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Dear Secretary of State,

## Proposed judicial review proceedings by the3million and others

1. This firm acts for the3million Ltd ('the3million'), a campaigning and representative organisation formed after the 2016 EU referendum to protect the rights of citizens of the 27 European Union states other than the UK ('EU27 citizens') who have made the UK their home.
2. Amongst those rights is the fundamental right to vote, which is the most important individual right to democratic participation guaranteed by law. The right ensures that citizens have their say in the formulation of public policy, that parties and candidates must seek democratic authority as a precondition for the exercise of power and that each citizen, regardless of how they vote, is represented by those who are elected by the majority. For each vote to carry equal weight in a democracy, the right to vote must be equally capable of being exercised by all eligible citizens.
3. These principles are reflected in EU and European Convention of Human Rights ('ECHR') law. Article 10 the Lisbon Treaty states that "[t]he functioning of the Union shall be founded on representative democracy", "[c]itizens are directly represented at Union level in the European Parliament..." and "[e]very citizen shall have the right to participate in the democratic life of the Union." Article 20(2)(b) of the Treaty on the Functioning of the EU ('TFEU') adds "[c]itizens of the Union shall enjoy the rights... provided for in the Treaties. They shall have, inter alia... the right to vote... in elections to the European Parliament ... in their Member State of residence, under the same conditions as nationals of that State." Article 22 TFEU and Article 39 of the EU Charter of Fundamental Rights ('the Charter') reiterate these words. Article 3 of Protocol 1 ECHR contains a similar guarantee to the "free expression of the opinion of the people in the choice of the legislature."

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4. A large number of EU27 citizens have contacted the 3million following the recent 2019 European Parliament Elections in the UK (**'the 2019 Elections'**). It is apparent that many such citizens were deprived of their right to vote because of unlawful systemic flaws in the processes under which the 2019 Elections were conducted, and that they have suffered unlawful discrimination at the hands of the UK Government, which ought to have been anticipated and prevented, but was not.
5. We invite you to acknowledge in response to this letter that there was illegality and discrimination as outlined below; to accept that the Government was responsible; and to take remedial action, in so far as that is possible, including the payment of compensation to those who have been deprived of their right to vote (see further §100 below). If these steps are not taken, the 3million will bring a judicial review claim seeking appropriate remedies, including declaratory relief.
6. The reasons why the conduct of the 2019 Elections was unlawful, and the grounds for the proposed judicial review, are summarised below.
7. Council Decision (EU, Euratom) 2018/767 of 22 May 2018 confirmed 23 to 26 May 2019 as the period for the 2019 Elections (which could also have been calculated from the 2014 European Parliament Elections). On 7 May 2019, following a period of equivocation, you confirmed publicly that the UK would be participating. The poll itself took place in the UK on 23 May 2019 and was concluded in other Member States three days later. There was a greater turnout of those who were eligible to vote in the UK in the 2019 Elections than in the 2014 European Parliament Elections. This is unsurprising because the 2019 Elections were seen by many UK and EU citizens as an important opportunity to express their view on the positioning of various UK parties on the political spectrum and their policies of on whether the UK should leave the EU and, if so, when and on what terms.
8. However, a large number of people who wanted to vote could not. Some of them were British Citizens who had registered as overseas voters but did not receive postal ballots in time or at all, or those who wished to register but could not do so in time. Others were EU27 citizens resident here in the UK other than citizens of the Republic of Ireland, Cyprus or Malta (**'EU24 citizens'**) who were unaware of, or unable to comply with, the UK's system of requiring them not only to register, but also to indicate their intention of voting here (and not in their country of EU24 citizenship) by completing and returning a 'UC1' or 'EC6' form (**'Declaration Form'**). Other EU24 citizens did manage to comply with that requirement in time, but were still not permitted to vote.
9. The UK's Declaration Form system is unique. That is not objectionable in itself as EU Member States have some discretion on how to give effect to Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals (**'the Voting Directive'**) which is the main implementing measure for the EU law rights discussed at

§2 above. This includes measures to discourage and identify double voting (i.e. voting both here and in EU27 states, which is not permitted). However, the UK's system unlawfully impedes the ability of registered EU24 citizens, or makes it excessively difficult for them, to exercise their voting rights. This happens because of the following cumulative features of the UK system:

- (1) EU24 citizens may register to vote in the UK in European elections;
  - (2) however, EU24 who have registered to vote here are automatically removed from the electoral register when it is being updated for a forthcoming poll, by means of their name being struck through and/or the use of a 'G' code indicating they are disqualified;
  - (3) to prevent this from happening automatically, EU24 citizens must access, complete and send a separate Declaration Form to a local Electoral Registration Officer ('ERO');
  - (4) the Declaration Form must be received by an ERO and processed before a deadline that corresponds to the last date for registering to vote; and
  - (5) although local authority officers are encouraged by guidance to advise EU citizens of these requirements in advance, and to send out Declaration Forms to registered voters, there is no legal obligation for them to do so. Local practice varies considerably.
10. By contrast, UK citizens resident in the UK who are resident in two or more places, and have registered to vote in more than one local authority area, are not required to identify where they intend to vote, or to complete any additional form declaring that they intend to vote in a particular area. It is simply an offence to vote more than once. Moreover, citizens of the Republic of Ireland, Cyprus and Malta resident in the UK are treated as if they are UK citizens, as are people who are dual nationals of both the UK and a EU27 state. They are not required to complete Declaration Forms, but may vote in the UK, without any additional formality, if they have registered to do so.
  11. The features of the Declaration Form system set out above were identified in 2014 as having significant disenfranchising effects (see §§19, 20 and 23 below). The Government undertook to reform the system, but failed to honour that commitment (see §21 below).
  12. Compounding these systematic problems, your confirmation on 7 May 2019 that the UK would participate in the 2019 Elections was given on the very same day on which the Declaration Forms had to be returned. As the Electoral Commission stated on Twitter on 23 May 2019, "[t]he very short notice from the government of the UK's participation in these elections impacted on the time available for awareness of this process amongst citizens, and for citizens to complete the process."
  13. The net result was unlawful in three respects.

