



Case No: CO/3212/2019

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**DIVISIONAL COURT**

Neutral citation Number: [2021] EWHC 245 (Admin)

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 11/02/2021

**Before :**

**LORD JUSTICE LEWIS**  
**SIR MICHAEL SUPPERSTONE**

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**Between :**

**THE QUEEN on the application of**  
**(1) THE 3MILLION LIMITED**  
**(2) KATHRIN DAVIES**  
**(3) SUSANNE STAHL**  
**(4) FILOMENA MEROLA**  
**(5) NELLY ADA LA GRO**  
**(6) ANNA WALCZNYSKA**  
**(7) CHRISTIANE REE**

**Claimants**

**- and -**

**THE MINISTER FOR THE CABINET OFFICE**

**Defendant**

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**Gerry Facenna Q.C. Anneli Howard and Gayatri Sarathy (instructed by Bindmans LLP)**  
**for the Claimants**

**Clive Sheldon Q.C., Christopher Knight and Daniel Isenberg (instructed by the**  
**Government Legal Department) for the Defendant**

Hearing dates: 26 and 27 January 2021  
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**APPROVED JUDGMENT**

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Thursday, 11 February 2021.

**Lord Justice Lewis handed down the following judgment:**

INTRODUCTION

1. This is the judgment of the court.
2. This claim concerns the arrangements relating to the holding of the European Parliamentary elections on 23 May 2019. The first claimant is a company which campaigns for the rights of European Union nationals in the United Kingdom. The third to seventh claimants are individual European Union nationals resident in the United Kingdom. The second claimant has withdrawn from the proceedings.
3. The claimants submitted that the relevant domestic regulations and the arrangements governing the registration of EU nationals from Member States (other than Ireland, Cyprus and Malta) who wished to vote in the 2019 European Parliamentary elections violated directly effective rights conferred by EU law and Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”). They submitted that the arrangements gave rise to unlawful discrimination on grounds of nationality. They also seek a declaration that the defendant failed to comply with the public sector equality duty set out in section 149 of the Equality Act 2010 (“the 2010 Act”) to have due regard to specified equality matters when exercising his functions. The defendant, who is the Minister for the Cabinet Office, submitted that the relevant regulations, and the arrangements adopted in relation to the 2019 European Parliamentary elections, did not involve a breach of European Union law or the Convention and did not involve unlawful discrimination. We set out below the defendant’s position in respect of the public sector equality duty.
4. The claim was brought on 2 August 2019. The United Kingdom ceased to be a Member State of the European Union on 31 January 2020. This claim relates to events before that date. The United Kingdom Parliament has enacted provisions requiring the courts to deal with claims begun before the United Kingdom left the European Union but not completed at that date: see paragraph 39 of Schedule 8 to the European Union (Withdrawal) Act 2018 (“the 2018 Act”). Parliament, therefore, has determined that the courts have power to deal with claims such as the present claim. There is an issue as to whether parts of the claim are now academic or historic in that no purpose would be served by a court hearing those parts of the claim or granting a remedy. We deal with that question below.
5. This judgment sets out the legal framework governing the right to vote at elections for the European Parliament, the factual background, and then considers the four grounds of claim in turn.

THE LEGAL FRAMEWORK

*The EU Legal Framework*

6. Article 10 of the Treaty on European Union (“TEU”) recognises that the European Union is founded on the principle of representative democracy and that citizens are directly represented in the European Parliament. Article 10(3) provides that “Every

citizen shall be taken to have the right to participate in the democratic life of the Union.”

7. The Treaty on the Functioning of the European Union (“the TFEU”) makes further provision in connection with voting. Article 20 TFEU provides that every national of a Member State is a citizen of the European Union and has, amongst other things, the right to vote in local government elections and European Parliamentary elections in the Member State where they reside. Article 20 TFEU provides that these rights “shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder”. Article 22 TFEU also deals with the right to vote. Article 22(1) provides for the right of an EU national resident in another Member State to vote in local elections. Article 22(2) deals with European Parliamentary elections and provides, so far as material, that:

“2. Without prejudice to Article 223 and the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.”

8. The detailed arrangements are set out in Directive 93/109/EC laying down detailed arrangements on the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens residing in a Member State of which they are not nationals (“the Council Directive”). The recitals note that the right to vote is an instance of the application of the principle of non-discrimination between nationals and non-nationals. They note that the application of the relevant Treaty provisions “does not presuppose the harmonization of Member States’ electoral systems”. They note that the purpose is to ensure that persons can vote under the same conditions as nationals while taking care that the freedom is not abused by people voting in more than one country. They note that account must be taken of the fact that in certain Member States residents who are nationals of other Member States have the right to vote in elections to the national parliaments and certain provisions of the Council Directive would accordingly need to be dispensed with.

9. Chapter 1 of the Council Directive sets out general provisions. Article 3 provides so far as material that any person who is a citizen of the European Union and is not a national of the Member State of residence:

“shall have the right to vote and to stand as a candidate in elections to the European Parliament in the member State of residence unless deprived of those rights pursuant to Article 6 and 7”.

10. Article 4 of the Council Directive provides, so far as material, that:

“1. Community voters shall exercise their rights to vote either in the Member State of residence or in their home Member State. No person may vote more than once at the same election.”

11. Article 7 of the Council Directive provides that a Member State may check whether citizens of the EU who have expressed a wish to exercise their right to vote have not been deprived of the right to do so under the civil or criminal law of their home Member State. The Member State of residence may use the information provided in the declaration made by an EU national to obtain information from the home Member State which should normally provide information in good time. Article 8 provides that a voter exercises his right to vote in the Member State of residence if he expresses the wish to do so.
12. Chapter Two of the Council Directive is headed “Exercise of the Right to Vote and Stand as a Candidate”. Article 9 provides that:

*“Article 9*

1. Member States shall take the necessary measures to enable a Community voter who has expressed the wish for such to be entered on the electoral roll sufficiently in advance of polling day.

“2. In order to have his name entered on the electoral roll, a Community voter shall produce the same documents as a voter who is a national. He shall also produce a formal declaration stating:

- (a) his nationality and his address in the electoral territory of the Member State of residence;
- (b) where applicable, the locality or constituency in his home Member State on the electoral roll of which his name was last entered, and
- (c) that he will exercise his right to vote in the Member State of residence only.

3. The Member State of residence may also require a Community voter to:

- (a) state in his declaration under paragraph 2 that he has not been deprived of the right to vote in his home Member State;
- (b) produce a valid identity document, and
- (c) indicate the date from which he has been resident in that State or in another Member State.

4. Community voters who have been entered on the electoral roll shall remain thereon, under the same conditions as voters who are nationals, until such time as they request to be removed or until such time as they are removed automatically because they no longer satisfy the requirements for exercising the right to vote.”

13. Article 12 of the Council Directive provides that:

*“Article 12*

The Member State of residence shall inform Community voters and Community nationals entitled to stand as candidates in good time and in an appropriate manner of the conditions and detailed arrangements for the exercise of the right to vote and to stand as a candidate in elections in that State.

14. There is an obligation on Member States to exchange information to ensure the implementation of the provisions of Article 4 which prohibit a national voting in more than one Member State. Article 13 provides:

“Article 13

The Member State of residence shall inform Community voters and Community nationals of the conditions and detailed arrangements for the exercise of the right to vote and to stand as a candidate in elections in that State.”

15. Chapter Three deals with derogations and transitional provisions. The material provision is Article 14.2 which provides that:

“Where, on 1 February 1994, the laws of a Member State prescribe that the nationals of another Member State who reside there have the right to vote for the national parliament of that State and, for that purpose, may be entered on the electoral roll of that State under exactly the same conditions as national voters, the first Member State may, by way of derogation from this Directive, refrain from applying Articles 6 to 13 in respect of such nationals.”

16. The Charter of Fundamental Rights of the European Union recognises certain rights, freedoms and principles. Article 21 of the Charter prohibits discrimination on specified grounds including nationality. Article 39 of the Charter recognises the right of every EU citizen to vote at elections to the European Parliament in the Member State in which he or she resides under the same conditions as nationals of that state.

*The Domestic Legal Provisions*

17. The United Kingdom enacted provisions to provide for EU nationals resident in the United Kingdom to be able to vote in European Parliamentary elections. The principal provisions giving effect to the relevant Treaty provisions and the Council Directive were the Parliamentary Elections (Franchise of Relevant Citizens of the Union) Regulations 2001 (“the 2001 Regulations”). Section 8 of the European Parliamentary Elections Act 2002 provides that a person is entitled to vote at European Parliamentary elections if he or she is entitled to do so by virtue of the 2001 Regulations.
18. The 2001 Regulations deal with the entitlement to vote of “relevant citizens of the Union”. Those are defined as European Union citizens excluding Commonwealth citizens (Maltese and Cypriot citizens) and citizens of the Irish Republic. The 2001 Regulations deal, therefore, with those referred to as EU24 nationals.
19. Regulation 3 of the 2001 Regulations provides that a person is entitled to vote as an elector at a European Parliamentary election if he or she is registered in the register of relevant EU citizens entitled to vote at European Parliamentary elections. Electoral registration officers (who are the persons responsible for the registration of electors by virtue of section 8 of the Representation of the People Act 1983 (“the 1983 Act”)) are obliged to maintain such a register (see regulation 5(2)) of the 2001 Regulations.
20. A person is entitled to be registered in that register if he or she is resident in the United Kingdom and is of voting age, satisfies certain conditions, and the electoral registration officer has received in respect of him or her “an application and declaration made in accordance with regulation 6(1) and (2)”: see regulation 4 of the 2001 Regulations.

21. Regulation 6(1) provides for an application to be made by a relevant EU citizen for inclusion on the register. The application must be signed and dated and provide specified information such as the applicant's full name and address. Regulation 6(2) provides that:

“(2)An application under this regulation shall include a declaration stating –

- (a) the nationality of the applicant;
- (b) the applicant's address in the United Kingdom, if different from the address given under paragraph (1)(b) above;
- (c) where the applicant's name has been entered in a register of electors in a locality or constituency in the Member State of which he is a national, the name of the locality or constituency where, so far as he knows, his name was last so entered; and
- (d) that the applicant will exercise any right which he has to vote at European Parliamentary elections at such elections only in the United Kingdom during the period for which any entry in the register of electors made in pursuance of this application remains in force.”

22. In practice, there was one document, a European Parliament Voter Registration Form (often referred to as Form UC1 or, in Northern Ireland, an EC6 form) which is used to satisfy the requirements of regulation 6(1) and (2) of the 2001 Regulations. Three boxes need to be completed giving the person's name, address and age (that constitutes the application for entry on the register of European Parliamentary election voters) and one box contains the declaration that the person must complete. The information required to complete that box is confirmation of the person's current address, whether or not the person has been entered on a register of electors in his or her home state, and if so where, and a declaration, signed by the individual that “I will use my right to vote at the European Parliamentary election in the UK (and not in my home country) for so long as my name appears on the UK register of electors for the European Parliament”.

