 12(2) of the 2020 Regulations should effectively be read as providing "would, as a matter of certainty, otherwise be held, or have been held, during the

relevant period”. Because the proper officer could not have concluded that the answer to a question to that effect was Yes, the Petition was valid. Therefore where the period within which a referendum *could* have been held terminates on the ordinary day of election, which is outside the relevant period, the proper officer must assume that it “*would* have been” held on the ordinary date of election i.e. 6 May 2021 outside the relevant period.

(2) *The alternative case*

67. The Claimant submits that, even if its primary case is not accepted, the delegated officer did not in fact examine when the referendum “would have been held” when he rejected the validity of the petition. In Mr Fenwick’s letter dated 24 September 2020 there is no suggestion that any consideration was given as to whether regulation 9 had actually been amended in this case. There was no determination as to whether the referendum would have been held before 5 May 2021. This is borne out by Mr Fenwick’s witness statement where he stated simply that the petition had been submitted within the relevant period and therefore it was determined that the petition could not be valid. It appears that therefore he believed that *any* petition submitted within the relevant period was invalid, regardless of the question of when the hypothetical referendum pursuant to such a petition would have been held. Whilst in their witness statements Mr Fenwick and Ms Loderick addressed the question of when the referendum might have been held but for the 2020 Regulations, these were not factual considerations taken into account by Mr Fenwick before he determined that he was bound to reject the petition. No reasonable officer delegated to take this decision could have rejected the Petition without determining the hypothetical question of when the referendum would have been held. As regards the Council’s reliance upon section 31(2A) Senior Courts Act 1981 (“SCA 1981”), the Court cannot safely conclude that “it is highly likely” that the outcome would have been the same, if Mr Fenwick had considered the hypothetical question at the time. The evidence now given as to a likely other referendum date is weak and is a post facto rationalisation; it should not be accorded substantial weight.

The Council’s case in more detail

(1) *The principal case*

68. The Council submitted that any referendum pursuant to the Petition would have been held within the relevant period and earlier than 6 May 2021 for the following reasons:
- (1) Regulation 12(3) of the 2020 Regulations is, by definition, dealing with a hypothetical question i.e. when a referendum “would otherwise be held” or “would otherwise have been held but for the 2020 Regulations.
 - (2) Regulation 16 does not provide that a referendum must be held on the next ordinary day of election; rather it provides that it must be held “no later than” that day.
 - (3) But for COVID-19 and the 2020 Regulations, a referendum would likely have been held on 1 April 2021 as per the Council’s resolution of 16 September 2019.

- (4) Section 12 of the Interpretation Act 1978 requires the Council not to delay, but “to get on with it”, from time to time as the occasion requires. Thus the referendum could have been held at any time up to the next ordinary day of election. In fact, but for the Coronavirus, “occasion” would here have required the referendum to be held prior to May 2021.
 - (5) Considering this hypothetical question in the present case, the petition was presented more than 7 ½ months before 6 May 2021. Following receipt of a valid petition, the proper officer would have been under a duty to act “as soon as reasonably practicable” or with 1 month to satisfy himself or herself as the validity of the regulation and to publish a notice of validity. On the hypothesis of the Petition being valid, a notice of validity under regulation 13 would have been published in October 2020, over 6 months before May 2021. To delay a referendum until then would have been contrary to the legislative purpose in requiring expeditious action. In this regard, reliance is placed upon the requirements in regulations 11(2), 13 and 14 of the 2011 Regulations to act “as soon as reasonably practicable”.
 - (6) There are practical reasons why a council would not seek to hold a governance referendum on the same date as the ordinary day of election. Although multiple elections and referendums on the same day are legally possible, they are viewed as undesirable. The ordinary day of election in a London borough can embrace Greater London Authority elections (in fact three simultaneous elections for the London mayor, assembly members by list and assembly members by constituency), borough and other elections.
69. The differentiation in regulation 12 of the 2020 Regulations between, on the one hand, referendums to be held following a resolution of the local authority and, on the other hand, those to be held following a petition is logical. Other regulations made under the 2020 Act provides for local authorities to hold remote meetings. A local authority may therefore resolve to hold a referendum of its own motion without requiring any social interaction. By contrast the requirement for a signature by at least 5% of the local government electors will require significantly greater social interaction, particularly in a London borough with a large population. If the Claimant’s construction were correct, there would be no purpose in regulation 12 differentiating between the two types of referendum; in both cases they would receive the same treatment i.e. postponement to 6 May 2021.
70. The Claimant’s contention that the proper officer was bound to determine that the referendum would have been held on the next ordinary day of election is not sustainable:
- (1) It would leave regulation 12(3) with no purpose and no meaning. On the Claimant’s construction any, and all, referendums pursuant to a petition presented in the relevant period would be bound to have been held on or after 6 May 2021, and thus in no case could a petition be rejected as invalid as a result of the amendment to regulation 9(1)(c) of the 2011 Regulations made by regulation 12(3).
 - (2) Regulation 12(2) and (3) clearly contemplate a hypothetical judgment as to whether a referendum would be or have been held within the relevant period.

