Electoral Law Forum

Caselaw update

Gethin Thomas

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A. INTRODUCTION

1. This paper summarises recent caselaw concerning the electoral process. The first three cases considered below have each addressed three discrete and disparate issues:
    a. candidate selection protocols and positive discrimination (*Dhamija v Liberal Democrats in England* [2019] EWHC 1398 (QB) (24 April 2019),
    b. the voter identification pilot scheme in local government elections this year (*R. (on the application of Coughlan) v Minister for the Cabinet Office* [2019] EWHC 641 (Admin) (20 March 2019)), and;
    c. whether the tactile voting device for blind and partially-sighted voters is fit for its legislative purpose (*R. (on the application of Andrews) v Minister for the Cabinet Office* [2019] EWHC 1126 (Admin) (3 May 2019)).

2. The fourth and final case considered below, *R. (on the application of Wilson) v Prime Minister* [2019] EWCA Civ 304 (4 March 2019), the Applicants brought a judicial contending that the Prime Minister's decision to notify the EU of the UK's intention to withdraw, and the notification itself, were unlawful because they were based upon the result of a referendum that was itself unlawful as a result of corrupt and illegal electoral practices.

B. CANDIDATE SELECTION

***Dhamija v Liberal Democrats in England* [2019] EWHC 1398 (QB) (24 April 2019)**

Introduction

3. The Claimant challenged the decision of the respondent political party (the Liberal Democrats) to amend its protocol governing the selection of candidates for elections. The Claimant, who was from a BAME background (black, Asian or minority ethnic), had been selected as one of the defendant's candidates in the May 2019 European Parliament elections under a selection protocol ("the Protocol") arranging the order of priority of its candidates for those elections by reference to section 104 of the

Equality Act 2010, under which it was permitted to take positive action to address the under-representation of certain groups.

Factual background

4. The Respondent's Protocol had stated:

> *The outcome of the final count will be adjusted to ensure that at least two of the top six candidates on each list are from BAME background [black, Asian or minority ethnic]. For Yorkshire and the Humber, one of those two must be in first or second place. For London, one of those two must be in first place.*[1]

5. However, this paragraph (among other similar paragraphs promoting others with protected characteristics in a similar manner, but which were not central to the claim) was withdrawn following complaints that it sought to discriminate in favour of individuals who have one protected characteristic against those who have another.

6. The Claimant ended up being second on the priority list in London. If the Protocol had not been amended, he would have been moved up to replace the person at the top of the list, as she was not from a BAME background. As Waksman J explained the advantage of being number one is particularly important under the d'Hondt voting system, as the '*unless you are number one, the chances of you ultimately obtaining a seat in the European Parliament are low*.'[2]

7. The Claimant challenged the removal of the paragraph of the Protocol on the basis that it was a breach of the contract with him that is constituted when anyone becomes a member of an unincorporated association such as the Liberal Democrats. However, the Claimant accepted that if the paragraph was unlawful, then it could not be enforced.

[1] Paragraph 6 of the Protocol.
[2] [2019] EWHC 1398 (QB), para 12.

The Equality Act 2010

8. Section 101 of the Equality Act 2010 ("the 2010 Act") provides that an association (A) must not discriminate against a member (B)…(d) by subjecting B to any detriment. Pursuant to section 104, however, a political party would not contravene that obligation only by acting in accordance with selection arrangements, which are defined as follows:

> *Selection arrangements are arrangements -*
> *(a) which the party makes for regulating the selection of its candidates in a relevant election,*
> *(b) the purpose of which is to reduce inequality in the party's representation in the body concerned, and*
> *(c) which, subject to subsection (7), [which is not relevant here] are a proportionate means of achieving that purpose.*

9. Subsection (4) defines what is meant by "inequality in a party's representation":

> *The reference …to inequality between -*
> *(a) the number of the party's candidates elected to be members of the body who share a protected characteristic, and*
> *(b) the number of the party's candidates so elected who do not share that characteristic.*

10. Waksman J explained that the only sensible interpretation of subsection (4) was that it required one to look at the inequality between the number of the party's candidates elected, meaning (a) those who have been elected to be members of a body who share a protected characteristic, and (b) those so elected, again who have also been elected but who do not share that characteristic. Accordingly, Waksman J concluded that the focus of any consideration for the purpose of section 104(3) and (4) had to be the single woman member of the European Parliament who represents the Liberal Democrats.