23. Regulation 10 of the 2001 Regulations deals with the period for which a person remains on the register after submitting the application and declaration. The regulation is headed “Removal of entries from the register” and provides so far as material:

“(1) A declaration under regulation 6(2) above may be cancelled at any time by the declarant.

(2) A relevant citizen of the Union registered in a register of electors maintained under regulation 5(2) above is entitled to remain so registered until –

(a) the end of the period of 12 months beginning with the date when the entry in the register first takes effect,

(b) the declaration under regulation 6(2) above is cancelled under paragraph (1) above,

(c) the citizen applies for his entry to be removed; or

(d) any entry made in respect of him in any other register of electors maintained under regulation 5(2) above takes effect,

whichever occurs first.

(3) Where the entitlement

of such a person to remain registered terminated by virtue of paragraph (2) above, the registration officer concerned shall remove the person's entry from the register, unless he is entitled to remain in pursuance of a further application and declaration under regulation 6(1).

.....”

24. The application and declaration forms had to have been returned to the electoral registration officer on or before 12 working days before the day of the European Parliamentary election as is the case with applications to be registered on the register for other elections. That requirement arises out of the operation of the provisions providing for applications for the inclusion of a person on a register, the time to be allowed for objections, and the period required for the alteration to the register to be published prior to the election: see sections 10ZC, 13, 13A and 13B of the Representation of the People Act 1983 and Regulations 27 to 31 of the Representation of the People (England and Wales) Regulations 2001, as applied to European Parliamentary elections by regulation 9 and the Schedule to the 2001 Regulations.
25. There is a separate register, and a separate registration process, for local government elections. UK nationals, other Commonwealth nationals and citizens of the Irish Republic and relevant EU citizens were entitled to vote in local government elections (see section 4 of the 1983 Act). An annual canvass is carried out by electoral registration officers to identify, amongst others, persons entitled to vote but not on the local government register. EU24 nationals were not required under EU or domestic law to make a declaration to vote at local government elections. Thus, there was no need to create an additional process whereby EU24 nationals had to submit a declaration as there was for European Parliamentary elections. The electoral registration officer is also obliged to combine the register of relevant EU citizens entitled to vote at European Parliamentary elections with other registers including the register of local government electors: see regulation 5(2) of the 2001 Regulations. In practice, the electoral registration officer produces one physical or electronic register with annotations showing in which elections a relevant EU citizen was entitled to vote – the letter “G” is entered against a person's name if the relevant EU citizen is entitled to vote in local government elections and “K” if he or she was entitled to vote both in local elections and European Parliamentary elections.
26. Section 69 of the Electoral Administration Act 2006 (“the 2006 Act”) provided, so far as material, that:
  - “(1) A local electoral officer must take such steps as he thinks appropriate to encourage the participation by electors in the electoral process in the area for which he acts.
  - (2) A local electoral registration officer must have regard to any guidance issued by the Electoral Commission for the purposes of this section”.
27. Electoral registration officers are entitled to recover any expenses properly incurred by them in the performance of their statutory functions from the local authorities that appointed them (see section 54 of the 1983 Act). In addition, the Secretary of State has a power to reimburse a registration officer in respect of any expenditure incurred under section 69 of the 2006 Act.

28. In addition, there is a statutory body, the Electoral Commission, created by section 1 of the Political Parties, Elections and Referendums Act 2000 (“the 2000 Act”). That is an independent body. Its functions include reporting on the administration of elections, and keeping under review and reporting on matters related to elections (see sections 5 and 6 of the 2000 Act). Section 13 of the 2000 Act provides, so far as material, that:

“(1) The Commission shall promote public awareness of-

(a) the current electoral systems in the United Kingdom and any pending such systems, together with matters connected with any such existing or pending systems as the Commission may determine.

.....

(4) The Commission shall perform their functions under subsection (1) in such manner as they think fit but may, in particular, do so by-

(a) carrying out programmes of education or information to promote public awareness of any of the matters mentioned in subsection (1); or

(b) making grants to other persons or bodies for the purposes of enabling them to carry out such programmes”

## THE FACTUAL BACKGROUND

### *European Parliamentary Elections*

29. Elections to the European Parliament are held in May every five years. Since the elections held in 1994, EU24 nationals resident in the United Kingdom have been entitled to vote either in the United Kingdom or in the state of which they are nationals in accordance with the 2001 Regulations described above. If they chose to vote in the United Kingdom they had to complete the application and make the declaration described above. The registration and declaration were valid only for 12 months. After that time, an EU24 national had to make a further application for registration on the register of electors for European Parliamentary elections and make a declaration in order to be able to vote. Any application and the declaration had to be received no later than 12 working days before the poll is held.
30. Guidance was given by the Electoral Commission to electoral registration officers indicating that the application and declaration form necessary to register to vote at European Parliamentary elections could be submitted at any time but would be of relevance only before a scheduled European Parliamentary election. It stated that electoral registration officers should send out copies of the relevant application form and declaration to those who indicated (in the annual canvass of voters or in an application to register for local elections) that they were an EU national. In practice, it seems, electoral registration officers in the different local authority areas did send out copies of application forms and declarations, usually well in advance of a scheduled election and, in many cases, followed that up with reminders in all the elections held up to and including the 2014 European Parliamentary election.

### *The 2014 European Parliamentary Elections*

31. In July 2014, the Electoral Commission reported on the 2014 European Parliamentary elections. It noted that on polling day it had received 74 complaints from EU nationals who had gone to their local polling station and found that they were not eligible to vote. It referred to its guidance that electoral registration officers should send out declaration forms and the websites available informing people of what steps to take. Despite that the Electoral Commission reported that it appeared that a significant number of EU nationals resident in the United Kingdom had not been able to vote here and, while the precise number could not be identified, it was unacceptable that administrative barriers prevented eligible voters from participating in elections. Later in the report, the Electoral Commission indicated that it would work with the United Kingdom government, electoral registration officers and representative organisations to identify what could be done to simplify administrative barriers. It would consider whether legislation should be changed so that in future elections EU nationals did not have to complete more than one electoral registration form.
32. The European Commission also raised various matters. They included the fact that some EU nationals did not receive the voter registration form that electoral registration officers were supposed to send out and in other cases forms were filled in but not processed by the authorities. The matters raised also included concerns that the government website and some local authority websites did not make it clear that two forms (an application to be placed on the register and the declaration) were required or that the declaration made for the 2009 election would not be valid for the 2014 election, and the authorities at polling stations did not respond adequately to complaints.
33. The Law Reform Commissions for the separate nations of the United Kingdom were, separately, reviewing the electoral system. They issued a joint consultation paper in 2014 expressing a provisional view that the declaration should last for so long as a voter was registered. They published an interim report in 2016. It noted the requirement for an EU national to make a declaration that he or she would vote only in the United Kingdom (in order to avoid them voting twice, in the United Kingdom and their home state). It expressed a provisional view that the declaration should last as long as the voter was registered or a maximum of five years. Its provisional view was that it was right that EU nationals be reminded of the need to choose where they wished to vote before each election and that the duration of the declaration need not to last longer than five years. We were told that they made no final recommendation as the withdrawal of the United Kingdom from the European Union meant there would be no further European Parliamentary elections held in the United Kingdom.
34. We were also shown a number of other e-mails and documents containing the view of individuals, or bodies on, or raising questions about, the appropriateness of particular aspects of the electoral arrangements. We have considered all the material referred to in writing and orally but we did not find that this material gave any real assistance in resolving the issues that arose as to the lawfulness of the regulations or the arrangements for the registration of voters for the 2019 European Parliamentary elections.
35. In about January 2016, officials at the Cabinet Office wrote to the Electoral Commission responding to requests to consider ways to integrate the registration process and the making of the declaration. The document made various points and identified possible changes which would require legislative changes, including

changes to the relevant statutory instruments. It asked for the views of the Electoral Commission and, in particular, the officials indicated that they needed a better sense of the scale of the problem before seeking the Minister's views. The Electoral Commission responded to the points raised and recommended exploring various options such as extending the validity of the declaration to five years, integrating the two step registration process into one, and asked whether consideration had been given to making the declaration form available at polling stations during the election.

Events from June 2016

36. On 23 June 2016, a referendum was held on the United Kingdom's membership of the European Union. A majority of those voting in the referendum supported the option that the United Kingdom should leave the European Union. On 15 July 2016, a new Prime Minister was appointed and a new administration formed. As Mr Lee, a senior civil servant in the Cabinet Office explains, no further work was carried out in relation to possible amendments to the 2001 Regulations. Officials, ministers and the Electoral Commission assumed that that work was now redundant or, at least, was not a priority given the need to make extensive preparations for the withdrawal of the United Kingdom. There was no formal decision to cease work on considering amendments. Rather there was a recognition by all involved that the allocation of time and resources on that work would not be justified.
37. On 29 March 2017, the Prime Minister notified the European Council of the intention of the United Kingdom to withdraw from the European Union pursuant to Article 50(2) of the TEU. There is provision in Article 50(2) for the negotiation and conclusion of a withdrawal agreement between the European Union and the Member State which has decided to withdraw. Article 50(3) provides that:

“The Treaties shall cease to apply to the State in question from the date of entry of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council in agreement with the Member State concerned, unanimously decide to extend this period.”
38. As a matter of EU law, therefore, the United Kingdom would have left the European Union on 29 March 2019, that is two months before the scheduled 2019 European Parliamentary elections, unless a withdrawal agreement was concluded providing for a different date or an extension was agreed. In addition, the United Kingdom was entitled to revoke its notification of intention to withdraw until either a withdrawal agreement entered into force or the two year period had expired: see *Case C-621/18 Wightman and others v Secretary of State for Exiting the European Union and others* [2019] Q.B. 199. The United Kingdom remained bound by the provisions of European Union law until the date on which it ceased to be a member. Any provision of EU law applicable to events during that period would therefore need to be complied with. But in terms of the context in which decisions and actions were taken by individuals and bodies within the United Kingdom, it is important to bear in mind that, from 29 March 2017, the position was that the United Kingdom would not be participating in the 2019 European Parliamentary elections unless a withdrawal agreement was reached or the two year withdrawal period extended (or the United Kingdom decided not to withdraw).