14. First, there was a large scale direct breach of the rights set out at §2 above. The data which has so far been gathered by the 3million suggests that, in some local authority areas, only 10.7% of registered EU24 citizens were able to vote (see §§35 to 38 below). This is reinforced by empirical information and research data (see §§0 to 33 below).
15. Secondly, the operation of the UK's system was unlawfully discriminatory. Only EU27 citizens from the Republic of Ireland, Cyprus and Malta were able to vote here under the same conditions as nationals of the UK as required by law. EU24 citizens were discriminated against, because of their nationality, contrary to:
  - (1) the specific non-discrimination provisions of Articles 20(2)(b) and 22 TFEU and Article 39 of the Charter;
  - (2) the general prohibitions on nationality discrimination in Articles 18 and 45 of the TFEU and Article 21(2) of the Charter which should be read with Articles 2 and 9 of the Lisbon Treaty;
  - (3) Article 2(1) read with 3(1)(h) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (**'the Equal Treatment Directive'**);
  - (4) Article 14 ECHR read with Article 3 of Protocol 1; and
  - (5) section 29(1), (2) and (6) read with section 9(1)(b) of the Equality Act 2010 (**'the 2010 Act'**);
16. Thirdly, there was a failure to discharge the public sector equality duty set out in section 149 of the 2010 Act (**"PSED"**). When you made arrangements for the 2019 Elections in the UK, you failed to have any regard, let alone the *"due regard"* required by the statute, of the need to *"eliminate unlawful discrimination"*, *"advance equality of opportunity"* (including by encouraging participation in public life) and *"foster good relations"* between, on the one hand, UK citizens, citizens from the Republic of Ireland, Cyprus and Malta and, on the other, EU24 citizens.
17. The remainder of this letter is structured as follows. Part I (§§19 to 0) sets out the factual background in more detail. Part II (§§46 to 74) summarises the legal framework and Part III (§§75 to 93) analyses and applies it in the present context and gives more details of the proposed grounds. Part IV (§§94 to 105) covers the remaining issues that arise under the Pre Action Protocol for Judicial Review (**'the Pre Action Protocol'**) including, importantly, a proposal of alternative dispute resolution (**'ADR'**) and requests for information and documents.
18. You are asked to reply substantively to this letter by 4.30 pm on 27 July 2019, as required by the Pre Action Protocol.

## **PART I: FACTUAL BACKGROUND**

### **Disenfranchisement during the 2014 European Parliament Elections**

19. Concerns were expressed after the 2014 European Parliament Elections about the adverse effects of the UK's Declaration Form system on EU24 citizens, many of whom were prevented from voting in the UK in those elections. In its statutory report on those elections of May 2014, the Electoral Commission said:

*“3.85 ... it appears that a significant number of citizens of other EU member states resident and registered to vote in the UK who wanted to vote in the UK at the May 2014 European Parliament elections were unable to do so, because they had not successfully completed the necessary declaration. While it is not currently possible to identify precisely how many citizens of other EU member states were affected, it is unacceptable that administrative barriers prevented eligible and engaged electors from participating in these elections.*

*3.86 We will work with the UK Government, EROs and organisations representing citizens of other EU member states in the UK to identify what can be done to simplify the system and remove unnecessary administrative barriers to participation so that this problem does not affect electors at the next European Parliament elections in 2019. In particular, we will consider whether legislation could be changed so that in future citizens of other EU member states do not need to complete more than one electoral registration form to be able to vote at European Parliament elections in the UK. We will make any recommendations to the UK Government in sufficient time for any changes to legislation to be introduced ahead of the 2019 European elections...”*

20. It appears that no meaningful progress was made in the following two years, because in its February 2016 interim report, ‘Electoral Law’, the Law Commission observed:

*“4.71 Our consultation paper noted a particular problem in the context of resident EU citizens’ entitlement to vote at EU Parliamentary elections. They are entered in a distinct register. Here there is a special requirement of a declaration stating, in particular, that the elector will exercise their right to vote only in the UK, and not their home state. This is to avoid double voting in two member states. However, there are potentially practical problems in administering the declaration, which can last only one year. Our provisional view was that the declarations should last for as long as the elector is registered, or for a maximum of five years...”*

and the accompanying impact assessment stated:

*“EU Citizens’ declaration of intent to vote at EU Parliamentary elections*

*While no one has suggested that this part of our proposals affected a protected group under section 5, we consider that there is a possible argument that difficulties in the current law affect ethnic minorities or particular racial groups. The issue, which was reported as a problem in 2013 [sic], is that EU citizens’ declaration of an intent to vote in the UK lasts only one year in the current law. Some voters presented at polling stations in 2013 [sic] without having made a declaration in the previous year, and were unable to vote. In our interim report, having considered consultees’ responses, we could see no reason in EU law why this should not be extended for the term of the EU Parliament. Recommendation 4-14: EU citizens’ declaration of intent to vote in the UK should have effect for the duration of the elector’s entry on the register subject to a limit of five years.”*

21. Pausing there, we observe that the five year limit suggested as an alternative to declarations lasting for as long as the elector is registered would not materially improve the UK’s system as European Parliamentary Elections take place on a five-yearly basis.