11. Undertaking that consideration, Waksman J held that (at para 49):

What [the paragraph of the Protocol] has done is to give the advantage of zipping to a member of one protected group - in this case, BAME - which would obviously have the effect of disadvantaging a member of another protected group precisely because they have not been zipped. In other words, one is advantaging one protected group at the expense of another. In those circumstances, I cannot see how that can be regarded as a proportionate response.

12. Accordingly, the Claimant's claim failed. Waksman J acknowledged that, whilst the protocol had been put in place out of a desire in overall terms to tackle a problem of under-representation, the paragraph of the Protocol relied upon by the Claimant was unlawful.

C. VOTER IDENTIFICATION

***R. (on the application of Coughlan) v Minister for the Cabinet Office* [2019] EWHC 641 (Admin) (20 March 2019)**

Background

13. The Claimant applied for judicial review of the Respondent's decision to introduce a voter identification scheme as a pilot project for the 2019 local government elections in 10 local authority areas. Under the scheme, voters would be required to present identification documents in order to obtain their ballot papers. Accepted identification documents included a passport, a photocard driving licence, various financial documents, a utility bill, birth certificate and a marriage certificate.

14. The purpose of the scheme was stated to be to facilitate voting and reduce the risk of voter fraud. The Claimant, a councillor within one of the pilot local authority areas, was concerned that the requirements of the scheme would "*further disenfranchise the poor and vulnerable who already struggle to have their voices heard*". However,

Supperstone J made clear that the merits of voter identification was not in issue in the judicial review claim.[3]

15. Section 10 of the 2000 Act empowered the Respondent to make orders in respect of approved pilot schemes for voting in local government elections. Insofar as relevant, this power was circumscribed to instigate schemes, pursuant to section 10(2)(a), which make, 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 when, where and how voting at the elections is to take place.

16. Supperstone J therefore summarised the central question as being:

> *whether the voter ID pilots are schemes within the meaning of s.10(2)(a) [of the 2000 Act] , that is, whether they are schemes for testing "how voting… is to take place". The Claimant contends that the requirement to produce voter ID does not concern "how" voting takes place, but whether voting is permitted to take place at all. The Defendant contends that the pilot schemes do fall within the scope of s.10(2)(a). They make provision differing in a relevant respect from that contained in secondary legislation made "under or by virtue of the Representation of the People Acts as regards … how voting at the elections is to take place". The Defendant contends the words Parliament used include procedures for demonstrating an entitlement to vote as part of the voting process, including a requirement to prove identity. Current procedures permit entitlement to vote to be demonstrated through questioning.*[4]

Proper interpretation of section 10(2)(a) of the 2000 Act

17. The Claimant's case was essentially that, in making the pilot scheme orders, the Defendant acted *ultra vires*. This was for two reasons: first, on the basis of an argument as to the proper statutory construction of section 10(2)(a) of the 2000 Act, the orders were not within the meaning of "*provision differing… from that made under or by virtue of the Representation of the People Acts as regards… how voting at the*

[3] At paragraphs to 31, Supperstone J does however provide a comprehensive summary of the background to, and evidence supporting, the voter identification pilot.

[4] [2019] EWHC 641 (Admin), para 4.

elections is to take place". The Claimant submitted that the requirement to produce voter ID does not concern "how" voting is to take place, but "whether" voting can take place at all.

18. Supperstone J rejected this argument, concluding that on their natural and ordinary meaning the words "*how voting at elections is to take place*" are broad enough to encompass procedures for demonstrating an entitlement to vote, including by proving identity, as part of a voting process. Supperstone J considered that, had Parliament intended to confine the provision to refer to the physical mechanism by which an individual vote is cast, it could have made that clear.

Were the pilots contrary to the statutory purpose of section 10?