39. As a matter of United Kingdom law, royal assent was given to the 2018 Act on 26 June 2018. That provided that the European Communities Act 1972 – the means by which the United Kingdom gave effect to European Union law – was to be repealed on exit day which was defined as 11 p.m. on 29 March 2019. Again, once the provisions of the 2018 Act came into force, and unless they were amended, the United Kingdom would cease to have been a member of the European Union as a matter of United Kingdom law on 29 March 2019 and would not have participated in the 2019 European Parliamentary elections.
40. A draft withdrawal agreement was reached between the European Union and the United Kingdom on 28 November 2018. On 15 January 2019, the House of Commons resolved not to approve that draft agreement. On 12 March 2019, the House of Commons resolved not to approve an amended draft withdrawal agreement.
41. On 22 March 2019, the European Council and the United Kingdom agreed to extend the period for withdrawal to 22 May 2019 if a draft agreement was approved by the House of Commons or the 12 April 2019 if it were not. On 29 March 2019, the House of Commons resolved not to approve the draft withdrawal agreement.
42. On 8 April 2019, the defendant made the European Parliamentary Elections (Appointed Day of Poll) Order 2019 (“the Order”) which came into force on 10 April 2019. That Order fixed the date of the poll for election of Members of the European Parliament as 23 May 2019.
43. On 10 April 2019, the European Council and the United Kingdom agreed an extension of the period for withdrawal pursuant to Article 50(2) of the TEU to 31 October 2019, unless the 2019 European Parliamentary elections were not held in which case the extension would end on 31 May 2019 (the new European Parliament elected at the 2019 elections taking office on 1 June 2019).
44. On 7 May 2019, the Chancellor of the Duchy of Lancaster formally confirmed that the United Kingdom would take part in the European Parliamentary elections. The policy of the government prior to that date had been that the United Kingdom would not participate in those elections.
45. The European Council and the United Kingdom agreed a further extension of the withdrawal period in October 2019 to 31 January 2020. At various dates, the definition of exit day, in the 2018 Act was amended so that, ultimately, the United Kingdom ceased to be a member of the European Union at 11 p.m. on 31 January 2020.

*The Arrangements for the 2019 European Parliamentary elections*

46. In about September 2018, the Electoral Commission informed the defendant that it was proposing to advise electoral registration officers not to send copies of the application form and declaration necessary to vote at the European Parliamentary elections as they would normally do. Rather the Electoral Commission advised electoral registration officers to encourage EU nationals to register to vote in their own member state. It is understood that the Electoral Commission did send that advice to electoral registration officers. We have not heard evidence from the Electoral Commission. The obvious inference is that that advice was based on the fact

that it was then believed that the United Kingdom would leave the European Union before the elections were held and EU24 nationals who wished to vote in those elections would need to do so in their home state.

47. As events unfolded, it became increasingly likely that the United Kingdom might not ratify a withdrawal agreement and might have to seek an extension of the withdrawal period. If so, and if the United Kingdom remained a member of the European Union in May 2019, it would have to hold European Parliamentary elections. We were shown correspondence in March 2019 from a number of sources expressing concern about the ability successfully to hold a poll if necessary preparatory work was not undertaken soon.
48. On 4 April 2019, the Electoral Commission advised electoral registration officers that in previous years they had been advised to send the relevant declaration to EU nationals to assist them in understanding their options and to exercise their right to vote. It noted that there was as yet no order confirming the poll date and that electoral registration officers may wish to wait until the order was made before sending out declaration forms. It advised electoral registration officers that they “should look now at what preparatory steps you will need to take in order to be able to send the declaration forms out at short notice”. It recommended consideration of other methods of raising awareness of the requirements that EU nationals had to satisfy such as social media.
49. The order was made on 8 April 2019 and came into force on 10 April 2019. The material provided by the Electoral Commission and the claimants show that there were 2,185,614 EU nationals who were entered on the electoral register to vote at local elections. The material demonstrates that 2,423,563 copies of the relevant application and declaration were sent out by electoral registration officers in the period between about 5 April 2019 and 7 May 2019. The Electoral Commission had data which indicated that three-quarters of the forms had been sent for printing and dispatch by 18 April 2019 (although the exact date on which forms were in fact posted was not known).
50. In addition, the Electoral Commission website and a your vote matters website run by it explained that EU24 nationals who wished to vote in the European Parliamentary elections would need to register to vote and download a voter registration form and return it to the local registration officer by 7 May 2019. The website had a link to the form which could be downloaded. The central government website, gov.uk, also stated that EU citizens living in the UK would need to register to vote by 7 May 2019 and download and fill in the voter registration form (and provided a link to the your vote matters website where the form could be found) and send it to the local electoral registration officer.
51. Under the relevant regulations, applications for registration and declarations had to be received by midnight on 7 May 2019, that is 12 working days before the election was held on 23 May 2019. Ms Hawkins, who is involved with the first claimant organisation, states that there were a large number of reports on social media, and broadcast media, of EU24 nationals who had been unable to vote as they had not completed the relevant application form and declaration. The first claimant opened a survey on their website and asked a series of questions and received 797 responses from EU24 nationals who, for various reasons, wished to vote but were unable to do

so. Dr Jakub Jablonowski, who has been active within the first claimant organisation since July 2016 and has been its research associate since May 2019, has made two witness statements both of which were admitted in evidence. He is not an expert witness and his evidence was not admitted as expert evidence. He provides useful factual information. He also expresses his views, in his own language, on what he believes the figures show.

52. The second to seventh claimants have also given evidence as to what happened in their cases. This was done to illustrate the different categories of reasons for why EU24 nationals were unable to vote and in support of the claim for a general declaration that the regulations, and the arrangements for the election, involved breaches of EU law. The second claimant, as we have noted above, has now withdrawn from the proceedings. The remaining five individuals who were claimants did not seek in the claim form individual declarations, based on the facts of their case, that there had been breaches of EU law.
53. The third claimant, Ms Stahl, is a German national resident in the United Kingdom since April 2004. She responded to letters received from the local registration officer at Birmingham City Council. The last letter she received was in August 2018 and that did not deal with, or refer to, registration for the 2019 European Parliamentary elections. Ms Stahl was, it seems, entered on the register of electors for local government elections. On 13 May 2019 (after the last date for submitting an application and declaration for registration for the European Parliamentary elections) she learned that she needed to complete a separate declaration. By that stage it was too late to do so and she was unable to vote. The evidence obtained by Dr Jablonowski shows that, in the Birmingham City Council area where Ms Stahl lived, there were 36,170 EU24 nationals on the local government register and the electoral registration officer sent out 55,816 declaration forms. As Ms Stahl's evidence is that she did not receive one, the natural inference must be that, in her case, it either was not sent or for some reason was not delivered.
54. The fourth claimant, Ms Merola, is an Italian national who became resident in the United Kingdom in 1997. She was resident at the material time in the London Borough of Lambeth and voted in a number of local elections. In the past, Ms Merola had voted by post in the European Parliamentary elections in Italy but voted in the United Kingdom in the 2014 election. Ms Merola decided to vote in the United Kingdom in the 2019 election. She had heard that there were rules about registration. She went on to a central government website, the gov.uk website, and completed an online form. She received an e-mail in reply on 24 April 2019 stating that the application had been forwarded to the electoral registration officer who would send an e-mail about the application within 10 working days. On 6 May 2019, she learned from a friend that she had to complete an additional declaration. She went onto the Italian consulate website and saw the declaration form for the first time. It could not be completed online and had to be printed out, completed and signed. Ms Merola did not have a printer at home. She decided to go to the local town hall that afternoon, 6 May 2019, to sort out the necessary documentation. Unfortunately there was bad traffic and Ms Merola arrived after the town hall had closed. She telephoned the electoral office at Lambeth Town Hall on 7 May 2019 and was told that her name would appear on the register by 1 June 2019. Ms Merola explained that she wished to vote on 23 May 2019 and the official said that she could simply go to the polling

station and vote. Ms Merola says that it was a brief telephone call and neither she nor the official mentioned the declaration. Consequently, Ms Merola did not complete the declaration and, when she went to the polling station on 23 May 2019, she was unable to vote even though her name was on the register. Given that Ms Merola is an Italian national, the advice that Ms Merola says the electoral officer gave her was either wrong or incomplete (although the extent of the information provided by Ms Merola to the official, particularly about her nationality, is not clear). She did need to complete the signed declaration by midnight on 7 May 2019 and could not simply vote without doing so. Dr Jablonowski's evidence shows that there were 29,554 voters on the local government electoral register in Lambeth and the electoral registration officer sent out 58,928 copies of the declaration. Ms Merola does not refer to receiving any such declaration. We do not know the reason why. Given that it appears that she did not apply to be registered until 24 April 2019, it may be that the declaration form was not sent to her or, if sent, it may not have arrived or there may be some other reason why she did not receive the form.

55. The fifth claimant, Ms La Gro, is a Dutch national who came to the United Kingdom in 1981. She currently lives in the London Borough of Haringey. She had voted in the United Kingdom in the 2014 European Parliamentary elections and has retained a letter telling her to complete and return a form to enable her to do so. She does not have a copy of the form she completed but the likelihood is that it was the form with the application for registration and declaration. She did not know it had to be done repeatedly. On 20 April 2019, Ms La Gro applied online on the central government website, the gov.uk website, to register to vote. She received an e-mail saying that her application had been sent to the electoral registration officer at Haringey and she would be sent an e-mail or letter within 10 working days. On 13 May 2019, Ms La Gro was told over the telephone by an official that she could vote. In fact, as she had not completed the declaration she could not vote and, when she attended the polling station on 23 May 2019, she was unable to vote. Ms La Gro complained in writing about the procedures for registering to vote. From the response dated 20 June 2019, it appears that Ms La Gro was placed on the register for local elections. However, as she had not completed the declaration she was not marked as a person eligible to vote in the European Parliamentary elections. The response indicates that, on about 5 April 2019, Haringey commissioned printers to print copies of the declaration for the approximately 25,000 EU nationals on the local government register. Printing was, it seems, completed by 16 April 2019 and forms were then posted by first class mail. Dr Jablonowski's evidence confirms that there were 25,334 EU24 nationals on the local government register for Haringey and 25,334 forms were sent out. The response stated that it proved not to be possible to send declarations to persons who were last minute entries to the register. That may be why Ms La Gro did not receive a declaration form or there may be some other reason.
56. The sixth claimant, Ms Walczynska, is a national of Poland who took up residence in the United Kingdom in 2007. Ms Walczynska was entered on the register of local government electors and did vote in Luton and again in Bedford. She also voted in the 2014 European Parliamentary elections in 2014. She accepts that she must have completed the application form and declaration in order to do so but does not recall doing so. Ms Walczynska voted in the local elections on 9 May 2019. When she went to the polling station on 23 May 2019, her name appeared on the combined register as a person eligible to vote in local elections, but, as she had not completed the

declaration form for European Parliamentary elections, she was not marked as eligible to vote in European Parliamentary elections and so was not able to vote. As appears from Dr Jablonowski's evidence, Bedford had 11,023 EU24 nationals registered to vote at local elections but only sent out 127 declarations. The overwhelming likelihood is that the electoral registration officer simply did not send her a declaration form and Ms Walczynska did not learn from any other source that she needed to complete one (as she had done in 2014).

