In The Supreme Court of the United Kingdom UKSC 2020/0129

ON APPEAL FROM THE COURT OF APPEAL: [2020] EWCA Civ 723

B E T W E E N :

THE QUEEN
(on the application of NEIL COUGHLAN)

Appellant

- and -

THE MINISTER FOR THE CABINET OFFICE

Respondent

(1) RUNNYMEDE TRUST
(2) OPERATION BLACK VOTE
(3) VOICE4CHANGE ENGLAND
(4) LGBT FOUNDATION
(5) STONEWALL

Interveners

WRITTEN CASE ON BEHALF OF THE FIRST TO THIRD INTERVENERS

A INTRODUCTION

1 The First to Third Interveners ("**the Interveners**") are non-partisan and not-for-profit organisations with considerable expertise in promoting the engagement of Black, Asian and Minority Ethnic ("**BAME**") voters in the democratic process and advocating for race equality. The Runnymede Trust is the UK's leading race and equality think tank. Its projects and publications help establish an evidence base on a wide range of areas addressing race equality, including the voting behaviour of ethnic minorities.[1] Operation Black Vote ("**OBV**") is an independent national organisation established in 1996 to address the Black British and ethnic minority "democratic deficit". Voice4Change England is a national advocate for the BAME voluntary and community sector. It has a particular interest in the participation of BAME voters in political decision-making. As not-for-profit organisations conducting research in, and with expertise on, the behaviour of BAME voters, the Interveners have serious concerns that the voter ID pilot schemes present a significant

[1] Runnymede Trust, 'Ethnic Minorites British Election Study: Key Findings' (February 2012) ; 'Race and the 2015 General Election: Voting patterns by ethnic group' (18 May 2015); 'Ethnic Minorities at the 2017 British General Election' (February 2019).

barrier to democratic participation for some of the most marginalised groups in society. The Interveners are grateful for the opportunity to make written submissions on the important issues raised in this appeal, concerning the legality of voter ID schemes introduced in ten local authorities at the May 2019 local government elections in England. The schemes were purportedly introduced pursuant to section 10 of the Representation of the People Act 2000 ("**the 2000 Act**").

2 The Interveners submissions address the first issue in this appeal, described by the Appellant as the "Constitutional Error" of the Court of Appeal (Appellant's Case §§73(1), 74-104). The Interveners submit that s.10 of the 2000 Act, interpreted in accordance with the principle of legality, did not authorise the Respondent to make an order introducing the voter ID pilot schemes. In summary, the Interveners submit:

(1) The right to vote in local elections is a fundamental right. Councils are responsible for decisions which affect communities on a daily basis, and often have greater immediate power and control over resources in their local area than their Westminster counterparts. Local government is of particular importance to ethnic minority groups, who are disproportionately adversely affected by acute social issues arising at a local level, including in education, housing, criminal justice and community engagement. However, BAME people are less likely than white British people to be enrolled to vote, and to cast their vote, at local and national elections. They are also underrepresented in local government, compared to population estimates and the proportion of ethnic minority Members of Parliament.

(2) Voter ID requirements have a detrimental impact on ethnic minority communities. In particular (i) BAME voters are less likely to own ID; (ii) there are costs and other practical obstacles associated with obtaining ID, even with the introduction of freely available forms of photo ID; and (iii) additional barriers to voting (such as ID requirements) and other measures (such as the requirement that a presiding officer be satisfied beyond *"reasonable doubt"* that the elector's identification is adequate) have a dissuasive effect and act as an impediment to voting for a group that is already hesitant about engaging in the democratic process, and who is underrepresented within it. The introduction of such a requirement threatens and/or imposes a restriction on the right to vote.

(3) The Windrush scandal[2] should serve as a salutary lesson that purportedly non-discriminatory requirements to produce documentation as a precondition to the exercise of fundamental rights may, in practice have a discriminatory impact and prevent particular communities from exercising those rights, with devastating consequences. It is also a cautionary reminder that such new requirements must be considered in their societal and historical context, and with proper regard to the warnings raised by the communities whose fundamental rights are most at risk. The Court is invited to have regard to concerns raised in the '*Windrush Lessons Learned Review'* when considering the risks posed to ethnic minority communities by voter ID requirements. The Interveners also invite the Court to have regard to the research and litigation in the United States on the impact of voter ID requirements on voter suppression, in particular of ethnic minority communities. The Interveners submit that these matters bear directly upon on the question of what Parliament can be taken to have authorised by way of s.10 of the 2000 Act.

(4) The purported rationale for introducing a stricter voter ID requirement is to prevent fraud and thereby improve confidence in the integrity of elections. However, the potential for the ID requirements to discriminate against certain groups and the lack of any clear measures to combat that discrimination should be considered against the low numbers of cases of voter fraud at polling stations, convictions, and cautions.

B THE IMPACT OF COMPULSORY VOTER ID ON BAME COMMUNITIES

(1) Historic disengagement and underrepresentation of BAME communities at the local and national level

3 Ethnic minorities[3] are less likely to be included on the electoral register than white British people: 25% of first generation and 20% of second-generation ethnic minorities who were eligible to register to vote had not done so, compared to 10% of the white British population. People of black African heritage also have the lowest levels of registration.[4] People from communities of black Caribbean and African heritage are also the least likely to vote in local and general elections in the UK. BAME turnout rates are affected by factors including the

[2] The term 'Windrush Scandal' is defined in Part 1 of W Williams, *Windrush Lessons Learned Review'*, Independent Review (HC 93) (March 2020)
[3] The term 'ethnic minorities' is used here because of its reference in Government data and other documents referred to below. There is no significant difference between that term and 'BAME', in this context.
[4] House of Commons, *Political disengagement in the UK: who is disengaged?* (CBP-7501, 2018), §4.3.

younger age profile of these communities, the higher level of social and economic deprivation experienced amongst these groups, and the fact that they predominantly live in urban areas where turnout levels tend to be lower than average.[5] A House of Commons Briefing Paper published in September 2018 stated as follows:[6]

> "Ethnic minorities are generally less likely to vote than white people. In the 2017 General Election, turnout among BAME voters is estimated to be around 59%, 11 percentage points lower than the turnout among white voters (70%). In the 2015 General Election turnout among BAME voters is estimated to be around 53% and 67% for white voters. In a study of the 2010 General Election (that used validated data instead of self-reporting) found that turnout was low (53%) among first generation ethnic minorities, but higher in the second generation (63%), although it remained below the turnout among the white British population (70%). ..."

