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Case No: CO/1094/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/08/2021

Before :

MR JUSTICE SWIFT

Between

THE QUEEN

on the application of

RACHAEL ANDREWS

Claimant

-and-

MINISTER FOR THE CABINET OFFICE

Defendant

TIM BULEY QC (instructed by Leigh Day Solicitors) for the Claimant
HANIF MUSSA & DANIEL CASHMAN (instructed by Government Legal Department)
for the Defendant

Hearing dates: 15 & 16 June 2021

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.

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MR JUSTICE SWIFT:**A. Introduction**

1. On 3 May 2019 I handed down judgment in the case of *Rachael Andrews v Minister for the Cabinet Office* [2019] EWHC 1126 (Admin) (“*Andrews No.1*”). In those proceedings Ms Andrews challenged arrangements made pursuant to provisions in the Representation of the People Act 1983 (“the 1983 Act”) intended to allow blind and partially sighted persons to vote without assistance. That challenge succeeded. I made a declaration in the following terms:

“Regulation 12 of the Representation of the People (England and Wales) Regulations 2001 is ultra vires, being an unlawful exercise of the power in Rule 29(3A)(b) of Schedule 1 to the Representation of the People Act 1983 ... ”

Regulation 12 of the Representation of the People (England and Wales) Regulation 2001 (“the 2001 Regulations”) had prescribed a device known as the Tactile Voting Device (or TVD) as the device to be available at polling stations to enable blind and partially sighted persons to vote without assistance.

2. The present claim was filed on 11 March 2020. Ms Andrews’ complaint is that since the judgment in *Andrews No.1* there has been no change to the provision made by regulation 12 of the 2001 Regulations. When it comes to voting, blind and partially sighted persons are in the same position now as they were in May 2019: notwithstanding what is said at Rule 29(3A)(b) of Schedule 1 to the 1983 Act, provision has not been made that enables them to vote without assistance. This is a matter of real importance. Since May 2019 one general election has come and gone (in December 2019); and local elections have also taken place, in May 2021. Progress needs to be made in time for the next round of local elections let alone any future general election.
3. In this claim Ms Andrews raises three complaints. The first repeats the complaint made in *Andrews No.1* that regulation 12 of the 2001 Regulations does not achieve the purpose specified in the enabling power in the 1983 Act (i.e., Rule 29(3A)(b) in Schedule 1 to that Act). This time the complaint is formulated by reference to matters as they stood as at the time of the December 2019 general election. The second and third complaints rely on the Human Rights Act 1998 (“the 1998 Act”). Ms Andrews contends that failure to put arrangements in place to enable blind and partially sighted persons to vote without assistance amounts to a breach of her Convention rights either under article 3 of Protocol 1, or under that article read together with ECHR article 14, the prohibition against discrimination.

B. The 1983 Act, the 2001 Regulations, and the relevant Convention rights

4. By section 23 of the 1983 Act parliamentary elections must be conducted in accordance with the rules at Schedule 1 to the Act (“the Election Rules”). At paragraphs 3 to 7 in the judgment in *Andrews No. 1*, I set out the material provisions in the Rules concerning

the manner of voting, including the provision made for blind and partially sighted persons:

“3. Schedule 1 to the [1983 Act] contains the parliamentary election rules (‘the [Election] Rules’), which govern the conduct of parliamentary elections in the United Kingdom. By section 23(2) of the 1983 Act, it is the “*general duty*” of the Returning Officer for each constituency

“... to do all such acts and things as may be necessary for effectively conducting the election in the manner provided by [the Election Rules]”.

4. If more than one candidate is nominated for election in a constituency, the [Election] Rules require that the election take the form of a poll (Rule 17); that votes at the poll are given by ballot (Rule 18); and that the ballot of every voter must comprise a ballot paper printed with the name and particulars of each candidate (Rule 19). The order of names on the ballot paper must be the same as in the statement of persons nominated (Rule 19(3)), namely an alphabetical order by surname (Rule 14(3)).

5. Rule 37 requires a ballot paper be provided for every voter who applies for one. Rule 37(5) and (6) then prescribe the process of voting as follows:

“(5) The voter, on receiving the ballot paper, shall forthwith proceed into one of the compartments in the polling station and there secretly mark his paper and fold it up so as to conceal his vote, and shall then show to the presiding officer the back of the paper, so as to disclose the number and other unique identifying mark, and put the ballot paper so folded up into the ballot box in the presiding officer's presence.

(6) The voter shall vote without undue delay and shall leave the polling station as soon as he has put his ballot paper into the ballot box”.

6. The equipment that a Returning Officer must provide to the Presiding Officer at each polling station is specified at Rule 29. In addition to ballot boxes, ballot papers, and other paraphernalia, Rule 29(3A) provides that

“(3A) The returning officer shall also provide each polling station with –

(a) at least one large version of the ballot paper which shall be displayed inside the polling station for the assistance of voters who are partially sighted; and

(b) a device of such description which may be prescribed for enabling voters who are blind or partially-sighted to vote without any need for assistance from the presiding officer or any companion (within the meaning rule 39 (1)).”