- (3) Even if the proper officer were bound to decide a fixed date, there is no good reason why that date should be 6 May 2021 as opposed to any other date.
- (4) The Claimant's construction permits and is likely to increase activities precluded by Coronavirus and public health legislation.

71. Finally, and in any event the proper officer's determination was a reasonable one.

(2) *The alternative case*

72. As regards the Claimant's alternative case, Mr Fenwick was aware that the Council had carried a motion giving 1 April 2021 as an indicative date for a referendum. In any event, even if he had not considered the hypothetical question, the Decision cannot be void for that reason:

- (1) The Court's concern is whether or not there has been compliance with the law. An authority that complies with the law adventitiously complies with the law.
- (2) To hold otherwise would lead to the highly undesirable outcome that if two authorities make the same decision on the same day, one may act lawfully and another unlawfully, depending on the officer's reasoning.
- (3) It is unrealistic to expect officers to anticipate all the nuances of subsequent legal proceedings when making day-to-day decisions.

73. In oral argument, Mr Straker QC also sought to rely upon section 31(2A) SCA 1981, submitting that it is highly likely that, had Mr Fenwick considered the "hypothetical question", the outcome would have been the same. He further submitted that Mr Fenwick could re-take the decision now.

Discussion

74. First, the proper officer, in this case Mr Fenwick, had a duty, pursuant to regulation 11(2), to satisfy himself as to the validity of the Petition. He decided that the Petition was not valid by virtue of the effect of the 2020 Regulations. The question for this court is whether, on the true construction of regulation 12(2) and (3) of those Regulations, that decision was wrong in law or *Wednesbury* unreasonable.

75. Secondly, I approach the question of construction of regulation 12(2) and (3) on the basis that the legislator intended that they should have effect and that meaning is to be given to the provisions in their entirety. Further I assess the consequences of adopting alternative possible constructions and test them against the practical outcome of giving effect to each, as outlined in paragraph 34 above. Thirdly, it was common ground, and I consider, that the 2020 Regulations were likely to have been drafted quickly. This is wholly understandable, given the urgency required by the Coronavirus pandemic in late March and early April last year.

76. In my judgment, and as supported by the Explanatory Memorandum, the purpose of regulation 12(2) and (3), in relation to a referendum pursuant to a petition (i.e. a section 9MC referendum) is threefold: first, that no such referendum should take place within the relevant period; secondly to preserve the validity of signatures obtained before the start of the relevant period for future submission; and, thirdly, that

valid petitions may not be presented during the relevant period. I further accept the contention that one reason for not permitting a petition to be presented during the relevant period was to limit or reduce the scope for, or discourage the extent of, social interaction which would be likely to occur in the process of obtaining a substantial number of signatures to a petition.

