Easter Term
[2022] UKSC 11
On appeal from: [2020] EWCA Civ 723

JUDGMENT

R (on the application of Coughlan) (Appellant) *v* Minister for the Cabinet Office (Respondent)

before

Lord Reed, President
Lord Sales
Lord Hamblen
Lord Stephens
Dame Siobhan Keegan

JUDGMENT GIVEN ON
27 April 2022

Heard on 15 February 2022

Appellant
Anthony Peto QC
Sarah Sackman
Natasha Simonsen
(Instructed by Leigh Day (London))

Respondent
Lisa Giovannetti QC
Hanif Mussa
Emily MacKenzie
(Instructed by The Government Legal Department)

1st-3rd Interveners (Written submissions only)
Matthew Ryder QC
Ayesha Christie
Gayatri Sarathy
Michael Etienne
(Instructed by Deighton Pierce Glynn (Bristol))

4th-5th Interveners (Written submissions only)
Timothy Otty QC
George Molyneaux
(Instructed by Linklaters LLP (London))

Interveners
(1) Operation Black Vote
(2) Runnymede Trust
(3) Voice4Change England
(4) LGBT Foundation
(5) Stonewall

LORD STEPHENS: (with whom Lord Reed, Lord Sales, Lord Hamblen and Dame Siobhan Keegan agree)

1. Introduction

1. In January 2019, the appellant sought judicial review of an announcement made in November 2018 that the Minister for the Cabinet Office ("the respondent") intended to authorise proposed schemes that would pilot temporary changes to rules set out in secondary legislation governing local elections. These changes were to take place in respect of the local government elections in May 2019. In February and March 2019, orders were made by the respondent to implement pilot schemes in respect of Braintree District Council ("Braintree") and nine other local authorities ("the Pilot Orders"). All of these pilot schemes introduced a new requirement for some form of voter identification.

2. The appellant believes that voter identification requirements in elections "will serve to disenfranchise the poor and vulnerable who already struggle to have their voices heard." The first to third interveners, Runnymede Trust, Operation Black Vote and Voice4Change England, express similar concerns stating that voter identification requirements "present a significant barrier to democratic participation" for ethnic minority communities by deterring or preventing those who are entitled to vote from voting. The fourth and fifth interveners, LGBT Foundation and Stonewall, express comparable concerns on behalf of individuals who are lesbian, gay, bisexual and/or transgender.

3. The primary issue in this appeal is whether these Pilot Orders were ultra vires, that is outside the respondent's legal powers, because the pilot schemes they sought to establish were not schemes within the meaning of section 10(2)(a) of the Representation of the People Act 2000 ("RPA 2000").

4. The second issue in this appeal is whether the pilot schemes were authorised for a lawful purpose under section 10(1) of the RPA 2000, consistent with the policy and objects of the Act.

5. As noted in the courts below by Supperstone J at para 3 of his judgment, and the Court of Appeal at para 3 of McCombe LJ's judgment, the court is not concerned with the merits or otherwise of the decision to introduce these pilot schemes, or with the merits of voter identification schemes in general, but only with whether the decision to introduce the pilots was lawful. This remains the case.

2. The Factual Background

6. Mr Neil Coughlan ("the appellant"), who lives within Braintree's area, commenced these judicial review proceedings prior to the making of the Pilot Orders. Thus, Mr Coughlan's original challenge was to the respondent's decision to make the Pilot Orders rather than to the Pilot Orders themselves. In the period between the commencement of the judicial review proceedings and the initial hearing on 7 March 2019 before Supperstone J, the respondent made the Pilot Orders pursuant to section 10(1) of the RPA 2000 which established the pilot schemes in Braintree and in the nine other local authority areas.

7. It is accepted that in relation to voters attending at polling stations, each of the ten Pilot Orders specified that a ballot paper must not be delivered to a voter unless that voter had produced one of several specified identification documents to the presiding officer or a clerk. The ten Pilot Orders contained substantially similar provisions, with some variations including regarding the "specified document" that a voter would be required to produce in order to obtain a ballot paper.

8. On 20 March 2019, Supperstone J, [2019] EWHC 641 (Admin); [2019] 1 WLR 3851, granted permission for the appellant to apply for judicial review but dismissed the claim on its merits, holding (a) at paras 58-60 that voter identification pilot schemes were schemes within section 10(2)(a) of the RPA 2000 and so were not outside the power to make the orders under section 10(1); and (b) at para 81 that the discretion conferred on the respondent by section 10(1) had not been exercised in a way that would frustrate the legislation's purpose. On 25 October 2019, Simon LJ granted the appellant permission to appeal to the Court of Appeal in view of the "important constitutional function served by local government elections". The appellant's appeal was dismissed by the Court of Appeal (Underhill LJ, Vice President of the Court of Appeal, Civil Division, and McCombe and Green LJJ), [2020] EWCA Civ 723; [2020] 1 WLR 3300. On 26 February 2021 permission to appeal was granted by a panel of the Supreme Court (Lord Briggs, Lord Hamblen and Lord Burrows).

3. The primary issue in this appeal: whether the Pilot Orders were ultra vires (para 3 above)

9. Section 10 of the RPA 2000 is entitled "Pilot schemes for local elections in England and Wales". Section 10(1) enables the Secretary of State by subordinate legislation to "make such provision for and in connection with the implementation of the scheme … as he considers appropriate". However, the Secretary of State's power to make subordinate legislation is limited to a scheme within the meaning of section

10(2). For present purposes the relevant provision is section 10(2)(a) which provides for schemes as regards "… how voting at the elections is to take place". So if the schemes in this appeal were not schemes as to "how voting at the elections is to take place" then they were outside the Secretary of State's legal power to make the subordinate legislation under section 10(1).