22. On 5 May 2019 in a House of Lords Debate, Cabinet Office spokesman Lord Young of Cookham told peers:

*“We were working with the Electoral Commission on streamlining the process following its recommendations after the last European elections, but given the result of the 2016 referendum it was not the Government’s policy to take the reforms forward because our policy was to leave the European Union before the end of March 2019 and therefore before the next election was due.”*

23. It is apparent that, despite an undertaking to the European Commission, the Government had failed to remedy the issues identified with the 2014 European Parliament Election. On 21 June 2019 the EU Commission’s Justice Commissioner, Věra Jourová, wrote to the Government setting out her concerns including that (our emphasis):

*“...the difficulties encountered were largely recurrences of the incidents and deficiencies that had previously arisen during the 2014 elections and which the United Kingdom had undertaken to remedy in time...”*

and in a blog of 24 May 2019 (**‘the 24 May 2019 blog’**), the new Election Commission Chair, Sir John Holmes, wrote:

*“The commission made the case for making this legal process easier for citizens following the last EU elections in 2014. However, improvements to the process are reliant on changes*

*to electoral law. While contingency plans can be made for the delivery of an election under current legislation, no amount of preparation by us or by local officials could effect a change in these rules which requires the action of government and parliament. While it is understandable that no changes were made in the face of the government's stern assurance that the UK would not participate in the election, it is deeply disappointing and in truth not good enough."*

#### UK participation in the 2019 Elections

24. As noted above at §7, the period within which the 2019 Elections would occur had been set by the EU a year earlier, on 22 May 2018. However, following the 2016 EU Referendum, the Government adopted a public position that the UK would not be participating. For example, when asked on 19 February 2019 about preparations, Cabinet Office Minister, Chloe Smith MP told the House of Commons that *"we will not be taking part in future European Parliamentary elections"*. On 19 March 2019 she said, *"the Government is not contingency planning to hold European Parliamentary Elections"*. On 1 April 2019, you wrote to the Electoral Commission stating *"the Government's position is that it remains the intention for the UK to leave the EU with a deal and not take part in the European Parliamentary Elections in May"*, though you went on to indicate that some preparatory expenditure had been authorised. You then laid the European Parliamentary Elections (Appointed Day of Poll) Order 2019 on 8 April 2019, but this was subject to the negative resolution procedure and, on 24 April 2019, your Cabinet Office colleague, Kevin Foster MP, Parliamentary Under-Secretary of State for Wales ('Mr Foster'), told the House *"[i]t remains the Government's intention to leave the EU with a deal before the 23 May, so we do not need to participate in European Parliamentary elections."*
25. The Electoral Commission's view on this was that resulting uncertainty was very problematic. Its then Chair, Sir Bob Holmes wrote in a blog of 24 April 2019:

*"...this is of course far from a normal situation. The government has said it does not want these elections to happen. If the Brexit withdrawal agreement is agreed by Parliament by 22 May, they say the elections could be cancelled, even at the eleventh hour... This is an unprecedented level of uncertainty in a mature democracy."*

and the 24 May 2019 blog mentioned above added:

*"... we and the wider electoral community raised concerns with the government, with rising urgency in the first months of this year. While a general election follows a well-trodden path and can be delivered relatively comfortably - albeit not without considerable effort - within eight weeks, the same is not true of the European parliament elections. The ongoing delays to confirming the poll continued to escalate the risks."*

26. Finally, on 7 May 2019, you made a widely-reported statement to the BBC indicating the UK would be participating in the 2019 Elections after all. By that time, the deadline given for EU24 citizens to return their Declaration Forms had nearly expired (because of the requirement that forms be received 12 working days before the poll). It expired at midnight the same day.

#### **the3million's and others' concerns**

27. Meanwhile, given the experiences of EU24 citizens during the 2014 European Parliament Elections, the3million had become concerned that EU24 citizens might fall foul of the stringent requirements of the UK Declaration Form system. It had already begun active campaigning on the issue on social media, in blogs and through newsletters sent out to subscribers in April and May 2019.
28. the3million were not alone in voicing these concerns. For example, as the problems discussed below emerged during the course of the 2019 Elections on 22 May 2019, they were raised in the House of Commons by Joanna Cherry MP who proposed that Declaration Forms be made available and accepted by local returning officers ('LROs') at polling stations and the register amended accordingly. This suggestion was rejected by the Prime Minister who stated that the lack of notice was *"because of a decision by this House on 29 March not to agree a [Brexit] deal that would have made it unnecessary to hold European elections"*.

#### **Disenfranchisement during the 2019 Elections**

29. By the time the 2019 Elections took place in the UK on 23 May 2019, a number of problems had arisen. All were directly linked to the UK's Declaration Form system and/or the timing of the Government's decision on UK participation. The affected EU24 citizens may be divided into the following main categories:
- (1) EU24 citizens who had registered to vote and who were aware of the need to complete and submit a Declaration Form, but who were unable to complete and return it before the deadline, which was the same day on which it was confirmed that the UK would participate in the 2019 Elections. Some of these submitted the Declaration Form late. Others did not return the Form, because they were informed of the 7 May 2019 deadline and realised it was impossible for them to complete and return the Form in time ('Category 1 EU24 citizens');
  - (2) EU24 citizens who had registered to vote, but who were unaware of the need for a separate Declaration Form, or were wrongly told that there were no further necessary formalities, so did not complete a Form ('Category 2 EU24 citizens');
  - (3) EU24 citizens who had registered to vote and had returned a Declaration Form in the previous European Parliamentary election, but who were unaware of the requirement that a new Declaration



Form must be submitted within 12 months of each poll, so did not complete one ('Category 3 EU24 citizens'); and