The difficulties with the hypothetical question

77. The course of the argument between the parties on the issue of construction has proceeded on the assumption that regulation 12(2) and (3) imposes the second condition and that the proper officer is required to consider the hypothetical question. However, if this assumption is correct and as highlighted by the parties' contentions set out above, a number of difficult and surprising consequences follow, whichever party's construction is adopted.
78. First, and in my view, critically, there is Mr Straker's contention (paragraph 70(1) above) that if *the Claimant's approach* to the hypothetical question is correct, regulation 12(3) would have no effect at all. In oral argument, Mr Hoar frankly accepted that this was the consequence of his case. In fact, on analysis, the position is not quite as submitted by Mr Straker. Rather the position, on the Claimant's case, is that every referendum pursuant to a petition presented *on or after 6 May 2020* within the relevant period would be held on or after 6 May 2021. For any and every case such case, the answer to the hypothetical question, as modified by the Claimant, would be "no". It could never be said with certainty that such a referendum would have been held before 6 May 2021 and the petition would be valid. However in the case of a petition presented, between 16 March 2020 and 5 May 2020 i.e. in the first six weeks of the relevant period, then, by the operation of regulation 11(2)(a), the referendum would have been required to have been held within 6 months i.e. by 5 November 2020 at the latest. In that case, the answer to the hypothetical question would be "yes". Such a referendum would otherwise have been held within the relevant period and, by operation of regulation 12(2), would be put back to 6 May 2021, and the petition would thus not be valid.
79. Nevertheless, certainly for any petition presented on or after 6 May 2020, regulation 9(1)(c) of the 2011 Regulations is not amended by regulation 12(3)(a) of the 2020 regulations. Thus, regulation 12(3)(a) has no effect at all and would, for 12 of the 13½ months of the relevant period, effectively, be meaningless. On this approach, the effect of the amendment is that a petition submitted up until 6 May 2020 (on, say, 5 May 2020) would not be valid, but a petition submitted after 6 May 2020 (on, say, 7 May 2020) would be valid. There is no rational basis why such a distinction *within* the relevant period should be or has been made. In my judgment, not only is this not a "practical outcome", but it is an "extraordinary result" which could not have been intended by the legislator. The intention of the legislator must have been to create one rule for the entirety of the relevant period.
80. Secondly, on the other hand, even if *the Council's approach* to the hypothetical question is correct, then, as the Claimant points out, first the proper officer is required to make an assessment which might well require an assessment of political judgments and an assessment of what, not just the executive, but the elected members would have decided. Whilst I do not accept that such an assessment would be a matter of discretion, nevertheless it might well put the proper officer in a delicate and difficult

position in making such an evaluation. It would also mean that the proper officer, by making that assessment, would have the power to decide the nature of any referendum which might be held once and for all for a period of 9 years. Furthermore, and more significantly, it gives rise to the problematic case of a petition presented late in the relevant period i.e. in March 2021 or even February 2021 (see paragraph 65(4) above). On any view, a referendum on such a petition could not be held within the relevant period and the petition would therefore be valid and it follows that the claimed statutory purpose of precluding valid petitions within the relevant period and of limiting or reducing social interaction would not be achieved.

A different question: “In relation to a referendum mentioned in paragraph (2)”

81. In the light of these consequences, I questioned whether the parties’ assumption of the existence of the second condition is correct. That condition is said to arise from the opening words of regulation 12(3) “*In relation to a referendum mentioned in paragraph (2)*”. I therefore invited submissions on the meaning of those words. Do they refer to:
- (1) a referendum which pursuant to regulation 16 would have been held within the relevant period; or alternatively
 - (2) any referendum in consequence of a petition (as opposed to a local authority instigated referendum under section 9MB)?
82. By the time of the oral hearing, Mr Straker QC had also identified this issue relating to the opening words and, unsurprisingly, submitted, as his primary case, that the words have the meaning set out in paragraph 81(2) above. Mr Hoar submitted that, whilst accepting that it is desirable to avoid the hypothetical question, nevertheless a “referendum mentioned in paragraph (2)” must mean a referendum that pursuant to regulation 16 would otherwise have been held i.e. the meaning set out in paragraph 81(1) above.
83. In my judgment, the words “a referendum mentioned in paragraph (2)” are to be interpreted as meaning “a referendum in consequence of a petition”; that is a referendum of the type provided for by section 9MC of the 2000 Act (in contradistinction to “a referendum mentioned in paragraph (1)” i.e. of the type provided for in section 9MB). The reference, in paragraph (3), back to paragraph (2) of regulation 12 is not intended to be concerned with the timing of such a referendum. Regulation 12(1) and (2) refer, distinctly, to the two types of referendum: section 9MB and section 9MC. *Those* two paragraphs deal with the timing of each of those two types arising from the postponement of elections due to the Coronavirus pandemic; and therefore, necessarily, paragraph (2) itself refers to regulation 16 which deals with the *timing* of the section 9MC petition. However, the purpose of the cross-reference *in paragraph (3)* to paragraph (2) is to identify to which of those two types of referendum the substantive amendment provisions of paragraph (3)(a) and (b) are intended to apply and is not to set an additional “temporal” condition for the application of the amendment. Paragraph (2) has two purposes: first, to identify the section 9MC type referendum and secondly to address the timing of that referendum. The cross-reference in paragraph (3) is directed to the first of those purposes. The intended position might have been more clearly expressed if paragraph (2) had been drafted to read “*A referendum in consequence of a petition that, pursuant to*

regulation 16...” or “*A referendum under regulations made under section 9MC of the 2000 Act that, pursuant to regulation 16...*”.