19. Second, the Claimant further argued that they are contrary to the statutory purpose of section 10 which is to "facilitate" and "encourage" voting at elections. Observing that the power to instigate pilot schemes under section 10(1) of the 2000 Act was to allow proposed changes to local government electoral procedures from time to time existing to be tested, Supperstone J considered that the discretion conferred on the Minister by s.10(1) has not been exercised in a way that would frustrate the legislation's purpose. Supperstone J accepted, *inter alia,* the Defendant's following arguments:

    a. Parliament did not specify in express terms the purposes for which the power under s.10(1) can be exercised, and the language used therein is permissive.

    b. Section 10(2)(b) of the 2000 Act makes clear that the section 10(1) power can be exercised for purposes other than facilitating and encouraging voters to vote at elections. It can be exercised to order a scheme as to how votes cast at the elections are to be counted.

    c. The section 10(1) power allows amendments to be made to local government election rules from time to time existing. The power was intended to operate to take account of developments in the future. That being so, a court should be slow to infer that the power is only intended to address a single specific concern existing at the time of its enactment.

20. Further and in any event, SUpperstone J held that even if the Claimant has correctly identified the purpose of the s.10(1) power as being to facilitate and encourage voting at an election, that purpose must be subject to two qualifications:

> *First, the voting that is to be facilitated and encouraged must be lawful voting by persons entitled to vote. Second, the purpose cannot be limited to pilot schemes that will facilitate or encourage voting at local government elections on the first occasion on which they are tested, rather they must lead to changes in electoral procedure that encourage voting over the longer term.*[5]

Restricting the constitutional right to vote?

21. In addition, the Claimant had sought in written submissions to contend that a fundamental constitutional right to vote was being restricted, the implications of which needed to be squarely confronted by Parliament.[6] However, this was not pressed in oral submissions, and Supperstone J indicated that he was not persuaded it was invoked in the circumstances. Supperstone J expressly left open for future determination the question as to whether the constitutional right to vote in national elections (and referenda) extends to local elections.

Conclusion

22. Accordingly, the Claimant's judicial review claim was dismissed.

D. VOTER ASSISTANCE DEVICE NOT FIT FOR (ITS LEGISLATIVE) PURPOSE

***R. (on the application of Andrews) v Minister for the Cabinet Office* [2019] EWHC 1126 (Admin) (3 May 2019)**

Overview

23. The Claimant suffers from myopic macular degeneration, and has been registered blind since 2000. She issued judicial review proceedings contending that the Representation of the People (England and Wales) Regulations 2001 ("the 2001

[5] [2019] EWHC 641 (Admin), para 82.

[6] *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, per Lord Bingham at para 25 and Lord Rodger at paras 61 and 62).

Regulations"), made under Rule 29(3A) of Schedule 1 to the Representation of the People Act 1983 ("the 1983 Act"), have failed to achieve the purpose of prescribing the use of a device that enables blind and partially sighted voters to vote without assistance.

24. The Claimant's judicial review was successful. Swift J issued declaratory relief in respect of regulation 12 of the 2001 Regulations, on the basis that the tactile voting device for blind and partially-sighted voters[7] it described did not enable voting without assistance as required by Rule 29(3A)(b) of schedule 1 to the 1983 Act.

Legislative background

25. Rule 29(3A)(b) of schedule 1 to the 1983 Act provides:

> *(3A) The returning officer shall also provide each polling station with –*
> *(a) at least one large version of the ballot paper which shall be displayed inside the polling station for the assistance of voters who are partially-sighted; and*
> *(b) a device of such description which may be prescribed for enabling voters who are blind or partially-sighted to vote without any need for assistance from the presiding officer or any companion (within the meaning rule 39 (1)).*[8]

26. As summarised by Swift J, the matter in issue in the claim was the scope of the power at Rule 29(3A)(b) to prescribe a device "*…for enabling voters who are blind or partially-sighted to vote without any need for assistance from the presiding officer or any companion*".[9]

27. This power was exercised by regulation 12 of the 2001 Regulations, which provides for a device known as the Tactile Voting Device ("TVD"), as follows:

> ***12.— Device referred to in rule 29(3A)(b) of parliamentary elections rules***

[7] I adopt Swift J's short hand reference to "blind voters" rather than "blind and partially-sighted voters" for clarity of expression (as at para 3 of his judgment).