The reference to “blind or partially sighted” is, as I see it, intended to cover all persons who because of a defect of sight are unable to complete a ballot paper without assistance. The words “partially sighted” are apt to cover a range of persons, including those who like the Claimant, have very little ability to see at all.

7. The Rules make express provision for assistance of blind and other disabled voters either from the Presiding Officer or from so-called companions. As to Presiding Officers, Rule 38(1) is as follows:

“(1) The presiding officer, on the application of a voter

—

(a) who is incapacitated by blindness or other disability from voting in manner directed by these rules, or

(b) who declares orally that he is unable to read,

shall in the presence of the polling agents, cause the voter's vote to be marked on a ballot paper in manner directed by the voter, and the ballot paper to be placed in the ballot box.”

By Rule 39, if on application by (among others) a blind person to vote with the assistance of someone at the polling station with him (a companion), a Presiding Officer is satisfied that the voter is blind, the Presiding Officer may permit the companion to assist the blind voter if: (a) the companion has made the required declaration (Rule 39(5)); (b) the companion is “qualified” (Rule 39(3)); and (c) the companion has not previously assisted more than one voter at the election (Rule 39(2)(b)(ii)). Rule 39(2) then provides that once the permission of the Presiding Officer has been obtained,

“... then anything which is by these rules required to be done to or by that voter in connection with the giving of his vote may be done to, or with the assistance of, the companion””

5. In summary, the Election Rules specify that votes are cast by making a mark against the name of a candidate on a paper ballot that lists the candidates for the constituency alphabetically by surname. Since this is how votes must be cast, some provision must be made for those who by reason of disability are unable to mark the ballot paper. Rules

38 and 39 of the Election Rules permit assistance from other people (either the presiding officer at the polling station or, with the consent of the presiding officer, a “companion” chosen by the voter). Rule 29(3A) goes further requiring a “device” to be available at polling stations that will permit blind and partially sighted persons to vote “without any need for assistance from the presiding officer or any companion”.

6. The 2001 Regulations, made in exercise of the power at Rule 29(3A) of the Election Rules, had specified the TVD as the relevant device: see regulation 12. The issue in *Andrews No. 1* was whether, in prescribing the TVD, the 2001 Regulations had fulfilled the purpose stated in Rule 29(3A)(b) of the Election Rules: was the TVD a device that enabled blind and partially sighted persons to vote without assistance?

7. The TVD (see paragraph 9 of the judgment in *Andrews No. 1*):

“9. ... is made from a sheet of transparent plastic which is as long as the ballot paper and is placed on top of the ballot paper. On the right-hand side of the TVD are flaps, numbered from 1 at the top and so on down the page, so that the number of flaps corresponds to the number of candidates standing in the constituency. The number printed on each flap is raised so that it can be felt by touch, and adjacent to each flap, the flap number is printed in Braille, to assist those who are blind and Brailleists. But no other information is present on the TVD. In particular there is no way using the TVD alone, that a blind person can know the name of the candidate, or the name of the party the candidate represents. The TVD will only permit a blind person to vote without assistance, if she memorised the order of candidates on the ballot paper either before she went to the polling station or while she was there.”

8. Article 3 of Protocol 1 to the European Convention on Human Rights (“article 3, Protocol 1”) provides this:

“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.”

Ms Andrews’ claim in these proceedings is focused on the obligation to conduct elections by secret ballot. The premise of much of her case is that to the extent that she is not able to vote without assistance, the secrecy of the ballot (so far as concerns her vote) is impaired.

9. Under the 1983 Act and the Election Rules secrecy of the ballot is provided for directly and indirectly by several provisions. The relevant provisions in the Election Rules are all in Part 4 of the Rules: see respectively, Rules 21, 31 – 33 and 37(5). Section 66 of

the 1983 Act is the most important provision. So far as material for present purposes, this is as follows:

“66. — Requirement of secrecy.

(1) The following persons—

- (a) every returning officer and every presiding officer or clerk attending at a polling station,
- (b) every candidate or election agent or polling agent so attending,

...

shall maintain and aid in maintaining the secrecy of voting and shall not, except for some purpose authorised by law, communicate to any person before the poll is closed any information as to—

- (i) the name of any elector or proxy for an elector who has or has not applied for a ballot paper or voted at a polling station;
- (ii) the number on the register of electors of any elector who, or whose proxy, has or has not applied for a ballot paper or voted at a polling station; or
- (iii) the official mark.

(2) Every person attending at the counting of the votes shall maintain and aid in maintaining the secrecy of voting and shall not—

- (a) ascertain or attempt to ascertain at the counting of the votes the number or other unique identifying mark on the back on any ballot paper;
- (b) communicate any information obtained at the counting of the votes as to the candidate for whom any vote is given on any particular ballot paper.

