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ELECTORAL LAW

Electoral reform and the authorisation of voter ID pilot schemes

Dr Ben Stanford*

R (Coughlan) v Minister for the Cabinet Office [2019] EWHC 641 (Admin)

Introduction

Following a series of pilot schemes in the May 2018 local elections, which required certain voters to produce some form of identification when voting in polling stations, the Cabinet Office announced that further pilots would take place in the May 2019 local elections. Neil Coughlan is one such voter affected by the requirement to show identification in one of the participating areas in the second round of pilots. After a crowd-funding campaign, Coughlan challenged the power of the Minister for the Cabinet Office to authorise the pilots pursuant to the Representation of the People Act (RPA) 2000.

In March 2019, Supperstone J dismissed the claim for judicial review, with the local elections taking place as scheduled. Looking to the future, the December 2019 Queen's Speech outlined the Government's plans to reform the constitution and democracy, which would *inter alia* introduce compulsory voter identification requirements at polling stations in general elections in Great Britain and local elections in England.

Facts in *Coughlan*

In February and March 2019, Ministerial Orders were made to authorise the second round of voter ID pilot schemes that took place in May 2019.¹ A total of 10 councils participated, including Braintree District Council, meaning that eligible voters in that area were required to show either one form of photo ID or up to two forms of non-photo ID.² The claimant, Neil Coughlan, is one such voter who was affected by the requirement to show photo identification, which he does not currently possess. After a short crowd-funding campaign prior to the elections, Coughlan challenged the power of the Minister for the Cabinet Office to authorise the voter ID pilots pursuant to the RPA 2000. The rolled-up hearing was heard on 7 March 2019 before Mr Justice Supperstone.

The claimant argued that the authorisation of the May 2019 voter ID pilots had been an unlawful use of s.10 of the RPA 2010. In essence, s.10(2)(a) permits voter ID pilots that allow modifications to electoral rules in respect of "when, where and how voting at the elections is to take place." The claimant argued that the meaning of "how" voting can take place should be construed narrowly and that "the requirement to produce voter ID does not concern 'how' voting takes place, but whether voting is permitted to take place at all."³ Further, the claimant argued that the purpose of s.10 was to facilitate voting, which voter identification requirements did not do.⁴

In response, the defendant argued that the pilot scheme orders were lawful and fell within the

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¹ See for example the Braintree District Council (Identification in Polling Stations) Pilot Order 2019.

² Braintree District Council, Braintree District Council taking part in Voter ID pilots in 2019 (3 November 2018) at <https://www.braintree.gov.uk/news/article/845/braintree-district-council-taking-part-in-voter-id-pilots-in-2019>

³ *R. (Coughlan) v Minister for the Cabinet Office* [2019] EWHC 641 (Admin) para. 55.

⁴ *Ibid.*

scope of s.10(2)(a). More specifically, the defendant argued that the relevant provisions of the RPA 2000 permit alterations to local election procedures with respect to “how voting at the elections is to take place.”⁵ These rules are currently governed by the Local Election (Principal Areas) (England and Wales) Rules 2006 and the Local Elections (Parishes and Communities) (England and Wales) Rules 2006, which concern the questions that may be put to voters in polling stations before being handed their ballot papers. Rather than preventing those who are lawfully entitled to vote from doing so, the defendant argued that increasing voter confidence might actually encourage greater voter participation in the long term.⁶ Additionally, the defendant argued that the voter ID pilots were authorised pursuant to a lawful purpose, that is, “with a view to improving the integrity of the electoral system and voter confidence by modernising electoral procedures and reducing the opportunity for fraud.”

The decision of the High Court in *Coughlan*

After a careful examination of the RPA 2000, together with the other relevant statutory provisions, Supperstone J ruled for the defendant. As Supperstone J acknowledged in his introductory remarks, the central question of the case was “whether the voter ID pilots are schemes within the meaning of s.10(2)(a), that is, whether they are schemes for testing ‘how voting...is to take place’”.⁷ As such, Supperstone J focussed on two interrelated issues – the meaning of the words in the relevant provisions and the purpose of those provisions.