[8] Rule 29(3A) was inserted into the Rules by section 13(2) of the Representation of the People Act 2000 ("the RPA 2000") with effect from 16 February 2001.

[9] [2019] EWHC 1126 (Admin), para 8.

(1) The device referred to in rule 29(3A)(b) of the rules in Schedule 1 to the 1983 Act shall be of the description set out in this regulation.

(2) The device must be capable of being attached firmly to a ballot paper and of being removed from it after use without damage to the paper.

(3) On the right-hand side of the device there shall be tabs of equal size which satisfy the conditions in paragraphs (4) to (7) below.

(4) The tabs shall be capable of being positioned on the ballot paper so that each one is above one of the spaces to the right of the particulars of the candidates on which the vote is to be marked ("the relevant space").

(5) Each tab shall be numbered so that, when the device is positioned over a ballot paper, the number of each tab corresponds to that of the candidate whose particulars are to the left of the relevant space covered by the tab in question.

(6) Each number on a tab shall be in raised form so that it can be clearly identified by touch.

(7) Each tab shall be capable of being lifted so as to reveal the relevant space and so that there is sufficient room to allow a voter to mark a cross on that space.[10]

28. Pursuant to regulation 12, and as described by Swift J, the TVD is made from a sheet of transparent plastic which is as long as the ballot paper, and is placed on top of the ballot paper. On the right-hand side of the TVD are flaps, numbered from 1 at the top and so on down the page, so that the number of flaps corresponds to the number of candidates standing in the constituency. The number printed on each flap is raised so that it can be felt by touch, and adjacent to each flap, the flap number is printed in Braille, to assist those who are blind and Braillists. However, and critically, no other information is present on the TVD. This means that there is no way using the TVD alone, that a blind person can know the name of the candidate, or the name of the party the candidate represents. As such, the TVD will only enable a blind person to vote without assistance from another person, if she has memorised the order of candidates on the ballot paper either before she went to the polling station or while she was there.

[10] [2019] EWHC 1126 (Admin), paras 8 to 9.

Swift J's conclusions

29. This, the Claimant argued, was not realistic.[11] Unless she has assistance from the Presiding Officer, or a companion, she is not able to mark her ballot paper against the name of the candidate she wishes to vote for. In practice, she stated she was denied the opportunity to cast her ballot in secret.

30. Swift J clarified that section 66 of the 1983 Act protected the secrecy of her ballot by conferring obligations on Returning Officers, Presiding Officers and others (including, for example, companions) to maintain the secrecy of the vote of any person they have assisted. However, Swift J acknowledged that the Claimant would not be able to exercise her right to vote effectively without having to tell another person providing assistance, who she wishes to vote for.

31. Accordingly, Swift J accepted the Claimant's argument that the TVD does not comply with the requirements of Rule 29(3A) because it is not a device that enables her to vote '*without any need for assistance from the presiding officer or any companion*.' In order to meet this requirement, the TVD would, as a minimum, need to have, row by row down the ballot, the name and party name of each candidate written in raised writing or in Braille.

32. Swift J was not persuaded by the Respondent's position that any construction of Rule 29(3A) must focus on what it is the device must enable the blind voter to do without assistance – namely "to vote". The submission made was that, on a proper construction of the Rules, voting means marking a ballot paper, which the TVD does allow a blind voter to do without assistance because the flaps on the right-hand side shows where the mark is to be made; and a valid mark made under any of those flaps will be a valid vote in that for the purposes of Rule 47(2), it would show an intention to vote for one or the other of the candidates.

[11] Swift J related the Claimant's argument that in the 2017 general election there were 6 candidates in the constituency she voted in; at a by-election in 2009 there were 12 candidates. The position becomes even more complicated if more than one election takes place on the same day. The Claimant gives the example of May 2015 when Parish Council, District Council and Parliamentary elections all took place on the same day (see para 10).