57. The seventh claimant, Ms Ree, is a German national who took up residence in the United Kingdom in 1996. Her local authority area in 2019 was Oxford City. Ms Ree was registered to vote at local elections. Ms Ree voted in the United Kingdom in the European Parliamentary elections in 2014. She accepts that she completed the application form and declaration in order to register to vote (and Oxford City Council has confirmed that she did) but does not recall doing so. In mid-April 2019, Ms Ree received a copy of the application and declaration form sent to her by the electoral registration officer for Oxford. She also received a second copy from another source. She completed the form. She did not want to risk returning it by post. She therefore hand delivered it to the Town Hall address provided on the letter and put it through the letterbox on about 26 April 2019. For some reason that the electoral registration officer has not been able to explain, the form was not taken to the electoral services office. Ms Ree was not therefore registered to vote in the European Parliamentary elections and, when she went to the polling station, she was unable to do so.
58. Following the election, the Electoral Commission prepared a report on the May 2019 European Parliamentary elections and an inquiry report on the voting registration process for EU citizens resident in the United Kingdom. Those showed that approximately 450,000, or approximately 21%, of the number of EU nationals who were included on the local government electoral register voted in the European Parliamentary elections on 23 May 2019. Of those, more than 400,000 were received in the weeks in the run up to the election. Approximately 1.7 million EU nationals who had previously registered to vote at local elections did not submit applications and declarations in time to be registered for the 2019 European Parliamentary election. The Electoral Commission considered it could not know how many of those may have wished to vote but did not submit the declaration in time. It considered that it was not possible to assess how many of these people opted to vote in the EU member state of which they were nationals or decided not to vote at all. Based on information which included 149 calls and e-mails made to the Electoral Commission, and 618 formal complaints, the Electoral Commission concluded that there were three main reasons why EU nationals were unable to vote. The most frequently cited concern was that the EU national was not aware of the need to complete an additional declaration. A smaller number of queries came from people who had found out about the requirement to submit the declaration but had been unable to submit it before the deadline. The third reason, cited by about a sixth of queries received, was that the EU national had submitted the declaration before the deadline but the electoral registration officer did not accept that they had done so. The Electoral Commission also said in this context that it was also likely that some EU nationals may have chosen to vote in their state of origin but had no figures. We would add that it is possible to envisage other reasons why EU nationals decided not to vote, or did not feel sufficiently motivated, to vote in the United Kingdom in the 2019 European Parliamentary elections given that the United Kingdom was intending to leave the

European Union and the members elected by United Kingdom constituencies would be unlikely to be members of the Parliament for any significant period.

59. We were invited to find that large numbers of EU24 voters wished to vote in the 2019 European Parliamentary elections and, at times it seemed, to infer from that fact alone that the defendant had breached relevant provisions of EU law. The claimants relied on cases indicating that material of the sort relied on here can, in appropriate circumstances, be sufficient to establish the relevant facts, drawing attention in particular to the judgment of Lord Reed in *R (Unison) v Lord Chancellor (Equality and Human Rights Commission intervening)* [2017] 3 W.L.R. 409 and Baroness Hale in *R (European Roma Rights Centre and others) v Immigration Officer at Prague Airport and others (United Nationals Commissioner for Refugees intervening)* [2005] 1 A.C. 1071. We accept that we can consider the material relied upon by the claimants. The question is what we are satisfied the material in fact demonstrates. It is likely that there were some EU24 nationals who wished to vote but were unable to do so. But we do not consider on evidence in this case that we can safely reach conclusions as to the number of EU24 nationals who wished to vote in the United Kingdom but were unable to do so because of the arrangements relating to the registration of voters that are the subject of complaint in this case (as opposed to EU24 nationals not voting for other reasons). Further, the fact that EU24 nationals wished to but were unable to vote does not, of itself, mean that there were widespread, or systemic, practices which were illegal. Whether or not the claimants are entitled to the declaration that they seek depends upon a careful consideration of the particular regulations, and the particular arrangements made to inform EU24 nationals of the registration requirements, and whether they were compatible with the relevant provisions of EU law applicable at the time.

### *The Proceedings*

60. The claimants issued proceedings on 2 August 2019. The second claimant, Ms Kathrin Davies, withdrew her claim. Permission to apply for judicial review was granted by Steyn J. on 20 December 2019. In her observations, the judge expressed the view that the claim was brought in time and in any event she would have extended the time for bringing the claim. No challenge has been made to those conclusions. We would note, however, that we are doubtful that this claim had been brought in time. CPR 54.5 requires claims to be brought promptly and in any event no later than 3 months after the date when the grounds for claim first arose. The test is promptness. Even assuming that the time ran from the date of the elections on 23 May 2019, we doubt that a claim filed on 2 August 2019, more than 2 months after that date, was brought promptly within the meaning of CPR 54.5. Furthermore, we note that in relation to the challenge to the 2001 Regulations, and possibly other matters, the time began to run from the date the 2001 Regulations were applied to the claimants. That may have been before 23 May 2019 (see *R (Badmus) v Secretary of State for the Home Department*) [2020] EWCA Civ 657 and the dicta in *R (Delve) v Secretary of State for Work and Pensions*) [2020] EWCA Civ 1199 at paragraphs 127 to 129). Even if the individual claimants did not realise that the 2001 Regulations applied to them, and that lack of knowledge justified an extension of time, they would have been required to act promptly after 23 May 2019 once they knew the position and could not assume that they would have three months to do so. In the event, it is not necessary to make decisions on these matters, and we did not receive submissions on

them, as it was accepted that the claimants were not prevented by delay from bringing this claim.

### THE CLAIM AND THE ISSUES

61. There are four grounds of challenge which are as follows. Ground 1 alleges that the defendant acted in breach of the directly enforceable rights of EU24 citizens contained in:
  - (1) Article 10 of the TEU, Articles 20(2)(b) and 22(2) of the TFEU and Article 39 of the Charter; and
  - (2) Articles 3, 8(1), 9(1), 9(4) and 12 of the Council Directive;
62. Ground 2 alleges that, in relation to the third to seventh claimants, the defendant acted in breach of Article 3 of the First Protocol to the Convention.
63. Ground 3 alleges that the defendant unlawfully discriminated against EU24 citizens and identifies the provisions allegedly breached under EU law, the Convention and the 2010 Act.
64. Ground 4 alleges that the defendant acted in breach of the public sector equality duty in failing to have due regard to the matters set out in section 149 of the 2010 Act “when planning and making arrangements for the 2019 election”: see paragraph 10(4) of the claim form.
65. It is clear from the way that grounds 1 and 3 are set out in the claim form that the claim is concerned with whether the arrangements in place for the 2019 European Parliamentary elections were unlawful so far as EU24 nationals generally are concerned. That is confirmed by the first two declarations sought in the section of the statement of facts and grounds that identify the remedies the claimants are seeking. The first remedy identified at paragraph 130(1) of the claim form was a declaration that certain specified features “rendered the Defendant’s system for registration of EU 24 citizens to vote in the 2019 elections unlawful”. In the event, as was confirmed expressly by counsel for the claimants at the hearing, the claimants were no longer seeking a declaration in those terms. The second remedy sought in paragraph 130(2) of the claim form (and the claimants’ skeleton argument) was a declaration that the “systemic disenfranchisement of EU 24 citizens during the 2019 elections” violated certain specific provisions of EU law and domestic law (and contravened, in respect of the individual claimants, Article 3 of the First Protocol to the Convention). The claimants produced a further version of the proposed declaration during the hearing which removed the reference to “systemic disenfranchisement” and would declare that the “arrangements for EU 24 citizens (including the Third to Seventh claimants) to vote in the 2019 elections” contravened the directly effective rights of EU24 nationals, including the third to seventh claimants, which were set out in certain specified provisions of EU law and domestic law and the rights of the third to seventh claimants under the Convention. So far as the individual claimants are concerned therefore, if any illegality is established, and if a declaration is granted in relation to EU24 nationals, they will fall within it as they are EU24 nationals. We did not understand from the terms of the declaration produced during the hearing (or indeed from the oral submissions of counsel for the claimants) that the individual claimants were seeking declarations based on the particular facts of their case (as opposed to the

arrangements in place and applicable to EU24 nationals generally). In the event, we do not consider that anything turns on the difference between the declaration as claimed in the claim form and the written skeleton argument and that produced at the end of the first day of the hearing.

66. There is a claim for *Francovich* damages for pecuniary and non-pecuniary loss, that is, a claim for damages arising out of a sufficiently serious breach of EU law causing loss. There are claims for damages under section 8(2) of the Human Rights Act for breach of Article 3 of the First Protocol to the Convention and for breach of section 29 of the 2010 Act. The parties were, unfortunately, not able to deal with the damages claims at the hearing.

THE FIRST ISSUE – THE COMPATIBILITY OF THE ARRANGEMENTS FOR THE 2019 EUROPEAN PARLIAMENTARY ELECTION WITH EU LAW (GROUND 1)

67. Mr Facenna Q.C. with Ms Howard and Ms Sarathy, for the claimants submitted that the defendant failed to take the steps necessary to give effect to the provisions of the Council Directive and failed to take appropriate measures to facilitate the effective exercise by EU24 nationals of their right to vote in the United Kingdom at the 2019 European Parliamentary elections. In general terms, he submitted that there were deficiencies in the relevant legislation which the defendant knew of but failed to rectify. The defendant is also alleged to have failed to make appropriate and timely contingency arrangements for holding the election and ensuring that those who wished to do so would be able to register to vote. He submitted that those failures by the defendant resulted in many EU24 nationals who wished to vote being unable to do so.
68. The specific disproportionate requirements and acts or failures of the defendant leading to that situation were itemised in paragraph 103 of the claim form and paragraph 90 of the claimants' written skeleton argument. They included criticisms of the relevant legislation including, in particular, the fact that declarations were valid for only 12 months and EU24 nationals were removed from the electoral register automatically at the end of that period and the requirement to submit applications for registration and declarations no later than 12 working days before the poll. He submitted that the practice of maintaining declaration forms as an additional form separate from voter registration, the failure to enable declarations to be completed and submitted online, and the decision to delay confirmation that the United Kingdom would participate in the 2019 European Parliamentary elections until 7 May 2019 (the last day for electoral registration officers to receive declarations) were all individually or cumulatively factors contributing to the unlawful failure to ensure that EU24 nationals were able to vote. He further submitted that the failure to require the distribution of declaration forms to all EU24 nationals sufficiently in advance of the 7 May 2019 deadline for submission, and the failure to provide clear, transparent and comprehensive information on the procedures for registration were unlawful. He also submitted that the failure to permit arrangements for electoral registration officers to accept declarations after the 7 May 2019 deadline, including arrangements for individuals to complete them in person at the polling station on the day of the election and the failure to ensure that the system had sufficient flexibility to take discretionary measures to facilitate the right to vote were unlawful.