- (4) EU24 citizens who had obtained and returned a Declaration Form before 7 May 2019, but who were told that they could not vote, despite having completed all the necessary legal formalities ('Category 4 EU24 citizens').
30. EU24 citizens in categories 1, 2, 3 and 4 were unable to vote. Those who attempted to do so were turned away at local polling stations. Many were told they should go and vote in their 'home' countries, which understandably upset and offended those who have made the UK their home. There is a mass of evidence indicating that this was a systemic problem.
  31. First, those denied their right to vote were vocal about it and conventional and social media was dominated from 23 May 2019 onwards with individual accounts. These accounts suggest that there were widespread problems throughout the UK which were clustered in local authorities such as Cambridge, Hackney, Lambeth, Lewisham and Manchester.
  32. Secondly, the3million responded to these protests and accounts by quickly establishing an online survey ('**the First Survey**') on 24 May 2019 to gather some basic information. There were 792 EU24 citizen respondents of whom all had been denied the right to vote. 27 found out about the form too late (so were a subset of Category 1). 517 did not know about the need for a new Declaration Form before the deadline (so were a subset of Category 2). Within the Category 2 cases, 210 volunteered in the response that they believed there were no further formalities to complete beyond registration. 16 of these volunteered that they received a letter explicitly stating there was nothing further they needed to do (an anonymised example is appended). 193 returned Declaration Forms in time but were still not permitted to vote (so were a subset of Category 4).
  33. Thirdly, on 30 June 2019 the3million established another survey ('**the Second Survey**') seeking more detailed information, and categorising it as set out at §29 above. To date, there have been 202 respondents who were denied the right to vote. Our preliminary analysis indicates that 10 were Category 1 EU24 citizens, 106 were Category 2, 6 were Category 3 and 72 were Category 4 (the remainder fall into different categories).
  34. Fourthly, despite RROs and LROs being exempt from the Freedom of Information Act 2000, some have volunteered statistical data about the registered EU24 voters and Declaration Forms issued and used in the 2019 elections in response to requests from the3million.
  35. For example, Redbridge which reports that 19,916 EU24 citizens had registered to vote, of whom only 3,516 (18%) were treated as eligible to vote (i.e. they had obtained and returned a Declaration form in time that was processed satisfactorily). That leaves 16,400 (82%) registered EU24 citizens who were treated as ineligible to vote. Of that large number, at least 1,243 (6.2%) were prevented from voting because Redbridge

considered their Declaration Forms were received too late (i.e. Redbridge treated then as a subset of Category 1). Of course, we are not in a position to verify when these forms were sent to or received by Redbridge or any other authority.

36. Milton Keynes is another authority that has provided statistics. It reports that 16,092 EU24 citizens had registered to vote, of whom only 1687 (10.5%) were treated as eligible to vote (i.e. they had obtained and returned a Declaration Form in time that was processed satisfactorily, or their form was accepted late). That leaves 14,405 (89.5%) registered EU24 citizens who were treated as ineligible to vote. Of that large number, at least 201 (1.4%) were prevented from voting because Milton Keynes considered their Declaration Forms were received too late (i.e. Milton Keynes treated them as a subset of Category 1).
37. Ealing reports that 41,348 EU24 citizens had registered to vote, of whom only 12,937 (31%) were treated as eligible to vote (i.e. they had obtained and returned a Declaration form in time that was processed satisfactorily). That leaves 28,411 (69%) registered EU24 citizens who were treated as ineligible to vote. Of that large number, at least 1,527 (4%) were prevented from voting because Ealing considered their Declaration Forms were received too late (i.e. Ealing treated them as a subset of Category 1).
38. The problems were not confined to larger local authorities. Hart District reports that 1967 EU24 citizens had registered to vote, of whom only 355 (18%) were treated as eligible to vote (i.e. they had obtained and returned a Declaration Form in time that was processed satisfactorily). That leaves 1612 (82%) registered EU24 citizens who were treated as ineligible to vote by that authority. In Chesterfield 1050 EU24 citizens had registered to vote of whom approximately 350 (33%) were treated as eligible to vote (i.e. they had obtained and returned a Declaration form in time that was processed satisfactorily). That leaves 700 (67%) registered EU24 citizens in Chesterfield who were treated as ineligible to vote.
39. Fifthly, on 4 June 2019, the Guardian published an article based on similar statistics it had gathered. It reported:

*“The Guardian asked more than 50 councils how many UC1 forms had been issued to voters on their register and how many had been returned by the cut-off date.*

*The return rate for the top 10 local authorities with EU citizens - Manchester, Birmingham, Leeds and seven London boroughs - was 21%.*

*In Birmingham, home to almost 35,000 EU citizens registered to vote, the return of forms was as low as 10.56%.*

*In Brent in north-west London, which has one of the highest number of EU nationals on the register, only 20.74% of voters who were sent the forms by the council returned them on time.*

*Kingston upon Thames appears to have had the highest rate of return in the country at 43% but other local authorities were not as successful in getting the message out. Some constituencies outside London had returns as low as 11% and 12%.”*

40. In short, no local authority has provided statistics to either the 3million or the Guardian showing that more than 43% of registered EU citizens were allowed to vote in the 2019 Elections; each of these UK authorities has indicated that less than half of the EU24 nationals registered to vote were treated as entitled to do so.

## **The Government’s response**

### *The 4 June 2019 statement*

41. On 4 June 2019, Mr Foster made this House of Commons statement about the problems that had occurred during the 2019 Elections:

*“The Government took all the legal steps necessary to prepare for the European parliamentary elections and put in place all the necessary legislative and funding elements to enable returning officers to make their preparations. We worked with returning officers, the Electoral Commission and other agencies, such as the Society of Local Authority Chief Executives and Senior Managers and the Association of Electoral Administrators, to support the smooth running of the polls. The Government are greatly appreciative of electoral administrators’ hard work inside and outside election periods, which resulted in a higher turnout than for previous European parliamentary elections.*

*Electoral registration officers are under a statutory duty to ensure that people who are eligible to vote in elections have the opportunity to do so. For the recent European Parliament elections—as for all previous such elections—that included making sure that EU citizens who are resident in the UK and registered to vote in local elections were made aware that they needed to complete a voter registration and declaration form, commonly referred to as a UC1 or EC6, so they could vote in the UK. The Electoral Commission supported EROs in this and encouraged them to take additional steps to raise awareness of this requirement locally, through social media channels and other means.*

