



# The right to vote for disabled persons and citizens living abroad: UK report

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## About ETHOS

*ETHOS - Towards a European Theory Of Justice and fairness* is a European Commission Horizon 2020 research project that seeks to provide building blocks for the development of an empirically informed European theory of justice and fairness. The project seeks to do so by:

- a) refining and deepening knowledge on the European foundations of justice – both historically based and contemporarily envisaged;
- b) enhancing awareness of mechanisms that impede the realisation of justice ideals as they are lived in contemporary Europe;
- c) advancing the understanding of the process of drawing and re-drawing the boundaries of justice (fault lines); and
- d) providing guidance to politicians, policy makers, activists and other stakeholders on how to design and implement policies to reverse inequalities and prevent injustice.

ETHOS does not merely understand justice as an abstract moral ideal that is universal and worth striving for. Rather, it is understood as a re-enacted and re-constructed ‘lived’ experience. The experience is embedded in firm legal, political, moral, social, economic and cultural institutions that are geared towards giving members of society what is their due.

In the ETHOS project, justice is studied as an interdependent relationship between the ideal of justice and its real manifestation – as set in the highly complex institutions of modern European societies. The relationship between the normative and practical, the formal and informal, is acknowledged and critically assessed through a multi-disciplinary approach.

To enhance the formulation of an empirically based theory of justice and fairness, ETHOS will explore the normative (ideal) underpinnings of justice and its practical realisation in four heuristically defined domains of justice - social justice, economic justice, political justice, and civil and symbolic justice. These domains are revealed in several spheres:

- a) philosophical and political tradition;
- b) legal framework;
- c) daily (bureaucratic) practice;
- d) current public debates; and
- e) the accounts of vulnerable populations in six European countries (Austria, Hungary, the Netherlands, Portugal, Turkey and the United Kingdom).

The question of drawing boundaries and redrawing the fault lines of justice permeates the entire investigation.

Alongside Utrecht University in the Netherlands, which coordinates the project, five further research institutions cooperate. They are based in Austria (European Training and Research Centre for Human Rights and Democracy), Hungary (Central European University), Portugal (Centre for Social Studies), Turkey (Boğaziçi University), and the United Kingdom (University of Bristol). The research project lasts from January 2017 to December 2019.

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## **ACRONYMS**

EA 2010	Equality Act 2010
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
HRA	Human Rights Act
RPA	Representation of the People Act
UK	United Kingdom

## INSTITUTIONAL FRAMEWORK

The United Kingdom (UK) is a monarchy with most legislative power vested in a two-chamber Parliament based in Westminster (London). One of the chambers, the House of Commons, is elected for fixed five-year terms and the other, the House of Lords, is made up of life-appointed members. Since the nearly simultaneous adoption of the Scotland Act, the Government of Wales Act and the Northern Ireland Act in 1998, elected assemblies in Scotland, Wales and Northern Ireland have shared legislative authority with the Westminster Parliament in various areas, including the right to vote. However, under the so-called 'Sewel Convention' these regional (or 'devolved') legislative bodies regularly defer to Westminster legislation in their areas of competence. The demographically dominant region of England does not have a legislative body of its own, meaning it falls under the direct jurisdiction of Westminster Parliament. Since legislative competence for the regulation of regional elections has been devolved, this report will confine itself to local, parliamentary and European elections as well as referendums. Most apply throughout the United Kingdom but, where this is not the case, the report will cover the provisions that apply in England.

Unlike its other European counterparts, the British constitution is not codified in a single legal text. Constitutional law, which can be defined as 'conditioning the legal relationship between citizen and state in some general, overarching manner, or [enlarging or diminishing] the scope of what might be regarded as fundamental constitutional rights,'<sup>1</sup> thus finds itself scattered across a variety of sources, such as statutes, precedent, European Union (EU) law, the European Convention on Human Rights (ECHR), academic treatises and parliamentary and royal customs.<sup>2</sup> In domestic courts, international treaties can influence the interpretation of UK law but not call into question its validity. The UK legal system has therefore traditionally been characterised as dualist. However, this position has been significantly eroded by the European Communities Act 1972 and the Human Rights Act (HRA) 1998, which respectively make the rights emanating from the EU and the ECHR directly enforceable in British courts. The HRA 1998, in particular, empowers courts to invalidate the decisions of public authorities and 'subordinate' legislation (created by an executive authority under the explicit mandate set out by Parliament in 'primary' legislation). Given the long-term shift of legislative power from Parliament to the cabinet of ministers, such prerogatives have greatly enhanced the supervisory role of the courts. This being said, the ECHR cannot invalidate a statutory Act or a subordinate regulation or administrative decision directly derived from it. Under the HRA 1998, domestic courts are only allowed to interpret such Acts so as to maximise their compatibility with the ECHR and, where this is not possible, to make a 'declaration of incompatibility' that enables (but does not oblige) the competent Secretary of State to make necessary changes.<sup>3</sup> To reduce the likelihood of incompatible legislation being passed in the first place, the HRA establishes an obligation for the relevant minister to make a 'declaration of compatibility'.<sup>4</sup>

Since the coming into force of the Tribunals Courts and Enforcement Act 2007 most claims against the decision of a public authority must be lodged in generic first tier (first instance) and upper

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<sup>1</sup> Peter Leyland (2012), *The constitution of the United Kingdom*, Oxford: Hart, 2<sup>nd</sup> edition, p. 27.

<sup>2</sup> *Ibid.*, pp. 25-32.

<sup>3</sup> HRA 1998, Sections 4 and 10.

<sup>4</sup> HRA 1998, Section 19.

(appellate) tribunals that are independent from the departments making the decisions under review. A limited number of specialised statutory tribunals mandated to ensure compliance with specific standards of public administration also remain in place.<sup>5</sup> In England, tribunal decisions can be appealed in the Administrative Court, the Court of Appeal and finally the Supreme Court, which took over from House of Lords Appellate Committee in 2009.<sup>6</sup> Claims for judicial review must meet the requirements of standing and public action. To have standing under the HRA 1998 a claimant must be a direct 'victim' of the contested measure, but in other areas of constitutional law representative organisations have frequently been allowed to bring suit. Public authorities encompass national, regional and local institutions, including lower courts. However, the boundary between public and private has been considerably blurred by the multiplication of semi-autonomous corporations and the contracting out of various public services to limited companies and charities. To determine whether an organisation falls within the scope of public law, courts have taken various and sometimes unpredictable factors into account, such as the source of the power being exercised, the statutory underpinnings of the body, the exercise of monopoly control and the reception of public funding. The main remedies available through judicial review are a quashing order, a mandatory order or a prohibitory order. Financial compensation for individual litigants is rarely available.<sup>7</sup>

## **GENERAL REGULATION OF THE RIGHT TO VOTE**

The Representation of the People Act 1983 is the key statutory instrument regulating the exercise of the right to vote in parliamentary elections throughout the United Kingdom. It also provides the template for local, mayoral and European elections as well as referendums, which are nevertheless governed by separate (mainly secondary) legislation.<sup>8</sup> To unpack the general principles underpinning voting rules, the following discussion will focus on the franchise and procedure applicable in parliamentary elections.

Under Sections 1 and 2 of the RPA 1983, a person is entitled to vote as an elector in a parliamentary election if she is registered in a given parliamentary constituency/local government area, is not subject to any legal incapacity to vote, is either a Commonwealth citizen or a citizen of the Republic of Ireland and is 18 years old or over. Most Commonwealth member states and the Republic

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<sup>5</sup> Anthony Wilfred Bradley, Keith Ewing and Christopher Knight (2015), *Constitutional & Administrative Law*, Edinburgh: Pearson, 16<sup>th</sup> edition, pp. 603-607.

<sup>6</sup> Constitutional Reform Act 2005, Part 3.

<sup>7</sup> *Constitutional & Administrative Law*, op. cit., pp. 668-676.