10. In essence the appellant contends that the requirement to produce voter identification does not concern "how voting at the elections is to take place" within section 10(2)(a) so that the pilot schemes were outside the respondent's legal power to make the subordinate legislation under section 10(1). The appellant asserts that the phrase "how voting at the elections is to take place" refers to the manner or means by which electors cast their vote at elections, confined to the "technical modalities of voting, such as whether votes are to be cast in person, by post, over the telephone or online". Moreover, the appellant contends the phrase does not relate to a person's eligibility or entitlement to vote. However, the respondent contends that the phrase is sufficient to include procedures for voting at a polling station, including procedures for demonstrating an entitlement to vote before casting a vote.

11. The outcome of this appeal in relation to the primary issue principally turns on the true interpretation of section 10 and in particular of section 10(2)(a) of the RPA 2000. Accordingly, it is appropriate at this stage to set out the principles as to interpretation relevant to this appeal.

4. Relevant principles of statutory interpretation

12. The RPA 2000 received Royal Assent on 9 March 2000. Shortly thereafter amendments were made to it by the Political Parties, Elections and Referendums Act 2000 which received Royal Assent on 30 November 2000. The respondent's power under section 10(1) of the RPA 2000 to make subordinate legislation at any time after the amendments came into force depends on the provisions of the RPA 2000 as amended. Furthermore, the purpose of section 10 of the RPA 2000, in so far as it can be discerned from an analysis of the language used by Parliament, is to be discerned from the legislation as amended.

13. In *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3; [2022] 2 WLR 343, Lord Hodge in his leading judgment, with which all in the majority concurred, reiterated, at para 29, that the primary source by which meaning is ascertained is by way of conducting an analysis of the language used by Parliament. Lord Hodge stated, at para 31, that "Statutory interpretation involves an objective assessment of the meaning which a

reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered." Lord Hodge also stated, at para 30, that external aids to interpretation therefore must play a secondary role. He continued, at para 30, by stating:

> "Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity."

14. The appellant sought to support his contention as to the correct interpretation of section 10(2)(a) by referring to statements made by the Home Secretary on the second reading of the Bill that became the RPA 2000: Hansard (HC Debates) 30 November 1999. The Home Secretary said: "we all have pet theories as to what might improve turnouts" (col 171), and "We need to ensure that it is as easy as possible for the public to vote and that our electoral procedures are compatible with modern life styles" (col 173). The appellant relied on these statements to establish that the phrase "how voting at the elections is to take place" is concerned with technical modalities aimed at improving turnouts by making it as easy as possible for the public to vote. However, such references are not a legitimate aid to statutory interpretation unless the three critical conditions set out by Lord Browne-Wilkinson in *Pepper v Hart* [1993] AC 593, 640 are met. The three critical conditions are (i) that the legislative provision must be ambiguous, obscure or, on a conventional interpretation, lead to absurdity; (ii) that the material must be or include one or more statements by a minister or other promoter of the Bill; and (iii) the statement must be clear and unequivocal on the point of interpretation which the court is considering. As will become apparent I do not consider that section 10(2)(a) is ambiguous so that the first condition is not met. Furthermore, the statements do not address the meaning of the words "how voting at the elections is to take place" in section 10(2)(a) and, in particular, the disputed issue of whether those words encompass procedures for demonstrating an entitlement to vote. Accordingly, the statements do not meet the stringent requirements of the third

condition as the statements are not clear or unequivocal and do not address the point of interpretation which arises in this appeal. The third condition is not met, and I propose to say no more about these statements in relation to statutory interpretation.

15. In addition, the appellant sought to support his contention as to the correct interpretation of section 10(2)(a) by relying on the principle of legality on the basis that the right to vote in local government elections is a fundamental constitutional right which could only be restricted by clear statutory words showing that Parliament has squarely confronted what it was doing and accepted the political cost. In *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131F Lord Hoffmann described the relationship between parliamentary sovereignty and the principle of legality in these terms:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. … The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

16. In relation to the principle of legality it is appropriate first to consider whether the language used in section 10 of the RPA 2000 expressly or by necessary implication authorises voter identification pilot schemes. It is only if it does not that it will be necessary to consider whether the right to vote in local government elections engages the principle.

17. Finally, the appellant characterised the power in section 10(1) of the RPA 2000 as a "Henry VIII power". The term Henry VIII power is commonly used to describe a delegated power under which subordinate legislation is enabled to amend primary legislation. One of the powers in section 10(1) of the RPA 2000, when read with section 17(2) (see para 31 below), does enable the respondent by order to modify or disapply primary legislation. However, that section also contains a separate power to modify or disapply subordinate legislation. In relation to both powers the rule for construction is

to test each proposed exercise by reference to whether or not it is within the class of action that Parliament must have contemplated when delegating. However, in relation to the power to amend primary legislation "if there is any doubt about the scope of the power conferred upon the Executive or upon whether it has been exercised, it should be resolved by a restrictive approach", see *McKiernon v Secretary of State for Social Security* (1989) 2 Admin LR 133, 140; *R v Secretary of State for Social Security, Ex p Britnell* [1991] 1 WLR 198, 204; *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 382; and *Regina (Public Law Project) v Lord Chancellor (Office of the Children's Commissioner intervening)* [2016] UKSC 39; [2016] AC 1531, paras 23-28. The appellant recognises that the power in fact exercised to make the ten Pilot Orders modified subordinate legislation. In such circumstances, the respondent contends that the restrictive approach is not engaged, as the power exercised does not modify or disapply primary legislation. I see the strength in the respondent's contention. However, it is appropriate first to consider whether there is any doubt about the scope of the power in section 10(1). If not then there is no need to resort to a restrictive interpretation.

5. The legislative framework for local government elections

18. To comprehend the impact of the Pilot Orders, it is necessary to consider the position that would otherwise have pertained in relation to local government elections.

19. Section 2 of the Representation of the People Act 1983 ("RPA 1983") provides, subject to certain exceptions, that a person is entitled to vote as an elector at a local government election in any electoral area if on the date of the poll he is registered in the register of local government electors for that area. Registration is carried out in accordance with section 10ZC of the RPA 1983 and an appeal lies to the county court under section 56 of the RPA 1983 from any decision of a registration officer not to register a person following an application under section 10ZC.