*The UC1 form implements a requirement under EU law. EU Council Directive 93/109/EC requires all member states to send the details of any EU citizens’ declarations to the state they are a citizen of,*

*“sufficiently in advance of polling day”,*

*to ensure that an EU citizen does not vote twice in the same European parliamentary election. That is not a new requirement and has been in place for previous European parliamentary elections. Similar provision applies to UK citizens living in other EU member states. The UC1 form was accessible on the websites of the Electoral Commission, local authorities and Your Vote Matters.*

*On 5 April, the Electoral Commission published guidance for local returning officers and EROs on the upcoming European parliamentary elections. In it, the Electoral Commission reminded EROs to prepare and issue UC1 forms to EU citizens on the electoral register. On 3 May, the Electoral Commission published guidance advising EU citizens to avoid registering to vote using unofficial registration sites. The guidance further stated:*

*“Any EU citizen who wants to vote in the European Parliamentary election in the UK must also print, complete and return a declaration form stating that they will only vote in the UK.”*

*The guidance also included a link to the Your Vote Matters website, where the form could be downloaded.”*

#### *The exchange of correspondence with Layla Moran MP*

42. By letter dated 7 June 2019, Layla Moran MP, with cross-party support from 68 other MPs, wrote to the Cabinet Secretary and Electoral Commission urging an inquiry into the disenfranchisement of EU24 citizens in the 2019 Elections. She requested the investigation into the following:

- *“Why the Government did not act following similar issues in 2014 and recommendations of reform made by the Electoral Commission*
- *The impact of such a decentralised system of voter registration*
- *The impact of the Government’s late confirmation of the European Election*
- *How many non-UK EU citizens were denied their vote on polling day, despite getting their UC1 forms to their local authorities by the deadline*
- *How many local authorities proactively informed EU citizens of the need for the additional UC1 form to be provided by 7 May, and if so, when they acted*
- *Whether any councils required dual UK/EU citizens to sign and deliver their UC1 form, and what impact this had*
- *How many local authorities informed EU citizens of the need for the additional UC1 form, and whether completed forms were accepted via email as well as by post*
- *How many EU citizens ...*

- ... are on the electoral roll
- ... on the electoral roll voted in the election
- ... were denied their vote because their UC1 form was not received by 7 May.”

43. Responding on 14 June 2019, the Government repeated the basis for its refusal to make any changes following the 2014 European Parliament Election, despite being aware that a large number of EU24 citizens that were denied the right to vote in the 2019 Elections:

*“Following the 2016 referendum the Government decided not to take forward any changes to the registration process for European Parliament election as its focus was to implement the result of the referendum and to leave the EU. The process, therefore, has remained the same as in previous years.”*

#### The Electoral Commission’s position

44. By letter of the same day, the Electoral Commission noted that the principal cause of the disenfranchisement of EU24 citizens was the timing of the Government’s announcement to participate in the 2019 Elections:

*“At the Electoral Commission, we fully understand the frustration felt both by EU citizens resident in the UK and by UK overseas voters, who found they were unable to vote at this poll when they wished to do so. As your letter indicates, the very short notice from the Government of the UK’s participation in these elections inevitably impacted on the time available to raise awareness of the registration process amongst EU citizens, and for citizens to complete the process. Normally, work would have begun on preparations to help both these groups from at least the beginning of 2019, but in this case, although we ourselves had contingency plans in place against the possibility that these elections would in the end take place, practical activity, especially at local level, could not start until April.*

*The Commission had been raising increasing concerns about the risks associated with the uncertainty around the European Parliamentary elections, with ministers and with others, including specifically highlighting concerns about the registration process for EU citizens. We wrote to ministers in March explaining the need to confirm the European Parliamentary election as soon as possible, to enable the electoral community to commit to reasonable spending on increasingly urgent contingency preparations for the poll. Authorisation for spending was finally given to the local authorities on 1 April, with the formal confirmation that the poll would go ahead following on 7 May.”*

45. The Electoral Commission also made clear that the Declaration Form system could be “made easier for [EU24] citizens in the UK” whilst complying with the requirements of EU law.

## PART II: LEGAL FRAMEWORK

### EU law

#### *EU citizens and their representative Parliament*

46. Voting and representation rights are an important aspect of EU citizenship, which is destined to be the fundamental status for nationals of the EU Member States. Article 10(3) of the Lisbon Treaty provides “[e]very citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.” To that end, Article 9 of the Lisbon Treaty provides for the European Parliament as one of the EU’s institutions and Article 9A sets out its functions adding that it “shall be composed of representatives of the Union’s citizens”. This representative role and the significance of the right to vote to its democratic legitimacy was analysed in detail by the Bundesverfassungsgericht (German Constitutional Court) when giving judgment in the Lisbon Treaty case on 30 June 2009.

#### *Rights of EU citizens to vote in European Parliamentary Elections and not to be discriminated against*

47. The primary Treaty and Charter rights to vote for representatives in the Parliament are set out at §3. Articles 20 and 22 TFEU have direct effect and are directly enforceable by individuals before national courts: *Case C-184/99 Grzelczyk v Centre Public d’Aide Sociale d’Ottignies Louvain la Neuve* [2002] 1 CMLR 19 at §31. The Member State’s exercise of its competence and powers in the area of national citizenship and associated political rights, in so far as it affects the rights conferred and protected by the EU legal order, is amenable to judicial review carried out in the light of EU law: *Case C-135/08 Rottman v Freistaat Bayern* [2010] QB 761 at §48. It is not open to Member States to exercise such powers in a manner which would result in a denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as an EU citizen: *Case C-34/09 Ruiz Zambrano v Office national de l’emploi* [2012] QB 265 at §§41-42.
48. Nor may provisions of national law be lawfully applied which are incompatible with general principles of EU law, particularly the principle of equal treatment or non-discrimination found in Articles 18 and 45 of the TFEU, Article 21(2) of the Charter and the Equal Treatment Directive: *Case C-300/04 Eman v College van burgemeester en wethouders van Den Haag* [2007] 1 CMLR 4 at §§57-61. When an EU citizen establishes direct discrimination on grounds of nationality has occurred, it cannot then be justified by the state: *Case 177/88 Dekker v Stichting Vormingscentrum voor Jong. Volwassenen (VJV- Centrum) Plus* [1991] IRLR 27.
49. The Voting Directive’s preamble makes these important points about those rights (emphasis added):