<sup>8</sup> Section 36 of the RPA 1983 establishes that the Secretary of State must set out rules for local government elections in England and Wales by applying Schedule I of the Act (Parliamentary Election Rules) subject to such adaptations, alterations and exceptions as seem appropriate. The main legislative instruments covering local, mayoral and European elections are the Local Elections (Principal Areas) (England and Wales) Rules 2006; the Local Authorities (Mayoral Elections) (England and Wales) Regulations 2007; and the European Parliamentary Elections Regulations 2004. Under the Political Parties, Elections and Referendums Act 2000, most of the rules governing referendums must be established specifically prior to their organisation. The referendum on the United Kingdom's withdrawal from the European Union was regulated by the European Union Referendum Act 2015.

of Ireland were once subject to British rule. Under Section 4 of the Act, a person can only be registered for a constituency if, on the date when the application for registration is made, she resides in the constituency. Commonwealth citizens subject to immigration controls must also have leave to remain in the United Kingdom. When deciding whether an elector resides at a particular address, registration officers must take into consideration the fact and purpose of her residence at the given address on the date of the application. In a case where, at a particular time, a person is staying at any place other than on a permanent basis, she may be considered resident there if she has no home elsewhere, or not resident there if she does. Residence must not be taken to have been interrupted by reason of a person's absence in the performance of any duty related to any office, service or employment if she intends to resume residence within six months of giving it up or the dwelling serves as a permanent place of residence that has been temporarily abandoned for the performance of that duty. Any temporary period of unemployment must be disregarded when determining the motive of the person's absence. Attendance on a course provided by an educational institution must be regarded as motivated by the performance of a duty.<sup>9</sup>

Citizens of British Overseas Territories (former colonies of the British empire)<sup>10</sup> and Crown dependencies (small nearby islands which were not colonised)<sup>11</sup> have their own representative bodies, although the British government retains residual powers in matters of security and foreign policy.<sup>12</sup> Like Commonwealth and Irish citizens, they do not have the right to vote in UK parliamentary elections unless they establish their residence in the United Kingdom. There are no exceptions for military personnel, civil servants or other service qualifications. Since eligibility for non-parliamentary elections mostly derives from the parliamentary franchise, these citizens are also excluded from the former. However, the European Parliament (Representation) Act 2003 provides for the creation of an EU electoral register for Gibraltar, which is combined with an electoral region in England and Wales (currently South West England).<sup>13</sup> This follows a decision of the European Court of Human Rights (ECtHR) finding the ineligibility of a Gibraltar citizen to participate in European Parliament elections to be in breach of the ECHR.<sup>14</sup>

The provision of false information in relation to electoral registration is an offence punishable by imprisonment for a term not exceeding 51 weeks or a fine not exceeding £5,000.<sup>15</sup> Decisions of the registration officer can be appealed to the county court of the Court of Appeal. An appeal that is

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<sup>9</sup> RPA 1983, Section 5.

<sup>10</sup> Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, St. Helena and its dependencies (Ascension Island and Tristan da Cunha), and the Turks and Caicos Islands.

<sup>11</sup> The Bailiwick of Guernsey (including Alderney and Sark), the Isle of Man and the Bailiwick of Jersey.

<sup>12</sup> Human Rights Committee, Consideration of reports submitted by State Parties under Article 40 of the Convention. United Kingdom, the British Overseas Territories, the Crown Dependencies, CCPR/C/GBR/7, 29 April 2013, pp. 8-33.

<sup>13</sup> The European Parliamentary Elections (Combined Region and Campaign Expenditure) (United Kingdom and Gibraltar) Order 2004, Article 2.

<sup>14</sup> *Matthews v UK* App no 24833/94 (ECHR, 18 February 1999).

<sup>15</sup> RPA 1983, Section 13D and Criminal Justice Act 1982, Section 37(1)(2).

pending when notice of an election is given does not prejudice the operation as respects the election of the decision appealed against.<sup>16</sup>

Under the Electoral Registration and Administration Act 2013, an individual must personally register to vote. The previous system placed on the head of a household the responsibility for declaring the names of those residing at the household who were entitled to vote.<sup>17</sup>

An elector may vote in a parliamentary or local government election at the polling station allotted to her or, alternatively, by post or by proxy.<sup>18</sup> To vote by post or by proxy, an elector must satisfy the registration officer that she cannot reasonably be expected to vote in person at the polling station allotted or likely to be allotted to her.<sup>19</sup> A person appointed to vote as proxy must fulfil the same eligibility requirements as other voters and be willing to act as such. In addition, a given person is not entitled to vote as proxy in the same parliamentary election on behalf of more than two unrelated persons. A related person is a spouse or civil partner, parent, grandparent, brother, sister, child or grandchild.<sup>20</sup>

In parliamentary elections, every constituency must be divided into polling districts with a designated polling place. In England, the council of each district has a duty to divide its area into polling districts and to designate the polling places for those polling districts.<sup>21</sup> In doing so, it must seek to ensure that all electors in a constituency in its area have such reasonable facilities for voting as are practicable in the circumstances.<sup>22</sup> The polling place for a polling district must be an area in the district, unless special circumstances make it desirable to designate an area wholly or partly outside the district,<sup>23</sup> and small enough to indicate to electors in different parts of the district how they will be able to reach the polling station.<sup>24</sup> The council must review each polling district and polling place in its area at least every four years.<sup>25</sup> Representations against council decisions regarding polling districts and places can be made to the Electoral Commission by the council of a parish in England and Wales, a minimum of 30 electors in the constituency concerned, or any elector who has made representation in the course of a review.<sup>26</sup> The returning officer for the constituency may make observations on such representations.<sup>27</sup> The Electoral Commission must consider such representations and observations and may direct the relevant authority to make alterations to the polling places or, if the authority fails to make the alterations before the end of the period of two months starting on the day the direction

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<sup>16</sup> RPA 1983, Section 56.

<sup>17</sup> Equality and Human Rights Commission (2017), *Being disabled in Britain: A journey less equal*, p. 119 [accessed via <https://www.equalityhumanrights.com/sites/default/files/being-disabled-in-britain.pdf>].

<sup>18</sup> RPA 1985, Section 5.

<sup>19</sup> RPA 1985, Sections 6-7.

<sup>20</sup> RPA 1985, Section 8.

<sup>21</sup> RPA 1983, Section 18.

<sup>22</sup> RPA 1983, Section 18A.

<sup>23</sup> RPA 1983, Section 18B(d).

<sup>24</sup> RPA 1983, Section 18B(e).

<sup>25</sup> RPA 1983, Sections 18C(4) and (5).

<sup>26</sup> RPA 1983, Sections 18D(1) and (6).

<sup>27</sup> RPA 1983, Section 18D(3).

is given, make the alterations itself.<sup>28</sup> For elections of county councillors in England, the county council may divide an electoral division into polling districts, and may alter any polling district, so that electors from any parliamentary polling district wholly or partly within the electoral area can, in the absence of special circumstances, be allotted to a polling station within the parliamentary polling place for that district unless the parliamentary polling place is outside the electoral area.<sup>29</sup>

Returning officers (in England, the sheriff of a county constituency or the chairman or mayor of a borough constituency) have a general duty to do all such acts and things as may be necessary for effectually conducting a parliamentary election.<sup>30</sup> The detailed rules for discharging this function are laid out in Schedule 1 of the RPA 1983. Under these rules, the returning officer must issue a statement of candidates stating the day and hours on which the poll will be taken. She must also give public notice of the situation of each polling station and the description of voters entitled to vote there.<sup>31</sup> The ballot of every voter must consist of a ballot paper, and only nominated candidates are entitled to have their names inserted in the ballot paper. Every ballot paper must contain the names and other particulars of the candidates as shown in the statement of persons nominated, be capable of being folded up and have a number and other unique identifying mark printed on the back.<sup>32</sup> For those entitled to vote by post, the returning officer must issue a ballot paper, a postal voting statement and envelopes for their return. In the case of a ballot paper issued to a person resident in the United Kingdom, the returning officer must ensure that the return of the ballot paper and postal voting statement or declaration of identity is free of charge to the voter.<sup>33</sup> The returning officer must provide a sufficient number of polling stations and allot the electors to the polling stations in such manner as she thinks most convenient. The polling station allotted to electors from any polling district shall be in the polling place for that district. One or more polling stations may be provided in the same room. Each polling station must comprise such number of compartments as may be necessary in which the voters can mark their votes screened from observation.<sup>34</sup>

The returning officer must appoint and pay a presiding officer to attend at each polling station and such clerks as may be necessary for the purposes of the election, but she must not appoint any person who has been employed by or on behalf of a candidate in relation to the election. A presiding officer or the clerks appointed by her may perform any act required or authorised to perform at a polling station except order the arrest, exclusion or removal of any person from the polling station or refuse to deliver a ballot paper.<sup>35</sup> As soon as practicable after the publication of notice of the election, the returning officer must send to electors and their proxies an official poll card. An elector's official poll card shall be sent or delivered to her address, and a proxy's to her address as shown in the list of proxies. The official poll card must set out the name of the constituency, the elector's name, qualifying address and number on the register, the date and hours of the poll and the situation of the elector's

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<sup>28</sup> RPA 1983, Section 18D(4).

<sup>29</sup> RPA 1983, Section 31.

<sup>30</sup> RPA 1983, Sections 23 and 24.

<sup>31</sup> RPA 1983, Schedule 1, rule 23.

<sup>32</sup> RPA 1983, Schedule 1, rule 19.

<sup>33</sup> RPA 1983, Schedule 1, rule 24.

<sup>34</sup> RPA 1983, Schedule 1, rule 25.