(3) No person shall—

- (a) interfere with or attempt to interfere with a voter when recording his vote;
- (b) otherwise obtain or attempt to obtain in a polling station information as to the candidate for whom a voter in that station is about to vote or has voted;

- (c) communicate at any time to any person any information obtained in a polling station as to the candidate for whom a voter in that station is about to vote or has voted, or as to the number or other unique identifying mark on the back of the ballot paper given to a voter at that station;
 - (d) directly or indirectly induce a voter to display his ballot paper after he has marked it so as to make known to any person the name of the candidate for whom he has or has not voted.
- (4) Every person attending the proceedings in connection with the issue or the receipt of ballot papers for persons voting by post shall maintain and aid in maintaining the secrecy of the voting and shall not—
- (a) except for some purpose authorised by law, communicate, before the poll is closed, to any person any information obtained at those proceedings as to the official mark; or
 - (b) except for some purpose authorised by law, communicate to any person at any time any information obtained at those proceedings as to the number or other unique identifying mark on the back of the ballot paper sent to any person; or
 - (c) except for some purpose authorised by law, attempt to ascertain at the proceedings in connection with the receipt of ballot papers the number or other unique identifying mark on the back of any ballot paper; or
 - (d) attempt to ascertain at the proceedings in connection with the receipt of the ballot papers the candidate for whom any vote is given in any particular ballot paper or communicate any information with respect thereto obtained at those proceedings.
- (5) No person having undertaken to assist a blind voter to vote shall communicate at any time to any person any information as to the candidate for whom that voter intends to vote or has voted, or as to the number or other unique identifying mark on the back of the ballot paper given for the use of that voter.
- (6) If a person acts in contravention of this section he shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale or to imprisonment for a term not exceeding 6 months.

... ”

Section 66 has been carefully formulated. It does not prevent any person revealing whether they have voted or for which candidate they have voted. Rather, a series of obligations of secrecy are placed on others who may have come to know information about who has voted, or for whom votes have been cast. Thus, obligations are imposed on presiding and returning officers while the poll is open (see section 66(1)), and on all persons who attend the count (see section 66(2)). Most importantly for present purposes are section 66(3)(c) and section 66(5). The former is a prohibition on any person at any time against communicating to anyone else any information obtained in a polling station which concerns how a vote has been cast. The latter applies to any person who assists a blind voter. That person may not tell any other person any information about how the blind voter voted or intended to vote.

C. Decision

(1) Ground 1: the arrangements in place for the general election in December 2019

10. Ms Andrews explains the matters that prompted this second claim at paragraphs 9 to 13 of her witness statement dated 11 March 2020:

“9. I had hoped that the Government would finally act to introduce new arrangements that would allow me to vote independently and in secret, but by the time of the 2019 General Election had been called, it became apparent that nothing seemed to have changed. It is therefore with great sadness that I am bringing this new challenge.

10. It is almost worse now than before the judgment [in *Andrews No.1*] because at least then the Government thought they were acting lawfully. Now they know they are acting unlawfully and are aware of the enormous impact it has on people through the evidence filed with my first challenge but have still made no real efforts to address it.

11. I am disappointed that despite the Court’s judgment, I was again left in a position where I was unable to vote without assistance in the December 2019 General Election. Frankly, I was more disappointed than before because I thought that following the judgment in May 2019 the Government would have to have done something.

12. My experience of the 2019 General Election was a rather bizarre one. The first thing was that when my husband and I entered the polling station, the Presiding Officer approached us and invited us into a sperate room. He obviously knew who I was, not least because my solicitors had contacted the Council a couple of days before. This was intended to give us some privacy, but I felt self-conscious about being singled out

from everybody else. Second, the Presiding Officer had an audio recording of the candidates on his person mobile phone. He fitted the TVD to my ballot paper and offered to play the recording and then leave the room, however, I felt uncomfortable being left with someone else's mobile phone and would not have been able to operate it should I have needed to replay the list or the phone had locked; I therefore asked him to stay. I recall that there were five candidates and that the recording listed their names, their parties and their addresses. It was not much different to the Presiding Officer just reading out the candidates himself as I would not have been able to independently navigate the list.

13. While I did appreciate the lengths the Presiding Officer went to, there was nothing independent or secret about my experience – the bottom line was that I still could not vote without assistance. I just wanted to vote in the same way as everyone else without sticking out or feeling like a nuisance. My husband did not want to go through the same palaver and therefore just asked the Presiding Officer to mark the ballot paper for him – I imagine many other people feel the same. I am not aware of any other blind voters who were given the same treatment as me.”

11. I fully appreciate Ms Andrews' frustration. However, her criticism of what happened to her on the day of the December 2019 general election is, I think, unfair. To my mind the presiding officer tried his best in difficult circumstances. Three days before the general election Ms Andrews' solicitors, Messrs Leigh Day, wrote to the returning officer for the constituency where Ms Andrews was due to vote. The letter enclosed a copy of my judgment in *Andrews No.1*, and various pre-action letters and responses sent during October, November, and December 2019 (running to some 20 pages). The tone and content of the letter were unnecessarily aggressive. The letter was more concerned with grandstanding than communicating with the returning officer. The letter concluded as follows:

“Finally, we remain dissatisfied with the Cabinet Office's response and anticipate commencing judicial review proceedings against the Minister shortly. In light of the pre-action correspondence, particularly the government's reference to the responsibilities of Returning Officers we propose making you an Interested Party in any proceedings.”