20. The rules governing local elections in England are not contained in primary legislation. Rather section 36(1) of the RPA 1983, as in force in 2019, provided that elections of councillors for local government areas in England and Wales shall be conducted in accordance with rules made by the Secretary of State. Section 36(2) provides that rules made under this section shall apply the parliamentary elections rules in Schedule 1 to this Act, subject to such adaptations, alterations and exceptions as seem appropriate to the Secretary of State. The current consolidated rules made by the Secretary of State pursuant to section 36 are the Local Elections (Principal Areas) (England and Wales) Rules 2006 (SI 2006/3304) ("the Principal Areas Rules").

21. The Principal Areas Rules provide that a ballot paper must be delivered to a voter who applies for one (rule 35(1)), subject to the qualification that a presiding officer is permitted to ask two prescribed questions of a person prior to delivering a ballot paper to him (rule 33(1)). For almost all electors, the two prescribed questions are, in effect: (1) Are you the person registered in the register of local government electors for this election?; and (2) Have you already voted here or elsewhere at this election otherwise than as a proxy for some other person? It is only if those prescribed questions are not answered satisfactorily that a ballot paper must not be delivered to the person required to answer them (rule 33(3)). No other enquiry is permitted as to the right of any person to vote (rule 33(4)). Furthermore, no person is to be prevented from voting by reason only that others believe there is reasonable cause to believe the person has committed an offence of personation, even if the person is arrested for suspected personation (rule 34).

22. Accordingly, there is no requirement in the Principal Areas Rules for voter identification prior to a person voting and the only permitted inquiries as to identity are limited to these two simple questions.

6. The 2019 voter identification pilot schemes

23. The ten Pilot Orders modified the Principal Areas Rules by introducing voter identification requirements in the ten participating local authority areas for the May 2019 local government elections. The Pilot Orders followed materially the same structure, save that the forms of identification which were required to be produced differed. The Pendle Borough Council (Identification in Polling Stations) Pilot Order 2019 required voters to present photographic identification. The Braintree District Council (Identification in Polling Stations) Pilot Order 2019 was a mixed model requiring voters to present either photographic identification or up to two forms of non-photo identification which would indicate the voter's registered address. The Watford Borough Council (Identification in Polling Stations) Pilot Order 2019 required voters to present their poll card. In each case, if the presiding officer at the polling station considered that a prospective elector's identity papers raised "a reasonable doubt as to whether the voter is the elector or proxy he represents himself to be", the Pilot Orders provided that the elector must be refused a ballot (see, for instance, paragraphs 35(2B) and (2C) of Schedule 1 to the Pendle Pilot Order). The Pilot Orders further provided that the presiding officer's decision "may not be questioned in any proceedings whatsoever other than proceedings on an election petition" (see, for instance, paragraph 35(2D) of Schedule 1 to the Pendle Pilot Order).

24. Each Pilot Order made provision for electors lacking the requisite identification papers to obtain a local identity document in advance of polling day. For example, under the Pendle Pilot Order, an application for an "*electoral identity document*" must:

(i) be made in writing and include: the applicant's full name and registered address; confirmation that the elector would not be able to provide the required photographic ID; the date of the application (paragraph 35A(3)(a) of Schedule 1 to the Order);

(ii) include a declaration provided by the applicant that the information provided in the application is true (paragraph 35A(3)(b));

(iii) be accompanied by a photograph of the applicant (paragraph 35A(3)(d));

(iv) the photograph must be attested by: a person to whom the applicant is known; who is on the register of local government electors; "whom the returning officer is satisfied is of good standing in the community"; but who is not a member of the applicant's immediate family, does not live at the same address as the applicant and has not already signed attestations for two or more applicants (paragraph 35A(8)); and

(v) be accompanied by at least two documents from the list in paragraph 35A(5) and one document from the list in paragraph 35A(6); alternatively one document from paragraph 35A(5) and two from the list in paragraph 35A(6); alternatively four of the documents in paragraph 35A(6); or,

(vi) where the applicant is unable to provide those documents, a further attestation similar to the photographic attestation in (iv) above (paragraph 35A(4)).

7. The statutory provisions at issue in this appeal

25. Part II of the RPA 2000, headed "Conduct of elections", contains sections 10 to 13, of which sections 10 and 11 are relevant to this appeal. The heading of "New electoral procedures" applies to both of those sections. The sub-heading to section 10 is "Pilot schemes for local elections in England and Wales".

26. As the outcome of the primary issue in this appeal (see para 3 above) depends on the true interpretation of section 10 of the RPA 2000 it is appropriate to set out the entire section so that the language used by Parliament can be analysed.

27. Section 10(1) provides:

> "(1) Where -
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> (a) a relevant local authority submit to the Secretary of State proposals for a scheme under this section to apply to particular local government elections held in the authority's area, and
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> (b) those proposals are approved by the Secretary of State, either -
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> (i) without modification, or
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> (ii) with such modifications as, after consulting the authority, he considers appropriate,
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> the Secretary of State shall by order make such provision for and in connection with the implementation of the scheme in relation to those elections as he considers appropriate (which may include provision modifying or disapplying any enactment)."

28. Section 10(1A) provides:

> "(1A) Subsection (1) applies to proposals falling within that subsection which are submitted by a relevant local authority jointly with the Electoral Commission as if in that subsection -
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> (a) the first reference to any such authority in paragraph (a), and

(b) the reference to the authority in paragraph (b)(ii),

were each a reference to the authority and the Commission; and, in a case where any such proposals are not jointly so submitted, the Secretary of State must consult the Commission before making an order under that subsection."