<sup>35</sup> RPA 1983, Schedule 1, rule 26.

polling station and such other information as the returning officer thinks appropriate.<sup>36</sup> The returning officer must provide each presiding officer with such number of ballot boxes and ballot papers as in her opinion may be necessary. Every ballot box must be so constructed that the ballot papers can be put in it, but cannot be withdrawn from it, without the box being unlocked. The returning officer must provide each polling station with materials to enable voters to mark the ballot papers. A notice giving directions for the guidance of the voters in voting, must be printed in conspicuous characters and exhibited inside and outside every polling station. In every compartment of every polling station there must be exhibited the notice 'Vote for one candidate only. Put no other mark on the ballot paper, or your vote may not be counted.'<sup>37</sup> Where a postal vote has been returned in respect of a person who is entered on the postal voters list, the returning officer must mark the list.<sup>38</sup>

The presiding officer must regulate the total number of voters and persons under the age of 18 who accompany them to be admitted to the polling station at the same time.<sup>39</sup> She has a duty to keep order at the polling station and, if a person misconducts herself or fails to obey her orders, have her removed from the polling station by a constable in or near that station or any other person authorised in writing. The person cannot again enter the polling station during the day without the presiding officer's permission. However, this power must not be exercised to prevent a voter who is otherwise entitled to vote at a polling station from having an opportunity of voting at that station. At the time of their application to vote (but not afterwards), the presiding officer must ask a voter if she is the person registered in the register of parliamentary electors and if she has already voted at this election otherwise than as a proxy for some other person. To a person applying as proxy, she must ask if she is the person whose name appears in the list of proxies, if she has already voted in this election as proxy on behalf of the voter in question and if she is the spouse, civil partner, parent, grandparent, brother/sister, child or grandchild of the voter. A ballot paper must not be delivered to any person required to answer any of these questions unless she has answered each question satisfactorily. No other inquiry is permitted as to the right of any person to vote.<sup>40</sup> Voters must not be prevented from voting by reason only that a candidate or her election or polling agent declares that she has reasonable cause to believe that the person has committed an offence of personation, or that the person is arrested on the grounds that she is suspected of committing or of being about to commit such an offence.<sup>41</sup> A ballot paper must be delivered to a voter who applies for one. Immediately before delivery, the number and name of the elector must be called out; the number of the elector must be marked on the list of electors entitled to vote at the polling station; a mark must be placed in the register of electors against the number of the elector to note that a ballot paper has been received; and the voter must sign the list of electors beside her elector number. In the case of a person applying for a ballot paper as proxy, a mark must also be placed against her name in the list of proxies.<sup>42</sup>

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<sup>36</sup> RPA 1983, Schedule 1, rule 28.

<sup>37</sup> RPA 1983, Schedule 1, rule 29.

<sup>38</sup> RPA 1983, Schedule 1, rule 31A.

<sup>39</sup> RPA 1983, Schedule 1, rule 32(1A).

<sup>40</sup> RPA 1983, Schedule 1, rule 35.

<sup>41</sup> RPA 1983, Schedule 1, rule 36A.

<sup>42</sup> RPA 1983, Schedule 1, rule 37(1).

In England, Wales and Scotland there is no requirement to present any identifying document before casting a vote.<sup>43</sup> However in May 2018 the Electoral Commission implemented a voter identification (ID) pilot scheme in five municipalities, with a view to deciding how to design a scheme that could be used in parliamentary and other local elections in England.<sup>44</sup> This followed a previous Commission recommendation highlighting potential risks of electoral fraud.<sup>45</sup>

Before issuing a ballot paper, the presiding officer or a clerk must provide the voter with the following instructions: 1) When you are given a ballot paper go to one of the compartments. Mark a cross in the box on the right-hand side of the ballot paper opposite the name of the candidate you are voting for; 2) Vote for one candidate only. Put no other mark on the ballot paper, or your vote may not be counted. Do not let anyone see your vote; 3) Fold the ballot paper in two. Show the back of the ballot paper to the presiding officer so as to disclose the number and other unique identifying mark. Put the ballot paper in the ballot box and leave the polling station; 4) If by mistake you spoil a ballot paper, show it to the presiding officer and ask for another one.<sup>46</sup>

On receiving the ballot paper, the voter must proceed into one of the compartments in the polling station and secretly mark her paper and fold it up to conceal her vote. She must 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 folded ballot paper into the ballot box in the presiding officer's presence.<sup>47</sup> The voter must vote without undue delay and leave the polling station as soon as she has put her ballot paper into the ballot box.<sup>48</sup> Any ballot paper that does not bear the official mark, on which votes are given for more than one candidate, on which anything is written or marked that could identify the voter except the printed number and other unique identifying mark on the back, or which is unmarked or void for uncertainty is void and not counted.<sup>49</sup> However, a ballot paper on which the vote is marked elsewhere than in the proper place, other than by means of a cross or by more than one mark must not for such reason be deemed to be void if an intention that the vote is for one or other of the candidates clearly appears, and the way the paper is marked does not identify the voter.<sup>50</sup>

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<sup>43</sup> In Northern Ireland voters must produce for inspection an identifying document. If the document or the apparent age of the voter as compared with her age according to her date of birth raises a reasonable doubt as to whether she is the elector or proxy she represents herself to be, the presiding officer must refuse to deliver a ballot paper to the voter. The refusal must be subject to review on an election petition but otherwise be final and not be questioned in any proceeding. See RPA 1983, Schedule 1, rules 37(1ABC) and 40A(1).

<sup>44</sup> Electoral Commission (2018), *May 2018 voter identification pilot schemes: Findings and recommendations*, pp. 1-2 [accessed via [https://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0006/244950/May-2018-voter-identification-pilots-evaluation-report.pdf](https://www.electoralcommission.org.uk/_data/assets/pdf_file/0006/244950/May-2018-voter-identification-pilots-evaluation-report.pdf)].

<sup>45</sup> Electoral Commission (2014), *Electoral fraud in the UK: Final report and recommendations* [accessed via [https://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0008/164609/Electoral-fraud-review-final-report.pdf](https://www.electoralcommission.org.uk/_data/assets/pdf_file/0008/164609/Electoral-fraud-review-final-report.pdf)].

<sup>46</sup> RPA 1983, Schedule 1, Guidance for voters.

<sup>47</sup> RPA 1983, Schedule 1, rule 37(5).

<sup>48</sup> RPA 1983, Schedule 1, rule 37(6).

<sup>49</sup> RPA 1983, Schedule 1, rule 47(1).

<sup>50</sup> RPA 1983, Schedule 1, rule 47(2).

During a parliamentary or local government election, a registered person cannot be excluded from voting on the grounds that she is not of voting age, that she is not a Commonwealth citizen, a citizen of the Republic of Ireland or a citizen of the European Union, or that she is otherwise subject to an incapacity to vote.<sup>51</sup> A misnomer or inaccurate description of a person or place named in the register of parliamentary elections or local government elections does not affect the full operation of the document with respect to that person or place where the description of the person or place is such as to be commonly understood.<sup>52</sup>

Officials attending at polling stations must maintain and aid in maintaining the secrecy of voting and must not, except for some purpose authorised by law, communicate before the poll is closed any information as to the identity of any elector or proxy for an elector who has or has not applied for a ballot paper or voted at a polling station.<sup>53</sup> Every person attending at the counting of the votes must also maintain and aid in maintaining the secrecy of voting and must not ascertain or attempt to ascertain at the counting of the votes any identifying mark on the back of any ballot paper or 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.<sup>54</sup> No person is allowed to attempt to interfere with a voter when recording her vote, 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, communicate 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 on the back of the ballot paper given to a voter at that station, or induce a voter to display her ballot paper after she has marked it so as to make known to any person the name of the candidate for whom she has voted.<sup>55</sup> Similar requirements apply to persons attending the proceedings in connection with the issue or the receipt of ballot papers for persons voting by post.<sup>56</sup> Infractions to secrecy are punishable on summary conviction by a fine of a maximum of £5,000 or imprisonment for a term not exceeding six months. No person who has voted at the election can, in any legal proceeding to question the election or return, be required to state for whom she voted.<sup>57</sup>

A series of additional offences are designed to prevent individual interference with the exercise of the right to vote. The offence of personation consists in voting as some other person or as proxy for a person whom one has reasonable grounds for supposing to be dead or fictitious, or when the appointment as proxy is no longer in force.<sup>58</sup> Other voting offences include knowingly voting without capacity, more than once and as proxy for more than two unrelated persons, as well as hampering the vote of another person.<sup>59</sup> There are also offences relating to declarations of service of local connection (see section below on citizens living abroad).<sup>60</sup> A person guilty of such practices becomes incapable of being registered as an elector or voting at any parliamentary election in the

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<sup>51</sup> RPA 1983, Section 49.

<sup>52</sup> RPA 1983, Section 50.

<sup>53</sup> RPA 1983, Section 66(1).

<sup>54</sup> RPA 1983, Section 66(2).

<sup>55</sup> RPA 1983, Section 66(3).

<sup>56</sup> RPA 1983, Section 66(4).

<sup>57</sup> RPA 1983, Schedule 1, rule 21.

<sup>58</sup> RPA 1983, Section 60.