84. Such a construction of the opening words is supported by the following considerations.
85. First, its effect is that no petition presented *at any time* within the relevant period can be valid, even one submitted in the later part of the period, including one presented in March 2021. It is thus consistent with, and advances, the stated statutory purpose.
86. Secondly, it avoids the multiple difficulties which would arise on the alternative construction (i.e. requiring an answer the hypothetical question): namely, the “extraordinary result” that, on the Claimant’s construction, for the vast majority of the relevant period, regulation 12(3)(a) is without effect (see paragraphs 78 and 79 above) ; the anomaly of the petition presented in March 2021 does not arise; nor does the possibility that the proper officer’s task might involve political judgments (see paragraph 80 above). Finally, the Claimant’s alternative case does not arise; the possibly difficult question of assessing what Mr Fenwick did in fact, and what he would have done, is not relevant.
87. In my judgment, this construction of the opening words of regulation 12(3) is the only one which can properly give effect to the true intent and purpose of the provisions.
88. Thirdly, on this construction, regulation 12(3)(b), relating to signatures, operates as intended. Taking the example of a petition presented on 16 March 2021, then, if there were a second condition, the petition would be valid and the referendum would take place some time between 6 May and 16 September 2021, but regulation 12(3)(b) would not apply and any signature before March 2020 would not count i.e. there would have to be the requisite number of signatures all made within the relevant period. On the other hand, if the opening words are construed in the sense set out at paragraph 81(2) above, the petition cannot be valid when presented, but it can be re-presented on 6 May 2021 and, by the application of regulations 12(3)(b), any signature as far back as 16 March 2019 would be valid.
89. Finally, I ask myself what could be the purpose of the “second condition”? The effect of it would be that if a referendum would have been held outside the relevant period, then a petition could be validly presented within the period; but if not, then a petition could not be so presented. I can see no reason for such a distinction. In either event, it is regulation 12(2) which prevents the holding of a referendum within the period. The additional purpose provided for by regulation 12(3) is to prevent the presentation of a petition within the period; yet, with the second condition, it would not achieve this purpose in all cases.

Conclusion on Regulation 12 of the 2020 Regulations (in their current form)

90. I conclude as follows:
 - (1) On their true construction, the words, in regulation 12(3) of the 2020 Regulation, “In relation to a referendum mentioned in paragraph (2)” mean “in relation to a referendum in consequence of a petition under regulations made under section 9MC of the 2000 Act”.

- (2) Therefore, by reason of regulation 12(3)(a) of the 2020 Regulations, no petition for a referendum presented within the period beginning with the 16 March 2020 and ending with 5 May 2021 can be valid.
- (3) It follows that the Petition was not valid and the Council did not err in law or act irrationally in reaching the Decision.
- (4) Regulation 12(3) does not impose a second condition as alleged by the Claimant: in considering whether regulation 12(3)(a) amends regulation 9, the hypothetical question posed in regulation 12(2) did not fall for consideration by the proper officer. He did not err by failing to consider that question. For that reason, the Claimant's alternative case is unfounded.

The effect, if any, of the 2021 Regulations

The 2021 Regulations

91. The 2021 Regulations were made on 18 January 2021 and laid before Parliament on 19 January 2021. They are due to come into force on 9 February 2021. When they come into force, they substantially amend the amending provisions of regulation 12 of the 2020 regulations, and thus they amend the 2011 Regulations, both generally and specifically in relation to regulation 9.
92. Regulation 3 of the 2021 Regulations provides, so far as material to the present case, as follows:

“In regulation 12 of the Local Government and Police and Crime Commissioner (Coronavirus)(Postponement of Elections and Referendums)(England and Wales) Regulations 2020, for paragraph (3) substitute -

“(3) Regulation 9 of the 2011 Regulations (validity of petitions) is to be read during the relevant period as if that period were to be disregarded for the purposes of calculating the period of 12 months mentioned in paragraph (5) of that regulation.