29. The legislative power to make provisions by order for pilot schemes under section 10(1) must be for a scheme "under this section". Section 10(2) defines what constitutes a scheme "under this section" for the purposes of section 10(1)(a). Section 10(2) provides:

"(2) A scheme under this section is a scheme which makes, in relation to local government elections in the area of a relevant local authority, provision differing in any respect from that made under or by virtue of the Representation of the People Acts as regards one or more of the following, namely -

(a) when, where and how voting at the elections is to take place;

(b) how the votes cast at the elections are to be counted;

(c) the sending by candidates of election communications free of charge for postage."

30. The "Representation of the People Acts" referred to in section 10(2) include the RPA 1983 and the RPA 2000 (see section 207(1) of the 1983 Act and section 17(1) of the RPA 2000).

31. As is apparent from section 10(1) the order made under that section may include provision modifying or disapplying any enactment. Pursuant to section 17(2), an enactment includes "any provision of an Act" (section 17(2)(a)), and "any provision of subordinate legislation" (section 17(2)(d)). Accordingly, section 10(1), when read with section 17(2), confers separate powers by order to modify primary legislation and

subordinate legislation. In fact, the ten Pilot Orders in this appeal modified subordinate legislation.

32. Section 10(3)-(12) provides:

> "(3) Without prejudice to the generality of the preceding provisions of this section, a scheme under this section may make provision -
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> > (a) for voting to take place on more than one day (whether each of those days is designated as a day of the poll or otherwise) and at places other than polling stations,
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> > (b) for postal charges incurred in respect of the sending of candidates' election communications as mentioned in subsection (2)(c) to be paid by the authority concerned,
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> and where a scheme makes such provision as is mentioned in paragraph (b), the Secretary of State's order under subsection (1) may make provision for disapplying section 75(1) of the 1983 Act (restriction on third party election expenditure) in relation to the payment of such charges by the authority.
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> (4) In subsection (2) the reference to local government elections in the area of a relevant local authority is a reference to such elections -
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> > (a) throughout that area, or
> >
> > (b) in any particular part or parts of it,
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> as the scheme may provide.

(5) Where the Secretary of State makes an order under subsection (1) -

(a) he shall send a copy of the order to the authority concerned and to the Electoral Commission; and

(b) that authority shall publish the order in their area in such manner as they think fit.

(6) Once any elections in relation to which a scheme under this section applied have taken place, the Electoral Commission shall prepare a report on the scheme.

(6A) The report shall be prepared by the Electoral Commission in consultation with the authority concerned; and that authority shall provide the Commission with such assistance as they may reasonably require in connection with the preparation of the report (which may, in particular, include the making by the authority of arrangements for ascertaining the views of voters about the operation of the scheme).

(7) The report shall, in particular, contain -

(a) a description of the scheme and of the respects in which the provision made by it differed from that made by or under the Representation of the People Acts;

(b) a copy of the order of the Secretary of State under subsection (1); and

(c) an assessment of the scheme's success or otherwise in facilitating -

(i) voting at the elections in question, and

(ii) (if it made provision as respects the counting of votes cast at those elections) the counting of votes,

or in encouraging voting at the elections in question or enabling voters to make informed decisions at those elections.

(8) An assessment under subsection (7)(c)(i) shall include a statement by the authority concerned as to whether, in their opinion -

(a) the turnout of voters was higher than it would have been if the scheme had not applied;

(b) voters found the procedures provided for their assistance by the scheme easy to use;

(c) the procedures provided for by the scheme led to any increase in personation or other electoral offences or in any other malpractice in connection with elections;

(d) those procedures led to any increase in expenditure, or to any savings, by the authority.

(9) If the Secretary of State so requests in writing, the report shall also contain an assessment of such other matters relating to the scheme as are specified in his request.

(10) Once the Electoral Commission have prepared the report, they shall send a copy of the report -

(a) to the Secretary of State, and

(b) to the authority concerned,

and that authority shall publish the report in their area, in such manner as they think fit, by the end of the period of three months beginning with the date of the declaration of the result of the elections in question.

(11) In this section 'relevant local authority' means -

(a) as respects England -

(i) a county council, a district council or a London borough council, or

(ii) once established, the Greater London Authority;

(b) as respects Wales, a county council or a county borough council;

(12) For the purposes of this section proposals falling within subsection (1) and submitted to the Secretary of State before the date on which this Act is passed shall be as effective as those so submitted on or after that date."

33. Pursuant to section 10(6), where an order has been made, following the election to which it relates the Electoral Commission must prepare "*a report on the scheme*". Section 10(7) provides that the report "*shall, in particular, contain*" certain prescribed matters. These prescribed matters include "*an assessment of the scheme's success or otherwise in facilitating … voting at the elections in question … or in encouraging voting at the elections in question or enabling voters to make informed decisions at those elections*" (section 10(7)(c)). Section 10(9) provides that, if the Secretary of State so requests in writing, the report shall also contain an assessment of such other matters relating to the scheme as are specified in his request. Accordingly, section 10(9) read with section 10(7) enables the report to be tailored to the circumstances of the particular scheme.

34. Section 10(8) makes further provision in connection with a report to involve not only the Electoral Commission but also the relevant local authority. Section 10(8) provides that an assessment under section 10(7)(c)(i) shall contain a "statement" by

the local authority concerned as to "whether, in their opinion (a) the turnout of voters was higher than it would have been if the scheme had not applied; (b) voters found the procedures provided for their assistance by the scheme easy to use; (c) the procedures provided for by the scheme led to any increase in personation or other electoral offences or in any other malpractice in connection with elections; (d) those procedures led to any increase in expenditure, or to any savings, by the authority".

35. The power conferred on the Secretary of State under section 10(1) to approve proposals for the scheme and to make orders for their implementation is subject to several limitations and restrictions. These include:

(i) The exercise of the power depends on the voluntary participation of a local authority since the power only arises where the local authority either itself submits or submits jointly with the Electoral Commission proposals (see sections 10(1)(a) and 10(1A)). No local authority can be compelled to participate in in any pilot scheme.

(ii) The proposals that are submitted must be for a scheme under section 10(2) and not any other type of scheme.