*“Whereas the right to vote... in elections to the European Parliament in the Member State of residence, laid down in*

*Article 8b (2) of the Treaty establishing the European Community, is an instance of the application of the principle of non-discrimination between nationals and non-nationals and a corollary of the right to move and reside freely enshrined in Article 8a of that Treaty...*

*Whereas the purpose of Article 8b (2) of the EC Treaty is to ensure that all citizens of the Union, whether or not they are nationals of the Member State in which they reside, can exercise in that State their right to vote... under the same conditions; whereas the conditions applying to non-nationals, including those relating to period and proof of residence, should therefore be identical to those, if any, applying to nationals of the Member State concerned*".

50. An important part of the voting rights conferred by the Treaty and the Voting Directive is that the EU citizen should have the freedom to vote in his/her Member State of origin or his/her Member State of residence. Article 8(1) of the Voting Directive provides "[a] Community voter exercises his right to vote in the Member State of residence if he has expressed the wish to do so." Article 9(1) imposes a mandatory obligation on Member States to "take the necessary measures to enable a Community voter who has expressed the wish for such to be entered on the electoral roll sufficiently in advance of polling day."

51. Article 9(4) provides for a right to remain on the electoral roll and precludes a Member State from removing EU citizens, save in limited circumstances:

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

52. The Voting Directive also makes provision for use of the information gathered as a result of directions. Article 4(1) states "[c]ommunity voters shall exercise their right to vote either in the Member State of residence or in their home Member State. No person may vote more than once at the same election." Article 13 adds:

*"Member States shall exchange the information required for the implementation of Article 4. To that end, the Member State of residence shall, on the basis of the formal declaration referred to in Articles 9 and 10, supply the home Member State, sufficiently in advance of polling day, with information on the latter State's nationals entered on electoral rolls or standing as candidates. The home Member State shall, in accordance with its national legislation, take appropriate measures to ensure that its nationals do not vote more than once or stand as candidates in more than one Member State."*

## The ECHR and other international legal instruments

53. Article 3 of Protocol 1 ECHR imposes a positive obligation on states to secure free elections, which includes the right to vote:

*“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.”*

54. From the perspective of the ECHR, every vote must ‘count’. In *Riza and Others v Bulgaria*, Applications nos. 48555/10 and 48377/10, the European Court of Human Rights (‘ECtHR’) observed at §148:

*“The active electoral right as guaranteed by Article 3 of Protocol No. 1 is not confined exclusively to the acts of choosing one’s favourite candidates in the secrecy of the polling booth and slipping one’s ballot paper into the box. It also involves each voter being able to see his or her vote influencing the make-up of the legislature, subject to compliance with the rules laid down in electoral legislation. To allow the contrary would be tantamount to rendering the right to vote, the election and ultimately the democratic system itself meaningless.”*

55. The ECtHR has also held any departure from the right to vote “risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. Exclusions of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3”: *Mathieu-Mohin and Clerfayt v Belgium* (1987) 10 EHRR 1 at §52. Abrogation must be subject to “tight... scrutiny”: *Davydov v Russia* (2018) 67 EHRR 25 at §286. In particular the Court emphasised in *Matthews v United Kingdom* (1999) 28 EHRR 361 (‘Matthews’) at §63 that it was required to:

*“... satisfy itself that the conditions do not curtail the right to vote to such an extent as to impair its very essence and deprive it of effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate. In particular, such conditions must not thwart the free expression of the people in the choice of the legislature.”*

56. Significantly, *Matthews* was a case where a particular group, Gibraltarians, were prevented from voting. The ECtHR’s decision was endorsed by the European Court of Justice in *Case 145/04 Spain v UK* [2006] E.C.R. I-7917 (‘Spain v UK’).
57. Article 14 ECHR provides that “[t]he enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as... race... national or social origin... or other status.” The notion of objective and reasonable justification in the context of race or



nationality “*must be interpreted as strictly as possible*”: *Sejdic v Bosnia and Herzegovina*, no. 27996/06, 22 December 2009 at §§43-44. Article 14, read in conjunction with Article 3 of Protocol 1, prohibits inequality of treatment in the enjoyment of the right to vote on the grounds of nationality, absent justification: see *Aziz v Cyprus* (2005) 41 EHRR 11 at §§36-38.

58. These rights are reinforced by other international law instruments, such as Articles 7 and 21(1) and (3) of the Universal Declaration of Human Rights and Articles 2.1 and 25(1) of the International Covenant on Civil and Political Rights.