69. He submitted that the defendant was unable to demonstrate that the provisions of the 2001 Regulations, and in particular those limiting the validity of the declaration to 12 months, were proportionate. The defendant, it was said, was unable to show that the provisions pursued a legitimate aim. Nor could he show that those provisions were necessary and suitable for achieving any legitimate aim or to demonstrate that they struck a fair balance. Consequently, he submitted, the defendant had failed to establish that the domestic implementing regulations were proportionate.
70. Mr Sheldon Q.C., with Mr Knight and Mr Isenberg, for the defendant, submitted that the relevant regulations were compliant with the provisions of EU law and were not onerous and were easy for individuals to satisfy. The first issue was whether the particular provisions of the 2001 Regulations lawfully implemented the Council Directive. He submitted that, on analysis, they did. In those circumstances, the defendant could demonstrate they pursued a legitimate aim, recognised by EU law, and were suitable and reasonably necessary to achieve that aim and struck a fair balance. The second issue concerned the adequacy of the arrangements for informing EU24 nationals of the relevant requirements. In that regard, the statutory bodies concerned, namely the electoral registration officers and the Electoral Commission, had specific functions. In assessing their actions, it was appropriate to bear in mind the context in which they were operating, namely that until early 2019 it was not anticipated that the United Kingdom would be participating in the 2019 European Parliamentary elections. While there may have been cases where individuals did not know of the relevant requirements or electoral registration officers did not adequately perform their functions, there was no systemic or generalised failure to ensure that EU24 nationals were able to exercise their right to vote.

*Discussion*

71. First, in order to deal with ground 1, it is necessary to consider the specific respects in which it is said that particular provisions of the 2001 Regulations and other statutory provisions breached provisions of EU law including, in particular, the Council Directive. Secondly, it is necessary to consider whether the other specific alleged failures on the part of the defendant are established and, if so, whether they did give rise to a situation where EU24 nationals were unable to exercise their right to vote.
72. The provisions principally under challenge are those which provide that a declaration is valid only for 12 months and voters will not be entitled to remain on the register of relevant EU citizens eligible to vote after the expiry of that 12 month period unless they complete a further application and declaration. Those requirements emerge from regulation 10(2) of the 2001 Regulations.
73. The starting point is an analysis of the Council Directive. The provisions of Chapter One deal with the existence of the right and the circumstances in which an EU national is to be taken as wishing to exercise the right. Article 3 provides that an EU national resident in a Member State of which he is not a national has a right to vote in that state if he satisfies the same conditions that the state of residence imposes on its own nationals in respect of eligibility to vote. So, where a state establishes conditions of eligibility such as attainment of a particular age or mental capacity, an EU national resident in that state must satisfy the same requirements in order to be eligible to vote. Article 8 provides that the voter exercises that right if he has expressed the wish to do so. Those provisions, therefore, define when a right exists to vote in the Member state

of residence (when an EU national meets the conditions for nationals of the Member State where he is residing) and when the EU national is to be taken as exercising that right rather than choosing to vote in his home state (that is, when the voter has expressed the wish to vote in the Member State of residence).

74. Chapter Two of the Council Directive deals with measures governing the exercise of the right to vote. Articles 9(1), (2) and (3) of the Council Directive require Member States to take the necessary measures to enable an EU national to be entered on the electoral roll sufficiently in advance of polling day. It provides that an individual must produce the same documents as a voter who is a national of a Member State. Article 9(2) provides that the individual “shall also produce a formal declaration” providing certain information and declaring that he will only vote in the Member State of residence. The Council Directive therefore envisages that there will be an additional requirement for EU nationals to be entered on the electoral roll. That reflects the requirement to ensure that an EU national resident in another state does not vote both in his home state and in his state of residence. Furthermore, the provisions of Article 9(1) to (3) are not concerned with fixing limits on the duration of a declaration. They are concerned with ensuring that a voter is able to be entered on the register sufficiently in advance of polling day so that he will be able to vote. There is nothing to suggest that a declaration, once made, must remain valid as a matter of EU law for so long as a person wishes to be registered. There is nothing to suggest, for example, that a declaration must remain valid for a period of time covering more than one European Parliamentary election. The Council Directive simply requires Member States to take steps to ensure that a person can be entered on the register before polling day and that the documentation is limited to that required of a national of a state and also and additionally the declaration. The duration of a declaration is, in principle, left to a Member State to determine.
75. In the case of the United Kingdom, a declaration is valid for 12 months. There is nothing in principle to suggest that a time-limited declaration of that nature was incompatible with Article 9(1) to (3) of the Directive. In reality, the real practical effect of the limit in regulation 10(2) of the 2001 Regulations was that a relevant EU citizen who wished to vote at a European Parliamentary election (which are held at fixed, five-yearly intervals) would need to ensure that he or she completed an application and declaration form in the 12 month period before an election. Such arrangements are compatible in principle with Article 9(1) to (3) of the Council Directive.
76. The claimants submitted that the provision for automatic removal under regulation 10(2) of the 2001 Regulations is incompatible with Article 9(4) of the Council Directive. That provides that relevant EU citizens shall remain on the electoral roll under the same conditions as voters who are nationals until such time as they request to be removed or until such time as they no longer satisfy the requirements for exercising the right to vote.
77. Article 9(4) of the Council Directive deals with three separate situations in which a relevant EU citizen may cease to remain on the electoral register. First, it is implicit that they must continue to satisfy the same conditions for voting as a national. Those are the conditions contemplated in Article 4. By way of example, if a Member State requires nationals to have mental capacity in order to be eligible to vote, and if an EU national resident in the state loses mental capacity, he does not have the right to

remain on the electoral roll. Secondly, if the EU national requests to be removed (for example, because he wishes to vote in his home state in future elections) he can be removed from the register. Thirdly, if the person no longer satisfies the requirements for exercising the right to vote he may be automatically removed. Thus if a Member State provides that a declaration is valid only for a period of time, and if an EU national has made a declaration and the period for which it is valid has expired, he can be removed from the register, unless he completes a further declaration. That, in truth, is what regulation 10(2) of the Regulations does. Once it is accepted that the declaration (which is a requirement for exercising the right to vote) may be valid only for a particular period, it necessarily follows that the fact that the declaration has expired means that the EU national does “no longer satisfy the requirements for exercising the right to vote”. The arrangements in regulation 10(2) of the 2001 Regulations are, therefore, compatible with Article 9(4) of the Council Directive.

78. We accept that the arrangements made by the United Kingdom to implement the Council Directive must be proportionate. The burden lies on the defendant to demonstrate that the arrangements are proportionate. The language used to describe the requirements or proportionality vary in the case law and depends to a significant extent on the context and, in reality, is often fact-specific. In general terms, and without purporting to provide an exhaustive definition, proportionality involves considering whether the particular defendant has demonstrated that the measure is intended to pursue a legitimate aim, that is, it is suitable to achieve that aim, that it is reasonably necessary and that the burdens imposed by the measure are disproportionate to the benefit to be achieved: see, generally, *R (Lumsdon) v Legal Services Board* [2016] A.C. 697, especially at paragraphs 23-24 and 33 to 34, and see, generally, *Lord Chancellor and another v McCloud and others* [2019] IRLR 477.
79. In the present case, a time limited declaration does seek to achieve a legitimate aim, namely, ensuring that an EU national does not vote in more than one Member State. The Council Directive itself provides that an EU national may not vote in more than one state. It allows Member States to require an EU national to make a declaration that he will only vote in the Member State where he resides. Requiring an EU national to make such a declaration periodically and, in particular, in the 12 months before the election is a suitable and reasonably necessary means of ensuring that he exercises his right only in one state, either where he resides or his home state, and does not vote in another state. That, in essence, is what regulation 10(2) achieves. By providing that a declaration is only valid for 12 months, it ensures that an individual must make a declaration in the 12 months before the election. That contributed to ensuring that there was no double-voting and did not, of itself, impose any undue or disproportionate burden on the individual who wished to vote in the United Kingdom.
80. The claimants also contend that the arrangements whereby applications to register and the declaration must be received 12 working days before the European Parliamentary election were unlawful. Those arrangements are compatible with the Council Directive. Article 9(1) which deals with the obligation on Member States to take the necessary measures to enable a person to exercise his vote contemplates that the measures will enable the individual to be placed on the electoral roll “sufficiently in advance of polling day”. Other provisions recognise that a Member State may require the declaration to be provided before polling day. Article 13 contemplates that Member States will provide information based on the information contained in the

declaration and will do so sufficiently in advance of polling day. Article 8 also contemplates that a Member State may notify the home state of the declaration to enable that state to verify if the person has been deprived of the right to vote under its civil or criminal law. The requirement that declarations are provided 12 working days before the European Parliamentary election is, therefore, compatible with the Council Directive.

81. The claimants do not suggest that these provisions were disproportionate. In any event, we are satisfied that the defendant has established that they were proportionate. They performed a legitimate objective, ensuring that registers were finally and publicly available before the election and, in addition, enabled the United Kingdom to perform its obligations under Article 13 of the Council Directive. They were suitable and reasonably necessary for those purposes. They did not impose an undue burden on the individual and the benefits of the arrangements outweighed any burdens.
82. Finally, in relation to the relevant regulations, the claimants contend that the failure by the defendant to permit or make arrangements for electoral registration officers or local returning officers to accept declarations sent after the deadline of 7 May 2019, or for declarations to be made in person at polling stations on the day of the poll, or to ensure that the system had sufficient flexibility for those officers to take discretionary action to facilitate the right to vote was unlawful. The short answer is that the 2001 Regulations provided a clear, comprehensive and acceptable framework governing voting at European Parliamentary elections. The absence of any discretionary provision to allow voters to enter their names on the register of relevant EU citizens eligible to vote at the European Parliamentary elections after 7 May 2019 was not unlawful. The Council Directive did not require that. A system of arranging for electors to apply for registration and submit their declaration by a fixed date 12 working days before the poll is compatible with the Council Directive. Indeed, the suggestion that people be able to submit their declaration at the polling station, or even shortly before the election, would not be consistent with Article 13 on the exchange of information and would be likely to deprive a Member State of the opportunity to carry out the checks permitted by Article 8 of the Council Directive. The approach adopted by the United Kingdom in this respect is the approach adopted in relation to the registration of other voters for other elections. There is nothing to indicate that the Council Directive required the United Kingdom to change this aspect of its electoral arrangements. Rather, the fifth recital to the Council Directive states that it does not presuppose harmonisation of Member States' electoral systems.
83. We have focussed on whether the relevant regulations and statutory provisions violated the provisions of the Council Directive. The claimants rely on the provisions of Article 10 of the TEU (for present purposes we assume, without deciding, that that article is sufficiently clear and precise to be capable of direct effect), Articles 20 and 22 of the TFEU and Article 39 of the Charter. The reality is that, if the arrangements comply with the detailed arrangements made by the Council Directive, and if the defendant has shown them to be proportionate, they will not (and did not in this case) involve any breach of those provisions.
84. The claimants make a number of further complaints about the conduct of the elections. They complain that the failure to enable the completion and submission of the declaration form online is a breach of various provisions of the Council Directive. First, the requirement that the form be completed and signed, and returned physically

(or, in appropriate circumstances, be scanned and returned by e-mail) does not begin to amount to any violation of EU law. The Council Directive does not require it. The use of a system of physical forms, and the absence of an online system, does not violate the right to vote as provided for by Articles 4 and 8 of the Directive, is not inconsistent with the provisions governing the exercise of the right in Article 9, and does not amount to a breach of the obligation on Member States to inform EU nationals of the detailed arrangements for voting. Nor does it amount to any violation of any provision of the TEU, the TFEU or the Charter.