(iii) The order and the relevant pilot scheme may only have temporary effect since the power under section 10(1) is conferred by reference to "*particular local government elections*" (see section 10(1)(a) and (b)). It is not capable of making any permanent change to existing legislation.

(iv) The order and the relevant pilot scheme may only have a geographically limited effect, confined to the particular local authority's area (see section 10(1)(a)). It is not capable of making any change to existing legislation having general effect.

(v) Before an order is made, the Secretary of State is required to consult the Electoral Commission, which is an independent body having special expertise in relation to the conduct of elections, and which is directly accountable to Parliament through the committee system (section 10(1A)).

(vi) The effect of every order and relevant pilot scheme is subject to assessment by the Electoral Commission (see section 10(6)-(9)) so that information is available on the practical consequences of the temporary and geographically limited legislative changes.

36. Section 11 under the sub-heading "Revision of procedures in the light of pilot schemes" provides for the revision of electoral procedures in light of successful pilot schemes conducted under section 10. Section 11(1) provides:

> "(1) If it appears to the Secretary of State, in the light of any report made under section 10 on a scheme under that section, that it would be desirable for provision similar to that made by the scheme to apply generally, and on a permanent basis, in relation to -
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> (a) local government elections in England and Wales, or
>
> (b) any particular description of such elections,
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> he may by order make such provision for and in connection with achieving that result as he considers appropriate (which may include provision modifying or disapplying any provision of an Act, including this Act). The power of the Secretary of State to make such an order shall, however, be exercisable only on a recommendation of the Electoral Commission."

37. Section 11(3) provides that orders made under section 11(1) are subject to Parliamentary scrutiny by means of the affirmative resolution procedure. The Secretary of State is also obliged to lay before Parliament "every report under section 10 which relates to a scheme making provision similar to that made by the order" (section 11(4)).

38. Section 11(6) provides that, where an order is made under section 11(1), the Secretary of State has further powers to make provision in connection with local government election rules. Section 11(6) states that "Rules made under section 36 of the 1983 Act (local elections in England and Wales) may make such provision as the Secretary of State considers appropriate in connection with any provision made … by an order under subsection (1)."

39. The power conferred on the Secretary of State to make an order under section 11(1) is circumscribed in that the power does not arise unless the Electoral Commission has expressly recommended that the Secretary of State should make an order under section 11(1). Therefore, it is not a power that can be exercised by the

Secretary of State unilaterally. Furthermore, the power is subject to the limitation that any draft order made under section 11(1) is subject to an affirmative resolution procedure. That procedure is enhanced because it is necessary to lay before Parliament a copy of every report under section 10 that relates to a scheme making provision similar to that made by the order (section 11(4)).

8. Analysis of the language used by Parliament

40. Against that background I turn to consider the true interpretation of section 10 of the RPA 2000 by reference to the language used by Parliament.

41. As noted at para 10 above, on behalf of the appellant, Mr Peto QC contends that "how voting at the elections is to take place" is confined to the technical modalities of voting which he submits accords with the natural and ordinary meaning of "how" as "in what way or by what means" (Oxford English Dictionary definition). I consider that the judge and the Court of Appeal were right to reject this argument and to decide that the phrase was sufficiently broad to encompass procedures for demonstrating an entitlement to vote, including by proving identity, as part of the voting process. In agreement with McCombe LJ, at para 36, I consider that the word "how" in section 10(2)(a) simply indicates the steps by which electors achieve the casting of a lawful vote. I come to that conclusion for several reasons.

42. First, section 10(2) provides that a scheme under section 10(1) "is a scheme which makes, …, provision differing *in any respect* from that made under or by virtue of the Representation of the People Acts" (emphasis added). The emphasised words embrace wide ranging pilot schemes, which words would embrace voter identification schemes as they clearly modify the existing provisions as to voter identification in the Principal Areas Rules, see para 23 above. Furthermore, the existing procedures permit limited inquiries as to identity so that had Parliament intended not to permit any changes to those procedures it would not have used the broad general language of a provision differing "in any respect". I consider that the use of the words "in any respect" in section 10(2), which is liberal permissive language, supports a wider meaning for the word "how" where it appears in section 10(2)(a).

43. Second, there is no limitation of time in section 10 so that the pilot schemes can address concerns that might arise from time to time.

44. Third, the word "how" appears twice in section 10(2). On the first occurrence, in section 10(2)(a), it appears in the phrase "how voting at the elections is to take place"

whilst on the second occurrence, in section 10(2)(b), it appears in the phrase "how the votes cast at the elections are to be counted." If Parliament intended to confine section 10(2)(a) to the physical mechanism by which an individual vote is cast it could have used the words "votes cast". Instead, Parliament declined to use any narrower formulation referring to any final physical act of marking or casting a vote but rather used the wider language of "how voting … is to take place".

45. Fourth, the broad nature of the schemes falling within section 10(2) is recognised in section 10(3) which provides that it is "Without prejudice to *the generality* of the preceding provisions of this section" (emphasis added).

46. Fifth, it was correctly accepted by Mr Peto, as obvious, that pilot schemes for internet voting would be included within the phrase "how voting at the elections is to take place" and it was also correctly accepted as obvious that such pilot schemes must have a voter identification requirement to be effective. The respondent contended that these concessions demonstrated that the phrase "how voting at the elections is to take place" was wide enough to encompass a requirement for voter identification. If the phrase was wide enough to encompass voter identification in relation to internet voting, then it must also be wide enough to encompass voter identification in relation to voting at polling stations. In response the appellant made two submissions. First, it was submitted that if the pilot scheme trialled a new method of voting, such as internet voting, which creates a real risk of identity fraud, then there was scope for implying an ancillary power into the RPA 2000 to address that risk. I reject this submission. Mr Peto was unable to define the nature of this implied ancillary statutory power or why there should be any implication if the word "how" was wide enough to encompass voter identification in relation to internet voting. Second, Mr Peto submitted that the new modality of voting fell within section 10(2)(a) but that the requirement for voter identification could be imposed by the respondent under section 10(1) as being a provision in connection with implementation. In this way a voter identification requirement was not a part of the scheme but rather would be accommodated as an implementation provision under section 10(1). I reject this as it is clearly inconsistent with the language of section 10 and would produce absurd results. The local authority must submit proposals for "a scheme" under section 10(1). If Mr Peto's submission was correct, then a proposal for a scheme for internet voting could not include any provision for voter identification and that would also be the position under section 10(1A) in respect of a joint proposal from the local authority and the Electoral Commission. The whole structure of section 10 is to involve the local authority and the Electoral Commission in the proposal for a scheme and yet the crucial aspect of a voter identification requirement in relation to internet voting would be excluded from the scheme proposed by the local authority and the Electoral Commission. Mr Peto's submission would also lead to the absurd result that the Electoral Commission's report on the scheme under section 10(6) could not include