If this letter was intended to assist the returning officer to help Ms Andrews on polling day, it missed its mark by the clearest of margins. I can only suppose that the returning officer put the presiding officer on notice, and the presiding officer then did his best to help on the day. In these circumstances it is unfair to describe what happened on the day of the election as “bizarre” or as an exercise that was designed to single out Ms

Andrews. If the situation at the polling station was awkward that was the result of the letter from Leigh Day.

12. Be that as it may, I share Ms Andrews' disappointment that by the time of the December 2019 general election no progress had been made to replace the TVD or supplement it with a device better suited to permit blind and partially sighted persons to vote without assistance.
13. What had happened following the judgment in *Andrews No.1* is explained in two statements made by Paul Docker the Head of Electoral Administration Team within the Cabinet Office. Prior to May 2019 the Cabinet Office had decided to work with the Electoral Commission to improve arrangements in polling stations to assist the blind and partially sighted. A working group (the Accessibility of Elections Working Group) had been formed and had sought assistance from the Royal National Institute of Blind People.
14. Immediately following the judgment in *Andrews No. 1* there was a proposal to withdraw the TVD and to introduce primary legislation that would amend Rule 29(3A)(b), removing the requirement to provide a device that enabled blind and partially sighted persons to vote without assistance, and reformulating the obligation on returning officers more broadly as an obligation to provide equipment and support for all disabled persons. A Bill to that effect was included in the October 2019 Queen's Speech.
15. However, by November 2019 consideration was being given to deploying an audio device to be used in conjunction with the TVD. The audio device would play a recording identifying each candidate by number and position on the ballot paper. The TVD could then be used to mark the ballot paper. Work on the audio device continued in early 2020. A ministerial submission made on 15 January 2020 proposed that the audio device option be pursued first, in advance of any amendment to the Election Rules. A further ministerial submission of 16 March 2020 recommended that the audio device be provided in the polling stations alongside the TVD. By May 2020, the Defendant agreed to a proposal to supplement the existing secondary legislation (i.e., the 2001 Regulations) with further regulations prescribing use of the audio device.
16. In the early part of 2020 it had been anticipated that some form of trial of the audio device would take place at the local elections scheduled for May 2020. The pandemic intervened, and the local elections were postponed for a year. Alternative options for testing were then considered. The circumstances created by the pandemic disrupted attempts to test the audio device. A small-scale trial did take place during the May 2021 local elections. As at the time of the hearing before me, the outcome of that trial remained under consideration. As to what will happen next, in his first statement Mr Docker explained that the intention was that additional secondary legislation would be made under the powers in the 1983 Act in time for the audio device to be used at the next local elections in May 2022. However, in his second statement Mr Docker cast doubt on whether things would be ready in time for May 2022.
17. Despite Ms Andrews' frustration at what happened on the day of the 2019 general election, and despite her disappointment at progress since the judgment in *Andrews No.1*, I do not consider that Ground 1 of her challenge leads anywhere. The legal basis for Ground 1 is the same as the challenge directed to regulation 12 of the 2001 of the Regulations, the challenge that succeeded in *Andrews No.1*. No different reason is now

advanced in support of the conclusion that regulation 12 is flawed. Therefore, unless repeating and revisiting this ground of challenge to regulation 12 would serve some practical purpose there could be no reason to adjudicate on it again.

18. The challenge is repeated with a view for obtaining further declaratory relief. Mr Buley QC who appears for Ms Andrews (and who also appeared for her in *Andrews No. 1*) formulated the declaration sought as follows:

“The Tactile Voting Device provided at polling stations at the general election on 12 December 2019 failed to fulfil the statutory purpose of enabling blind or partially sighted voters to “vote without any need for assistance” within the meaning of rule 29(3A)(b) of the Election Rules in Schedule 1 to the Representation of the People Act 1983”

Making a declaration in this form would not serve any purpose distinct from the one already achieved by the declaration made in May 2019. The only difference between the declaration now requested and the declaration made in May 2019 is that the new declaration is formulated specifically by reference to the December 2019 general election. But that is not material. The May 2019 declaration addressed matters generally and for all purposes, unless and until either further Regulations are made in exercise of the Rule 29(3A)(b) power or (as might in future happen) Rule 29(3A)(b) is itself amended. A further declaration recording only that the same state of affairs recognised in the May 2019 declaration continued to exist on 12 December 2019, the date of the general election, would add nothing. On this point, it must also be noted that when the judgment in *Andrews No. 1* was handed down, Ms Andrews did not seek an order quashing regulation 12 of the 2001 Regulations. For entirely understandable pragmatic reasons she only requested declaratory relief. This underlines that the declaration now requested would not recognise any new or different event; it is no more than a form of facsimile of the relief already granted in 2019. For these reasons Ground 1 of the challenge fails.