<sup>59</sup> RPA 1983, Sections 61 and 62A.

<sup>60</sup> RPA 1983, Section 62.

United Kingdom or at any local government election in Great Britain, as well as holding any elective office, for a period of three or five years.<sup>61</sup> Section 65 of the RPA 1983 lists various offences targeting election officials: fraudulently defacing or destroying any nomination or ballot paper, supplying a ballot paper without authority, fraudulently putting in a ballot box any paper other than the ballot paper authorised by law, fraudulently taking a ballot paper out of the polling station or destroying, taking, opening or otherwise interfering with any ballot box or packet of ballot papers. Commission of such an offence by a returning officer, a presiding officer or an appointed clerk may entail imprisonment for a term not exceeding two years, a fine or both. Any other person is liable to imprisonment for a term not exceeding six months, a fine or both.<sup>62</sup> Police officers who engage in illegal canvassing, which consists in trying to persuade any person to give her vote or dissuade her from giving it by word, message, writing or any other manner, are liable to a fine not exceeding £1,000.<sup>63</sup> A final set of offences target interference by candidates themselves or their supporters. *Bribery* consists in: giving money or procuring any office to or for any voter, any other person on behalf of any voter or any other person in order to induce any voter to vote or refrain from voting; corruptly doing any such act on account of any voter having voted or refrained from voting; making any such gift or procurement in order to induce a person to procure the return of any person at an election or the vote of any voter; or procuring or engaging, in consequence of any such gift or procurement, the return of any person at an election or the vote of any voter.<sup>64</sup> *Treating* consists in corruptly giving or providing in whole or in part any meat, drink, entertainment or provision for the purpose of corruptly influencing that person or any other person to vote or refrain from voting, or on account of having done so. An elector or proxy who corruptly accepts or takes any such meat, drink, entertainment or provision is also guilty of treating.<sup>65</sup> *Undue influence* consists in making use of any force, violence or restraint, or inflicting or threatening to inflict any temporal or spiritual injury, damage, harm or loss upon or against any person in order to induce or compel that person to vote or refrain from voting, or on account of that person having voted or refrained from voting; or by abduction, duress or any fraudulent device or contrivance, impeding or preventing the free exercise of the franchise of an elector or proxy for an elector.<sup>66</sup> Where a candidate is proven to have been guilty of bribery, treating or undue influence in respect of any person who voted at the election, one vote must be struck off on a scrutiny of the poll for every person proven to have been so bribed, treated or unduly influenced.<sup>67</sup>

## RELEVANT ANTI-DISCRIMINATION PROVISIONS

The Equality Act (EA) 2010 prohibits direct discrimination, indirect discrimination, harassment and victimisation. A person directly discriminates against another person if, because of a protected

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<sup>61</sup> RPA 1983, Section 160.

<sup>62</sup> RPA 1983, Sections 65(3) and (4).

<sup>63</sup> RPA 1983, Section 100 and Criminal Justice Act 1982, Section 37(1)(2).

<sup>64</sup> RPA 1983, Section 113.

<sup>65</sup> RPA 1983, Section 114.

<sup>66</sup> RPA 1983, Section 115.

<sup>67</sup> RPA 1983, Section 166.

characteristic, she treats her less favourably than she treats or would treat others.<sup>68</sup> A person indirectly discriminates against another if she applies a provision, criterion or practice that is also applied to persons who do not share the protected characteristic but puts or would put persons sharing the characteristics at a particular disadvantage and is not a proportionate means of achieving a legitimate aim.<sup>69</sup> A person harasses another if she engages in unwanted conduct related to a relevant protected characteristic that has the purpose or effect of violating the person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.<sup>70</sup> A person victimises another if she subjects her to a detriment because she brings proceedings under the EA 2010, gives evidence or information in connection with proceedings under the Act, does any other thing in connection with the Act or makes an allegation that someone has contravened the Act.<sup>71</sup>

Where a person reasonably thinks that those who share a protected characteristic suffer a disadvantage connected to the characteristic, have different needs or disproportionately low rates of participation in an activity, Section 158 allows her to take any proportionate action to meet those needs to enable or encourage persons who share the protected characteristic to overcome or minimise their disadvantage or participate in the activity.

Section 29 specifically prohibits the following forms of discrimination, harassment and victimisation by providers of services to the public or a section of the public, for payment or not: 1) not providing the person with the service; and 2) discriminating against a person as to the terms of service provision, by terminating service provision or by any other detriment. It also imposes a duty on service providers and persons who exercise a public function to make reasonable adjustments. Public authorities or other persons who exercise public functions must have due regard to eliminating discrimination, harassment, victimisation and any other discriminatory conduct, advancing equality of opportunity and fostering good relations between persons who share a relevant protected characteristic and persons who do not share it.<sup>72</sup>

Discrimination claims can be brought in county courts within six months after the act to which they relate, or such other period as the court thinks just and equitable.<sup>73</sup> County courts have the power to grant any remedy that could be granted by the High Court in proceedings in tort or on a claim for judicial review.<sup>74</sup> If there are facts from which the court could decide, in the absence of any other explanation, that discrimination has occurred, the court must hold that the provision concerned has been contravened unless the defendant proves the contrary.<sup>75</sup>

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<sup>68</sup> EA 2010, Sections 13(1) and (3).

<sup>69</sup> EA 2010, Section 19.

<sup>70</sup> EA 2010, Section 26.

<sup>71</sup> EA 2010, Section 27.

<sup>72</sup> EA 2010, Section 149.

<sup>73</sup> EA 2010, Sections 114 and 118.

<sup>74</sup> EA 2010, Section 119.

<sup>75</sup> EA 2010, Section 136(1)(2)(3).

## SPECIFIC PROVISIONS ON DISABLED VOTERS

Section 6(1) of the EA 2010 states that a person has a disability if she has a physical or mental impairment that has a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities. Statutory guidance lists the following types of impairments from which a disability can arise: sensory impairments affecting sight or hearing; impairments with fluctuating or recurring effects such as rheumatoid arthritis, myalgic encephalitis, chronic fatigue syndrome, fibromyalgia, depression and epilepsy; progressive impairments such as motor neurone disease, muscular dystrophy, and forms of dementia; auto-immune conditions such as systemic lupus erythematosus; organ specific, including respiratory conditions such as asthma, and cardiovascular diseases, including thrombosis, stroke and heart disease; developmental, such as autistic spectrum disorders, dyslexia and dyspraxia; learning disabilities; mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, or unshared perceptions; eating disorders; bipolar affective disorders; obsessive compulsive disorders; personality disorders; post-traumatic stress disorder, and some self-harming behaviour; mental illnesses such as depression and schizophrenia; impairments produced by injury to the body, including to the brain.<sup>76</sup> HIV, cancer and multiple sclerosis are also considered as disabilities. A person who is certified as blind, severely sight impaired, sight impaired or partially sight impaired by a consultant ophthalmologist is deemed to have a disability without having to show the effects of the impairment.<sup>77</sup> Unless it was originally the result of the administration of prescribed drugs or other medical treatment, addiction to alcohol, nicotine or any other substance is not treated as an impairment.<sup>78</sup> Neither are the tendencies to set fires, steal, physically or sexually abuse other persons, exhibitionism and voyeurism. Allergic rhinitis only qualifies as an impairment if it aggravates the effect of any other condition.<sup>79</sup> Severe disfigurement cannot be treated as having a substantial adverse effect on day-to-day activities if it consists of a tattoo or non-medical piercing.<sup>80</sup> For other types of severe disfigurement, substantial adverse effects need not be demonstrated. The severity of disfigurements such as scars, birthmarks, deformation or skin diseases must be assessed through factors such as the nature, size, prominence and location of the disfigurement.<sup>81</sup>

Substantial effect can be determined by considering the time taken to carry out an activity, the way in which it is carried out and the number of activities affected by the impairment, the possibility of behavioural adaptation to the impairment and the effects of the environment. Except in the cases of spectacles or contact lenses, impairments that are subject to treatment or correction must be treated as having a substantial adverse effect if they would have that effect without the treatment.<sup>82</sup> Progressive conditions such as dementia and motor neurone disease must be treated as

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<sup>76</sup> Office for Disability Issues (2010), *Equality Act 2010: Guidance on matters to be taken into account in determining questions relating to the definition of disability*, pp. 8-9 [accessed via [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/570382/Equality\\_Act\\_2010-disability\\_definition.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/570382/Equality_Act_2010-disability_definition.pdf)].

<sup>77</sup> *Ibid.*, p. 11 and Equality Act 2010 (Disability) Regulations 2010, reg 7.

<sup>78</sup> EA 2010 (Disability) Regulations 2010, reg 3.

<sup>79</sup> EA 2010 (Disability) Regulations 2010, reg 4.

<sup>80</sup> EA 2010 (Disability) Regulations 2010, reg 5.

<sup>81</sup> *Equality Act 2010: Guidance*, op. cit., p. 26.

