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Stanford, Ben (2022) Case Comment - R (on the application of Coughlan) v Minister for the Cabinet Office. Coventry Law Journal, 27 (1). pp. 126-129. ISSN 1758-2512

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Electoral Law – Voter Identification – Pilot Schemes – Right to Vote – Representation of the People Act 2000 – Elections Act 2022

R (on the application of Coughlan) v Minister for the Cabinet Office [2022] UKSC 11

UK Supreme Court

Introduction

In April 2022 the UK Supreme Court had the final say in a three-year long legal battle concerning the implementation of a "pilot scheme" in the 2018 local elections. This scheme required voters in Braintree to show identification when voting in polling stations, in light of the Government's objective to roll out voter identification requirements nationwide. The focus of this judicial review concerned the scope and interpretation of section 10 of the Representation of the People Act (RPA) 2000, which authorises the Secretary of State to make subordinate legislation to implement pilot schemes for local elections in England and Wales. Under this provision, a pilot scheme can be implemented to make alternative arrangements for elections in respect of "when, where and how voting…is to take place" (s.10(2)(a)), with the main issue for the courts being whether the requirement for voters to show identification fell within the scope of "how" voting is to take place. Dismissing the applicant's appeal against the Court of Appeal and High Court's earlier judgments, the Supreme Court held that the Secretary of State had not acted *ultra vires* to implement the pilot scheme. The Court found that the scheme was within the meaning of s.10 of the RPA 2000, and it was a scheme as regards the "how voting" is to take place, which could include procedures for demonstrating an entitlement to vote.

Facts

The origins of the Government's voter identification proposals can be traced back at least as far as 2014 when the Electoral Commission recommended that voters in Great Britain should be required to prove their identity when casting their vote, suggesting that voting in person "remains vulnerable to personation fraud" due to the "few checks" in place to prevent impersonation (Electoral Commission, "Electoral Fraud in the UK: Final Report and Recommendations", January 2014 p.5). Proposals to reform electoral practice did not feature in the Conservative Party 2015 general election manifesto but, amongst other electoral reforms, their 2017 election manifesto pledged to "legislate to ensure that a form of identification must be presented before voting" (Conservative Party Manifesto 2017, p.43).

In the May 2018 local elections in England, the first round of pilot schemes to act on this pledge were held in Bromley, Gosport, Swindon, Watford and Woking which required voters to present some form of identification before voting in polling stations. Immediately afterwards, the Government declared its intention to hold further pilots the following year. In early 2019, Ministerial Orders were made to authorise the second round of voter ID pilot schemes that took place in May 2019. A total of 10 councils participated, including Braintree District Council, meaning that eligible voters in that area were required to show either one form of photo ID or up to two forms of non-photo ID.

The appellant in this case, Neil Coughlan, a resident of Braintree District Council, was one such voter affected by the requirement to show identification. Coughlan first applied to the

High Court in January 2019, after the Council signalled its intention to participate in the pilot schemes but before formal authorisation had been granted.

On 20 March 2019, Mr Justice Supperstone granted permission for the claimant to apply for judicial review to the High Court but dismissed the claim on its merits ([2019] EWHC 641 (Admin); [2019] 1 WLR 3851). As Supperstone J acknowledged, the central question of the case was "whether the voter ID pilots are schemes within the meaning of s.10(2)(a), that is, whether they are schemes for testing 'how voting…is to take place'". As such, Supperstone J focussed on two interrelated issues – the meaning of the words in the relevant provisions and their purpose. On the first issue, Supperstone J agreed with the defendant that the "natural and ordinary meaning" of the words "how voting at elections is to take place" are sufficiently broad to allow procedures requiring voters to prove their entitlement to vote. On the second issue, Supperstone J agreed with the defendant, finding that Parliament had intended for pilot schemes to test a range of matters, and that there "may be a range of important public interest considerations associated with the modernisation of electoral procedures extending beyond those specified matters".

The appellant then sought leave to appeal to the Court of Appeal, which was granted by Lord Justice Simon in October 2019. In the appeal the appellant focused on the ordinary meaning of the word "how" in s.10 of the RPA 2000, the overall text of s.10 when read as a whole requiring pilot schemes to be assessed in terms of their success in facilitating voting, and finally the legislative purpose of s.10 to facilitate and encourage voting. On 5 June 2020, the appeal was dismissed by the Court of Appeal ([2020] EWCA Civ 723; [2020] 1 WLR 3300) for essentially the same reasons as the High Court. The appellant then sought leave to appeal to the Supreme Court which was subsequently granted in February 2021.

The decision of the Supreme Court

The Supreme Court heard the appeal on 15 February 2022 and issued judgment on 27 April 2022 dismissing the appeal ([2022] UKSC 11). Lord Stephens delivered the judgment to which the other Justices all agreed. The Court identified the two issues [3-4], primarily whether the Pilot Orders were *ultra vires* because the pilot schemes did not come within the meaning of s.10 of the RPA 2000, and additionally whether the pilot schemes were authorised for a lawful purpose consistent with the policy and objects of the RPA 2000.

On the primary issue, which constituted the majority of the judgment [9-76], the Court first identified and considered the relevant principles of statutory interpretation. Most importantly, the Court indicated that an analysis of the language used by Parliament is the primary source when deducing the purpose of legislative provisions [12-13]. The appellant pointed to various parliamentary statements made by the Home Secretary during the second reading of the Bill that became the RPA 2000, but the Court rejected the relevance of these due to the legislative provision in question not being sufficiently ambiguous [14].