4 Ethnic minorities are also underrepresented in local and national government. A recent audit by OBV revealed that of 123 'Single Tier' local authorities in England, one third have either no BAME representation or only one BAME councillor.[7] A study by the University of Manchester found that 7% of local councillors are of ethnic minority background, which is lower than the proportion of ethnic minority Members of Parliament (10%) and lower than population estimates (14%). The study found that:[8]

> "… while the diversity of local councils tracks closely with the local population, geographical distribution of minorities is not a sufficient explanation for under-representation in local government. ... [U]nlike at the national level where the political parties frequently now select minority candidates into less diverse places, there are no signs of this happening at the local level. ... Parliament has become the arena for parties to signal their diversity credentials – the greater visibility at the national level means that having more ethnic minority MPs is symbolically more significant than grassroot diversity. At the local level, therefore, scrutiny of political parties is lower, there are lesser rewards for parties to increase representation, thus a similar demand for diversity may be lacking. Most local authorities remain unrepresentative, with many of the most diverse including London boroughs needing to do much more."

5 That lack of diversity, leading to a lack of representation, is an important consideration. Local elected officials preside over essential daily public services, including social care, housing, education, and community engagement many of which are of particular concern to ethnic minority communities. Any measures introduced to reform the electoral process must

[5] Electoral Commission, *Voter engagement among black and minority ethnic communities* (2002), p.7.
[6] House of Commons, *Political disengagement in the UK: who is disengaged?* (CBP-7501, 2021), §4.3. The same trends were subsequently observed in the updated Briefing Paper published in February 2021: see House of Commons (n.2), §4.4.
[7] Operation Black Vote, *BAME Local Political Representation Audit 2019* (April 2019).
[8] See M Sobolewska and N Begum, *Ethnic Minority Representation in UK Local Government* (2020), pp.2, 5, 7.

be cognisant of the need to avoid imposing further obstacles to the engagement of underrepresented communities in the democratic process.

(2) Impact of the introduction of voter ID on BAME voters

6 The Interveners submit that the introduction of voter ID presents a barrier to the engagement of BAME voters in the democratic process, for the reasons set out below.

(a) BAME voters are less likely to possess photographic ID

7 The Electoral Commission estimated (on 2013 figures) that approximately 3.5 million electors (7.5% of the electorate) did not own photo ID suitable for the voter ID scheme. 11 million electors (25% of the electorate) do not have a passport or photographic drivers' licence.[9] A March 2021 Cabinet Office survey of 8,500 adults who were eligible to vote, showed that 98% of people held some form of photo ID. This decreased to 96% when asked if their ID had a recognisable photo, and 91% when asked if they had photo ID that was both in-date and recognisable.[10] As the Joint Committee on Human Rights found, on the Cabinet Office's figures 2.1 million people would not have suitable ID to vote.[11]

8 Within those statistics there are striking difference between different ethnic groups: 76% of the white population own a driving licence compared to 38% of Asians and 48% of the general BAME population.[12] BAME persons aged 17-30 are 15% less likely to own driving licences than their white counterparts.[13]

9 Electors who have no photo ID are less likely to vote. The March 2021 Cabinet Office study found that over a quarter (27%) of those without any form of photo ID and a fifth (19%) of those with no recognisable photo ID would be less likely to vote if they had to present photo ID. This compares to 4% of those with recognisable photo ID.[14]

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[9] Electoral Commission, *Delivering and costing a proof of identity scheme for polling station voters in Great Britain* (December 2015), p.18.
[10] Cabinet Office, *Photographic ID Research – Headline Findings* (March 2021), p.5.
[11] Joint Committee on Human Rights, *Legislative Scrutiny: Elections Bill* (2021), §18.
[12] J Mortimer, 'Equality groups sound the alarm on 'US-style voter suppression' potentially coming to the UK', Electoral Reform Society, 23 June 2020.
[13] Z Haque (Deputy Director of the Runnymede Trust), 'The real voter fraud is this government's new ID plan', *The Guardian* (15 October 2019).
[14] Cabinet Office (n.9), p.9.

(b) Costs associated with obtaining photographic ID

10 Those who do not currently possess any form of photo ID may be excluded or dissuaded from obtaining it because of the associated expenses or pressures on their time. For example, passport fees are £85 and provisional driving licences cost £43.

11 Even if photo ID was available for free, this would not resolve difficulties in obtaining ID. An elector (1) would have to provide Government-issued ID to prove their identity (e.g. a birth certificate) or multiple other forms of ID (e.g. bank statements, mortgage statements, utility bills) to acquire such a document; (2) would also need to obtain (and pay for) a passport photograph; and (3) acquiring a freely available form of photo ID would nonetheless involve hidden or other costs, and demands on that person's time, including travel to and waiting at a council office to request an elector card, during opening hours (all matters which have been recognised as imposing additional barriers for underprivileged and ethnic minority communities by the US Courts, as set out further in Section D below).