33. Swift J did not accept the proposition that voting only means marking a ballot paper.[12] In so concluding, he took a different view on the meaning of 'voting' than that taken by Hickinbottom J in *R (Kolendowicz) v Proper Officer of the Greater London Authority* (CO/1672/2016) in refusing permission for judicial review on the papers in a different context. Swift J considered (at paras 20 and 22) that:

> *A description of voting only in terms of marking a ballot paper focuses on the physical act but pays no intention at all to the purposes of the act, namely for the voter to state her preferred candidate. I do not consider it possible to separate the act from its purpose…*
> *Voting under the rules means marking a ballot paper so as to indicate an intention to vote for one or other candidate.*

34. As such, and in strong terms, Swift J held that (at para 22):

> *A device that does no more than enable blind voters to identify where on a ballot paper the cross can be marked, without being able to distinguish one candidate from another, does not in any realistic sense enable that person to vote. Enabling a blind voter to mark ballot papers without being able to know which candidate she is voting for, is a parody of the electoral process established under the Rules.*

35. The present TVD was deemed not to be a device within the scope of the Rule 29(3A) power. It does not enable blind voters to vote '*without any need for assistance'* because it does not assist the blind voter when it comes to marking her vote against the candidate of her choice.

36. Accordingly, Swift J granted the Claimant the declaratory relief sought.

[12] Swift J referred to section 202(1) of the Representation of the People Act 1983, which rather unhelpfuly simply states that *'"voter" means a person voting at an election … and "vote" (whether noun or verb) shall be construed accordingly,…'* (see paras 18 to 20).

E. ELECTORAL PROCESS AND BREXIT

***R. (on the application of Wilson) v Prime Minister* [2019] EWCA Civ 304 (4 March 2019)**

Background

37. The Court of Appeal[13] refused permission to appeal against Ouseley J's judgment refusing permission to judicially review the Respondent's decision to notify the European Union ("EU") of the UK's intention to withdraw from the EU (dated 10 December 2018).

38. The Applicants contended that the Respondent's decision to notify, and the notification itself, were unlawful because they were based upon the result of a referendum that was itself unlawful as a result of corrupt and illegal electoral practices, notably offences of overspending committed by those involved in the campaign to leave the EU. It was further argued in the alternative that the Respondent erred in law in not responding to the subsequent evidence of those practices as it emerged.

39. Specifically, the Applicants' claim focused on alleged misconduct in the EU referendum by various permitted participants who campaigned for leaving the EU, notably the designated lead campaigner Vote Leave Limited ("Vote Leave"); another leave campaigner Leave.EU Limited ("Leave.EU"), its director Arron Banks and its campaign organiser Better for the Country Limited; and Darren Grimes as well as BeLeave, an unregistered campaigner with which Mr Grimes was associated. The essential alleged misconduct comprised of exceeding campaign spending limits and rules as prescribed by the Political Parties, Elections and Referendums Act 2000 ("the 2000 Act").[14]

40. The Court of Appeal observed that, when the withdrawal notice was given on 29 March 2017, the Electoral Commission had concluded two investigations into Vote Leave's spending, and found that there were no reasonable grounds to suspect that

[13] Hickinbottom LJ gave judgment, with which Haddon-Cave LJ concurred.
[14] [2019] EWCA Civ 304, para 14.

there had been any incorrect reporting of campaign donations or spending.[15] However, following the judicial review claim brought the Good Law Project, the Court of Appeal explained that the High Court held that certain payments Vote Leave had made in respect of campaign expenses incurred by Mr Grimes were referendum expenses incurred by Vote Leave and should therefore have been included in its expenses return, contrary to the Electoral Commission's prior advice to Vote Leave that these need not be included.[16] Following the commencement of the Good Law Project challenge, the Electoral Commission opened three investigations, which were described in the judgment as follows:

a. The first to report, on 11 May 2018, was an investigation into Leave.EU and its associates. As a non-designated campaigner, its spending limit was £700,000. It had reported spending of just under that figure. However, the Electoral Commission found that it had failed to include a minimum of £77,380 in its spending return being the fees it had paid Better for the Country as its campaign organiser, so that it had overspent by at least 10%. It identified a number of offences that appeared to have been committed by both Leave.EU and its responsible person, Ms Elizabeth Bilney. Those findings are currently the subject of an appeal to the County Court. The Electoral Commission also imposed a fine on Leave.EU of £77,000 for multiple breaches of electoral rules; and referred Ms Bilney and the campaign generally to the police for further investigation.