<sup>82</sup> *Ibid.*, p. 21.

having a substantial adverse effect from the moment they have some adverse effect, provided it is likely to become substantial.<sup>83</sup> A long-term effect is one that has lasted or is likely to last at least 12 months.<sup>84</sup>

For the purposes of the Act, day-to-day activities are understood as things people do on a regular or daily basis such as shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.<sup>85</sup> Where a child under six years of age has an impairment that does not have a substantial and long-term adverse effect on the ability of that child to carry out normal day-to-day activities, she is deemed disabled where it would normally have that effect on a person aged six years or over.<sup>86</sup>

Under Section 15(1) and (2) of the EA 2010, a person discriminates against a disabled person if she treats her unfavourably because of something arising in consequence of her disability and cannot show that the treatment is a proportionate means of achieving a legitimate aim. There is an exception if the former did not know, and could not reasonably be expected to know, that the person had the disability. A person also discriminates on the grounds of disability if she fails to comply with the duty to make reasonable adjustments. The duty comprises three requirements: 1) where a provision, criterion or practice puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take reasonable steps to avoid the disadvantage;<sup>87</sup> 2) where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take reasonable steps to avoid the disadvantage;<sup>88</sup> 3) where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take reasonable steps to provide the auxiliary aid.<sup>89</sup> Where the first or third requirement relates to the provision of information, the steps include ensuring that the information is provided in an accessible format.<sup>90</sup> A person is not entitled to require a disabled person in relation to whom she has a reasonable adjustment duty to pay the costs of complying.<sup>91</sup> In relation to the second requirement, avoiding a substantial disadvantage includes removing the physical feature in question, altering it or providing a reasonable means of avoiding it.<sup>92</sup> A physical feature can be a feature arising from the design or construction of a building; a feature of an approach to, exit from or

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<sup>83</sup> Ibid., p. 23.

<sup>84</sup> EA 2010, Schedule 1, rule 2.

<sup>85</sup> *Equality Act 2010: Guidance*, op. cit., p. 34.

<sup>86</sup> EA 2010 (Disability) Regulations 2010, reg 6.

<sup>87</sup> EA 2010, Section 20(3).

<sup>88</sup> EA 2010, Section 20(4).

<sup>89</sup> EA 2010, Section 20(5).

<sup>90</sup> EA 2010, Section 20(6).

<sup>91</sup> EA 2010, Section 20(7).

<sup>92</sup> EA 2010, Section 20(9).

access to a building; a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises; or any other physical element or quality.<sup>93</sup>

Section 29 of the Mental Capacity Act 2005 specifies that nothing in the Act permits a decision on voting at an election for any public office, or at a referendum, to be made on behalf of a person. Section 73 of the Electoral Administration Act 2006 abolishes any common law rule providing for legal incapacity to vote by reason of a person's mental state.

The RPA 1983 makes various specific provisions aiming to facilitate the vote of persons with mental or physical disabilities. Patients in mental hospitals, defined as any establishment maintained wholly or partly for the reception of persons suffering from a mental disorder, must be regarded as resident at the mental hospital in question if the length of the period which they are likely to spend at the hospital is sufficient for them to be regarded as being resident there. However, they can also register as resident at some other place, including by making a declaration of local connection.<sup>94</sup> Such a declaration must specify the name of the declarant and either an address to which correspondence can be delivered or that she is willing to collect such correspondence periodically from the registration officer's office; the date of the declaration; the grounds for making the declaration; the address at which the patient would be residing if she were not a patient, or at which she has resided; a declaration of being a Commonwealth citizen or a citizen of the Republic of Ireland; and whether the declarant has attained the age of 18 years.<sup>95</sup> While the person's declaration of local connection is in force, she must be regarded as resident at the hypothetical or past address on the date of the declaration. The person is entitled to remain so registered until the end of the period of 12 months beginning with the date when the entry in the register first takes effect, she cancels the declaration or another entry in a register of electors takes effect (whichever occurs first).<sup>96</sup>

When designating polling places, district or borough councils must seek to ensure that so far as is reasonable and practicable every polling place for which they are responsible is accessible to electors who are disabled. They must also have regard to the accessibility to disabled persons of polling stations in a given polling place.<sup>97</sup> When conducting a review of polling districts and polling places, councils must seek representations from persons they think have particular expertise in relation to access to premises or facilities for persons who have different forms of disability.<sup>98</sup> Representations made to the Electoral Commission during a review of polling districts and places can be made by a person who is not an elector in a constituency in the authority's area but who the Commission thinks has sufficient interest in the accessibility of disabled persons to polling places in the area or has particular expertise in relation to the access to premises or facilities of disabled persons. Such representations may relate to a failure by a district or borough council to take sufficient account, during a review, of the accessibility to disabled persons of polling stations within a polling place.<sup>99</sup>

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<sup>93</sup> EA 2010, Section 20(10).

<sup>94</sup> RPA 1983, Section 7.

<sup>95</sup> RPA 1983, Section 7B.

<sup>96</sup> RPA 1983, Section 7C.

<sup>97</sup> RPA 1983, Section 18B(4).

<sup>98</sup> RPA 1983, Schedule A1, rule 4.

<sup>99</sup> RPA 1983, Sections 18D(1)(a) and (2).

If a physically disabled elector is unable to enter the polling station, the presiding Officer, after informing any agents present, may take the ballot paper to the elector. After the ballot paper has been marked, the presiding Officer must place the folded paper into the ballot box immediately. The secrecy of the vote must be maintained, and the ballot box must not be left unattended or removed from the polling station.<sup>100</sup> There is no requirement for mobile ballot boxes to be made available.

Disabled voters have the right to be admitted to a polling station with a companion.<sup>101</sup> Returning officers must provide each polling station with a large version of the ballot paper to display inside the polling station for voters who are partially sighted, as well as a device for enabling voters who are blind or partially sighted to vote without any need for assistance from the presiding officer or any companion.<sup>102</sup> The enlarged copy of the ballot paper must be displayed in a well-lit area where electors can easily see it before being issued with their ballot paper. It can be used by the voter in the polling station as an aid for marking their ballot paper. The device consists in a tactile voting template that works by lifting the selected window, marking the ballot paper, closing the window, separating the template from the ballot paper, folding and placing the ballot paper in the ballot box and returning the template to the presiding officer. All polling station staff must know how to use the template and be able to explain its use to blind or partially sighted voters.<sup>103</sup> There is no requirement for the sample ballot to contain instructions in graphical or other forms.

When the presiding officer, on the application of a voter who is incapacitated from voting by blindness or another disability or who declares orally that he is unable to read, must 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.<sup>104</sup> Administrative guidance specifies that instructions must be given in the privacy of the ballot booth. Presiding officers must ensure that no other voter can overhear the choices expressed by disabled voters – if possible by choosing a part of the polling station where a conversation in normal tones cannot be overheard. However, if candidates, election agents or polling agents are present, they should be invited to listen and observe the presiding officer so that they can confirm that the ballot paper is marked in accordance with the wishes of the elector.<sup>105</sup> This seems to be the only (indirect) reference to a possible link between disability and vulnerability to voting influence or manipulation. The name, number on the register and disability of the elector must be entered on a list of votes marked by the presiding officer.<sup>106</sup>

If a voter makes an application to the presiding officer to be allowed, on the grounds of blindness or other disability or inability to read, to vote with the assistance of a companion, the presiding officer must require the voter to declare, orally or in writing, whether she is so incapacitated

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<sup>100</sup> Electoral Commission (2018), *Handbook for polling station staff: Supporting local government elections in England and Wales*, p. 20 [accessed via [https://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0006/141936/Polling-station-handbook-LGEW.pdf](https://www.electoralcommission.org.uk/_data/assets/pdf_file/0006/141936/Polling-station-handbook-LGEW.pdf)].

<sup>101</sup> RPA 1983, Schedule 1, rule 32(1)(h).

<sup>102</sup> RPA 1983, Schedule 1, rules 29(3A)(a) and (b).

<sup>103</sup> *Handbook for polling station staff*, op. cit., p. 21.

<sup>104</sup> RPA 1983, Schedule 1, rule 38(1).

<sup>105</sup> *Handbook for polling station staff*, op. cit., pp. 20-21.