85. The claimants submitted that the practice of maintaining a declaration form as an additional form which is entirely separate from voter registration was unlawful. Article 9(1) of the Council Directive provides that an EU national must provide the same documents as a national of the state where he resides in order to be entered on the electoral roll. Article 9(2) provides that an EU national “shall also produce a formal declaration”. That provision contemplates as a minimum that a declaration may be separate from the documents required to register although Member States could, if they wished, combine the two sets of documents (the material for voter registration and the declaration) in one document. There is nothing unlawful in the practices adopted by the United Kingdom in this respect. In particular, there is nothing unlawful in having one system of registration governing local elections, and, in addition, requiring individuals to make a separate additional declaration in order to be able to vote at European Parliamentary elections.
86. Next the claimants challenge the failure to require the distribution of forms to all EU24 nationals in advance of the 2019 election and the failure to provide clear, transparent and comprehensive information on the procedures for registration. These are said to violate Articles 9(1) and 12 of the Council Directive.
87. Article 9 requires Member States to take the necessary measures to enable an EU national who has registered the wish to vote to be entered on the electoral roll sufficiently in advance of the polling day. The United Kingdom did implement that provision. The 2001 Regulations provided for an electoral registration officer to maintain a register of electors entitled to vote at European Parliamentary elections and to enter on that register a person who has applied to be registered and who has provided the relevant declaration: see regulations 4, 5 and 6 of the 2001 Regulations.
88. So far as Article 12 is concerned that requires Member States to inform voters in good time and in an appropriate manner of the conditions and detailed arrangements for the exercise of the right to vote. First, statutory officers within the United Kingdom did take adequate steps to implement that obligation. Electoral registration officers were under an obligation to maintain registers of voters. They had statutory functions to promote participation in elections and a duty to have regard to guidance issued by the Electoral Commission. That latter body was itself under a duty to promote public awareness of current electoral systems.
89. Secondly, those statutory bodies did seek to inform voters in good time and in an appropriate manner of the conditions and detailed arrangements for voting at the 2019 European Parliamentary elections. Electoral registration officers were required to have taken steps to ensure that every person entitled to register at a local government election (which included EU24 nationals resident in the United Kingdom) was registered. The Electoral Commission had issued guidance to those officers that,

before any scheduled European Parliamentary election, they should send application and declaration forms to any local government elector who had indicated that they were EU nationals. On 4 April 2019, the Electoral Commission re-iterated that advice to electoral registration officers indicating that they may wish to wait for the poll to be confirmed before incurring the expense of doing so (the expense itself was a registration expense payable by the local authority) but they should make arrangements to send out the declaration forms at short notice. In fact, electoral registration officers did send out 2,423,563 declaration forms (there were 2,185,614 EU24 nationals who were registered to vote at local elections). On the evidence collated by Dr Jablonowski, there was one electoral registration officer of the 372 he had figures for who did not send out any declarations and a small number of electoral registration officers who sent out fewer declaration forms than the number of EU24 nationals registered on the register of local government electors. The Electoral Commission, in its post-election inquiry report noted that 2.4 million forms were sent out and the data it had indicated that more than three-quarters of forms had been sent for print and despatch by 18 April 2019 (although they may have been directly posted to electors after that date).

90. It was the case that the timetable for sending out declarations was a tight timetable, and was shorter than during previous elections. That was the result of the fact that the United Kingdom had given notification of its intention to leave the European Union and did not expect to participate in the 2019 European Parliamentary elections. As it became clear that the United Kingdom would still be a member of the European Union at the date of the elections the electoral registration officers, in accordance with the guidance given by the Electoral Commission, did take steps to inform those on the register of local government electors what steps they needed to take to be able to vote in the United Kingdom if they wished to do so. Electoral registration officers did send EU24 nationals registered to vote at local government elections copies of the relevant form in time to enable them to register to vote at the 2019 election.
91. There is also the possibility that EU24 nationals had not been entered on the register of local government electors for some reason or had arrived in the United Kingdom after that register had been compiled. The Electoral Commission website and the your vote matters website run by it explained that EU24 nationals who wished to vote in the European Parliamentary elections would need to register to vote and download a voter registration form and return it to the local registration officer by 7 May 2019. The website had a link to the form which could be downloaded. The central government website, gov.uk, also stated that EU citizens living in the UK would need to register to vote by 7 May 2019 and download and fill in the voter registration form (and provided a link to the your vote matters website where the form could be found) and send it to the local electoral registration officer. Those were appropriate means of informing EU24 nationals in the UK who were not registered as local government electors on what steps they needed to take if they wished to vote in the United Kingdom election. It would also provide appropriate information to those EU24 nationals on the register of local government electors who, for whatever reason, did not receive a copy of the declaration directly from their local registration officer.
92. Overall, we are satisfied from the evidence that the responsible statutory bodies did take steps to inform voters in good time, given the circumstances, and in an appropriate manner of the conditions and the detailed arrangements for voting. The

arrangements themselves were not onerous. There will, inevitably, have been individuals who did not see the websites or receive the form. There will have been cases when individual registration officers did not, or claimed they did not, receive the relevant forms in time or, for whatever reason, did not act on them. That, however, does not mean that there was any systemic, or general, failure to take sufficient steps to enable those who wished to vote to be able to do so. It does not on the evidence result in a failure to comply with Article 12 of the Council Directive.

93. The final point made by the claimants is that the government did not confirm that the United Kingdom government would be participating in the elections until 7 May 2019, the last day for the receipt of registration forms and declarations. This, however, is a misconceived argument. Either the arrangements made prior to the 7 May 2019 were sufficient to satisfy the requirements of Article 12 and EU law generally or they were not. For the reasons given above, they were sufficient. Anything said (or not said, for that matter) by the government on 7 May 2019 cannot have affected the question of whether the arrangements adopted prior to that date were lawful. The criticism also overlooks the fact that on 4 April 2019 the Electoral Commission had advised local registration officers to be ready to send out forms when the poll date was fixed and that occurred on 8 April 2019.
94. For the reasons given above, we do not consider that the regulations governing registration of relevant EU nationals, nor the arrangements in place for enabling them to do so, involved a systemic, or general, failure to comply with the Council Directive or relevant provisions of the TEU, the TFEU or the Charter or the principle of proportionality.

*Declaratory Relief*

95. Even if we had considered that there had been any breach, we would not have granted the declaration sought. Declarations are discretionary remedies. The court may decline to grant a remedy where the matter complained of is academic or would serve no practical purpose (although the court has a discretion in public law cases to deal with academic disputes where there is a good reason to do so: see generally *R v Secretary of State for the Home Department ex p. Salem* [1990] 1 AC 490).
96. We accept that the ability to exercise the right to vote is an important matter. However, on the facts of this case, it is clear that the issues raised under ground 1 are academic. The 2001 Regulations have been repealed. The United Kingdom left the European Union over a year ago on 31 January 2020. The United Kingdom will not participate in European Parliamentary elections in future. It no longer has any members in the European Parliament and those elected in the 23 May 2019 elections ceased to be members on 31 January 2020. There is no current or future issue to which the matters raised under ground 1 are relevant. They are, in truth, historic and the general declaration sought in relation to the treatment of EU24 nationals serves no practical purpose. For that additional, and separate reason, we would not have granted the declaration sought.

97. Mr Facenna submitted that the third to seventh claimants contend that they wished to vote at the 2019 European Parliamentary elections but they, and other EU24 nationals, were unable to do so. He submitted that the requirements imposed on EU24 citizens were excessive and resulted in the effective exclusion of the third to seventh claimants from voting and that was contrary to Article 3 of the First Protocol to the Convention. He relied upon the decisions in *Mathieu-Mohin v Belgium* (1987) 10 EHRR 1, *Hirst v United Kingdom (No. 2)* (2006) 42 EHRR, *Davydov v Russia* (2018) 67 EHRR 25 and *Aziz v Cyprus* (2005) 41 EHRR 11.
98. Mr Sheldon submitted that the Convention confers a wide margin of appreciation on contracting states, particularly in regard to the application of conditions governing the exercise of non-nationals to vote, as was apparent from *Benkaddour v France* App. Ao. 5/685/99. Nothing in the 2001 Regulations prevented the third to seventh claimants from participating in the 2019 European Parliamentary elections.

*Discussion*

99. Article 3 of the First Protocol to the Convention provides that:
- “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”
100. Section 6 of the Human Rights Act 1998 (“the 1998 Act”) provides that it is unlawful for a public authority, such as the defendant, to act in a way which is incompatible with a Convention rights.
101. The European Court of Human Rights has emphasised that the right to vote and to stand at elections is crucial to the establishment and maintenance of an effective and meaningful democracy. The Court has recognised that contracting states have a wide margin of discretion in this area and there “are numerous way of organising and running electoral systems” (*Hirst (No 2)* at paragraph 61). Nevertheless it is ultimately for the courts to satisfy themselves that the conditions “do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim and that the means employed are not disproportionate” (*Hirst (No 2)* at paragraph 62). The Court is particularly astute to consider departures from the principle of universal suffrage and the exclusions of groups or categories of the general population (*Hirst (No.2)* at paragraph 62). Indeed, three of the cases relied upon by the claimants involved such exclusions and are very different from the present case. *Matthieu* involved a limitation on membership of elected bodies on language grounds. *Aziz* concerned the exclusion of particular ethnic groups from the right to vote. *Hirst (No.2)* concerned the exclusion of a category of persons, convicted prisoners, from the right to vote. The fourth case relied upon by the claimants, *Davydov* concerns the process of investigating complaints of electoral fraud.
102. The arrangements in the present case do not begin to amount to an impermissible restriction on the rights guaranteed by Article 3 of the First Protocol. The arrangements did not restrict the right to vote to particular groups. Rather, they extended the right to vote in European Parliamentary elections to include all EU-nationals resident in the United Kingdom. EU24 nationals were required to vote only

once and had to choose between voting in their state of origin or state of residence. The relevant provisions requiring EU24 nationals to make a formal signed declaration stating where they would vote, and providing that the declaration was valid only for 12 months, and requiring the declaration to be received 12 days before the poll, pursue the legitimate aims of regulating the electoral process, ensuring that only those who are eligible to vote may do so, preventing double-voting and ensuring the timely preparation and publication of electoral registers. The measures are rational, proportionate measures for achieving those aims. They do not impose an onerous obligation on individuals. They simply have to complete the relevant forms giving their details and declaring that they will vote in the United Kingdom. They do not impair the very effectiveness of the right to vote. They do not undermine their essence or deprive the right of its essence. The measures are sensible, proportionate, means of organising the electoral process. As such, the regulations and provisions complained of do not violate Article 3 of the First Protocol.