b. Second, the Electoral Commission reported on its further investigation into Vote Leave and its associates on 17 July 2018, which focused on payments made in June 2016 to a Canadian data analytics firm called Aggregate IQ which had been the focus of one of the original investigations. On a different basis from that looked at in the original investigation, it found that there had been a breach of the regulations. Vote Leave, as the designated campaigner, had a spending limit of £7m. The Electoral Commission's main finding was that all of Mr Grimes' and BeLeave's spending on referendum campaigning was

[15] The investigations concluded on 4 October 2016 and 21 March 2017 respectively. See [2019] EWCA Civ 304, para 16.

[16] *R (Good Law Project) v Electoral Commission* [2018] EWHC 2414 (Admin); [2019] 1 All ER 365. The Commission are currently seeking to appeal that decision. See [2019] EWCA Civ 304, para 17.

incurred under a common plan with Vote Leave, so that, for the purposes of Vote Leave's return, their spending should have been aggregated. The aggregate spend was just under £7,450,000. The Commission fined, amongst others, Vote Leave £61,000 and Mr Grimes £20,000.[17]

c. Third and finally, on 1 November 2018, the Electoral Commission published a further, short report confirming that it had reasonable grounds to suspect that Arron Banks (who was involved with Better for the Country), and Ms Bilney and others from Leave.EU and its associates had concealed the true details of various campaign financial transactions; and it had referred the matter and handed over the evidence to the National Crime Agency.[18]

The judicial review application

41. On 13 August 2018, the Applicants issued a judicial review claim, which contended that the decision to notify the EU was unlawful because of the conclusions of the Electoral Commission published in May and July 2018 (the first and second reports, above). The relief sought included orders quashing both the Respondent's decision to serve the notification and the notification itself (in addition to various other declarations).

Invalidity of the EU Referendum at Common Law

42. Hickinbottom LJ summarised the statutory scheme governing corrupt and illegal practices, and observed that Parliament did not prescribe any consequences for breaches of the donation and spending rules governing the EU referendum in the European Union Referendum Act 2015 ("the 2015 Act"). In particular, sections 159 and 164 of the 1983 Act, which provide respectively for the voiding of an election in the situations where, first, a candidate or their agent has personally been guilty of corrupt or illegal practices, and secondly, where there is general corruption so extensively infecting the election that it may be reasonably supposed to have affected the result, were not transcribed by the 2015 Act to apply in an equivalent manner to the EU referendum.[19]

[17] Hickinbottom LJ noted that Vote Leave has exercised its right to appeal to the County Court (at para 20).
[18] [2019] EWCA Civ 304, paras 19 to 21.
[19] [2019] EWCA Civ 304, paras 5 to 8.

43. As such, the Applicants contended, pursuant to their first ground, the referendum involved corrupt and illegal practices such that, had it been subject to the relevant provisions of the 1983 Act, it would have been void. The Applicants argued that the fact that there are no statutory consequences does not exclude or otherwise affect the jurisdiction of the court to apply long-established common law rules in such circumstances. In particular, the Applicants invoked a fundamental right to vote in accordance with "*the modalities of the expression of democracy*"[20], and contended that:

> *…in respect of a binding election, the common law considered that a vote was void if either (i) the candidate or his agents were guilty of any corrupt or illegal practice, or (ii) where there was no such guilt, but the corrupt or illegal practices committed in reference to an election to promote or procure the election of a candidate has so extensively prevailed that they may reasonably be supposed to have affected the result. The common law would not want for a remedy, and so, in an appropriate case, it must be open to a court of law to quash or declare a vote void.*[21]

44. The Applicants relied upon the following dicta of Lord Denning MR (as he then was) in *Morgan v Simpson* [1975] Q.B. 151:

> *I suggest that the law can be stated in these propositions:*
> *1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. That is shown by the Hackney case, 2 O'M. & H. 77, where two out of 19 polling stations were closed all day, and 5,000 voters were unable to vote.*
> *2 If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls - provided that it did not affect the result of the election. That is*

[20] Relying on *Moohan v Lord Advocate* [2014] UKSC 67; [2015] AC 901 per Lord Hodge JSC at para 34.
[21] [2019] EWCA Civ 304, para 28. The Applicants relied on, *inter alia, Ashby v White* (1703) 1 Smith's LC (13th ed) 253; 2 Ld Raym 938; 92 ER 126*, Faulkner v Elger and Newby* (1825) 4 B&C 449*, Bradford Case (No 2)* (1869) 1 O'M&H 35 ; 19 LT 723.

shown by the Islington case, 17 T.L.R. 210 , where 14 ballot papers were issued after 8 p.m.

3. But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls - and it did affect the result - then the election is vitiated. That is shown by Gunn v. Sharpe [1974] Q.B. 808, where the mistake in not stamping 102 ballot papers did affect the result.[22]

45. They argued that these requirements of the common law had simply been adopted and codified by Parliament, in a succession of Acts ending with the 1983 Act. The Applicants submitted that the common law still applied to non-binding votes such as the EU referendum not covered by that legislation. As such, they contended that the referendum failed to satisfy the first, or alternatively the second, of Lord Denning's three propositions.

46. The Court of Appeal rejected this ground, and considered it was unarguable. In particular, Hickinbottom LJ held that *Morgan v Simpson* does not provide any support for the proposition that the courts have a freestanding jurisdiction outside that granted by Parliament to set aside elections and referendums:

Far from it. As Lord Denning described in that case (at pages 161-2), before statutory intervention, polls were taken by open ballot; and any redress was not through the courts of law but through an election petition to Parliament. Petitions were first diverted to the High Court by the Parliamentary Elections Act 1868 , and various statutes starting with the Ballot Act 1872 (and including the 2015 Act) have set out the (very restricted) circumstances in which the courts can interfere with the results of elections and referendums...

…

In circumstances such as this – where, in paragraph 19 of schedule 3 to the 2015 Act, Parliament has set out the circumstances on which the court may interfere with the EU referendum result – there must a strong presumption

[22] [1975] Q.B. 151, 164. In their joint consultation paper, the Law Commissions of the UK observe that Lord Denning's restatement went further than the other two members of the Court of Appeal, but his formulation has proved to be authoritative: Law Commission, *Electoral Law: A Joint Consultation Paper,* LCCP 218, paras 13.29 to 13.30.

that it did not intend the court to interfere otherwise. In any event, where, as here, the vote is only advisory, and Parliament has retained ultimate control over the question of whether the UK leaves the EU, I am entirely unpersuaded that the courts have any residual common law power to interfere.[23]

Is there a free-standing common law power to vitiate the result of an electoral event?

47. Notwithstanding its rejection of this ground, Hickinbottom LJ expressly did not determine whether, absent power granted by Parliament, the court has a residual common law power to interfere in an election in any circumstances. Hickinbottom LJ did, however, consider this issue (albeit somewhat cursorily and strictly *obiter dicta*).

48. He considered that, on the hypothetical assumption that there was such a common law power, the criteria by which its scope is determined could not simply be read across from those adopted in an entirely different context by Parliament:

> *…the minimum requirement for the exercise of any common law power in this new context of non-binding referendums would be that any breach of rules is material. It would be inconceivable for the common law to adopt a principle that requires or even enables a court of law to interfere with the democratic process where any breach of the voting rules is proved but not such as to affect the result.*[24]

49. Hickinbottom LJ explained that there were two limbs to this 'materiality' threshold:

    d. First, before breaches could rationally be said to be material for the purposes of the court interfering with the democratic process, there must be certainty and finality in relation to the findings of misconduct. Hickinbottom LJ considered that, despite the Electoral Commissions' findings being made on the criminal standard of proof, other ongoing investigations meant that the facts were not fully and finally established.