12 An Electoral Commission survey conducted during the pilots revealed that if free, locally-issued IDs were made available for use at elections, 23% of those who had no photo ID said they were not sure whether they would apply. 17% said they probably / definitely would not apply.[15] The Cabinet Office's figures are starker. 56% of respondents said they would be unlikely or very unlikely to apply for the ID. Of those with no existing photo ID, 42% said that they would be unlikely or very unlikely to apply for the ID.[16]

(c) Additional difficulties faced by ethnic minority groups in obtaining local ID

13 Some ethnic minority groups may find it particularly difficult to obtain local ID. In respect of the Pendle Pilot Order (see Appellant's Case §50), an application for an "*electoral identity document*" must (amongst other things) have been accompanied by (1) a photo of the applicant, 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 and has not already signed attestations for more than two applicants; and (2) relevant identity documents or, if the applicant is unable to provide those documents, a further attestation similar to (1).

[15] Electoral Commission, *Public Opinion Tracker 2021*.
[16] Cabinet Office (n.9), p.16.

14 Many people from ethnic minority and/or underprivileged groups, may be less likely to encounter individuals, socially and professionally who the returning officer considers to be of "*good standing*". Further, even where they have access to recognised community figures, such as a religious leader or doctor, those individuals may only provide a maximum of two attestations. Some ethnic minority communities will have particular difficulty meeting these requirements. For example, many in the Traveller community are without a fixed address and do not have the necessary documentation to obtain a local ID.[17]

(d) Dissuasion and/or increased hesitancy to engage in the democratic process

15 These intervenors have spoken publicly of their concern that a compulsory voter ID requirement is likely to dissuade ethnic minority communities with already low turnout from voting. Lord Woolley, founder and director of OBV, said the following in evidence to the Joint Committee on Human Rights:[18]

> "I have run Operation Black Vote for 25 years. Our starting point is voting and getting people registered to vote. It has always been an uphill battle, first because people are distrustful of authorities and what they might do with their information… I am deeply afraid that if there is another layer of bureaucracy it will be another impediment for a group that is already hesitant about fully engaging in the democratic process. Part of that mistrust is real. We have seen it with vaccinations. There is mistrust in the Government and mistrust in institutions. That has cost lives and made us all a little unsafe, so that hesitancy is extremely real.... There is another layer. Quite a few people in black, Asian and minority ethnic communities feel that a Government who do not have their best interests at heart may want to find a route for these ID cards as Big Brother to watch over them. That adds further to the distrust."

(e) Obligation on the presiding officer to refuse a voter a ballot if 'reasonable doubt' exists

16 As explained in the Appellant's Case at §49, in respect of each Pilot Order made in 2019, voters are required to satisfy the presiding officer or clerk beyond *"reasonable doubt"* that their ID document satisfactorily identifies them. Where a presiding officer has a *"reasonable doubt"* about this, he *"must"* refuse the voter a ballot. This represents a fundamental change in the electoral system by imposing an obligation on a presiding officer to prevent a person on the electoral roll from voting merely because a reasonable doubt about their document exists. The potential for such a provision to both discourage BAME voters, and subject them to

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[17] The Traveller Movement, *Access denied? The introduction of voter ID laws and the potential impact on Gypsy, Roma and Irish Traveller people* (July 2021), p.17: "*Gypsies, Roma and Travellers… thought the voter ID laws did nothing to tackle existing barriers to democratic participation… implementing mandatory voter ID adds yet another barrier to participation, while additional barriers like lower levels of literacy mean it is harder for Travellers to complete forms or fill in paperwork. Voter ID laws… may permanently lock many GRT people out of a system they already struggle to participate in.*"

[18] Joint Committee on Human Rights, *Oral evidence: Legislative Scrutiny: Electoral Integrity Bill,* HC 223, 26 May 2021.

discriminatory treatment when they do vote, is analogous to the experience of those subjected to hostile environment provisions in the Windrush scandal (see §28 below).

(3) Concerns expressed in the lead up to the 2018 and 2019 Pilot Schemes

17 The above concerns led the Interveners and other organisations to write to Chloe Smith MP, former Minister for the Constitution, about the May 2018 voter ID pilot schemes:[19]

> "[T]here is simply not enough evidence of voter fraud in the UK to justify these potentially damaging pilots, which threaten to disenfranchise members of some of the most vulnerable groups of society. In 2016 there were 44 allegations of impersonation – the type of fraud that voter ID is designed to tackle – out of nearly 64 million votes, reflecting just 1 case for every 1.5 million votes cast. By comparison, the Electoral Commission has warned that 3.5 million people (7.5% of the electorate) in Great Britain do not have access to any form of photo ID. 11 million electors (24% of the electorate) do not have access to a passport or photographic driving licence.
>
> As organisations who support and represent a diverse range of communities, we have serious concerns that these proposals present a significant barrier to democratic engagement and risk compromising a basic human right for some of the most marginalised groups in society. Decades of international studies show that restrictive identification requirements are particularly disadvantageous to certain voter groups who are less likely to possess approved ID for a variety of socio-economic and accessibility reasons. Voter ID reforms could therefore affect young people, older people, disabled people, transgender and gender non-conforming people, BAME communities and the homeless."

18 On 22 April 2018, Kunle Olulode, director of Voice4Change England wrote that voter ID requirements: "*will not only have minimal impact on the miniscule level of voting fraud but will create potentially new and unnecessary barriers to participation in the electoral process if people become uncertain of requirements when they turn up at polling stations, further impacting negatively on registrations*."[20]

19 On 23 April 2018, the Equality and Human Rights Commission wrote to David Lidington MP, the former Minister for the Cabinet Office, expressing concern that the pilot voter ID scheme *"will have a disproportionate impact on voters with protected characteristics, particularly older people, transgender people, people with disabilities and/or those from ethnic minority communities"* and that *"some voters will be disenfranchised as a result of restrictive identification requirements"*.