The meaning of the words used in s.10(2)(a)

The claimant contended that the “how” matter in s.10(2)(a) refers to the “way or manner in which voting occurs, or the (physical) means by which votes are cast,” rather than an individual voter’s eligibility or legal entitlement to vote.⁸ The former interpretation, according to the claimant, was consistent with the construction of s.10(2)(a) when read as a whole. The claimant argued that the clause concerned the practicalities of voting, in the sense that “when” and “where” referred to the time and place of voting, and that “how” should similarly be concerned with the physical manner or way of voting, rather than whether voting could take place at all.⁹ In contrast, the defendant submitted that the “how” matter was broad enough to “encompass procedures for demonstrating an entitlement to vote, including by proving identity,” and that had Parliament intended to confine the provision to the physical manner of voting only it could have done so.¹⁰

On these matters, Supperstone J agreed with the defendant that the “natural and ordinary meaning” of the words “how voting at elections is to take place” are sufficiently broad to allow procedures which require voters to prove their entitlement to vote.¹¹ Going further, Supperstone J agreed that pilot schemes could be authorised that would differ “in any respect” from the existing provisions in respect of “how voting” is to take place, which again served to indicate the breadth of discretion served upon the Minister for the Cabinet Office.¹²

The purposes for which the power under s.10(1) may be exercised

The lengthiest discussion concerned the contested purpose of the power under s.10(1) of the RPA 2000. According to the claimant, the provisions of the RPA 2000 had to be interpreted by reference to the purpose and mischief at which it was aimed; that public authorities can only use

⁵ *Ibid*, para. 53.

⁶ *Ibid*, para. 54.

⁷ *Ibid*, para. 4.

⁸ *Ibid*, para. 56.

⁹ *Ibid*, para. 57.

¹⁰ *Ibid*, para. 58.

¹¹ *Ibid*.

¹² *Ibid*, para. 60.

statutory powers conferred on them for the purpose conferred; and finally public authorities must use statutory powers to promote the statutory policy and objects.¹³ Moreover, the claimant argued that the purpose (or at least the dominant purpose) of pilot schemes under s.10 was to facilitate or encourage voting.¹⁴ In support, the claimant pointed to the mandatory post-election report that must follow a pilot scheme, which requires “an assessment of the scheme’s success or otherwise in facilitating voting.”¹⁵

In response, the defendant argued that whilst facilitating or encouraging voting *may* be an objective of pilots, the real policy and objects of the power under s.10 are wider and concern the “modernisation of electoral procedures in the public interest.”¹⁶ Moreover, the post-election report could also include “an assessment of such other matters” that the Secretary of State may require.¹⁷ On this point, Supperstone J agreed with the defendant, finding that Parliament had intended for pilot schemes to test a range of matters and that there “may be a range of important public interest considerations associated with the modernisation of electoral procedures extending beyond those specified matters.”¹⁸

The claimant also placed great emphasis on the Act’s Explanatory Notes as further evidence that the purpose of pilot schemes was to facilitate and encourage voting. In this respect, the Explanatory Notes cite the Howarth Report’s recommendations that pilot schemes should test innovative electoral procedures such as “weekend voting, electronic voting, early voting, and mobility polling stations.”¹⁹ However, Supperstone J found that these recommendations were not solely concerned with facilitating and encouraging voting, but rather with the “fundamental modernisation of the electoral process” and that safeguarding the integrity of the proposed voting arrangements was an important consideration.²⁰

Accordingly, Supperstone J dismissed the claimant’s arguments. Firstly, s.10(1) was “permissive” and Parliament had “not specified in express terms the purposes for which the power under s.10(1) can be exercised.”²¹ Secondly, s.10(2)(b) was framed in such a way that pilot schemes could be “exercised for purposes other than facilitating and encouraging voters.”²² Thirdly, the power to allow pilots was “intended to operate to take account of developments in the future”, which could be used to “conduct experiments to obtain information about any reform to electoral procedure that may need to be introduced from time to time.”²³ Fourthly, the s.10(1) power had to be “considered in terms of the enactment as a whole.”²⁴ Under s.11 of the RPA 2000, electoral procedures can be revised in light of successful pilot schemes, which can only be executed by a Secretary of State order, via a statutory instrument, following an Electoral Commission recommendation, and subject to Parliamentary approval.

Supperstone J also agreed with the defendant that even if the purpose of pilot schemes was to facilitate and encourage voting, the purpose had to be subject to two qualifications.²⁵ Firstly, “the voting that is to be facilitated and encouraged must be lawful voting” and secondly, the purpose of s.10(1) cannot be limited to pilot schemes that facilitate or encourage voting on the first

¹³ *Ibid*, paras. 63-65.

¹⁴ *Ibid*, para. 66.

¹⁵ *Ibid*, para. 68.

¹⁶ *Ibid*, para. 66.