#### UK law

*Provision for citizens of the UK, Malta, Cyprus and the Republic of Ireland to vote in European Parliament elections*

59. The European Parliamentary Elections Act 2002 (**‘the 2002 Act’**) purports to give effect to the Voting Directive. Section 8 provides materially:

“(1) *A person is entitled to vote as an elector at an election to the European Parliament in an electoral region if he is within any of subsections (2) to (5).*

(2) *A person is within this subsection if on the day of the poll he would be entitled to vote as an elector at a parliamentary election in a parliamentary constituency wholly or partly comprised in the electoral region, and—*

- (a) *the address in respect of which he is registered in the relevant register of parliamentary electors is within the electoral region, or*
- (b) *his registration in the relevant register of parliamentary electors results from an overseas elector's declaration which specifies an address within the electoral region.”*

60. Section 4 of the Representation of the People Act 1983 (**‘the 1983 Act’**) provides for registration “*in the relevant register of parliamentary electors.*” It states:

“4.— *Entitlement to be registered as parliamentary or local government elector.*

(1) *A person is entitled to be registered in the register of parliamentary electors for any constituency or part of a constituency if on the relevant date he—*

- (a) *is resident in the constituency or that part of it;*
- (b) *is not subject to any legal incapacity to vote (age apart);*
- (c) *is either a qualifying Commonwealth citizen or a citizen of the Republic of Ireland; and*
- (d) *is of voting age...*

- (6) *In this section “qualifying Commonwealth citizen” means a Commonwealth citizen who either-*
  - (a) *is not a person who requires leave under the Immigration Act 1971 to enter or remain in the United Kingdom, or*
  - (b) *is such a person but for the time being has (or is, by virtue of any enactment, to be treated as having) any description of such leave...”*

- 61. British citizens, other Commonwealth citizens, and citizens of the Republic of Ireland remain registered on the electoral roll indefinitely unless they are no longer resident at the address at which they are registered or if they are subject to legal incapacity, see section 10ZE of the Representation of the People Act 1983.
- 62. Such citizens may also be registered at two or more addresses: *Fox v Stirk and Bristol Electoral Registration Officer, Ricketts v Cambridge City Electoral Registration Officer* [1970] 2 QB 463. It is, however, an offence to vote twice in a European Parliament election under section 9 of the 2002 Act. This was introduced to give effect to Council Decision (EU Euratom 2018/994).

*Provision for EU24 citizens to vote in European Parliament elections*

- 63. By section 8(5), a person who is not a British Citizen, any other eligible Commonwealth citizen or a citizen of the Republic of Ireland is entitled to vote as an elector at an election to the European Parliament if he or she is entitled to vote in the electoral region by virtue of the European Parliamentary Elections (Franchise of Relevant Citizens of the Union) Regulations 2001 (**‘the Franchise Regulations’**). Regulation 1 of the Franchise Regulations states that they only apply to citizens who are not Commonwealth citizens or citizens of the Republic of Ireland. In other words, their effect is confined to EU24 citizens. Regulation 3 materially states:

- “(1) *A person is entitled to vote as an elector at a European Parliamentary election in an electoral region if on the date of the poll he -*
  - (a) *is registered in the region in the register of relevant citizens of the Union entitled to vote at European Parliamentary elections (maintained under regulation 5(2) below);*
  - (b) *is not subject to any legal incapacity to vote (age apart);*
  - (c) *is a relevant citizen of the Union; and*
  - (d) *is of voting age (that is, 18 years or over).*
- (2) *A person is not entitled to vote as an elector -*
  - (a) *more than once in the same electoral region at any European Parliamentary election, or*

*(b) in more than one electoral region at a European Parliamentary general election.”*

64. Regulation 4(1) sets out the conditions for the entitlement of EU24 citizens to be registered as European Parliamentary electors (our emphasis):

*“(1) A person is entitled to be registered in the register of relevant citizens of the Union entitled to vote at European Parliamentary elections (maintained under regulation 5(2) below) for part of an electoral region if on the relevant date he -*

*(a) is resident in that part of the region;*

*(b) is not subject to any legal incapacity to vote (age apart);*

*(c) is a relevant citizen of the Union; and*

*(d) is of voting age;*

*and the registration officer has received in respect of him an application and declaration made in accordance with regulation 6(1) and (2) below.”*

65. Regulation 5(2) requires each registration officer to maintain a register of persons entitled to be registered under regulation 4 of the 2001 Regulations. This register is different in character from all other electoral registers, in that being registered to vote and on the 5(2) register does not mean a person can vote, only that they potentially can.

66. Regulation 6 sets out the requirement for the Declaration Form to be made by EU24 citizens to be registered as European Parliamentary electors including at 6(2)(d) the requirement for a declaration *“that the applicant will exercise any right which he has to vote at European Parliamentary elections at any such election only in the United Kingdom during the period for which any entry in the register of electors made in pursuance of this application remains in force.”*

67. By Regulation 6(3) the registration officer must *“supply free of charge as many copies of forms for use in connection with applications and declarations... as appear to that officer reasonable in the circumstances...”*. No time frame is imposed for this duty.

68. Regulation 10 provides for the removal of entries from the register. In particular, by regulation 10(2)(a), EU24 citizens are automatically removed from the register after 12 months of receipt of their application form and declaration:

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

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

- (a) *the end of the period of 12 months beginning with the date when the entry in the register first takes effect,*
  - (b) *the declaration under regulation 6(2) above is cancelled under paragraph (1) above;*
  - (c) *the citizen applies for his entry to be removed;*
  - (d) *any entry made in respect of him in any other register of electors maintained under regulation 5(2) above takes effect,*  
*whichever occurs first.*
- (3) *Where the entitlement of such a person to remain registered terminates by virtue of paragraph (2) above, the registration officer concerned shall remove the person's entry from the register, unless he is entitled to remain in pursuance of a further application and declaration under regulation 6(1) and (2) above."*

### *The Declaration Form*

69. The Declaration Form seeks identifying information and requires a signed declaration that the EU24 citizen completing it will vote here (*"I will use my right to vote at the European Parliamentary election only in the UK (and not in my home country [sic]) for as long as my name appears on the UK register of electors for the European Parliament."*) It does not say it relates to any particular European Parliament election or that the effect of declaration expires in 12 months, or at all. The currently published versions give 7 May 2019 as the deadline for returning the form.