(4) The 2018 and 2019 Pilot Schemes: Electoral Commission Reports

20 The results of the 2018 and 2019 pilot schemes bore out those concerns. An evaluation by the Electoral Commission of the 2018 pilot reported that the total number of voters unable to cast their vote (i.e. those who arrived at the polling stations without ID and did not return

[19] Electoral Reform Society, 'Letter to Chloe Smith MP on Voter ID' (12 March 2018).
[20] T Helm and M Savage, 'Tories in new race row over identity checks for elections' (Observer, 22 April 2018).

with the correct form of ID) was between 326 and 350, ranging from 0.06% to 0.4% of the electors in five local authorities.[21] This is a significant number. If it were extrapolated to (for example) the 2016 EU referendum, over 17,000 people would have been excluded from voting.[22] In respect of the 2019 pilot scheme, around 2,000 people were initially turned away from the polling station for not having ID. Between 740 and 758 did not return to vote, ranging from 0.03% to 0.7% in the ten local authorities participating in the 2019 pilot scheme.[23] These figures do not account for the much larger number of voters who may be dissuaded from voting because of the ID requirement, or those who did not even attempt to vote due to their lack, or perceived lack, of the correct ID.

21 As only five local authorities took part in the 2018 pilot scheme, the Electoral Commission felt unable to reach a concluded view on the impact of voter ID on particular demographic groups.[24] However, it found a correlation in Watford between the proportion of a ward's population that is Asian/British Asian and the number of electors initially turning up without identification and not returning.[25] Of the 42 people not returning to vote, 23 (55%) were in the two wards with the highest proportion of people from an Asian background.[26]

22 The Electoral Commission published a further report on the 2019 pilot. It found particular wards with a higher number of people initially arriving at the polling station with no, or the wrong, identification and not returning, and that those wards had a higher than average BAME population.[27] In Watford, the proportion of people who did not return was significantly higher in two wards, one of which has a higher than average proportion of ethnic minorities. In Derby, the proportion of people who did not return was significantly higher in three wards with higher than average BAME populations. There was a "*strong correlation*" between the proportion of each ward's population from an Asian background and the number of people not issued with a ballot paper. In Woking, 9 of the 22 people who did not return came from a ward with a higher than average BAME population. In Pendle, the proportion of people not returning increased to 1% in 3 out of the 20 electing wards – one of these wards had a higher than average proportion of Asian/British or Asian residents.

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[21] Electoral Commission, 'May 2018 voter identification pilot schemes: findings and recommendations' (July 2018), p.7.
[22] Public Administration and Constitutional Affairs Committee, 'Oral evidence: Electoral intimidation and voter identification' (11 September 2018) (HCF1366) [App/872].
[23] Electoral Commission, 'May 2019 voter identification pilot schemes – our evaluation' (July 2019), p.4
[24] Electoral Commission (n.22), §1.33.
[25] *ibid*, §1.34.
[26] Electoral Commission, 'Watford May 2018 voter identification pilot evaluation' (July 2018), §1.22.
[27] *ibid*, §1.22-1.23.

23 The Electoral Commission's views appear to have been misinterpreted by Government. On 29 June 2020, Chloe Smith MP presented the Electoral Commission's evaluation that there was insufficient evidence of negative impact on any particular demographic group, as though it was evidence of no negative impact, stating:[28] *"Based on the independent Electoral Commission's evaluations of the 2018 and 2019 voter ID pilots, there is no indication that any consistent demographic was adversely affected by the use of voter ID. The evaluation shows that the pilots were a success and the overwhelming majority of people cast their vote without a problem."*

24 The Respondent has relied upon the fact that he consulted with equalities groups[29] prior to the May 2018 and 2019 pilot schemes in support of the submission that "*Pilot Schemes operated in a way which was sensitive to the needs of different categories of voters*."[30] The Interveners note that none of the groups consulted were organisations specifically representing the interests of BAME voters.[31]

(5) Scale of voter fraud in the UK

25 The purported rationale for introducing stricter voter ID requirement is to prevent fraud and thereby improve confidence in the integrity of elections. However, as the Electoral Commission has found, there is no evidence of large-scale fraud in the UK.[32] Between 2014 and 2019, there were only 161 allegations of electoral fraud of any type, including personation (an average of less than 30 per year), three convictions for electoral fraud, and nine cautions.[33] The Interveners submit that, when considering the potential for voter ID requirements to discriminate against certain groups and the absence of clear measures to combat this discrimination, the Court should pay particular regard to the low number of allegations of electoral fraud, and the even lower number of convictions and cautions.

[28] UK Parliament: Written questions, answers and statements, 'Elections: Proof of Identity' (29 June 2020).
[29] See First Witness Statement of Paul Docker (Head of the Electoral Administration Team in the Cabinet Office), §120 [App/592].
[30] Respondent's Reasons for refusing permission to appeal to the Supreme Court, §4.2.
[31] EHRC, Stonewall, the LGBT Foundation, Centrepoint, Age UK, Independent Age, the Alzheimer's Society, St Mungo's Shelter, the Patchwork Foundation, the National Union of Students, Mencap and the RNIB.
[32] Electoral Commission, *Electoral fraud data* (2020).
[33] Joint Committee on Human Rights (n.12), §15.