¹⁷ *Ibid*, para. 70.

¹⁸ *Ibid*, para. 70.

¹⁹ *Ibid*, para. 71.

²⁰ *Ibid*, para. 73.

²¹ *Ibid*, para. 77.

²² *Ibid*, para. 78.

²³ *Ibid*, para. 79.

²⁴ *Ibid*, para. 80.

²⁵ *Ibid*, para. 82.

occasion they are tested; rather, they “must lead to changes in electoral procedure that encourage voting over the longer term.”²⁶ Supperstone J also rejected the argument that an individual’s right to vote, as a fundamental constitutional right, could only be restricted by clear statutory provisions.²⁷ As the defendant argued, “the right to vote at local government elections is conferred by statute” and “there is no right to vote at common law.” However, Supperstone J left for future deliberation the question as to whether the constitutional right to vote in national elections extends to local elections.²⁸

As a peripheral issue, Supperstone J rejected the defendant’s argument that the claimant had not acted promptly in bringing his claim, on the basis that Coughlan “was not required to challenge the decision to introduce pilot schemes before he knew that they would affect Braintree.”²⁹

Tacking electoral fraud or disenfranchising voters?

Whilst voter verification and identification requirements in broad terms can be traced back several decades in the UK, the principal issue contested in this case (the Cabinet Office’s power to introduce additional voter ID requirements in pilot schemes in local elections), can be traced back to the late 1990s and the enactment of the Representation of the People Act (RPA) 2000.

Firstly, in 1998, the House of Commons’ Home Affairs Committee determined that whilst reforms to the voting process should be considered, it was not yet necessary to introduce any additional requirements for voters to prove their identity when voting in polling stations in Great Britain.³⁰ In 1999, a Working Party on Electoral Procedures produced the “Howarth Report”, which concluded that it was necessary to modernise the electoral process, and to that end, different voting arrangements should be tested in pilot schemes.³¹ Shortly afterwards, the RPA 2000 was enacted, which provides for the possibility of pilot schemes in local elections pursuant to ss.10 and 11 of the Act. Several pilot schemes have been conducted since then, including remote electronic voting, the requirement to provide signatures at polling stations, postal voting signature checking and postal vote tracking. Most significantly, in 2014 the Electoral Commission suggested that voters in Great Britain should be required to prove their identity to improve the security of the voting process,³² which was echoed shortly afterwards in the 2016 “Pickles Report.”³³

In the May 2018 local elections, the first round of pilots testing voter identification were held in Bromley, Gosport, Watford, Woking and Swindon, where voters were required to show some form of identification when voting in polling stations.³⁴ The exact requirements differed in each area, but generally required voters to show either their polling cards or some form of photo or non-photo identification. Whilst the 2018 voter ID pilots attracted criticism from some

²⁶ *Ibid.*

²⁷ *Ibid.*, para. 83.

²⁸ *Ibid.*

²⁹ *Ibid.*, para. 87.

³⁰ House of Commons’ Home Affairs Committee, Electoral Law and Administration (HC 1997-1998, 768-1) para. 102.

³¹ Home Office, *Final Report of the Working Party on Electoral Procedures* (not printed, 19 October 1999) paras. 3.1.3-3.1.6.

³² Electoral Commission, *Electoral Fraud in the UK: Final Report and Recommendations* (January 2014) at https://www.electoralcommission.org.uk/_data/assets/pdf_file/0008/164609/Electoral-fraud-review-final-report.pdf p. 5. The practice is now relatively uncontroversial and even welcomed by many in Northern Ireland as a means to improve voter confidence, where voter identification has been required since 1985 and photo identification since 2003.

³³ *Securing the Ballot: Report of Sir Eric Pickles’ Review into Electoral Fraud* (August 2016).

³⁴ See generally Electoral Commission, *May 2018 Voter Identification Schemes: Findings and Recommendations* (July 2018) at https://www.electoralcommission.org.uk/_data/assets/pdf_file/0006/244950/May-2018-voter-identification-pilots-evaluation-report.pdf.

academics and campaigning organisations,³⁵ the Electoral Commission concluded that they had “worked well” overall, but that “a small number of people...were unable to vote because they did not have, or did not bring with them, the right type of identification.”³⁶ The Cabinet Office deemed them a success and announced shortly afterwards that a further round of pilots would be conducted in the May 2019 local elections, which would involve a more diverse range of councils.³⁷