After a detailed outline and examination of the applicable law [18-39], Lord Stephens found that the words "how voting…is to take place" in s.10 of the RPA 2000 were "sufficiently broad to encompass procedures for demonstrating an entitlement to vote, including by proving identity, as part of the voting process" [41]. Amongst other reasons, this was because s.10(2) allows modifications in a pilot scheme "differing in any respect" which was liberal permissive language, thus allowing a wide interpretation of "how" voting can take place [42]. The Court also found that Parliament declined to use a narrow formulation in s.10(1) when setting out the scope of pilot schemes, but rather chose wider language in the form of "how voting…is to take

place" [44]. One of the most significant findings was that if a pilot scheme was implemented to test internet voting, then it would obviously require a voter identification requirement to be effective. As such, if s.10 was wide enough to allow internet voting with voter identification as a prerequisite, then s.10 would be wide enough to allow voter identification in polling stations [46-47].

Turning to the legislative purpose of s.10 of the RPA 2000, the Court rejected the appellant's argument that pilot schemes could only be implemented to facilitate or encourage voting, which is an issue that the Electoral Commission must consider when evaluating the success of a scheme pursuant to s.10(7)(c). Moreover, the Court found the Electoral Commission could report on other matters not just linked to whether the schemes encouraged or facilitated voting [50]. Rather, the Court found that voter identification may even improve public confidence in the electoral system if voter fraud was eliminated [51]. Ultimately, Lord Stephens found that the purpose of pilot schemes was to allow evidence to be gathered about the effects of changes to electoral practice, which would subsequently be analysed and inform decision makers in the future about the benefits of reform [52]. This could even extend to schemes which could have adverse effects on the exercise of the right to vote [53].

Despite rejecting the primary ground of appeal purely based on the statutory language of s.10 of the RPA 2000, the Supreme Court briefly considered the external materials relied on by the appellant, most of which were found to be irrelevant to the interpretation of the provision in question. This included several parliamentary reports [59-67], previous pilot schemes [70], an Electoral Commission report [71], and the "Pickles Report" [72].

Lastly, on the issue of whether the pilot scheme was implemented for a lawful purpose, the Court rejected the argument that pilot schemes were confined to facilitating and encouraging voting, but found, rather, that the purpose of pilot schemes was to gather information to assist in the modernisation of electoral procedures in the public interest [77].

Analysis

As the three courts each made clear, the sole purpose of the *Coughlan* case was to review the legality of the Cabinet Office's power to authorise the May 2019 voter ID pilot schemes, not to test the merits of compulsory voter identification. On this latter issue much legal analysis has already been offered and broader questions about the right to vote, political participation and the nature of British democracy itself arise (Ben Stanford, "Compulsory voter identification, disenfranchisement and human rights: electoral reform in Great Britain" (2018) 23(1) EHRLR 57-66).

Following the Conservative Party's significant election victory in December 2019, the Elections Bill was formally introduced in July 2021, receiving Royal Assent on 28 April 2022. Whilst the Act finally fulfilled the Party's 2017 General Election pledge to introduce compulsory voter identification for elections in Great Britain, it also enacted a whole raft of changes to electoral law, some of which have generated considerable controversy. The Act consists of seven Parts, further supplemented by 11 Schedules of considerable length and complexity to implement these changes. Whilst the introduction of voter identification requirements in Part 1 and Schedule 1 of the Act has attracted the most attention, other reforms to generate controversy include the issuing of strategic direction for the Electoral Commission as well as removing its power to initiate prosecutions for breaches of electoral law (Part 3), reforms to third party spending and campaigning (Part 4), and a requirement for digital campaigning material imprints (Part 6).

The scale of these reforms, including the introduction of voter identification requirements, undoubtedly presents considerable administrative and financial challenges. Recognising these, the Chief Executive of The Association of Electoral Administrators recently expressed concern that the "current projected implementation timelines [for the Elections Act 2022] are optimistic at best, undeliverable at worst, especially for a 'no-fail' service like elections" (Letter from Peter Stanyon to the Minister for Levelling Up Communities, 17 May 2022). Moreover, assuming that a free identification card is provided for voters who lack adequate documents, the Cabinet Office has estimated the cost could be up to £17.9 million per general election (Cabinet Office, Electoral Integrity Project – Local Elections 2018 – Evaluation p.43).

Given the scarcity of voter impersonation in UK elections, the necessity of such an expensive reform can be seriously questioned, whilst the potential negative impact on voter turnout and the risk of widespread disenfranchisement, particularly of minority groups, remains a serious concern. Moreover, there is a strong case for prioritising the reform of other areas of electoral law such as voter registration and party funding as a matter of urgency, as well as British democracy and constitutional issues more generally, which have been rocked by recent allegations of sleaze and declining standards.

Conclusions

Following the passage of the Elections Act 2022, millions of voters in Great Britain will now find for the first time in their lives that in order to cast their vote in polling stations, formal identification will be required. To minimise the risk of disenfranchisement, a mass publicity campaign will be required across the country in the run up to the first occasion identification is required, as took place in the various areas which participated in the 2018 and 2019 pilot schemes. This will be necessary to ensure that the electorate are aware of the new law, but also the exact forms of identification that are needed as well as those which will be rejected. Moreover, councils will need the sufficient time, resources and support to ensure that free identification can be provided to voters who do not possess suitable documentation. In this respect, the Government can look to Northern Ireland and the Electoral Office for Northern Ireland for four decades of good practice.

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