C THE WINDRUSH SCANDAL - THE IMPACT OF PURPORTEDLY NON-DISCRIMINATORY IDENTIFICATION REQUIREMENTS ON BAME COMMUNITIES IN THE UK

26 The Windrush scandal provides a cautionary reminder of how introducing purportedly non-discriminatory requirements to produce documentation, as a precondition to the exercise of fundamental rights may prevent particular communities from exercising those rights, with devastating consequences. For example, the requirements introduced as part of the Government's *"hostile environment"* immigration policy, to produce documentary evidence of British nationality or a right of residence in order to exercise basic rights (e.g. the right to work or to rent a house, and enjoy access to essential daily services including healthcare, a bank account and a driving licence) resulted in: breaches of fundamental rights, improper detention, removal from the UK, and loss of their right to reside, along with *"jobs lost, lives uprooted and untold damage done to so many individuals and families"*.[34] The independent *'Windrush Lessons Learned Review'* ("**the Review**") was commissioned by the (former) Home Secretary and authored by Ms Wendy Williams CBE, HM Inspectorate of Constabulary. Its finding are relevant to the issues in this appeal.

27 First, the Review found that there were disincentives for members of the Windrush community to apply to register their status in the UK or otherwise engage with the Home Office. One dissuasive factor was cost, another was the difficulty in finding the documentary proof required: applications to register status in the late 1980s cost £60 and it subsequently *"became increasingly difficult for people to prove their status"* as *"the standard of evidence became higher and the processes more complex and costly"* (pp 59, 61). *"Many"* members of the Windrush generation reported *"how hard it was… to navigate the system, and to find the proof of residence the Home Office required"* (p 96). Another potentially dissuasive factor was loss of confidence in the Home Office by ethnic minority groups who *"are used to unconscious prejudice"* and to *"detect[ing] unconscious racial stereotyping"* and an ensuing withdrawal from engaging with its services (p 91).

28 Second, the Review found that the burden and standard of proof applied in practice by the Home Office was too high and that there was an organisational lack of understanding of the difficulties that certain groups face in providing satisfactory documentary evidence. The Review stated: *"[t]he Home Office demanded an unreasonable level of proof for them to be able to demonstrate their status"* (p 10) *"especially considering that the Windrush group were confirming a right"* (p 98), and observed that this approach *"destroyed people's faith in the system"* (p 100). The Review

[34] W Williams, *Windrush Lessons Learned Review'*, Independent Review (HC 93) (March 2020), p.7.

found that *"[m]easures introduced to mitigate the risks were shown to be inadequate, as evidenced by the events which occurred"* (p 44). It specifically criticised the Home Office for *"distancing itself from the human impact of its decisions"*, failing to have a better understanding of *"how difficult it would be for certain groups of people to prove their status"*, and its focus on *"arguing that this was all a matter of people producing the right documents"* (p 91).

29 Third, the Review concluded that *"what happened to those affected by the Windrush scandal was foreseeable and avoidable"* and that there were a *"range of significant warning signs", "from both inside and outside of the Home Office";* by "*politicians and civil society groups alike"* which showed that *"immigration control policies… could, and later on did, have significant and traumatic effects on certain groups of people"*, which *"were simply not heeded by officials and ministers"* (pp 7, 44). There was found to be a *"fail[ure] to grasp"* the disparate adverse impact of immigration policies on BAME individuals and their families (p 14), a failure of impact assessments to *"go far enough to identify or address possible risks"* of the proposed measures (p 80), a *"lack of insight into [the Windrush generation] community"* and a *"misunderstand[ing]"* of *"the likely experiences of these individuals since coming to the UK"* (p 91).

30 Fourth, the Review emphasised that it was *"key"* to understand the *"scandal"* in its wider context, finding that the *"trap"* had been set not simply by immigration legislation but also as a result of *"historical, social and political influences"*. It had been identified by others as an issue *"with a racial impact and with a racial element"* but the knowledge needed for this to be accepted had been *"institutionally forgotten to such a significant extent inside the Home Office, it led to circumstances where the ongoing racial effects could continue unchecked"* (p.71).

31 The Interveners submit that the above concerns are applicable in the present context, where (i) there is evidence that imposing barriers to the exercise of the right to vote poses an impediment for ethnic minority groups who are already hesitant about engaging in a democratic process in which they are underrepresented; (ii) the practical obstacles to obtaining photo ID may adversely obstruct and dissuade underprivileged and ethnic minority communities from exercising their right to vote; and (iii) a high standard of proof is imposed whereby voters are required to satisfy the presiding officer *"beyond reasonable doubt"* that their ID document is satisfactory, and presiding officers are obliged to refuse to allow a person to exercise their right to vote if that presiding officer believes they have a reasonable doubt as to the documents presented to them.

D THE EXPERIENCE OF VOTER ID REQUIREMENS IN THE UNITED STATES

32 While voter ID requirements are novel in this country, in the United States, there is significant experience of the discriminatory effects of voter ID laws. The Interveners submit that this case law provides a helpful context for the Court to consider the potential impact on ethnic minority communities of imposing new voter ID requirements in the UK.

33 Following the US Supreme Court's decision in *Shelby County v Holder* 570 U.S. 529 (2013), which had the effect of removing the requirement for States to obtain federal government approval before implementing changes to voting laws (which was widely considered to be a key constitutional safeguard against racialised disenfranchisement), a number of US States have introduced voter ID laws. This has resulted in a decrease in turnout amongst ethnic minority communities (the depressive effect is estimated as being 2-3%[35]) and an increased gap in the participation rate between white and non-white voters. Up to 25% of eligible African-American citizens lack government-issued photo ID, compared to 8% of the white population.[36] A 2017 study summarised the effect of photo ID on suppressing minority votes, finding that *"[f]or Latinos, Blacks, and multi-racial Americans there are strong signs that strict photo identification laws decrease turnout"* both in general and primary elections, that *"[i]n all cases, the effects are politically meaningful"*, and as a consequence *"while whites were largely unaffected by these laws, racial and ethnic minorities were falling further and further behind and increasingly losing their place in the democratic process"*.[37]

34 The Interveners also draw the Court's attention to recent judgments in Texas and North Carolina. The US Courts' careful consideration of the practical impact of voter ID laws on ethnic minority communities is instructive.