The voter ID pilots took place as planned on 2 May 2019 in the 10 participating councils, including Braintree District Council. Although Supperstone J made it clear that “this court is not concerned with the merits of the decision to introduce the pilot schemes”, he also acknowledged that voter identification reforms are controversial.³⁸ In that respect, the claimant in this first, unsuccessful, legal challenge to the Cabinet Office’s decision to test enhanced voter identification procedures has already sought leave to appeal to the Court of Appeal.³⁹

Whilst any formal critique of the pilot schemes is beyond the scope of this piece, it appears that two things are certain. Firstly, the Government remains resolute and determined to implement voter ID reforms nationwide, but also to safeguard elections in the UK in other ways.⁴⁰ Secondly, it is highly unlikely that criticism of the proposals to roll out compulsory voter identification nationwide will dissipate. To some extent echoing the 2018 voter ID pilots, evidence from the May 2019 pilots suggests that several dozen voters were effectively prevented from voting due to the lack of adequate identification in polling stations.⁴¹ The task of considering the actual merits of voter ID reforms therefore, including the considerable human rights concerns, may well fall to other courts.

Looking to the future, following the Conservative Party’s victory in the December 2019 General Election, the subsequent Queen’s Speech outlined the Government’s proposals to reform the constitution and democracy in a number of ways. This will include the creation of a Constitution, Democracy and Rights Commission with a view to repealing the Fixed-Term Parliaments Act 2011 and to introduce voter ID at UK parliamentary elections and local elections in England.⁴² Additionally, the Government has proposed to reform postal and proxy voting, to allow a wider range of people to assist disabled voters in polling stations, to allow British citizens overseas to

³⁵ Ben Stanford, ‘The 2018 English Local Elections ID Pilots and the Right to Vote: A Vote of (no) Confidence?’ (2018) 23(6) *European Human Rights Law Review* 600; Heather Green, ‘The Voter ID Pilots: An Unlawful Electoral Experiment’ (2019) *Public Law* 242; Michela Palese and Chris Terry, ‘A Sledgehammer to Crack a Nut: The 2018 Voter ID Trials’, Electoral Reform Society (September 2018) at <https://www.electoral-reform.org.uk/wp-content/uploads/2018/09/2018-Voter-ID-Trials.pdf>.

³⁶ Electoral Commission, *May 2018 Voter Identification Schemes: Findings and Recommendations* (July 2018).

³⁷ Cabinet Office, ‘Government Commits to New Round of Voter ID Pilots at Next Local Elections’, Press Release (19 July 2018) at <https://www.gov.uk/government/news/government-commits-to-new-round-of-voter-id-pilots-at-next-local-elections>; Cabinet Office, ‘Next Round of Voter ID pilots Announced for 2019’, Press Release (3 November 2018) at <https://www.gov.uk/government/news/next-round-of-voter-id-pilots-announced-for-2019>.

³⁸ *R. (Coughlan) v Minister for the Cabinet Office* [2019] EWHC 641 (Admin) para. 3.

³⁹ Leigh Day, ‘Essex Man Set to Appeal High Court Ruling that Government’s Voter ID Pilots are Lawful’ (20 March 2019) at <https://www.leighday.co.uk/News/2019/March-2019/Essex-man-set-to-appeal-High-Court-ruling-that-Gov>.

⁴⁰ Cabinet Office, ‘Government Safeguards UK Elections’, Press Release (5 May 2019) at <https://www.gov.uk/government/news/government-safeguards-uk-elections>.

⁴¹ See for example, Rob Parsons, ‘Forty-Eight People Turned Away from Polling Booths and Don’t Come Back as Craven Council Tries Voter ID Scheme in North Yorkshire’, *The Yorkshire Post* (3 May 2019) at <https://www.yorkshirepost.co.uk/news/politics/forty-eight-people-turned-away-from-polling-booths-and-don-t-come-back-as-craven-council-tries-voter-id-scheme-in-north-yorkshire-1-9748374>; Dan Bloom, ‘Local Elections: Woman, 87, Who’s Voted all her Life Turned Away for Having no ID’, *Daily Mirror* (2 May 2019) at <https://www.mirror.co.uk/news/politics/local-elections-woman-87-whos-14984757>.