(2) *The Convention rights challenges*

19. Ms Andrews relies on article 3 Protocol 1 both alone and in combination with Article 14. Article 3 Protocol 1 includes an undertaking by the state parties to the ECHR “... to hold free elections at reasonable intervals by secret ballot ...”. The gist of the article 14 claim is that she suffers discrimination in the enjoyment of the rights arising under article 3 Protocol 1 by reason of disability. For the reasons set out below each of the Convention rights challenges fails.
20. I do not consider that Ms Andrews establishes any interference with any right protected under article 3 Protocol 1. The case law of the European Court of Human Rights shows a restrained approach to interpretation of the content of article 3 Protocol 1. The cases recognise the existence of two specific individual rights: the right to vote; and the right to stand as a candidate in elections. However, as to the content of these rights, the Court has consistently emphasised that the rights are not absolute, and that so far as any

contracting state frames these rights in its own law, it must be allowed a significant margin of appreciation. The Court has been careful not to prescribe how either right should be realised, save to the extent that the right must be effective and any description and regulation of it under national law must preserve the legitimacy of the democratic process: see for example *Zdanoka v Latvia* (2007) 45 EHRR 17 at paragraphs 102 to 104.

21. Similarly, although the Court has stated in its judgments that article 3 Protocol 1 gives rise to a positive obligation on contracting states to hold free elections by secret ballot, the court has not sought to prescribe precise rules for the conduct of elections. In *Communist Party of Russia v Russia* (2015) 61 EHRR 28, in the context of a claim concerning complaints that state-controlled TV channels had favoured the governing party over opposition parties during an election campaign, the Court said the following:

“108. ... that being said, the Court observes that Article 3 of Protocol No. 1 was not conceived as a code on electoral matters, designed to regulate all aspects of the electoral process. There are numerous ways of organising and running electoral systems and a wealth of differences, inter alia, in historical development cultural diversity and political thought within Europe, which it is for each Contracting State to mould into its own democratic vision.”

Instead, recognising such matters must primarily be ones of national choice, the Court has limited itself to applying boundary standards: for example, that contracting states should not act in any way that shows lack of genuine concern for protecting the integrity of elections. All this is significant for present purposes.

22. Ms Andrews' complaint concerns lack of protection for the secrecy of her vote. She submits the Election Rules ought to be such that the secrecy of her vote is protected by enabling her to vote without assistance. Elections conducted under the provisions of the 1983 Act, including the Election Rules, do not work in this way, at least so far as concerns blind or partially sighted persons (and for that matter too, any other person who by reason of disability is unable to mark the ballot paper as required, without assistance). Rather, in such instances the secrecy of the ballot is secured by section 66 of the 1983 Act and in particular the prohibition at section 66(5) of the 1983 Act. Any breach of that prohibition is punishable as a criminal offence, by fine or imprisonment. Given the significant margin that contracting states are permitted when giving effect to the obligations arising from article 3 Protocol 1, the provision for secrecy made by section 66 of the 1983 Act is clearly sufficient to meet any requirement under that provision. Further measures which would permit Ms Andrews to vote without assistance are not required; the absence of those measures displays no failure to comply with any requirement arising under article 3 Protocol 1.
23. The 1998 Act/article 3 Protocol 1 claim must also fail for the further reason that it is a claim outside the scope of section 6 of the 1998 Act. Section 6(1) provides:

“(1) It is unlawful for a public authority to act in a way that is incompatible with a Convention right.”

Section 6(6) defines “an act” as including an omission, but (at section 6(6)(a)) there is a proviso; a failure to “... introduce in, or lay before, Parliament a proposal for legislation ...” is not an act for section 6 purposes. Section 6 of the 1998 Act is not a provision that concerns the remedies that a court might grant. Rather, it identifies what does and what does not count as an unlawful act which is capable of founding a claim that there has been a breach of Convention rights. Hence for present purposes, the proviso at section 6(6)(a) of the 1998 Act is important.

24. In his judgment in *R(Rose) v the Secretary State for Health* [2002] EWHC 1593 (Admin), Scott Baker J accepted that secondary legislation required to be made by an affirmative resolution procedure fell within the proviso at section 6(6)(a) of the 1998 Act: see his judgment at paragraphs 49 – 51. The same conclusion on the application of the proviso to secondary legislation made pursuant to affirmative procedures was stated by the Supreme Court in *R(T) v Chief Constable of Greater Manchester Police* [2015] AC 49: see per Lord Wilson at paragraph 65 and Lord Reed at paragraphs 147 – 149.
25. In the present case, the substance of the article 3 Protocol 1 claim is that the Defendant has failed to exercise his power under the 1983 Act to make regulations. The judgment in *Andrews No. 1* concluded the power under Rule 29(3A) had been exercised unlawfully to the extent that the TVD prescribed by the 2001 Regulations was not a device that enabled blind and partially sighted persons to vote without assistance: the 2001 Regulations had failed to achieve the purpose specified in the enabling power. The complaint now is that the Defendant has acted unlawfully by failing to make new provision in exercise of the power at Rule 29(3A) to put matters right (and meet the objective specified in that Rule). The reference in Rule 29(3A)(b) to “a device of such description as may be prescribed” means prescribed in regulations: see the definition at section 202(1) of the 1983 Act. Such regulations must be laid before Parliament and approved by resolution of each House of Parliament: see section 201(2). In the premises, Ms Andrews’ complaint is not a complaint about an unlawful act within the definition at section 6(6) of the 1998 Act.
26. Mr Buley submitted that section 6 of the 1998 Act did not have that effect in this case. First, he submitted, section 6 would not prevent a challenge on Convention rights grounds to regulation 12 of the 2001 Regulations. That much is true; but this is not relevant for the purposes of this challenge. Regulation 12 was addressed in *Andrews No.1*; it does not need to be addressed again. The present challenge is not directed to regulation 12 but rather to the Defendant’s failure to act since the judgment in *Andrews No.1*.
27. Mr Buley’s second submission was that the failing identified by the judgment in *Andrews No. 1* could and should have been addressed by the Defendant without resort to his power to make regulations. Thus, the submission goes, the present claim does rest on an unlawful act as defined at section 6 of the 1998 Act. I reject this submission too. Putting this claim as a contention that the Defendant should have acted out-with his powers under the 1983 Act (including the Election Rules) is artificial. The focus of Ms Andrews’ case is what the Defendant should have done to prescribe a device that would enable her and other blind or partially sighted persons to vote without assistance.