35 In *Veasey v Abbott*, No. 14-41127, 2016 WL 3923868 (5th Cir. July 20, 2016), the US Court of Appeals for the Fifth Circuit considered the legality of Texan legislation ("SB 14") which required individuals to present one of several forms of photo ID in order to vote. A 9-6 majority affirmed the District Court's finding that the legislation violated s.2 of the Voting Rights Act because of its discriminatory impact on African-American and Hispanic voters

[35] Government Accountability Office, 'Report to Congressional Requesters, Issues Related to State Voter Identification Laws' (September 2014).
[36] Brennan Center for Justice, *Citizens without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification* (2006), pp.1, 3.
[37] Z Hajnal, N Lajevardi, L Nielson, 'Voter Identification Laws and the Suppression of Minority Votes' (2017) 79(2) *The Journal of Politics* 363, 378; available online here, at p 16.

in Texas. The Fifth Circuit noted that in-person voter fraud, the stated purpose for introducing the measure, was "*very rare*" and that, even if the State's articulated objectives were legitimate, that was not "*a magic incantation a state can utter to avoid a finding of disparate impact"* (p.16). The majority reasoned as follows (p.70):

> "[T]he district court held that SB 14 acted in concert with current and historical conditions of discrimination to diminish African Americans' and Hispanics' ability to participate in the political process. ... The district court clearly delineated each step of its analysis, finding that:
>
> > (1) SB 14 specifically burdens Texans living in poverty, who are less likely to possess qualified photo ID, are less able to get it, and may not otherwise need it; (2) a disproportionate number of Texans living in poverty are African–Americans and Hispanics; and (3) African–Americans and Hispanics are more likely than Anglos to be living in poverty because they continue to bear the socioeconomic effects caused by decades of racial discrimination. *Veasey v. Perry*, 71 F. Supp. 3d at 664…" [38]:

36 In *N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), the US Court of Appeals for the Fourth Circuit struck down as unconstitutional a law that required in-person voters to show photo ID, finding that the measure constituted impermissible racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment and s.2 of the Voting Rights Act. It found that this measure "*target[ed] African-Americans with almost surgical precision*" and that it "*constitute[d] inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist.*" The Court of Appeals further held:

> "In this one statute, the North Carolina legislature imposed a number of voting restrictions. The law required in-person voters to show certain photo IDs, beginning in 2016, which African Americans disproportionately lacked, and eliminated or reduced registration and voting access tools that African Americans disproportionately used. ... Moreover ... prior to enactment of SL 2013-381, the legislature requested and received racial data as to usage of the practices changed by the proposed law. ... This data showed that African Americans disproportionately lacked the most common kind of photo ID, those issued by the Department of Motor Vehicles... As amended, the bill retained only the kinds of IDs that white North Carolinians were more likely to possess. ...
>
> It is beyond dispute that "*voting is of the most fundamental significance under our constitutional structure.*" ... For "*[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.*" ... We thus take seriously, as the Constitution demands, any infringement on this right. We cannot ignore the record evidence that, because of race, the legislature enacted one of the largest restrictions of the franchise in modern North Carolina history."

37 The Supreme Court refused to hear an appeal against this decision (without expressing a view on the merits).[39] The North Carolina Senate sought to re-introduce the photo ID

[38] It should be noted that subsequent, modified legislation was found to be sufficient to cure the defects in SB 14: *Veasey v Abbott*, No. 17-40884 (5th Cir. 2018); available online here.
[39] *North Carolina v. NAACP* 581 U.S. (2017).

requirement in 2019 for the 2020 presidential election by passing SB 824, which permitted the County Boards of Elections to provide qualifying ID cards free of charge. In *N. Carolina State Conference of NAACP v. Cooper*, 430 F. Supp. 3d 15 (M.D.N.C. 2019), the District Court found that the 2019 law was likely to be racially discriminatory and issued a preliminary injunction to enjoin its enforcement.[40] The District Court found that voter ID requirements were likely to prevent minority voters from voting at polling stations because they were "*less likely than white voters to already possess an ID that they can use for voting*".

38 The District Court's observations, in rejecting the argument that 'free' forms of ID resolved this issue, are particularly pertinent in the present case:[41]

> "It makes sense that, for many individuals, having the option to get a state-issued ID at no charge is a convenience. For those struggling to navigate daily life, however, making the trip to the county board or the DMV during open hours can be prohibitively costly. As Professor Burden explains, "*[b]oth options for acquiring ID make demands on a person's time and impose transportation costs because the individual must present themselves in person to apply*"… A 2014 study conducted through Harvard Law School found that "the expenses for documentation, travel, and waiting time" associated with obtaining free ID "*are significant – especially for minority group and low-income voters – typically ranging from about $75 to $175*." … This could explain why, as of October 21, 2019, only 1,720 "*free*" IDs were issued in a state with millions of eligible voters."

39 The District Court found that some voters are likely to be deterred from even attempting to vote because "*they lack, or believe they lack, acceptable identification*", observing that alterations to voting requirements "*have bred distrust, mistrust and apathy among eligible minority votes*". The Court referred to a Stanford University study which found that, following *McCrory*, voters without proper identification remained 2.6% less likely to turn out in the 2016 general election and that these dissuaded voters were disproportionately people of colour.

E ISSUES BEFORE THE SUPREME COURT

40 The Interveners invite the Court to take account of the matters set out above when considering whether the requirement to produce ID as a pre-requisite to voting presents an impediment to or restricts the exercise of the right to vote, and whether s.10 of the 2000 Act, interpreted in light of the principle of legality, authorises the Respondent to make an order for the introduction of voter ID pilot schemes.