(3A) Subject to paragraph (3B), for the purposes of the 2011 Regulations a petition presented to, or received by, a local authority on any day during the period beginning with 16th March 2020 and ending with 8 February 2021 is to be treated as having been presented or received on 9th February 2021.

(3B) ...”

(emphasis added)

(Paragraph (3B) of the amended regulation 12 of the 2020 Regulations addresses the version of the electoral register to be used in considering the validity of a petition, but is not directly relevant to the present circumstances).

93. Thus, with effect from 9 February 2021, regulation 12(3) of the 2020 Regulations as set out in paragraph 27 above (and the amended version of regulation 9(1)(c) of the

2011 Regulations as set out at paragraph 30 above) will no longer apply. Rather the 2011 Regulations and regulation 9 in particular are modified as provided for the newly amended paragraphs (3) to (3B) of regulation 12 of the 2020 Regulations.

94. The Explanatory Note accompanying the 2021 Regulations state as follows:

“These Regulations amend the [2020 Regulations] to remove the restriction on petitions for a referendum on a change of local authority governance being validly presented to a local authority during the period from 16th March 2020 to 5th May 2021 (inclusive).

Regulation 3 substitutes paragraph (3) to remove this restriction and inserts new paragraphs (3A) and (3B) into regulation 12 of [the 2020 Regulations] to provide that a petition presented during the period from 16th March 2022 8 February 2021 (inclusive) is to be treated for the purposes of the [2011 Regulations] as having been presented on 9th February 2021 but that, for the purposes of establishing the validity of the petition, the local authority must use the version of the electoral register which had effect on the day on which the petition was actually presented to the authority.”

(emphasis added)

95. The Explanatory Memorandum to the 2021 Regulations states, inter alia, as follows:

“2. Purpose of the instrument

2.1 To enable a government petition submitted to a council between 16 March 2020 and 8 February 2021 to be treated as having been presented on 9 February. This could, if the petition is valid, enable a referendum to be held within six months of 9 February 2021, which would allow a referendum to be held on 6 May 2021, alongside any local elections taking place on that date. The instrument also enables governance petitions to be presented from 9 February 2021; any activity on compiling petitions should be in accordance with any guidance the Government issues about what activity in a public place might safely be undertaken in the context of the Coronavirus pandemic. It is expected that in practice the principal effect of this statutory instrument will be to allow the London Borough of Croydon to process a petition that has already been gathered and presented to the council, to facilitate the governance referendum taking place at the same time as scheduled elections in the local authority area.”

Section 6 of the Explanatory Memorandum is headed “Legislative Context” and, after setting out the statutory framework as provided for by the 2000 Act and the 2011 Regulations, and the governing provisions of the 2020 Act, continues as follows:

- “6.3 ... the 2020 Regulations... postpone all such by-elections and local referendums to 6 May 2021. Regulation 12(3)(a) of the 2020 Regulations modifies the 2011 Regulations to provide that governance petitions may not be validly presented to a council during the period beginning with 16 March and ending with 5 May 2021.”
- 6.4 *These amendments to the 2020 Regulations amend regulation 12 to remove the restriction on presenting positions from the coming into force of these amendment Regulations on 9 February 2021. They also provide that a position presented to a local authority on any day during the period beginning with 16 March 2020 and ending with 8 February 2021 is to be treated as having been presented on 9 February 2021.”* (emphasis added)

Section 7 provides inter-alia as follows:

“Policy background

What is being done and why?

...

- 7.2 *In response to the public health emergency presented by the Covid-19 pandemic, the 2020 Act postponed all elections scheduled to take place on 7 May 2020 until 6 May 2021. The 2020 Regulations postponed other electoral events such as local byelections and governance and neighbourhood planning referendums until the same date. They also provided that governance petitions may not be validly presented to a council during the period beginning with 16 March 2020 and ending with 5 May 2021.*
- 7.3 *Notwithstanding the current prohibition, a small number of governance petitions have been submitted. In Croydon a petition calling for a referendum introducing a mayor and cabinet system has been submitted and the petitioners have requested that the referendum be held on 6 May 2021. Under the current restrictions such petitions need to be formally resubmitted after 5 May 2021 and thereafter validated. A referendum could not be held, on 6 May 2021 alongside the London mayoral election and would have to be held on a separate date later in the year.*
- 7.4 *These Regulations enable the Croydon petition, and other such petitions that have been submitted during*

this period, to be treated as lawfully submitted and validated from 9 February. It would be open to the council to hold the referendum on 6 May 2021, or on any other date within six months of 9 February 2021.”
(*emphasis added*)