28. Moreover, the case that the Defendant acted unlawfully but without reference to his powers under the 1983 Act has not been properly pleaded; therefore, it is not part of Ms Andrews' case in these proceedings. As I have said, the case advanced in the Statement of Facts and Grounds is concerned with what the Defendant should have done to address the finding of illegality in the judgment in *Andrews No. 1*, concerning the way in which the Defendant had exercised his power under Rule 29(3A) of the Election Rules (more precisely, that he failed fully to exercise that power to achieve the objective specified in the Rule). Logically therefore, the case pleaded in the Statement of Facts and Grounds is directed to what the Defendant needed to do in exercise of his regulation-making power and the premise of the claim under the 1998 Act is that the Defendant's failure further to exercise that regulation-making power was unlawful.
29. The pleading does not clearly advance any other case. The high point for the purpose of this part of Mr Buley's submission, is paragraph 78 of the Statement of the Facts and Grounds where the pleading responds to the Defendant's reliance on section 6 of the 1998 Act (emphasis in the original):

“... The Claimant does not argue that the Defendant's failure to introduce secondary legislation since the judgment breaches Article 14 ECHR (or indeed A3P1). She argues simply that there is a breach of Article 14 ECHR because the Defendant has failed to make provision to address the objective needs of blind voters. That breach has subsisted since before the judgment, and continues thereafter. It does not arise from the Defendant's failure to take remedial action *since the judgment*, by laying further legislation, but by the fact that no provision is made (whether in primary or secondary legislation, or otherwise) to address the Claimant's needs.”

The hint at a case that might rest on a section 6 unlawful act is in the words “or otherwise” in the parenthesis at the end of the final sentence. Yet even this faint reference is at odds with what had been said earlier in the pleading. At paragraph 34 of the Statement of Facts and Grounds a footnote expressly doubts the existence of any power available to the Defendant to act other than Election Rules.

“... the Election Rules leave little room for practices which are not permitted or prescribed by the Rules themselves.”

30. The Defendant took this matter up in his Detailed Grounds of Defence at paragraph 55 (emphasis in the original):

“The decision the Claimant challenges is stated to be “*The arrangement made by the Defendant to enable blind people and partially-sighted voters to vote without assistance at polling stations*” dated 12 December 2019 (Claim Form, section 3). This formulation obscures the act or failure to act which is impugned. The only public function of the Minister which the Claimant expressly identifies in her Statement of Facts and Grounds is the function under Rule 29(3A)(b) of prescribing a device, in the

exercise of a power to make regulations subject to an affirmative resolution procedure. The act or failure to act which is challenged must therefore consist of either (1) original exercise of the power under Rule 29(3A)(b) in 2001 to prescribe regulation 12 of the 2001 Regulations (in respect of which the Claimant has already obtained the relief that she sought in the previous JR); or (2) the omission to exercise the power under Rule 29 (3A)(b) to prescribe new regulations specifying a device of a different description.”

A footnote at the end of this passage continued

“The Minister is concerned about the ambiguity in the Claimant’s pleaded case as to the relevant act of the Minister that is challenged. In the event that the Claimant chooses to advance a challenge to any currently unspecified act she would require permission of the Court to do so. Should such permission be obtained, the Minister will in any event require proper opportunity to respond, including by adducing further evidence if necessary.”