103. It is clear from the pleadings and we understood had been confirmed in oral argument that the five individual claimants were not seeking declarations in their individual cases that there had been a breach of Article 3 of the First Protocol. Rather, they were claiming a general declaration that the rights of all EU24 nationals were violated and their individual cases were examples. That general declaration was sought by them, not by the first claimant which is a campaigning organisation, as only they had standing as victims under section 7 of the 1998 Act.
104. For completeness, however, we note that there is no basis on the material before us to grant individual declarations in relation to the five individual claimants. So far as they complain about the regulations governing the election, those regulations do not violate Article 3 of the First Protocol. So far as they are complaining about the facts of their cases, they do not demonstrate that this defendant acted incompatibly with Article 3. Two claimants knew of the requirement to complete a declaration and attempted to do so. One was unable to reach the town hall before it closed on the day before the deadline. One posted the declaration through the door of the town hall but the relevant staff of the local authority or the electoral registration officer did not process it. Those were not matters for which this defendant was responsible. Three did not know (or did not remember) that there was a requirement to complete a declaration. In fact, other statutory bodies did take steps to inform the public of the requirements. There was no breach of Article 3 of the First Protocol and, in any event, none that this defendant could be said to be responsible for.
105. The claim for a declaration in respect a breach of Article 3 of the First Protocol to the Convention therefore fails.

### THE THIRD ISSUE – UNLAWFUL DISCRIMINATION (GROUND 3)

106. Mr Facenna submitted that the arrangements for the election amounted to unlawful discrimination contrary to provisions of EU law, Article 14 of the Convention read with Article 3 of the First Protocol, and section 29 of the 2010 Act. He submitted that the appropriate comparison was between EU24 nationals and Irish, Cypriot and Maltese nationals, or with what were described in the written skeleton argument as “Dual resident UK/EU 24 nationals”. We understood that latter phrase to mean UK nationals who were dual residents and lived in the UK and in another EU member state. We understood counsel for the claimants to confirm at the hearing that that that

was what the phrase meant. Mr Facenna submitted that the former group of EU24 nationals had to complete a declaration which was time limited. The latter groups did not. He submitted that the defendant could not establish that the differential treatment was objectively justified. In submissions made after the draft judgment was circulated, counsel for the claimants submitted that what the phrase “Dual resident UK/EU24 nationals” was meant to refer to were persons who were dual nationals, that is persons who held UK nationality and the nationality of an EU Member State, who were able to vote in either the UK or their EU Member State without completing a declaration.

107. Mr Sheldon submitted that the appropriate groups for comparison were UK nationals, resident in another EU member state, who wanted to vote in the United Kingdom. He submitted that those UK nationals were treated in the same way as EU24 nationals in that they had to make a relevant declaration which was time limited. Further, the regulations were objectively justified as they sought to achieve a legitimate aim, namely the prevention of double voting or what he described as inadvertent disenfranchisement. So far as the 2010 Act was concerned, EU24 nationals were not in materially similar circumstances to the comparator groups and so there was no unlawful discrimination. Further, paragraph 1 of Schedule 23 to 2010 Act exempted on grounds of nationality discrimination anything done in pursuance of a statutory instrument. That included the requirement to make declarations which were time limited and to provide them 12 working days before the poll.

#### *Discussion*

108. In summary, discrimination on grounds of nationality for the purposes of the relevant provisions of EU law relied upon by the claimants arises where there is differential treatment on grounds of nationality between persons in materially similar or analogous circumstances and which the public body concerned cannot demonstrate is objectively justifiable.
109. In the present case, there is no unlawful discrimination between EU24 nationals and UK nationals resident in the United Kingdom, as the claimants accept. There is differential treatment. EU24 nationals resident in the United Kingdom must complete the declaration required under Article 9(2) of the Council Directive and regulation 6 of the 2001 Regulations. UK nationals resident in the UK do not. But those two groups are not in materially analogous or similar circumstances. EU24 nationals have a right to vote in their state of origin or the UK where they are resident. The declaration reflects the fact that they are required to declare where they will vote. UK nationals resident in the UK are in a materially different position. They can only vote in the United Kingdom. The declaration is therefore not legally or factually relevant to them. It is for that reason that the five individual claimants seek to compare themselves and other EU24 nationals with Irish, Maltese and Cypriot nationals resident in the UK who are not required to complete a declaration. The claimants seek to be treated in the same way that citizens of those three EU Member States are treated. Alternatively, they seek to compare themselves with UK nationals who are resident both in the UK and a Member State of the European Union.
110. Irish citizens, and Commonwealth citizens are not in a materially similar position to other EU24 nationals. By reason of historical factors, citizens of those countries resident in the United Kingdom were already entitled to vote in the United Kingdom

prior to the adoption of the provisions of EU law enabling EU nationals to vote in Member States where they were resident. There was no need to extend the right to vote to them. The twelfth recital to the Council Directive recognises that account must be taken of the fact that in certain Member States residents who are nationals of other Member States already have the right to vote and that, consequently, certain requirements including the need for a declaration, should be dispensed with. To that end, Article 14(2) of the Council Directive expressly provides that Articles 6 to 13 (which includes the requirement to make a declaration) do not apply where, on 1 February 1994, the laws of a Member State prescribed that nationals of another Member State resident in the state had the right to vote for national parliaments. That was the position in relation to Irish, Maltese and Cypriot nationals resident in the United Kingdom. Their position is, historically and legally, different from the position of the nationals of other EU Member States.

111. Similarly, the position of UK nationals who are dual residents, that is they resided for part of the time in the United Kingdom and part of the time in a Member State of the European Union, was legally and factually different from that of EU24 nationals. Such UK nationals are entitled to vote in the United Kingdom if they wish as they are nationals of the UK. They were entitled to vote in the Member State of residence and, if so, they would have to complete a declaration stating that they were voting only in their state of residence. It is a false and artificial comparison to compare the position of an EU24 national resident in the UK with the UK national who spent part of the time in the UK (and did not need a declaration to vote here) without taking into account that if the UK national wanted to vote in a different Member State in the 2019 elections he would have had to complete a declaration. Their legal and factual positions as a whole are not materially similar or analogous to EU24 nationals.
112. For those reasons, we do not consider that there is any unlawful discrimination contrary to any of the EU provisions relied upon as the claimants have not identified any differential treatment between them and others who were in a materially similar position. In those circumstances, it is not necessary to consider the defendant's proposed comparators. For completeness, we consider that the defendant had established that any differential treatment is objectively justified in relation to pursuing the legitimate aim of seeking to prevent double voting largely for the reasons given above.
113. The same position applies in relation to the claim relating to Article 14 of the Convention. There would need to be differential treatment between persons in a materially analogous position on the grounds of nationality or other status in relation to a matter falling within the scope of the Convention which the defendant cannot show was objectively justified. The claimants were not in a materially similar position to nationals of Ireland, Cyprus, Malta or to nationals of the United Kingdom who resided in the UK and a Member State of the European Union and, in any event, the defendant has demonstrated that the arrangements were objectively justifiable for the reasons given.
114. Finally, the claimants contend that the arrangements relating to the 2019 European Parliamentary election constitute unlawful discrimination contrary to section 29(6) of the 2010 Act. That complaint relates to the provisions of the 2001 Regulations and the other relevant statutory provisions, and, it seems, to the alleged failure by this defendant to ensure that the arrangements ensured that EU24 nationals were informed

of the need to submit a declaration in order to be eligible to register to vote and able to do so.

115. Section 29(6) of the 2010 Act provides, so far as material, that:

“(6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment, or victimisation”.

116. A person discriminates against a person if, because of a protected characteristic (which includes race), he treats another person less favourably: see sections 13 and 4 of the 2010 Act. Section 23 provides that, on a comparison of cases for the purposes of section 13, there “must be no material difference between the circumstances relating to each case”. Finally, paragraph 1 of Schedule 23 to the 2010 Act provides that a person does not discriminate against another because of the other’s nationality in respect of something done pursuant to an enactment. Paragraph 2 of Schedule 3 to the 2010 Act provides, so far as material:

“(3) Section 29 does not apply to preparing, making, confirming approving, or considering an instrument which is made under an enactment by –

(a) a Minister of the Crown.....”

117. In brief, the claim that there has been a breach of section 29 of the 2010 Act fails for each of a number of different, discrete grounds. First, the circumstances of EU24 nationals and of Irish, Cypriot and Maltese nationals, and of UK nationals who are resident for part of the time in the UK and for part of the time in a Member State are materially different for the reasons already given above. There is therefore no discrimination within the meaning of section 13 read with section 23 of the 2010 Act. Secondly, so far as the complaint is about the application of the relevant 2001 Regulations, and other statutory provisions, differential treatment on grounds of nationality in respect of things done pursuant to those enactments does not amount to discrimination. Similarly, if there are said to be complaints about the consideration of legislation to amend the requirements of the 2001 Regulations or other statutory provisions, section 29 would not apply to those arrangements. Thirdly, if the claimants are complaining generally, or in their individual cases, about the information given to them or what happened to them when they tried to register, that does not involve any allegation that this defendant was exercising a public function in relation to them. It was other bodies, such as electoral registration officers, or local authority officials, who took those steps.

118. For those reasons, the claim that there has been unlawful discrimination contrary to the provisions of EU law, the Convention or the 2010 Act fails.

#### Postscript

119. Unusually, as indicated above, after the draft judgment was circulated, counsel for the claimants submitted that the phrase dual resident UK/EU24 nationals meant those who held nationality of both the UK and an EU Member State. If that was what was intended, those persons would not be in a materially similar position to those with EU24 nationality only and who were resident in the UK as the first group would possess UK nationality and the second group, people with EU24 nationality only,

would not possess UK nationality. That conclusion would apply to discrimination under EU law, the Convention and domestic law.

THE FOURTH ISSUE – THE PUBLIC SECTOR EQUALITY DUTY (GROUND 4)

120. The claimants claim that the defendant failed to comply with his public sector equality duty to have due regard to certain specified matters. At the hearing before us, the claimants approached the matter on the basis that that issue had been conceded by the defendant and that, therefore, this court should grant a declaration. As will appear, the matter was not in fact that straightforward and the court invited and received further written submissions from the claimants which have been taken into account.

121. The provisions of section 149 of the 2010 Act on which the claimants principally rely provide that:-

“(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

“(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

.....

“(7) The relevant protected characteristics are—

race;

.....”