[23] [2019] EWCA Civ 304, paras 34 and 36.
[24] [2019] EWCA Civ 304, para 37.

e. Secondly, and in any event, even if the breaches are taken at their highest, Hickinbottom LJ concluded that there was no evidential basis for the proposition that they are material in the sense that, had they not occurred, the result of the EU referendum would probably have been different.[25]

50. In any event, Hickinbottom LJ held that, even if there were a common law principle that a court of law could hold or declare a binding vote to be void if it fell within one of those two limbs, it could not be assumed that that principle can simply be transferred across from binding elections to non-binding votes. Hickinbottom LJ considered that *'an advisory referendum is a very different animal from a binding election*.'

The Respondent's decision to notify

51. By their second and third grounds, the Applicants essentially argued that the Respondent's decision to notify the EU of the UK's intention to withdraw could not be based on an unlawful referendum. The Court of Appeal also considered both these grounds were unarguable. Hickinbottom LJ concluded that the Respondent could not have erred in law in exercising the discretion given to her by Parliament in the 2017 Act to notify withdrawal from the EU on 29 March 2017, when she was unaware – and could not have been aware – of the illegalities that were discovered later. In any event, there was no evidence that any mistake as to the lawfulness of the referendum played a material part in the decision-maker's reasoning.

52. Notably, the Court of Appeal emphasised Ouseley J's observation that the Respondent's discretion to notify the EU of the UK's intention to withdraw is conferred by Parliament, through the 2017 Act. Hickinbottom LJ considered that the Respondent was therefore not required:

[25] [2019] EWCA Civ 304, paras 38 to 39. Hickinbottom LJ did not accept, as an evidential basis for the proposition that had there been none of the alleged breaches of the referendum rules then the result of the referendum would probably have been different, the following two factors: (i) the fact that the overspend of Vote Leave was about 8%, and (ii) the swing required to reverse the result was only about 600,000 votes. Ousely J had refused permission to rely on a report served late by the Applicants, written by Prof Philip Howard, dated 30 November 2018 (and its addendum dated 6 December 2018), which recorded his view that without the extra (unlawful) expenditure by the campaign to leave on digital advertising it is "very likely" that the EU referendum result would have been different.

to await the outcome of any and all future investigations into actual or potential irregularities in the EU referendum. The referendum was merely advisory; and it was up to those that it advised to consider whether, in all the circumstances, the EU referendum result was and continues to be sufficiently robust as to reflect the will of the people on the question of withdrawal from the EU…[26]

53. The Court of Appeal made clear that the withdrawal process was controlled by Parliament.[27] As such, Hickinbottom LJ explained that for the court to declare void the decision to notify withdrawal or the notification itself would '*clearly be a constitutionally inappropriate and unlawful interference in the due democratic process.'*[28]

Duty to respond to the developing evidence of illegality in the EU Referendum?

54. Finally, the Applicants fourth ground of challenge contended that the Respondent irrationally in failing to take any such steps and failing even to have any regard to the illegalities which have now been established. This was also rejected by the Court of Appeal as being unarguable.[29]

Conclusion

55. Hickinbottom LJ was concerned to emphasise, arguably unfairly given the seriousness of the findings of the Electoral Commissions' investigations, that '*however it was sought to present the Applicants' grounds, at the heart of their case is an attack on the democratic process, i.e. on the referendum itself and its outcome*'. The Court of Appeal also reinforced the (somewhat trite) fundamental norm that judges would not engage in politics in the judicial review process.[30]

[26] [2019] EWCA Civ 304, paras 47 to 48.
[27] As affirmed by the Supreme Court in *R. (on the application of Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin).
[28] [2019] EWCA Civ 304, para 50.
[29] [2019] EWCA Civ 304, para 51 to 54.
[30] [2019] EWCA Civ 304, paras 55 to 56. Hickinbottom LJ referred to *R. (on the application of Webster) v Secretary of State for Exiting the European Union* [2018] EWHC 1543 (Admin), per Gross LJ at para 24, and *R (Hoareau and Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2019] EWHC 221 (Admin), per Singh LJ and Carr J at para 326.