31. Thus, the Defendant put Ms Andrews on notice that if she wanted to advance the case that the Defendant should have acted in exercise of powers other than those in the 1983 Act (including the Elections Rules), she needed to set that case out expressly. No such case was raised; following service of the Detailed Grounds Ms Andrews made no application to amend her case. The skeleton argument settled by Mr Buley did not advance any formulated case resting on the “or otherwise” reference at paragraph 78 of the Statement of Facts and Grounds. There is a faint hint in paragraph 73 to 74 of the skeleton argument where passing reference is made to there being no need “to consider whether the Defendant has a bespoke power to make ... provision via secondary legislation”. But this way of putting the case was not further developed. It was only in his submissions in reply that Mr Buley asserted that this was indeed one way in which he wanted to put Ms Andrews’ case.
32. Drawing these matters together, there is no case before the court to the effect that the breach of the 1998 Act comprised the Defendant’s failure, acting out-with his powers under the 1983 Act, to ensure that blind and partially sighted persons could vote without assistance. No such case has been properly pleaded; if such a case was to be pursued, it should have been. The Defendant had raised his reliance on section 6 of the 1998 Act in his response to the pre-action letter: see letter from the Government Legal Department dated 13 November 2019 at paragraphs 5.13 – 5.15. In the face of this, Ms Andrews’ Convention rights case continued to focus on the Defendant’s failure to exercise his powers under the 1983 Act. There was the slimmest hint at some alternative claim, not made by reference to the 1983 Act, at paragraph 78 of the Statement of Facts and Grounds, but in context that is no more than a throw away reference. It does not come close to anything sufficient to identify that claim as requiring adjudication by the court. The same goes for the passing reference in the skeleton argument. Any such case ought to have been properly formulated and expressly advanced in a pleading so the Defendant could respond to it, and the court be properly placed to adjudicate upon it. These are basic requirements of fairness.

33. In these circumstances, Ms Andrews' Convention rights claim based on article 3 Protocol 1 does not rest on any unlawful act falling within the scope of section 6 of the 1998 Act. For that reason, this claim must fail.
34. The same conclusion must also apply to Ms Andrews' claim based on ECHR article 14 read with article 3 Protocol 1.
35. In any event, even if the section 6 point is put to one side, Ms Andrews' article 14 claim fails on its merits. The nature of the article 14 claim can be described in either of two ways, one narrower, the other wider. The narrower description of the claim focuses on arrangements in English law that ensure elections are by secret ballot, as required by the undertaking on the face of article 3 Protocol 1. For this purpose, the question arising is whether the provisions made in English law to safeguard that secrecy discriminate against disabled voters. The wider description of the claim looks generally at the arrangements for voting at elections in the 1983 Act (including the Election Rules). Article 3 Protocol 1 does not prescribe particular voting arrangements. But the case law of the European Court of Human Rights referred to above (see paragraphs 20 – 21) does make clear that any arrangements that contracting states do put in place to give effect to the right to vote must not undermine the integrity of an election. On this analysis, the issue in the present case is whether the arrangements for voting, so far as they affect blind or partially sighted persons, are discriminatory.
36. The legal basis for the article 14 claim can also be analysed in either of two ways. The analysis favoured by Ms Andrews rests on the principle stated in *Thlimmenos v Greece* (2001) 31 EHRR 15, that absent reasonable justification it is discriminatory to fail to treat differently persons whose situations are significantly different: see the judgment of the Court at paragraph 44. In that case the European Court of Human Rights considered the legality of a rule that prevented any person convicted of a felony from becoming a chartered accountant. The Court concluded this rule that applied to all persons with felony convictions amounted to unlawful discrimination. The Court's reasoning was as follows:
 - “47. The court considers that as a matter of principle, States have a legitimate interest to exclude some offenders from the profession of chartered accountant. However, the Court also considers that, unlike other convictions for serious criminal offences, a conviction for refusing on religious or philosophical grounds to wear the military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession. Excluding the applicant on the ground he was an unfit person was not, therefore, justified. The Court takes note of the Government's argument that persons who refuse to serve their country must be appropriately punished. However, it also notes the applicant did serve a prison sentence for his refusal to wear the military uniform. In these circumstances, the Court considers that imposing a further sanction of the applicant was disproportionate and it follows that the applicant's exclusion from the profession of chartered accountants did not pursue a legitimate aim. As a result, the Court finds there existed no objective and reasonable

justification for not treating the applicant differently from other persons convicted of a felony.

48 ... In the present case the Court considers it was the State having enacted the relevant legislation which violated the applicant's right not to be discriminated against in the enjoyment of his right under Article 9. That State did so by failing to introduce appropriate exceptions to the rule barring persons convicted of a felony from the profession of chartered accountants."

37. The Defendant's submission on the legal basis for any article 14 claim rested on the judgment of the European Court of Human Rights in *Stoian v Romania* (Application No. 289/14; judgment 29 June 2019). The Defendant's submission was that the substance of Ms Andrews' complaint was that the provisions in the 1983 Act including the Election Rules failed to include reasonable adjustment to accommodate the needs of blind and partially sighted persons.
38. I do not consider that anything material turns on whether the claim is described more narrowly or more broadly, or whether it is analysed in terms of *Thlimmenos*-style application without justification of a single set of rules to persons whose circumstances are materially different, or a *Stoian*-type failure to make a reasonable adjustment or accommodation.
39. The Election Rules and the 1983 Act do not apply the same rules both to blind and partially sighted persons, and to able-bodied persons. The starting point is the rules on how votes are cast. The "usual" position is at Rule 37: a ballot paper is given to each voter. Once this has happened Rule 37(5) describes what the voter must do:

"The voter, on receiving the ballot paper, shall forthwith proceed into the one of the compartments in the polling station and secretly mark his paper and fold it up so as to conceal his vote, and shall then show to the presiding officer the back of the paper, so as to disclose the number and other unique identifying mark and put the ballot paper so folded up into the ballot box in the presiding officer's presence."