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[40] An appeal against the decision to issue a preliminary injunction was allowed on the basis that the District Court had failed to place the burden of showing discriminatory intent on the petitioners: *N.C. State Conf. of the NAACP v Raymond*, 981 F.3d 295, 311 (4th Cir. 2020); available online here.

[41] Emphasis here and below added, save where otherwise stated.

(1) The right to vote in local elections is a fundamental right

41 The right to vote in local government elections is a fundamental right. It is the only way a person can influence who makes the important local administrative decisions that affect their lives. BAME communities are affected by those decisions but are currently underrepresented in the local democratic process both as electors and electees. Any measures to reform the electoral process must have regard to the need to improve, rather than exacerbate the underrepresentation of communities in the democratic process.

42 The consequence of the right to vote in local elections being a fundamental right is that, in construing a statute which purports to permit interference with that right, the principle of legality is engaged. The principle of legality is summarised in the Appellant's Case §§83-87. The Interveners emphasise two additional points. First, an interference with fundamental rights need not involve a complete abrogation of the right in order to trigger the application of the principle of legality. It is sufficient that a measure imposes a barrier to or *"frustrates"* the enjoyment of a fundamental right (*Sheffield City Council v Smart* [2002] HLR 639 §42; see also *R (Miller) v Prime Minister* [2020] AC 373 §§50-51); or that it creates a *"hindrance or impediment"* even if it does not make enjoyment of the right *"completely impossible" R (UNISON) v Lord Chancellor* [2020] AC 869 §78. Second, the principle of legality also applies where there is a *"real risk"* that the enjoyment of a fundamental right will be prevented *(UNISON* §87).

(2) The requirement to produce voter ID as a pre-requisite to voting presents an impediment to, or restricts, the exercise of the right to vote

43 The Interveners submit that the Court of Appeal erred in concluding that the requirement to produce voter ID did not present an impediment to or restrict the exercise of the right to vote. McCombe LJ concluded that "*a requirement of suitable identification is a [not] a restriction on voting at all. It is merely a means of trying to ensure that those who vote are entitled to do so*" (§40) and that the voter ID pilot schemes "*do not ... "override" the important right to vote*" (§68). The Interveners submit that McCombe LJ was wrong to reach that conclusion and emphasise the four points, below.

44 First, BAME groups are less likely to possess photo ID suitable for the voter ID scheme. There is evidence that electors who do not possess photo ID are less likely to vote, if that were imposed as a requirement: the Government's data shows that over a quarter of those without any form of photo ID and a fifth of those with no recognisable photo ID would be less likely to vote if they had to present photo ID (§§7-9 above). Although the Electoral

Commission was unable to conclusively determine the impact of voter ID on particular demographic groups (due to the limited sample of local authorities involved in the 2018 pilot scheme), it found a correlation between race and the proportion of electors turning up without ID and not returning in certain local authority wards (§§20-24 above).

45 Second, there are significant expenses and other practical obstacles associated with obtaining official forms of photo ID (§§10-16 above). The proposal to introduce freely available ID does not resolve the issue. Acquiring local ID is nonetheless likely to involve hidden or other costs and inconvenience. As US Courts have recognised, whilst *"for many individuals, having the option to get a state-issued ID at no charge is a convenience"*, this not the case for *"those struggling to navigate daily life"*, when options for obtaining an ID *"make demands on a person's time"* and impose other costs (e.g. taking steps to obtain and paying for a passport photograph, finding someone who can attest to the photograph, and finding and producing multiple forms of sufficiently detailed official documentation) (see §38 above). Studies conducted during and after the pilot schemes indicate that almost 50% of those without photo ID are unlikely or very unlikely to apply for the ID (§12 above).

46 Third, the introduction of voter ID requirements and the additional associated bureaucracy, is also likely to dissuade minority communities with an already low turnout from voting. As recognised by the US Courts, voters may be deterred from even attempting to vote because "*they lack, or believe they lack, acceptable identification*", or because alterations to voting requirements "*have bred distrust, mistrust and apathy among eligible minority votes*" (see §39 above). These concerns were clearly articulated by Lord Woolley, Director of OBV (§15 above) in relation to the pilot ID schemes. They should also be considered in light of the instructive findings of the *'Windrush Lessons Learned Review*,' that minority groups who *"are used to unconscious prejudice"* may withdraw from engaging with services.

47 Fourth, voter ID requirements do not simply concern what evidence must be produced as part of the modality of exercising the right to vote. Voters must satisfy the presiding officer or clerk beyond *"reasonable doubt"* that their document satisfactorily identifies them; if they do not, the presiding officer must refuse them a ballot. As set out above, the Windrush scandal illustrates that where the executive imposes a high burden of proof and creates a power or obligation to prevent the exercise of a right, particular groups may be denied their fundamental rights, as well as *"destroy[ing] people's faith in the system"*.

(3) Section 10 of the 2000 Act, interpreted in light of the principle of legality, does not authorise the Respondent to introduce of voter ID pilot schemes

48 The principle of legality gives rise to a presumption that fundamental rights cannot be subject to interference except by the clearest statutory language.[42] The Interveners agree with the Appellant's submissions that, properly construed, s.10 of the 2000 Act does not empower the Secretary of State to authorise pilot schemes requiring voters to present identification as a precondition of being permitted to exercise their democratic right to vote. The Interveners make the following additional points.

49 First, the Court of Appeal erred in its approach to construing s.10(2)(1). McCombe LJ relied on the generality of the words *"how voting… is to take place"*, and found that they *"do not indicate a restriction merely to the physical methods of communicating voting intention"* and that *"[i]f such a restriction had been intended, it would have been quite simple for Parliament to introduce it"* (§36). This was the wrong approach: where statutory words are general, the principle of legality requires the Court to construe them *"strictly and restrictively"* rather than expansively, and ask whether Parliament made it *"crystal clear"* that it intended to confer upon the executive the power to authorise measures which obstruct the right to vote, and which prevent individuals from casting a vote unless the presiding officer is satisfied beyond reasonable doubt that the elector's identification is adequate.