any report of the impact of a voter identification requirement as that would not be a part of the scheme. Furthermore, section 10(7) requires that the report from the Electoral Commission shall, in particular, contain "a description of the scheme and of the respects in which the provision made by it differed from that made by or under the Representation of the People Acts". If Mr Peto's submission was correct, then the Electoral Commission could not identify that voter identification requirements differed from the Principal Areas rules.

47. I consider that the phrase in section 10(2)(a) encompasses identification requirements in relation to new modalities of voting such as internet voting and accordingly must also include voter identification requirements in relation to existing methods of voting.

48. Sixth, I reject Mr Peto's submission that "*how*" must be given a confined meaning so that the words "*when*" and "*where*" in section 10(2)(a) are not rendered otiose. Mr Peto submits that section 10(2)(a) addresses, in order: first, time of voting (ie, "*when*"); second, place of voting (ie, "*where*"); and third, the "*steps*" by which electors achieve the casting of a lawful vote (ie, "*how*"). He contends that if a wide meaning is given to "*how*" then it necessarily encompasses both "*where*" (the polling station) as well as "*when*" (on polling day), since all those elements must be present, and all steps completed, before an elector can achieve the casting of a lawful vote. However, I consider that the use of "*when*" and "*where*" makes clear beyond doubt that pilot schemes within section 10(2)(a) may alter provision made concerning the date and time of voting and the location of voting. Those words are not intended to restrict the meaning of "*how voting at the elections is to take place*".

49. Seventh, I reject Mr Peto's submission based on a purposive interpretation of the phrase "how voting at the elections is to take place." Mr Peto submits that (a) the only statutory purposes as derived from the statutory language are facilitating or encouraging voting at the elections; (b) voter identification requirements do not encourage voting so that; (c) how voting at elections is to take place at the elections should be restricted to the modalities of voting.

50. I agree that both facilitating or encouraging voting are purposes to be derived from, for instance, section 10(6) read with section 10(7)(c) which requires the Electoral Commission's report, "*in particular*", to contain "an assessment of the scheme's success or otherwise in *facilitating* - (i) voting at the elections in question, … or in *encouraging voting* at the elections in question …" (emphasis added). However, I consider that the statutory purposes are not confined by section 10(7)(c) simply to facilitating or encouraging voting as there are other matters upon which the Electoral Commission can report as is clear from the words "in particular" and from section

10(9) which provides that "If the Secretary of State so requests in writing, the report shall also contain an assessment of such other matters relating to the scheme as are specified in his request." In this way the respondent can request the Electoral Commission to report on matters which might not have encouraged or facilitated voting, such as a voter identification requirement.

51. However, even if the statutory purposes are confined to encouraging or facilitating voting, I do not agree with Mr Peto's second proposition that voter identification requirements necessarily do not encourage some persons to vote. I consider that if persons have confidence in the electoral system by the elimination or reduction in voter fraud then they might be encouraged to vote by virtue of their increased confidence in the electoral process. This in turn might lead a participating local authority to form an opinion under section 10(8) that "the turnout of voters was higher" and would lead the Electoral Commission to report under section 10(7)(c) as to the "success or otherwise" (ie, the success or failure) of the scheme in encouraging voting.

52. I consider that the statutory purpose of section 10 is to enable pilot schemes temporarily modifying the existing arrangements in relation to particular local government elections so as to permit evidence to be gathered as to the effects of such changes at real elections and for that evidence to be assessed, including by the Electoral Commission (see section 10(6)-(9)). The evidence enables an assessment of which measures should be avoided, which deserve further consideration, and which should be taken forward under section 11 as permanent reforms upon the recommendation of the Electoral Commission. The schemes naturally will have advantages and disadvantages. They are not necessarily likely to have absolute success in the particular elections at which they are first trialled. Rather the purpose is to inform decision makers for the future as to whether the scheme is a beneficial reform. The purpose is not restricted to changes in the existing arrangements at the time of the RPA 2000 but can also include changes in respect of legislation existing at the time of the proposal. In this way the statutory purpose is forward looking. That statutory purpose does not lead to a restricted meaning of the phrase "how voting at the elections is to take place" but rather supports a wider interpretation. A purposive interpretation does not limit the scope of the piloting power to the actual mechanics of voting; rather it supports the enablement of a power to pilot changes to the voting process in the broader sense.

53. Eighth, I consider that Mr Peto's reliance on the principle of legality is misplaced. All pilot schemes within section 10(2)(a) are likely to have an adverse effect on *some* people as regards exercise of their right to vote since they relate to when, where and how voting is to take place. One of the purposes of a pilot scheme is to

establish whether a temporary modification would in fact discourage or impede those who are entitled to vote from voting. Another purpose is whether the adverse effect of the pilot scheme on *some* people is outweighed by positive benefits in encouraging or facilitating others. In relation to that purpose and for instance, a pilot scheme for online voting might be less facilitative for people with no or limited access to a computer and the internet but might be found to improve turnout overall. Accordingly, the test of lawfulness of a pilot scheme cannot be whether it tends to discourage or impede any person at all. Rather, Parliament chose to authorise schemes that could have adverse effects on the exercise of the right to vote because they are, despite their effects, a valuable way of obtaining information on potential reforms to electoral law and procedure.