The parties' submissions in relation to the 2021 Regulations

96. The Claimant submits first, that, regardless of the 2021 Regulations, the Court should give judgment in the case on the facts and law as they stood at the date of the Decision and the initial hearing on 13 January 2021. The Claimant points out that the 2021 Regulations have not yet come into force in any event. Secondly, as to the particular effect of the 2021 Regulations, the Claimant's submission proceeds on the basis that under regulation 12 of the 2020 Regulations (in unamended form) the hypothetical question arises and falls to be determined in the sense propounded by the Claimant (see paragraphs 54 and 55 above). On that basis, the Claimant submits that the 2021 Regulations have the unforeseen and unintended effect (both potentially and in the present case) of rendering *invalid* a petition which is otherwise valid. This arises by reason of the potential effect of regulation 7 where there has been a Council resolution for a referendum. That is a particular reason why the Court should give judgment on the basis of the case as originally presented.
97. The Council, on the other hand, submits, first, that the 2021 Regulations and in particular statements in the Explanatory Note and the Explanatory Memorandum, make it clear that the intention of regulation 12 of the 2020 Regulations (in unamended form) was, and is, to render invalid all petitions submitted within the relevant period and not to require consideration of the hypothetical question. Secondly, whatever the effect of the 2021 Regulations generally, in the present case, and as a result of regulation 7 of the 2011 Regulations, they can have no effect on the validity of the Petition, because of the Council's own decision to hold a referendum.

Discussion

98. In my judgment, the 2021 Regulations, when they come into force, have no effect upon the validity of the Petition and do not affect the conclusion I have reached at paragraph 90 above. For the reasons given above, on the true construction of regulation 12(3) of the 2020 Regulations (in their current form), the Petition was not valid when presented.
99. When the 2021 Regulations come into force on 9 February 2021, then by operation of new regulation 12(3A) the Petition *will* be treated as having been presented or received on 9 February 2021; and thus *potentially* valid. However, in the present case, the fact of the Council's decision to hold its own referendum (paragraph 47 above) and the operation of regulation 7 of the 2011 Regulations mean that the Petition, deemed presented on 9 February 2021, will not have been presented until *after* the Council had, on 23 December 2020, given notice of *their* intention to hold a referendum (paragraph 51 above). The Petition, even when treated as presented on 9 February 2021, therefore cannot be valid. Nor could it be validly re-presented at a later date. In the specific circumstances of the prior Council decision in the present case, the fact that the petition in the case of the London Borough of Croydon will (or is intended to) be rendered valid by the 2021 Regulations has no relevance to the

Petition here. (It also follows that, because I do not accept the Claimant's construction of regulation 12(3) (in unamended form), the Claimant's concern that the effect of the 2021 Regulations is to render invalid a petition which would otherwise be valid does not arise).

100. I add that I have reached my conclusions in paragraph 90 above as to the true construction of regulation 12 (in its unamended form) quite independently of the effect of the 2021 Regulations and the explanations thereto given in the Explanatory Notes and the Explanatory Memorandum. I had provisionally reached those conclusions prior to being aware of the 2021 Regulations. Having considered the 2021 Regulations carefully, I see no reason to alter those conclusions. In these circumstances, and despite the Council's first submission in paragraph 97 above, I do not need to consider the question whether it is permissible or appropriate, when construing a statute or statutory instrument (provision A) as and when made, for the Court to take into account a subsequently enacted statute or statutory instrument (provision B) (including any explanatory material for provision B), in ascertaining the intention of the legislator when enacting provision A. For example, is the Court entitled to take account of the fact that provision B proceeds on a particular assumption as to the proper construction of provision A? Such questions do not arise here.

Conclusion

101. Whilst the Claimant's case is arguable, on detailed analysis and for the reasons given in paragraphs 83 to 90 above, that case fails. For the reasons given in paragraphs 98 to 100 above, the 2021 Regulations have no effect upon this conclusion. Accordingly the application for judicial review is dismissed.
102. I will hear the parties on matters consequential upon this judgment. Finally, I am grateful to counsel for the helpful way in which this application has been dealt with, not least in the circumstances of the present COVID-19 situation.