<sup>106</sup> RPA 1983, Schedule 1, rule 38(2).

by her blindness or other disability, or by her inability to read, as to be unable to vote without assistance.<sup>107</sup> If the presiding officer is satisfied that the voter is so incapacitated and is also satisfied that the companion is qualified, she must grant the application. Anything that is required to be done to or by that voter in connection with the giving of her vote may then be done to, or with the assistance of, the companion.<sup>108</sup> There is no distinction between types of disability (for example, physical or mental disability) regarding assistance by a companion. A person is qualified to assist a voter with disabilities to vote if she is entitled to vote as an elector at the election or is the father, mother, brother, sister, spouse, civil partner, son or daughter of the voter and has attained the age of 18 years.<sup>109</sup> At the time when a voter applies to vote with the assistance of a companion, the companion must make the following declaration before the presiding officer: 'I, A. B., of..., having been requested to assist C. D., whose number on the register is..., to record his vote at the election now being held in this constituency, hereby declare that [I am entitled to vote as an elector at the said election] [I am the (state relationship with voter) of the said voter and have attained the age of 18 years], and that I have not previously assisted any voter with disabilities [except E. F., of...] to vote at the said election. (Signed) A. B.'<sup>110</sup> No fee or other payment can be charged in respect of the declaration.<sup>111</sup> The name and number in the register of electors of every voter with disabilities assisted by companions and the name and address of the companion must be entered on a list.<sup>112</sup> To protect secrecy, no person having assisted a blind voter to vote must communicate any information as to the candidate for whom that voter intends to vote or has voted.<sup>113</sup>

A person who cannot reasonably be expected to vote unaided by reason of blindness or other disability is eligible for indefinite absent vote at parliamentary elections.<sup>114</sup> If she is digitally registered and the registration officer is satisfied that it is not reasonably practicable for the applicant to sign in a consistent and distinctive way because of blindness or any other disability or because the person is unable to read, the officer may make a determination to that effect.<sup>115</sup> This rule also applies to persons who register for absent voting at a particular election.<sup>116</sup>

Postal ballot papers sent by returning officers must be accompanied by such information as she thinks appropriate about how to obtain a translation into Braille of directions or guidance as well as graphical or any other (including audible) forms of such directions and guidance.<sup>117</sup>

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<sup>107</sup> RPA 1983, Schedule 1, rule 39(1).

<sup>108</sup> RPA 1983, Schedule 1, rule 39(2).

<sup>109</sup> RPA 1983, Schedule 1, rule 39(3).

<sup>110</sup> RPA 1983, Schedule 1, rule 39(5).

<sup>111</sup> RPA 1983, Schedule 1, rule 39(6).

<sup>112</sup> RPA 1983, Schedule 1, rule 39(4).

<sup>113</sup> RPA 1983, Section 66(5).

<sup>114</sup> RPA 1985, Section 6(2)(a)(ii).

<sup>115</sup> RPA 1985, Section 6(1ZA).

<sup>116</sup> RPA 1985, Section 7(1ZA).

<sup>117</sup> RPA 1983, Schedule 1, rule 24(2).

## SPECIFIC PROVISIONS ON CITIZENS LIVING ABROAD

Citizens living abroad are not specifically protected against discrimination by the EA 2010. In addition, Schedule 23 of the Act explicitly allows provisions, criteria or practices that relate to a person's place of residence or the length of time she has been present or resident in or outside the United Kingdom or an area within it, as long as they are done in pursuance of an enactment, in pursuance of an instrument made by a member of the executive under an enactment, to comply with a requirement imposed by a member of the executive by virtue of an enactment, in pursuance of arrangements made by or with the approval of a Minister of the Crown or to comply with a condition imposed by a Minister of the Crown.<sup>118</sup>

The RPA 1985 entitles a person to vote as an elector at a parliamentary (but not a local) election if she is a registered British citizen who qualifies as an overseas elector in respect of a constituency and is not subject to any legal incapacity to vote.<sup>119</sup> To qualify as an overseas elector in respect of a constituency, a person must either have been registered as an elector in that constituency in the previous 15 years or have resided, as a person under voting age, with a registered parent or a guardian in that constituency.<sup>120</sup> To register, an overseas elector must make a declaration stating the date of the declaration, that the declarant is a British citizen, that she is not resident in the United Kingdom and when she ceased to be a resident. She must also specify the address at which she was a resident and, if applicable, the name of the parent or guardian on whose registration in respect of that address she relies. Regulations may prescribe for the declaration to be attested and for the charging of fees in regard of attestation.<sup>121</sup> The registration automatically expires after 12 months.<sup>122</sup>

Unlike other British citizens living overseas, persons who have a service qualification can vote both in local and parliamentary elections.<sup>123</sup> They are also exempt from the 15-year limit on overseas residence. A person has a service qualification if she is a member of the Armed Forces, is employed in the service of the Crown in a post outside the United Kingdom, is employed by the British Council in a post outside the United Kingdom, is the spouse or civil partner of a member of the Forces, or is the spouse or civil partner of an employee of the Crown or the British Council and is residing outside the United Kingdom to be with his or her spouse or civil partner.<sup>124</sup>

A person with a service qualification or who is about to leave the United Kingdom so as to acquire a service qualification may register for an election by making a service declaration, which expires after 12 months.<sup>125</sup> The service declaration must state the date of the declaration; that on that date the declarant is, or but for the circumstances entitling her to make the declaration would have been, residing in the United Kingdom; the address where the declarant is or would have been residing in the United Kingdom, or alternatively an address at which she has resided in the United Kingdom;

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<sup>118</sup> EA 2010, Schedule 23, rule 1.

<sup>119</sup> RPA 1985, Section 1(1).

<sup>120</sup> RPA 1985, Section 1(2)(3)(4).

<sup>121</sup> RPA 1985, Sections 2(3) and (4).

<sup>122</sup> RPA 1985, Section 14(2).

<sup>123</sup> RPA 1985, Section 15(5).

<sup>124</sup> RPA 1983, Section 14(1).

<sup>125</sup> RPA 1983, Section 15(1)(2).

that the declarant is a Commonwealth citizen, a citizen of the Republic of Ireland or a relevant citizen of the European Union; and whether the declarant had on the date of the declaration attained the age of 18 years and the date of her birth.<sup>126</sup> Where a service declaration appearing to be properly made out and (where required) attested is transmitted to the registration officer in the proper manner, the declarant must, until the contrary is proven, be treated for the purposes of registration as having a service qualification.<sup>127</sup>

Arrangements must be made by the government department employing a person with a service qualification for securing that she has an effective opportunity of exercising her rights in relation to electoral registration, appointment of a proxy and voting in person, by post or by proxy.<sup>128</sup> In particular, such arrangement must ensure that she receives such instructions and other assistance as may be reasonably sufficient in connection with the exercise of voting rights.<sup>129</sup>

Proceedings in respect of an electoral offence alleged to have been committed outside the United Kingdom may be taken, and the offence may be treated as having been committed in any place in the United Kingdom.<sup>130</sup>

Under EU law British citizens residing in EU member states have the right to vote at municipal and European Parliament elections in their state of residence.<sup>131</sup> There are some exceptions prohibiting voting in more than one country in a single European election and allowing states to require a minimum period of residence where more than 20% of the population is composed of foreign nationals. After Brexit not only will British citizens lose their European voting rights but the preservation of local voting rights may be left at the discretion of individual states.<sup>132</sup> On 21 January 2019 the United Kingdom and Spain, where some 300,000 British citizens reside, signed a treaty protecting the right of British and Spanish citizens to vote in each other's local elections.<sup>133</sup>

## **JUDICIAL REVIEW AND COMPLIANCE WITH HUMAN RIGHTS LAW**

No application for judicial review of the regulations with respect to the right to vote for disabled persons seems to have been decided by domestic courts. In its 2017 concluding observations, however, the Committee on the Rights of Persons with Disabilities expresses concern at the insufficient information on accessibility and reasonable accommodation for persons with disabilities at all stages of the electoral cycle, aimed at facilitating the exercise of the right to vote in private and to be assisted. It also recommends that the United Kingdom take, in consultation with organisations of persons with

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<sup>126</sup> RPA 1983, Section 16.

<sup>127</sup> RPA 1983, Section 17(2).

<sup>128</sup> RPA 1983, Section 59(3).

<sup>129</sup> RPA 1983, Section 59(3A).

<sup>130</sup> RPA 1983, Section 178.

<sup>131</sup> Consolidated version of the Treaty on the Functioning of the European Union (2012), Article 22.

<sup>132</sup> Eline Schaart (2019), 'Citizens' rights for Brits in the EU if there's no Brexit deal', *Politico* [accessed via <https://www.politico.eu/article/citizens-rights-for-brits-in-the-eu-if-theres-no-brexite-deal/>].