54. Furthermore, Parliament could not realistically have intended that section 10(2)(a) should be construed subject to the right to vote so that only pilot schemes that could not have any adverse effect on the exercise of the right to vote would fall within its scope. Such a restriction would not make sense in the context of a power to pilot, whose very purpose is to test the effect of schemes, and in circumstances where the true effect of schemes would only become apparent after they were undertaken. Such a construction would severely limit the use of pilot schemes concerning "how voting at the elections is to take place" since there would almost always be a risk of an adverse effect on the exercise of the right to vote and a consequent risk of a legal challenge on the grounds that the scheme was not within the meaning of section 10(2)(a).

55. Whether or not the right to vote in a local government election is a fundamental constitutional right, I consider that Parliament has squarely confronted what it was doing and by necessary implication authorised voter identification pilot schemes.

56. Ninth, Mr Peto characterises the power in section 10(1) as a "Henry VIII power", which thus requires a restrictive approach to its construction. I consider that it is not necessary to take a restrictive approach, as there is no doubt about the scope of the power conferred on the respondent by section 10(1).

57. In conclusion based on an analysis of language used by Parliament I consider that the phrase "how voting at the elections is to take place" includes procedures for demonstrating an entitlement to vote. Accordingly, a scheme with a voter identification requirement is a scheme within section 10(2)(a) so that the respondent has the power under section 10(1) to make an order for or in connection with the implementation of such a scheme.

9. External materials relied on as an aid to interpretation

58. As is apparent I consider that the answer to the first ground of appeal is to be found in the statutory language. However, in deference to the submissions made by Mr Peto, I have considered the external material on a secondary basis, to assist in identifying not only the mischief which the RPA 2000 addresses but also the purpose of the legislation thereby assisting a purposive interpretation of section 10(2)(a). I see nothing in that material which would lead to the restricted meaning of the phrase "how voting at the elections is to take place" contended for by the appellant.

59. The RPA 2000 was preceded by:

(a) The Fourth Report of the House of Commons' Home Affairs Committee entitled "Electoral Law and Administration" ("the HAC Report") published on 10 September 1998.

(b) A Report of a Working Party on Electoral Procedures under the chairmanship of Mr George Howarth MP, then Parliamentary Under Secretary at the Home Office which was published on 19 October 1999 ("the Howarth Report"). The Working Party had been established following the general election in 1997 by the then Secretary of State for Home Affairs, the Rt Hon Jack Straw MP who had directed that a review of electoral procedures should be carried out.

(c) The Government's response to the Howarth Report published on 8 November 1999.

10. External materials preceding the RPA 2000

(a) The HAC Report

60. The introduction to the HAC Report stated that "if democracy is to be properly safeguarded, the laws relating to the running of elections need to be efficient and effective." The Report accepted that it was important that participation in elections should be as high as possible and that practical steps were needed to increase participation. It also accepted that administration needed to be brought up to date to maximise effectiveness and relevance to modern needs.

61. Section D of the HAC Report was devoted to “Making it easier to cast a vote”. This concluded that the time was right to consider a range of possible reforms to the physical process of casting a vote. It said that reforms should be approached cautiously and had to be based not simply upon modernity but on whether changes were safe and effective.

62. Section E dealt with “Fraud”. It found that at that time there was no great problem with voter impersonation in UK elections, outside Northern Ireland, and saw no need to introduce any additional proof of identity requirements before a voter could be given a ballot paper.

63. The appellant relies on the HAC Report seeking to establish that voter impersonation in UK elections, outside Northern Ireland, was not a mischief sought to be addressed by Parliament in the RPA 2000 and that the statutory purpose was to make voting easier in order to increase participation in elections. However, I do not consider that the proposals contained in this wide-ranging report should be confined in this way. There was nothing in the HAC Report to suggest that if there were emerging concerns as to voter impersonation that those concerns should not be addressed. Furthermore, there was also nothing in the Report to say that the particular suggestions as to reform of the voting system were definitive so as to exclude all other potential reforms. Rather the aim was to safeguard democracy by efficient and effective running of elections.

(b) The Howarth Report

64. The Howarth Report recommended that the respondent should be authorised to amend electoral legislation to approve pilot schemes. The Report recognised the developing consensus for new approaches to voting which will more clearly reflect modern patterns of behaviour and which can assist in reinvigorating the public’s interest and participation in the democratic process. The Report stated that local authorities and electoral administrators in particular were very keen to test out the effectiveness of allowing electors to vote in more flexible ways. Under the heading “Improving voting arrangements and making voting easier” it stated, at para 3.1.2, that it was “now time to consider a *fundamental modernisation* of the electoral process” (emphasis added). It broke down the innovative reforms which *might* reasonably be introduced into three broad headings: “When to vote” (para 3.1.7), “Where to vote” (para 3.1.9) and “How to vote” (para 3.1.11). Under the heading of “How to vote” the Report suggested some possible pilot schemes, for instance wholly postal ballots, automated voting/vote counting, telephone voting and electronic voting. Such schemes, it said, should take account of the need to safeguard the integrity of the voting arrangements. To this list, the summary of recommendations for piloting

innovative approaches added other proposals for changes to polling days and polling hours, early voting, mobile polling stations and out of area voting. The Report recommended encouragement of innovation in "re-engaging the electorate".

65. The appellant relies on this external material seeking to establish that voter impersonation was not a mischief to be addressed by the RPA 2000 and that the interpretation of "how voting at elections is to take place" was limited to the technical modalities of voting as set out in the Report under the heading of "How to vote". Again, there was nothing in this Report to say that the particular suggestions under the heading of "How to vote" were made to the exclusion of all other innovative reforms to modernise the electoral process. Furthermore, it was expressly recognised that "How to vote" in respect of electronic voting was sufficiently wide to include safeguards to the integrity of the voting arrangements. Finally, the reference to fundamental modernisation of the electoral system envisaged an ongoing process, rather than a static process, of assessing potential permanent change through pilot schemes. The whole point of the pilot schemes being to assess the impact in the light of actual experience.