50 Second, the Court of Appeal erred in its consideration of the impact of s.11, which grants the Secretary of State the power to permanently implement measures which have been introduced via a pilot scheme, on the construction of s.10(2)(a):

(1) Underhill LJ approached s.10(2)(a) by treating the power to authorise pilot schemes under s.10, and the power to roll out pilot schemes generally and permanently under s.11, as *"distinct matter[s]"*, declining to interpret s.10 *"on the basis that Parliament cannot have contemplated the possibility of permanent voter identification requirements being introduced"* under s.11 (§80). This approach was wrong. It is well-established that a statute must

42 *Ahmed v HM Treasury* [2010] 2 AC 534 §§45, 47: *"[t]he closer [the] measures come to affecting… the basic rights of the individual, the more exacting the scrutiny must become";* the Court must interpret the legislation *"on the basis that Parliament did not surrender its legislative powers to the executive any more than must necessarily follow from the words used by it"*; *Kennedy v Charity Commission* [2015] AC 455 §117-8 : the language of the statute must make it *"plain beyond possible doubt that this was Parliament's intention"*; this must be demonstrated *"unequivocally"* by the statute; *R (Evans) v Attorney General* [2015] AC 1787 §58: the power to interfere with fundamental rights *"must be 'crystal clear' from the wording [of the statute]"*; *B (Algeria) v Home Secretary* [2018] AC 418 §29: the principle of legality required the court to interpret statutory provisions *"strictly and restrictively"*; *R (Ingenious Media) v HMRC* [2017] 1 All ER 95 §20: *"the more general the words, the harder it is likely to be to rebut the presumption"*.

be construed as a whole (*Customs & Excise Commissioners v Zielinski Baker* [2004] 2 All ER 141 §38), and that Parliament is assumed to use language carefully with a view to producing a consistent and coherent legislative scheme (*Inland Revenue Commissioners v Hinchy* [1960] AC 748, 766). The s.11 power may only be exercised in relation to provisions arising out of a pilot scheme authorised by s.10. Thus, s.10(2)(a) must be construed in the context of both the s.10(1) and the s.11 powers, and its meaning must be consistent. That s.11 confers on the executive a power to make an order implementing the pilot schemes on a permanent basis, and to modify or disapply primary legislation, provides a further basis for adopting a restrictive construction of s.10(2)(a). As held in *McKiernon v Secretary of State for Social Security* (1989) 2 Admin LR 133, 140 (approved by this Court in *R (Public Law Project) v Lord Chancellor* [2016] AC 1531 §27), *"Whether subject to the negative or affirmative resolution procedure [subordinate legislation] is subject to much briefer, if any, examination by Parliament, and cannot be amended… if there is any doubt about the scope of the power conferred upon the executive… it should be resolved by a restrictive approach"*.[43]

(2) The Court of Appeal relied on *"significant safeguards"* in s.11 as justification for adopting a broad construction of s.10(2)(a) that: (i) the power may only be exercisable on a recommendation by the Electoral Commission; and (ii) a draft order exercising the power must be subject to the affirmative resolution Parliamentary procedure (§69, §80). These *"safeguards"* cannot convert the *"general or ambiguous"* language in s.10(2)(a) into *"express language"* authorising the interference with the right to vote. Nor do they give rise to a *"necessary implication"* that Parliament must have intended to permit the introduction of measures which interfere with the exercise of the right to vote. As this Court held in *J v Welsh Ministers* [2020] AC 757, *"the test for a necessary implication is a strict one"* (§25), approving the judgment of Lord Hobhouse in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 §45 that a necessary implication is not what would have been *"sensible"* or *"reasonable"* for Parliament to have included but *"one which necessarily follows from the express provisions of the statute construed in their context"* and *"what it is clear that the express language of the statute shows that the statute must have included"*. It is *"a matter of express language and logic not interpretation"*. Nothing in the language of the 2000 Act shows that Parliament *must have intended* to confer on the executive the power to introduce measures restricting the right to vote. On the

[43] Approved by the House of Lords in *R v Secretary of State for Social Security, Ex p Britnell* [1991] 1 LR 198, 204 and *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 392.

contrary, s.10(7) provides a strong indication that the purpose of the pilot schemes is to promote, not to restrict, the exercise of the right to vote, and that Parliament is concerned with *"facilitating… voting"*, *"encouraging voting"* and *"enabling voters to make informed decisions at… elections"*. It does not *"clear[ly]"* or *"necessarily follow"* as a matter of logic, from the *"safeguards"* in s.11, that Parliament *must have intended* to permit the Secretary of State to authorise measures restricting the right to vote.

51 The Interveners emphasise two further points. First, the imposition of voter ID requirements is not a politically neutral measure. Just as voting age is considered an electoral advantage or disadvantage by political parties, so is the imposition of requirements which may have the effect of reducing the turnout of ethnic minority voters. This, it is submitted, is a further reason why any such changes to the electoral landscape must be squarely confronted by Parliament, and not be imposed by the Executive. Second, the risks involved in permitting presiding officers to determine whether electors should be allowed to cast their ballot should not be underestimated. The electoral legislation has, until now, deliberately removed discretion and judgment from the voting process, and has not permitted a presiding officer at a polling station from preventing a person from voting due to concerns about personation. Such a significant change in the electoral process must, it is submitted, be clearly addressed by Parliament, and not permitted by way of executive order.

F CONCLUSION

52 For the reasons set out above, the Interveners submit that the right to vote is a fundamental right, that the imposition of voter ID requirements present a significant barrier to the exercise of that right for some of the most marginalised groups in society including BAME (ethnic minority) voters.

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