<sup>133</sup> Department for Exiting the European Union (2019), 'Expat voting rights treaty secured with Spain' [accessed via <https://www.gov.uk/government/news/expat-voting-rights-treaty-secured-with-spain>].

disabilities, appropriate measures to secure accessibility for persons with disabilities and repeal provisions restricting the right of persons with disabilities to vote.<sup>134</sup>

In 2014, the House of Commons Political and Constitutional Committee published a report denouncing the barriers to political participation faced by people with disabilities. The report was based on consultations with Mencap, a charity for people with learning disabilities, and the Royal National Institute of Blind People (RNIB), a charity for people with sight loss. The report cited concerns about low participation rates among people with learning disabilities, partly due to difficulties in understanding political communications. Recommendations included making information available in British Sign Language, producing it in 'easy read' formats, making manifestos available in accessible formats such as large print, audio and Braille, using electoral registration to link someone's name and address to their preferred reading format and introducing tactile voting devices to enable blind persons to mark a ballot paper independently and in private (see previous section for the implementation of the last recommendation).<sup>135</sup> The report also advised against any requirement for voters to present photographic IDs at polling stations due to ensuing risks of voter suppression.<sup>136</sup> In its response to the report, the Government committed to working with Mencap and RNIB to improve accessibility, for instance by publishing an easy-to-read guide on registering and voting on its website. It also accepted the recommendation against the introduction of a voter ID requirement.<sup>137</sup> The findings of the Electoral Commission evaluation of the voter ID pilot scheme also mentioned risks of disabled and other voters finding it harder to show a passport, driving licence or travel card.<sup>138</sup>

In 2017, the Electoral Commission developed and sent a questionnaire asking disabled people to share their experiences of voting at the general election, in collaboration with civil society organisations. Based on the responses, it recommended changing election forms and party manifestos so they could be easily understood, giving the disabled voter greater flexibility and choice in the voting procedure (including who they can take to the polling stations with them), providing greater support for registration and voting, and informing carers and support workers that the disabled can vote and be supported to register and vote.<sup>139</sup> A House of Commons report published in 2018, drawing on

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<sup>134</sup> Committee on the Rights of Persons with Disabilities (2017), Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland, CRPD/C/GBR/CO/1, para 60-61.

<sup>135</sup> House of Commons Political and Constitutional Reform Committee (2014), *Voter engagement in the UK*, London, pp. 36-39 [accessed via <https://publications.parliament.uk/pa/cm201415/cmselect/cmpolcon/232/232.pdf>].

<sup>136</sup> *Ibid.*, pp. 29-30.

<sup>137</sup> *Voter engagement in the UK*, op. cit., pp. 4-5.

<sup>138</sup> *Voter identification pilot schemes*, op. cit., pp. 1-2.

<sup>139</sup> Electoral Commission (2017), *Elections for everyone: Experiences of people with disabilities at the 8 June 2017 UK Parliamentary general election*, pp. 2-4 [accessed via [https://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0008/237194/Accessibility-report-call-for-evidence.pdf](https://www.electoralcommission.org.uk/_data/assets/pdf_file/0008/237194/Accessibility-report-call-for-evidence.pdf)].

secondary data, identified the disabled as one of the least politically engaged groups in the United Kingdom.<sup>140</sup>

Citizens living abroad have applied for judicial review of the 15-year limit for their right to vote in parliamentary elections and referendums, alleging violations of their right to vote under the ECtHR and their right to freedom of movement under EU law. None of these cases prospered.

In *Doyle v UK*,<sup>141</sup> a British national who was born in 1947 and had moved to Brussels in 1983 alleged that The Department for Constitutional Affairs' refusal to register him on the UK electoral role violated Article 3 of Protocol No. 1 ECHR.<sup>142</sup> The Department had pointed out that he could be reinstated on the electoral role if he returned to live in the United Kingdom and that he was entitled to vote in the European elections in Belgium as a citizen of the European Union. The applicant submitted that he should not be denied his right to vote in national elections of his country of nationality until he was registered to vote in the elections of his country of residence. In an admissibility decision, the Court did not perceive any effective disenfranchisement of the applicant or impairment of the very essence of the right to vote and therefore found the application manifestly ill-founded.

A very similar case, brought by a UK citizen who had move to Italy following his retirement in 1982, was decided on the merits six years later.<sup>143</sup> The applicant argued that no time limit should be imposed on the rights of EU citizens resident abroad to vote in their country of origin while they retained the nationality of that country, and that the justifications cited in *Doyle v UK* for the residence requirement needed reconsideration (see below). He also pointed to the Council of Europe's support for emigrants' right to vote and to the fact that other EU member states allowed unrestricted overseas voting by their nationals.<sup>144</sup> While recognising the increasing ease for migrants to maintain contact with their state of nationality, the interest of international organisations in the protection of migrants' voting rights and the general trend toward the extension of the franchise to citizens living abroad,<sup>145</sup> the Fourth Section was satisfied that the 15-year rule was proportionate to the aim of promoting legal certainty and fell within the contracting state's margin of appreciation. One of the considerations that weighed on its decision was the sustained scrutiny and debate the rule had received among parliamentary legislators.<sup>146</sup> Citing a lack of evidence, it also rejected as manifestly ill-founded the applicant's contention that he had been discriminated on the grounds of age since a significant percentage of British nationals who moved abroad did so after retirement.<sup>147</sup>

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<sup>140</sup> Noel Dempsey and Neil Johnston (2018), *Political disengagement in the UK: Who is disengaged?*, House of Commons Library Briefing Paper CBP-7501, pp. 27-28 [accessed via <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7501>].

<sup>141</sup> *Doyle v UK* App no 30158/06 (ECtHR, 6 February 2007).

<sup>142</sup> '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.'

<sup>143</sup> *Shindler v UK* App No. 19840/09 (ECtHR, 7 May 2013).

<sup>144</sup> *Ibid*, para 88-92.

<sup>145</sup> *Ibid*, para 110-115.

<sup>146</sup> *Ibid.*, para 116-118.

<sup>147</sup> *Ibid.*, para 120-123.

In *Preston v Wandsworth Borough Council and Lord President of the Council*,<sup>148</sup> a British business owner residing in Spain brought judicial review proceedings against the Council in which he alleged that the 15-year rule penalised him for exercising his fundamental rights to freedom of movement under Articles 20, 21, 45 and 49 of the Treaty on the Functioning of the European Union.<sup>149</sup> To make this point, he drew on an analogy with cases in which the Court of Justice of the European Union (or its predecessor, the European Court of Justice) had found residence requirements for the concession of benefits to interfere unjustifiably with freedom of movement. In particular, he claimed that British subjects who valued the right to vote would feel sufficiently aggrieved at its removal to be tempted to return to the United Kingdom as the fifteen-year deadline approached.<sup>150</sup> The High Court held that while there had been a restriction on free movement, it was insufficient evidence of its deterrence effect on British citizens considering whether to move abroad or to remain there after 15 years.<sup>151</sup> Even if this effect could be proven, however, the rule would still be proportionate in view of its legitimate aims.<sup>152</sup> The Court of Appeal upheld this decision the following year, based on the following reasoning:

The claimant's assertion about the potential effect of the 15-year rule on free movement is very difficult to demonstrate by any means, because it does not square with ordinary human experience. In the course of crowded human lives over a period of 15 years inevitable uncertainties, unknowns and contingencies make it impossible to arrive at a reliable or credible conclusion that the rule could deter free movement. No legal test, whether formulated in terms of 'probability', or 'likelihood', or 'capability', or 'liability', or 'real possibility', addresses the basic difficulty that what is asserted in the claimant's case is too speculative, remote and indefinite to establish a case.<sup>153</sup>

Two very similar cases were brought by *Shindler*, the aforementioned retiree who had moved to Italy, and a Brussels-based claimant against Section 2 of the EU Referendum Act 2015, which also excluded from the Brexit referendum franchise UK citizens who had moved abroad and were last registered to vote in the United Kingdom more than 15 years ago.<sup>154</sup> The claimants argued that the *Preston* decision only applied in the context of parliamentary elections and that it imposed an unwarranted burden for

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<sup>148</sup> [2011] EWHC 3174 (Admin).

<sup>149</sup> Article 20.2: Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: a) the right to move freely within the territory of the Member States. Article 21.1: Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. Article 45: Freedom of movement for workers shall be secured within the Union. Article 49: [...] restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

<sup>150</sup> Para 14-18.

<sup>151</sup> Para 39.

<sup>152</sup> Para 42-44.

<sup>153</sup> *Preston v The Lord President of the Council* [2012] EWCA Civ 1378, para 80.

<sup>154</sup> *Shindler v Chancellor of the Duchy of Lancaster* [2016] EWHC 957 (Admin); *Shindler & Anor v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469.

claimants to prove the certainty of a deterrence effect.<sup>155</sup> The Divisional Court relied on the Preston case to hold that if disenfranchisement from regular parliamentary elections could not be construed as a significant restriction on free movement, there was an *a fortiori* argument to reach the same conclusion for one-off referenda. The Court of Appeal expressed doubts on the application of *a fortiori* reasoning to UK nationals living abroad who faced the loss of their EU citizenship but insisted that this risk was unlikely to convince them to ‘pick up sticks and return’.<sup>156</sup>

The appeal also included a secondary claim that the right to vote was a constitutional right recognised as such at common law and that the Court of Appeal had a discretionary power to declare the 15-year rule unconstitutional. Citing a recent Supreme Court decision on the disenfranchisement of prisoners, the Court found that there was no such common law right and that it could not declare the legislation unlawful unless ‘a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise or similar device’ – a scenario that did not apply to the case at hand.<sup>157</sup>

## ELECTORAL LAW AND JUSTICE

The right to vote clearly furthers the Fraserian ideal of representation. Indeed, it is telling that the main statutory instruments regulating its exercise in the United Kingdom – the Representation of the People Act 1983 and 1985 – explicitly state their aim to facilitate this representation. As numerous theorists have noted, the election of representatives does not eliminate inequalities in decision-making power, a goal that would require forms of direct participation such as referendums. These currently constitute a residual but highly consequential form of decision making that has mainly been used to redistribute powers between the state, regional governments and the EU. This being said, elections do enable citizens to influence the decisions of their representatives, particularly when accompanied by mechanisms of accountability such as access to information and a free press whose legal underpinnings are beyond the scope of this report.