(c) The Government's response to the Howarth Report

66. In its response to the Howarth Report the Government accepted the recommendation to authorise and evaluate pilot schemes of alternative voting arrangements. It agreed with the HAC Report that there was at that time no great problem with impersonation at elections outside Northern Ireland.

67. I reject Mr Peto's submission that the external material preceding the RPA 2000 confined the statutory purpose to facilitating or encouraging persons to vote. Rather, I consider that this external material supports the statutory purpose as securing the modernisation and effectiveness of the electoral process over time by authorising, subject to safeguards, pilot schemes to permit evidence to be gathered as to potential reforms. The potential reforms are not restricted to those then in focus. Such a restriction was not included in the external material, no doubt because it would defeat the purpose of securing the modernisation and effectiveness of the electoral process on an organic basis.

11. Background materials which followed the RPA 2000

68. Sections 10 and 11 of the 2000 Act came into force on 9 March 2000 and were amended by the Political Parties, Elections and Referendums Act 2000 which

established the Electoral Commission as an independent body to oversee elections and regulate political finance in the UK. Important functions as regards pilot schemes under section 10 of the RPA were assigned to the Commission. For instance, the Commission either had to jointly submit proposals for a pilot scheme to the respondent or had to be consulted by the respondent in relation to a local authority's proposals.

69. Although not relevant to the interpretation of section 10 of the RPA 2000, the parties referred to several background materials which followed the RPA 2000 as amended to evidence the context in which the Pilot Orders came about. I summarise these briefly here.

(a) Pilot schemes 2000 to 2018

70. The Electoral Commission performed its functions in pilot schemes which were conducted over a number of years from 2000 to 2018, before the launch of the pilot schemes in issue in these proceedings. Some of those schemes had required identification mechanisms for electronic voting. Others required provision of a signature prior to issue of a ballot paper at polling stations, postal voting signature checking and postal vote tracking.

(b) The report of the Electoral Commission entitled "Electoral Fraud in the UK, Final Report and Recommendations"

71. In January 2014, the Electoral Commission published a report on electoral fraud, noting numerous examples of impersonation offences and stating that "Perceptions of fraud can be as damaging as actual incidents of fraud. Voters must be able to have confidence in the system …". It recommended that voter identification requirements at polling stations should be introduced. This was followed by details of proposals for this in a December 2015 Electoral Commission report.

(c) The report entitled "Securing the Ballot" published by Sir Eric Pickles, MP

72. In 2015, Sir Eric Pickles, appointed by the Prime Minister as "Government Anti-Corruption Champion", carried out a review of electoral fraud and produced 50 recommendations, including one that identification at polling stations should be considered by the Government and tested by pilot schemes. In December 2016, the Government published a response accepting that particular recommendation, which (in turn) was welcomed by the Electoral Commission. The recommendation was picked up by the Conservative party's election manifesto for the June 2017 election.

73. As a result, pilots of voter identification schemes were employed in five local authority areas in the local elections in 2018. The Electoral Commission reported favourably upon the schemes, while commenting that there was "a small number of people who were unable to vote because they did not have, or did not bring with them, the right type of identification". It was said that there was some evidence to suggest that the identification requirements "had a positive impact on public confidence in the May 2018 elections, although this picture was not consistent within the individual pilot areas and there was evidence that wider local circumstances also have an impact". It was thought the measures were likely "to have had some positive impact on reducing the potential for electoral fraud by impersonation at polling stations". The Electoral Commission recommended further trials in May 2019. A Cabinet Office report of July 2018 concluded that the pilots had been a success. However, it is acknowledged by the respondent in evidence in these proceedings that the 2018 pilots were controversial and were opposed by some organisations, including the Electoral Reform Society.

74. In August 2018, the Cabinet Office produced a "Prospectus", inviting local authorities to take part in further voter identification pilots. The introduction stated that, "We are seeking to encourage voting by improving the integrity of the voting system and voter confidence". Other policy considerations were also set out. On 3 November 2018, the Cabinet Office announced that eleven authorities had chosen to participate, with the stated objective to "… provide further insight into how best to ensure the security of the voting process and reduce the risk of voter fraud". The Pilot Orders, purportedly pursuant to section 10 of the 2000 Act, followed in February and March 2019.

75. The background material following the RPA 2000 demonstrates growing concerns as to voter fraud which provides the context in which the ten Pilot Orders were proposed by the participating local authorities and were made by the respondent.

12. Conclusion in relation to the primary issue

76. In conclusion I consider that the phrase "how voting at the elections is to take place" includes procedures for demonstrating an entitlement to vote. Accordingly, a scheme with a voter identification requirement is a scheme within section 10(2)(a) so that the respondent has the power under section 10(1) to make an order for or in connection with the implementation of such a scheme. I would dismiss this ground of appeal.

13. The second issue in this appeal: whether the pilot schemes were authorised for a lawful purpose (para 4 above)

77. The second issue in this appeal is whether the pilot schemes were authorised for a lawful purpose under section 10(1) of the RPA 2000, consistent with the policy and objects of the Act. The respondent accepts, based on the principle expounded in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, that the discretion in section 10(1) of the RPA 2000 to make subordinate legislation cannot be lawfully exercised so "as to thwart or run counter to the policy and objects" of the RPA 2000. The appellant contends that the policy and objects of the RPA 2000 were to "facilitate and encourage voting". As I have explained I do not consider that the policy and objects are confined in that way, see para 52 above. Rather, the purpose of section 10 is to facilitate pilot schemes to enable the gathering of information to assist in the modernisation of electoral procedures in the public interest. The ten Pilot Orders were made to promote that object and accordingly were authorised for a lawful purpose. I would dismiss this ground of appeal.

14. Overall conclusion

78. I would dismiss the appeal.