⁴² The Queen’s Speech and Associated Background Briefing, on the Occasion of the Opening of Parliament on Monday 19 December 2019 at <https://www.gov.uk/government/publications/queens-speech-december-2019-background-briefing-notes> p. 126.

vote in parliamentary elections for life, and finally to consult on electoral integrity with respect to foreign influence and digital campaigning.⁴³

The potential risks of voter identification reforms in Great Britain from a human rights perspective are discussed in depth elsewhere.⁴⁴ In essence, the European Court of Human Rights has stressed that a number of requirements must be met for any restrictions upon the right to vote under Article 3 of the First Protocol to the European Convention on Human Rights to be lawful. The measures taken by states must not curtail the right to vote in a way that impairs its essence and effectiveness; the conditions imposed must be proportionate and pursue a legitimate aim; the free expression of the people must not be thwarted; the requirement must be concerned with the integrity and effectiveness of the election process; and, if relevant, the exclusion of any group of the public must be reconcilable with the purpose of Article 3 of the First Protocol.⁴⁵ Furthermore, although voter identification is, on the face of it, a neutral policy that would concern all eligible voters, the European Court of Human Rights has made it clear that indirect discrimination may arise in circumstances when the “disproportionately prejudicial effects of a general policy or measure which, although couched in neutral terms, discriminates against a group.”⁴⁶

Bearing in mind these important principles, the 2018 and 2019 voter ID pilots have painted a somewhat mixed picture. Despite the legitimate rationale provided by the Government for reform and the demonstrable increase in voter confidence in participating areas,⁴⁷ voter identification laws are open to accusations of being disproportionate. This is because of the potential risk of a drop in voter turnout, and the fact that several hundred eligible voters were effectively denied the right to vote in the May 2018 and 2019 pilots.⁴⁸

Ultimately, it might be argued that the Government should not be considering such fundamental reforms to electoral law, however well-intentioned the rationale may be, in response to what is a relatively insignificant problem and in a way that may in fact discourage or even thwart the free expression of the people to choose the legislature.

Conclusions

The sole purpose of the *Coughlan* case was to review the legality of the Cabinet Office’s power to authorise the May 2019 voter ID pilot schemes; not to test the merits of compulsory voter identification. The impact of the case will thus be limited. Whilst unsuccessful in the High Court, the appeal due to be heard in 2020 may shed further light on the legality of the voter ID pilot schemes. On the one hand, the Government may well seek to rely upon the findings of the High

⁴³ *Ibid*, ps. 126-127.

⁴⁴ Ben Stanford, ‘Compulsory Voter Identification, Disenfranchisement and Human Rights: Electoral Reform in Great Britain’ (2018) 23(1) *European Human Rights Law Review* 57.

⁴⁵ See, in particular, *Mathieu-Mohin v Belgium* (1988) 10 E.H.R.R. 1; *Hirst v United Kingdom (No.2)* (2006) 42 E.H.R.R. 41; *Yumak v Turkey* (2009) 48 E.H.R.R. 4; *Sitaropoulos v Greece* (2013) 56 E.H.R.R. 9; *Scoppola v Italy* (2013) 56 E.H.R.R. 19.

⁴⁶ *Biao v Denmark* (2017) 64 E.H.R.R. 1, para. 103; *DH v Czech Republic* (2008) 47 E.H.R.R. 3, para. 184; *Adami v Malta* (2007) 44 E.H.R.R. 3, para. 80.

⁴⁷ Electoral Commission, May 2019 Voter Identification Pilot Schemes: Impact on Voters: Confidence (12 July 2019) at <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/our-views-and-research/our-research/voter-identification-pilots/may-2019-voter-identification-pilot-schemes/impact-voters-confidence>;

Electoral Commission, May 2018 Voter Identification Schemes: Findings and Recommendations (July 2018) ps. 14-18.

⁴⁸ Electoral Commission, May 2019 Voter Identification Pilot Schemes: Impact on Voters: Experience (12 July 2019) at <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/our-views-and-research/our-research/voter-identification-pilots/may-2019-voter-identification-pilot-schemes/impact-voters-experience>; Ben Stanford, ‘The 2018 English Local Elections ID Pilots and the Right to Vote: A Vote of (no) Confidence?’ (2018) 23(6) *European Human Rights Law Review* 600, 605-606.

Court (and the Court of Appeal if the appeal is dismissed) as support for their proposals to roll out compulsory voter identification laws nationwide. On the other hand, if the appeal is successful, opponents of voter ID will undoubtedly seek to increase their support and pressurise the Government to scrap the proposals. Ultimately, future legal challenges will need to engage with the substantive issues that such reforms raise vis-à-vis the right to vote, especially in respect of the legality and proportionality of such measures.