While the moral purpose of the vote is relatively transparent, eligibility criteria and procedures suggest that its grounds are far less certain. Recent legislative changes show that the question of who should be entitled to vote in which elections remains a contested one, including for disabled persons and citizens living abroad.

Disabled voters enjoy strong anti-discrimination protections establishing a duty to make reasonable adjustments for all disabilities, without distinguishing between physical and mental ones. However, electoral law seems to be underpinned by diverging approaches to mental and physical disability. For voters with physical disabilities, particularly those which result in a loss of mobility or sight, the law sets out a series of highly specific adjustments such as accessible polling stations, tactile devices, assisted voting, postal voting or proxy voting. It also establishes procedural guarantees for the participation of disabled persons in the preparation of the poll. These far-reaching protections can be

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<sup>155</sup> [2016] EWHC 957 (Admin), para 32-33.

<sup>156</sup> [2016] EWCA Civ 469, para 45.

<sup>157</sup> [2016] EWCA Civ 469, para 47-50.

linked to a definition of disability that emphasises its involuntary nature.<sup>158</sup> Voters with mental disabilities may also benefit from some legally mandated reasonable adjustments such as those geared at overcoming a voter's inability to read, stemming *inter alia* from learning difficulties. Specific provisions also facilitate the registration of those who reside in mental hospitals, and any disenfranchisement linked to mental incapacity has been explicitly prohibited. Nevertheless, human rights bodies point out that few measures have been taken to ensure that mentally disabled persons, and especially those with learning difficulties, can access and understand the information needed to evaluate and compare the political proposals put forward during campaigns. This serious shortcoming seems to reveal an implicit hierarchy between physically and mentally disabled voters.

What conception of justice, if any, underlies this hierarchy? One possible answer is a certain idea about the cognitive conditions for the exercise of the vote. It could be that mentally disabled persons, like children and convicted prisoners, are not regarded as fulfilling the psychological requirements for voting, such as the capacity to understand and balance the interests at stake in political decisions. Unlike in the case of children and convicted prisoners, however, this idea is not explicitly captured in a disenfranchisement rule but implicitly revealed by the limited support provided to mentally disabled voters. Cognitively based restrictions to vote, explicit or implicit, may be justified by the fact that its consequences reach all those who share a given voter's constituency, a knock-on dimension that voting shares with other rights such as education.<sup>159</sup> An interesting difference between the two is that education law manages third-party implications by making education a duty whereas electoral law makes voting a privilege. The assumption seems to be that more harm can be caused by using the right to vote inadequately than by not using it at all, whereas the reverse is true in the case of education.

Citizens living abroad shed a different light on the grounds for claims of representative justice. These potential voters are not specifically protected by anti-discrimination law, perhaps on the premise that their residential status is the product of a deliberate choice rather than a circumstance. In their case the grounds of representative justice are entangled with matters of scope, and the dilemma relates to what a person should be entitled to vote for as well as who should be so entitled. To put the question in general terms, which political decisions should one be able to make or influence?

In *Doyle v UK*, the ECtHR cited four factors justifying residence requirements for the franchise: 1) a non-resident citizen is less directly or less continually concerned with her country's day-to-day problems and has less knowledge of them; 2) it is impracticable for parliamentary candidates to present electoral issues to citizens abroad and non-resident citizens have no influence on the selection of candidates or the formulation of their electoral programmes; 3) there is a close connection between the right to vote in parliamentary elections and the fact of being directly affected by the acts of the political bodies so elected; and 4) the legislature may wish to limit the influence of citizens living abroad on issues that primarily affect persons living in the country. The first two arguments, concerning voters' knowledge of the issues at stake, closely approximate the cognitive reasons inferred above for the implicit or explicit disenfranchisement of disabled, convicted or underage voters. The latter two, which

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<sup>158</sup> Cf Pier-Luc Dupont (2019), *The right to education for disabled persons and religious minorities: UK report*, ETHOS WP 3.6, p. 27.

<sup>159</sup> *Ibid.*, p. 26.

seem to capture two sides of the same coin (all those directly affected by a decision, and none of those who are not so affected, should be entitled to vote), evoke what Fraser has characterised as the 'all-subjected principle' to determine the limits of the legitimate constituency.<sup>160</sup>

Doyle v UK qualified these principles for the attribution of voting rights by stating that the impossibility of applying them to every individual case means that the law is obliged to lay out general rules that would further these principle in a practical and efficient way. Legislative debates and judicial cases on the length of time during which citizens living abroad should be entitled to vote seem to have arisen precisely from the difficulty of agreeing on such a rule. In the 2011 case of Preston for instance the claimant argued:

The 15-year rule is too blunt an instrument to measure citizenship commitment. It is too exclusive a criterion by which to judge the degree of connection with a Member State. A continued connection may exist in forms other than residence. As shown by the witness statements British citizens may retain numerous links to the UK, notwithstanding their residence in another Member State for 15 years or more e.g. paying taxes, representing the UK in an international institution, representing firms with their HQ in the UK and holding academic positions in the UK.<sup>161</sup>

In Shindler, the applicant systematically rebutted the empirical links between long-term residence and the justifications for voting restrictions put forward in Doyle v UK:

The applicant argued that no time limit should be imposed on the right of EU citizens resident abroad to vote in their country of origin while they retained the nationality of that country. Addressing the Court's decision in *Doyle*, cited above, he argued that the four factors identified to justify the residence requirement were now outdated. Globalisation, modern technology and low-cost travel companies made it easier for citizens resident overseas to maintain contact with their country of origin both remotely and by frequent visits. [...] Despite their residence abroad, journalists could continue to work for British newspapers, businessmen could be employed by British companies and lawyers could provide advice on English law. Notwithstanding long-term residence abroad, British nationals might still be considered domiciled in the United Kingdom, which had particular relevance to matters concerning tax and inheritance.

The applicant maintained that he had retained very strong ties with the United Kingdom. He was a retired serviceman of the British army; he received a pension from the State, paid into a British bank account; he paid tax on his pension to the Inland Revenue; he had family members in the United Kingdom and was a member of a number of clubs and organisations there; and he was the representative in Italy of a British ex-servicemen organisation. He pointed out that he was entitled to return to the United Kingdom to live and to receive treatment from the National Health Service. Matters such as pensions,

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<sup>160</sup> Nancy Fraser (2009), *Scales of justice: Reimagining political space in a globalizing world*, New York: Columbia University Press, pp. 48-75.

<sup>161</sup> Preston v Wandsworth Borough Council and Lord President of the Council [2011] EWHC 3174 (Admin), para 60.

banking, financial regulations, taxation and health, which were all the subject of political decisions in the United Kingdom, affected him.<sup>162</sup>

It should be noted that UK law, by making an exception to the 15-year rule for employees of the Crown, the British Council and the armed forces, recognises that personal circumstances other than place and time of residence can shape citizens' effective connection to the state and subjection to its laws.

In addition to such considerations, the UK government in the case of Shindler argued that the applicant could have acquired Italian citizenship, thus gaining an opportunity to participate in Italian elections. This argument seemed to rely on a conception of political representation that pays less attention to the specific representative body concerned than to the overall opportunities for political participation available to a given person. The applicant attempted to counter this argument both on empirical grounds, by denying that he could participate fully in Italian politics without being proficient in the Italian language,<sup>163</sup> and on normative ones, by pointing out the negative consequences of acquiring Italian citizenship.<sup>164</sup> This latter argument hints at a representative ideal according to which a person should be free to choose her political memberships, which previous ETHOS research has conceptualised as concerns of self-determination.<sup>165</sup>

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<sup>162</sup> Shindler v UK App No. 19840/09 (ECtHR, 7 May 2013), para 88-89.

<sup>163</sup> Shindler v UK, para 96.

<sup>164</sup> Shindler v UK, para 91.

<sup>165</sup> Bridget Anderson and Pier-Luc Dupont (2018), 'How does it feel to be a problem?' *What we can learn about justice as political representation through empirical case studies*, ETHOS Deliverable 5.2 [accessed via [https://www.ethos-europe.eu/sites/default/files//docs/d5.2\\_loaded\\_website\\_version.pdf](https://www.ethos-europe.eu/sites/default/files//docs/d5.2_loaded_website_version.pdf)].

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