The requirements on voters are modified for persons who by reason of disability, require assistance to vote. First, Rule 39 allows a voter to seek permission of the presiding officer to vote with the assistance of another person. When such permission is granted, Rule 39(2) provides "anything which is by these rules required to be done to or by that voter in connection with the giving of his vote may be done to or with the assistance of, the companion." Alternatively, by Rule 38, the presiding officer may, on request, assist a disabled person to vote. The different arrangements made by Rules 38 and 39 is addressed in section 66 of the 1983 Act, the provision ensuring the secret ballot: see section 66(5) which prohibits any person (presiding officer or otherwise) who has assisted a person to vote from revealing any information about how that person voted or intended to vote. The cumulative effect of these points is that the present claim

does not sit naturally within the *Thlimmenos* category of discrimination claims. No single rule or set of rules is being applied to persons in materially different positions.

40. A more natural description of Ms Andrews' complaint is that the Defendant has failed to make reasonable adjustment or accommodation so as to avoid putting her at a disadvantage by comparison with others who are not disabled. Put in this way, the substance of the dispute is whether the different provision made for blind and partially sighted persons (see above) is sufficient, or whether reasonable adjustment requires further differentiation in the form of taking steps necessary to enable blind and partially sighted persons to vote without assistance.
41. In *Stoian*, a case concerning a complaint that insufficient steps had been taken to enable a disabled pupil to attend a mainstream school, the European Court of Human Rights approached this issue in the following way.

“102. ... in the absence of accessibility of the physical environment prior to the integration of children with a disability in mainstream schools, the authorities have an obligation to provide reasonable accommodation from the moment it is requested ... However, this obligation may not impose a disproportionate or undue burden on the authorities ... Moreover, it is not for the Court to define the “reasonable accommodation” – which can take on different material and non-material forms – to be implemented in the educational sphere in response to the educational needs of persons with disabilities ...”

Thus, the Court accepted that the notion of reasonable adjustment or accommodation included a margin of appreciation.

42. In the context of a claim based on article 14 read with article 3 Protocol 1, this point is significant. Article 3 Protocol 1 does not prescribe an election code. Success on an article 14 claim does not require demonstration that a free-standing Convention right has been breached. But nor should the particular latitude that the court has held to be available to contracting states arising both from the formulation of article 3 Protocol 1 itself, and the nature of the right held to arise under it, be removed in one fell swoop because a claim is put as an article 14 complaint. Discrimination claims under the 1998 Act require article 14 to be read together with one or other of the free-standing Convention rights. When performing this exercise, the application of article 14 must be sensitive to the nature and extent of the free-standing right relied on.
43. In the present case, and applying the approach in *Stoian*, there is no discrimination contrary to article 14. The parts of the 1983 Act described above at paragraph 39, do make particular provision for blind and partially sighted persons, and are sufficient to meet any obligation to make reasonable adjustment or accommodation arising under article 14 read together with article 3 Protocol 1. Blind and partially sighted persons are enabled to vote with assistance but the requirement for a secret ballot is met by section 66(5), a prohibition against disclosure of information, that applies to any person who provides that assistance and is backed by criminal sanction in the event of breach. On this basis no question of justification arises.

44. If I am wrong on this and it is necessary to consider justification I accept the Defendant's submission summarised at paragraph 71 and 72 of his skeleton argument. Progress towards providing a device that will permit blind and partially sighted persons to vote without assistance was not, prior to the December 19 general election, as fast as might have been hoped. However, progress was made and any change to the practice of voting is a matter worthy of careful and proper thought and reflection. Thus, prior to the December 2019 general election, the Defendant did act for a legitimate purpose (consideration of how a matter affecting the conduct of elections should be addressed) and in a way that struck a permissible balance between the general public interest and the rights of disabled persons. Mr Buley's submissions to the contrary relied (among other matters) on article 29 of the United Nations Convention on the Rights of Persons with Disabilities. Given the overall effect of the provisions in the 1983 Act referred to above (at paragraph 39), and given also the judgment of the Supreme Court in *R(SC and others) v Secretary of State for Work and Pensions* [2021] UKSC 26 on the relevance of unincorporated international law to justification arguments (see per Lord Reed at paragraph 74 and following; judgment handed down after the hearing of this claim), this point takes matters no further.
45. All this is sufficient to deal with matters as they are raised in the Claim Form and relate to conduct at the time of the December 2019 general election. As far as concerns the period since, the pandemic has interrupted progress on developing testing and procuring the audio device that it is now proposed, when used in conjunction with the TVD, will enable blind and partially sighted persons to vote without assistance. I sincerely hope that, as and when the pandemic recedes, this work will be completed promptly and, as Mr Docker said in his first statement, will be completed in time to allow the audio device to be used at the May 2022 local elections.

D. Disposal

46. For the reasons above, this application for judicial review is refused.
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