122. The importance of the public sector equality duty has been emphasised many times by the courts including most recently by the Court of Appeal in *R (Bridges) v Chief Constable of South Wales of Police* [2020] EWCA Civ 1058 at paragraph 175. The

general approach to whether the public sector equality duty has been complied with is well-established. Relevant principles are set out in the decision of the Court of Appeal in *R (Bracking) v Secretary of State for Work and Pensions* [2014] Eq LR 60 especially at paragraph 26. That decision has been followed in subsequent cases, including *Bridges*. In *Bracking*, the relevant government department decided to close a fund operated by an independent non-governmental body which, broadly, provided funding to assist disabled persons to lead independent lives. On the facts, the Court of Appeal concluded that the information provided to the relevant minister did not give her an adequate awareness that the proposals would place independent living in serious peril for a large number of people and the Court concluded, in that particular case, that the minister had not complied with the public sector equality duty and quashed the decision. As the Court of Appeal has subsequently observed, that decision has to be read in context and the application of the public sector equality duty will differ from case to case depending upon the function being exercised and the facts of the case. Furthermore, courts should be careful not to read the judgment in *Bracking* as though it were a statute (see *Powell v Dacorum Borough Council* [2019] EWCA Civ 23, [2019] HLR 21 at paragraph 51).

123. The Court of Appeal in *R (Baker) v Secretary of State for Communities and Local Government* [2009] PTSR 809 has also given valuable guidance on assessing whether there had been compliance with section 71 of the Race Relations Act 1996 (“the 1996 Act”). Similar principles apply to the equivalent duty in section 149 of the 2010 Act: see *Hotak v London Borough of Southwark* [2016] A.C. 811 at paragraphs 73-74. In broad terms, the duty is a duty to have due regard to the specified matters, not a duty to achieve a specific result. The duty is one of substance, not form, and the real issue is whether the relevant public authority has, in substance, had regard to the relevant matters, taking into account the nature of the decision and the public authority's reasoning (see, e.g., *Baker* at paragraphs 36-37, and *Bracking* at paragraph 26). As Lord Neuberger observed at paragraph 74 of his judgment in *Hotak v London Borough of Southwark* “the weight and extent of the duty are highly fact-sensitive and dependent on individual judgment”.
124. Furthermore, it is important to identify the specific functions that a defendant is exercising as it is in the exercise of its functions that a public authority is under a duty to have due regard to the specified matters. See, for example, the decision in *Simone and others v Chancellor of the Exchequer and the Secretary of State for Education* [2019] EWHC 2609 (Admin). The question of what regard is due will be influenced by a number of factors including, but not limited to, the nature of the decision being taken, the stage of the decision-making process that has been reached and the particular characteristics of the function being exercised.

### *The Pleadings*

125. Paragraphs 124 to 127 of the claim form set out the matters which the claimants say give rise to a breach of the public sector equality duty. The first complaint is a general allegation that the defendant failed to gather and assess information to understand the discrimination, equality or good relations issues in accordance with the requirements of section 149 of the 2010 Act. So far as that complaint identifies the functions that the defendant was exercising when he allegedly failed to do so, it refers to refusing “to engage, properly or in good time, with the legal requirements and practical arrangements for the UK’s participation in the 2019 Elections”. The second complaint

is that “in carrying out its electoral functions” the defendant failed to identify any risk of unlawful discrimination or the consequences of inequality of opportunity of fostering good relations and failed to have regard to the need to encourage EU24 nationals to participate in public life in accordance with section 149(3) of the 2010 Act. Specific factual matters are then identified including that the defendant knew of defects in the electoral system and did not nothing to prevent discrimination being repeated or improve the arrangements. There is a complaint about the making of the 2019 Order fixing the date of the poll and, in particular, the lack of an equality impact assessment. The remedy sought was:

“A declaration that the Defendant has failed to discharge the public sector equality duty set out in section 149 of the [2010] Act.”

126. Paragraph 59 of the defendant’s detailed grounds of resistance state that, as regards the claimant’s challenge on public sector equality duty grounds, “the Defendant accepts that due regard was not had to the matters set out in section 149 [of the 2010 Act] in the lead-up to the 2019 Election”. It then goes on to say that, however, for a number of reasons it was only at a late stage that it became sufficiently certain that the United Kingdom would not have withdrawn from the European Union by 23 May 2019 and by that time there was no realistic prospect of amending the regulations. The detailed grounds do not address the issue of the making of the Order.

127. The evidence of Mr Lee for the defendant on this matter is brief. He states at paragraph 183 of his witness statement that:

“I accept that neither officials nor Ministers had specific regard to the public sector equality duty when: no further steps were taken after spring 2016 to amend the 2001 Regulations; contingency plans were made for the 2019 Election from March 2019; the Appointed Day of Poll Order was made and brought into force; or in the other advice assistance provided by the [Cabinet Office] to those exercising their statutory duties in each region”.

However at paragraph 185, Mr Lee also says:

“Officials were well aware of why EU24 citizens were in a different position to others; that is why the [Cabinet Office] encouraged and agreed with the Electoral Commission advising [electoral registration officers] positively to send out Forms and other related measures.”

128. The claimants’ written skeleton argument states that the defendant “admits that due regard was not had to the factors made relevant by the [public sector equality duty] in advance of the 2019 Elections” and then deals with issues relating to the discretion to refuse a remedy. The defendant’s written skeleton argument simply repeats the relevant paragraphs of the detailed grounds of resistance and deals with some issues relating to the discretion or duty to refuse a remedy. Mr Sheldon, at the hearing, indicated that if the defendant’s detailed grounds and skeleton were to be read as a concession that there had been a breach of the public sector equality, he would seek to withdraw that concession.

### *Discussion*

129. We can well understand from the documents why the claimants considered that the defendant had conceded that he had, in general terms, failed to comply with the public sector equality duty. We are not sure that, on careful analysis, the documents do actually make that concession and certainly do not make clear what any admitted breaches actually consist of. In any event, we would have allowed Mr Sheldon to withdraw his concession notwithstanding the objections put forward in the claimants' written submissions of 29 January 2021. The public sector duty is an important duty. It would not be right for a court to make formal, binding, unparticularised declarations that a public official had breached such an important duty when there were real issues as to whether any breaches had been established and what the extent of those breaches were.
130. Some examples of the factual and legal issues that the pleadings and the evidence appear to leave unanswered can be readily identified. First, the duty is a duty on the public authority to have due regard to certain matters "in the exercise of its functions". In relation to the making of regulations amending the 2001 Regulations, there is a real issue as to whether the defendant was exercising any functions in that matter after June 2016. If regulations are made, and quite possibly, when the issue of whether to amend regulations or not is being actively considered, a minister may be exercising functions. The minister will need to comply with the public sector equality duty and have due regard to the specified matters in reaching a decision. But the evidence here is that after June 2016, no one was actively considering whether or not any regulations should be amended because it was thought that the United Kingdom would not participate in the 2019 European Parliamentary elections. It is by no means clear that those circumstances involved the exercise of a function. By way of further example, it is unclear what electoral functions the claimant is asserting that the defendant was exercising when he failed to consider any risks of unlawful discrimination or the consequences in terms of lack of opportunity and fostering good relations.
131. Further, consideration would need to be given as to whether, at least in relation to some exercises of function, the minister did in substance have due regard to the position of EU24 nationals. The evidence of Mr Lee, for example, is that officials were well aware of the position of EU24 nationals and that is why the Cabinet Office "encouraged and agreed" the issuing of advice to electoral registration officers to send out forms and other matters. Before it was appropriate for a court to make a declaration of the kind sought, a court would need to consider whether in relation to some functions at least the defendant did have due regard in substance to the particular equality matters arising out of the position of the EU24 nationals.
132. Finally, a court is precluded by section 31(2A) of the Senior Courts Act 1981 from granting a remedy if it appears to be highly likely that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred. In relation to the Order, made on 8 April 2019, and coming into force on 10 April 2019, and fixing the poll date for 23 May 2019, it is by no means clear that the court could grant any remedy. It is difficult to see how the defendant could have done anything other than make the Order. The United Kingdom would be a member of the European Union at the date of the poll. Consequently, it was obliged to hold the poll (and to do so on 23 May 2019). The outcome in relation to that allegation is that even if the conduct complained of (breach of the public sector equality duty because of a

failure to have regard to the matters specified) had not occurred, the outcome for the claimants would have been the same. The Order would have been made.

133. For each of those reasons, we do not consider that it would be appropriate simply to grant the declaration sought without establishing the relevant facts and deciding if declaratory relief was prohibited.
134. More generally, however, even if the defendant had conceded a breach, or even if such a breach could be established now, we do not consider that it would be appropriate as a matter of discretion to grant any remedy now in relation to the public sector equality duty. We accept that it is an important duty. We accept that the context, the exercise of the right to vote for members of an elected, representative body, is an important one. We had regard to the matters set out in the claimants' written submissions of 29 January 2021 on why it is important that such a declaration be granted. But, the issues now are entirely academic, dealing with historic matters only, which have no existing or future legal relevance to the claimants. First, the relevant regulations have been repealed. Secondly, the United Kingdom left the European Union over a year ago. The United Kingdom will not be participating in any future European Parliamentary elections. There are currently no members of the European Parliament who were elected by constituencies in the United Kingdom. Those members of the European Parliament ceased to hold their seats on the United Kingdom ceasing to be a member of the European Parliament on 31 January 2021. The issue, and the declaration sought, have only historic relevance and are not related to any current or future issue relevant to these claimants (or any other EU24 national).
135. The five claimants submitted that the matter might be relevant to the question of their claim for *Francovich* damages in that it might be relevant to whether there had been a sufficiently serious breach of European Union law causing them loss. Nothing that we have said in refusing a declaration for discretionary reasons would prevent the individual claimants from seeking to establish relevant facts, and make submission on their legal relevance, in any damages claim that they decide to continue.

## CONCLUSION

136. The 2001 Regulations and other relevant provisions governing the 2019 European Parliamentary elections, and the arrangements for the registration of those entitled to vote at that election, did not give rise to any breach of any relevant provision of EU law. Even if there had been any breach, the court would not, as a matter of discretion, have granted any general declaratory relief in relation to those matters as the issues are now academic and do not affect the existing or future position of the claimants. The relevant regulations do not involve a breach of Article 3 of the First Protocol to the Convention. They do not involve any unlawful discrimination contrary to EU law, the Convention or the 2010 Act. The court would not grant any declaratory relief in relation to the public sector equality duty given that, even if any breach were established or conceded, the matter is now academic and historic only.

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ORDER

**UPON** consideration of the Claimants' claim form issued on 2 August 2019 and the material included within the agreed hearing bundles

**AND UPON** hearing leading counsel for the Claimants and leading counsel for the Defendant

**AND UPON** the Costs Capping Order dated 11 November 2020

**AND UPON** the claimants agreeing a draft order that, having seen the terms of the draft judgment that the claim for damages be dismissed

**AND UPON** judgment being handed down electronically under the COVID-19 Protocol on 11 February 2021

**IT IS ORDERED THAT:**

- (1) The Claimants' claims for judicial review are dismissed.
- (2) The Third to Seventh Claimants' claims for damages are dismissed.
- (3) The Claimants pay the Defendant's costs in the sum of £65,099.35 inclusive of VAT.
- (4) Permission to appeal is refused.

DATED: 11 February 2021.