### *Guidance about the Declaration Form*

70. RROs are told in Electoral Commission guidance to distribute Declaration Forms to *"each local government elector who has indicated on their registration application that they are a citizen of an EU member state and who will be 18 years of age or over on, or before, polling day."* No deadline is given and this guidance has no statutory underpinning.
71. There was a limited amount of Electoral Commission guidance addressed to EU nationals about the Declaration Form. On 24 April 2019, it tweeted about registering and completing a Declaration Form to vote. On 3 May 2019, it tweeted to ward against use of an online tool Best for Britain had written about the form. On 30 April it tweeted about the registration form, but not the Declaration Form. On 4 May 2019, it published more detailed guidance but, like the Declaration Form, this does not appear to mention that a Declaration Form expires in 12 months, or at all.

### *Rights not to be discriminated against under domestic equality law*

72. The domestic right to non-discrimination is contained in the 2010 Act. Under section 9(1)(b), the protected characteristic of *"race"* includes *"nationality"* and *"national origins"*. Section 13(1) provides *"person (A)*

*discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*". Section 29(6) provides "[a] person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination." Direct discrimination cannot be legally justified.

73. There are some limited exceptions to these rights. Schedule 23 allows direct nationality discrimination and indirect race discrimination on the basis where the discrimination is in pursuance of an enactment or statutory instrument, or required by Ministerial arrangements or Ministerial conditions. These exemptions do not apply to policies, the establishment of extra-statutory schemes or the exercise of discretion, however. *R (European Roma Rights Centre) v Immigration Officer, Prague Airport* [2004] UKHL 55 and *Secretary of State for Defence v Elias* [2006] EWCA Civ 1293 (*'Elias, Court of Appeal'*) both involved schemes being quashed because they were unlawfully discriminatory contrary to the Race Relations Act 1976 (which contained an exemption similar to schedule 23).

#### *The public sector equality duty*

74. Prompted by recommendations made in the MacPherson Inquiry Report about identifying and confronting institutional race discrimination, Parliament legislated to impose the public sector equality duty on bodies including central government departments. The duty is now found in section 149(1) of the 2010 Act which provides:

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

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."*

and by section 149(3)(c), subsection 149(1)(b) includes "*due regard to the need*" to "*encourage persons who share a relevant protected characteristic to participate in public life*".

### **PART III: ANALYSIS AND PROPOSED GROUNDS OF JUDICIAL REVIEW**

#### **Substantive breach of rights**

75. All the available information and data indicates that, during the 2019 Elections, there was a large scale and systematic breach of the directly enforceable rights set out in Article 10 the Lisbon Treaty, Articles 20(2)(b)

and 22 TFEU, Article 39 of the Charter of Fundamental Rights and Article 3 of Protocol 1 ECHR (see §2 above). The conditions imposed by the UK's system "*curtail the right to vote to such an extent as to impair its very essence and deprive it of effectiveness*" and "*thwart the free expression of the people in the choice of the legislature*": see *Matthews* at §63. In all five local authority areas from which the 3million has statistical data (see §§34 to 38 above), it reveals that the overwhelming majority of EU24 citizens were treated as ineligible to vote because of the Declaration Form requirement and, in the largest three authorities, that a substantial proportion of EU24 citizens wished to vote on the basis of late forms but would not have been permitted to do so. The Guardian report data shows a similar pattern (see §39 above). the 3million's own survey data demonstrates that a great many EU24 citizens were unaware of the need for the forms, or had completed them in the past and assumed they did not need to be completed again. That is not a surprising assumption since neither the forms themselves nor the guidance given to EU24 citizens indicates that their effect lapses in 12 months.

76. The sole response to this problem given by the Government thus far is to say that EU law, specifically Articles 4 and 13 of the Voting Directive, positively requires the Declaration Form system to be operated as it is (see §0 above). This answer is flawed for five reasons.
77. First, the Government has read provisions into the Voting Directive that are neither there on the face of the text nor capable of being implied. It contains no requirement for a renewable, time limited declaration. A single declaration made upon registration, or made as part of registration and when circumstances materially change will suffice. Nor does the Voting Directive require notification of EU citizens who have expressed an intention to vote here 12 working days ahead of a poll. There is no authority for the proposition that a EU24 citizen can be automatically removed from the register for failing to complete the Declaration. That is not only contrary to the wording of the Voting Directive but also unnecessary and disproportionate. Checks against double voting can always be made after the poll has closed (indeed that is the only time when they become meaningful) and any double voting dealt with then under section 9 of the 2002 Act.
78. Secondly, the requirements in the current system are disproportionate in terms of EU law. That is impermissible: *Spain v UK*, §94. The requirements are both burdensome and several, demanding knowledge of the Declaration Form requirement and the time limited nature of a declaration, then action by the EU24 citizen within a compressed time frame (especially in the 2019 Elections) to complete and submit the Declaration Form and then effective action being taken by an ERO within the same time frame. It is unsurprising that so many Category 1, 2 and 3 people did not submit forms before 7 May 2019 in these circumstances and that the forms of so many Category 4 people were not processed sufficiently expeditiously.
79. Thirdly, there is also disproportionality from the perspective of the ECHR. Echoing *Matthews*, in *Hirst v United Kingdom (No 2)* (2006) 42 E.H.R.R. 41,

§62 the ECtHR noted that conditions on the exercise voting rights should not:

*“curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate. In particular, any conditions imposed must not thwart the free expression of the people in the choice of the legislature—in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of people through universal suffrage.”*

80. This is precisely the effect of the Declaration Form system.
81. Fourthly, if the Government’s answer were correct then all EU Member States would need to operate an identical Declaration Form system to that used in the UK. This is not the case. The UK’s system is unique, as we have said. Some countries also have a declaration system, but once given the declaration lasts for a long period (10 years in Austria, for instance) or indefinitely (as, for example, in the Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, the Republic of Ireland, Italy, Poland, Malta, Slovenia and Spain).
82. Last, if the Voting Directive required a system that could only be operated in this way, the Government would no doubt have said so in 2014 when the Electoral Commission reported on the European Parliament Elections of that year and again in 2016 when the Law Commission reported. It said no such thing. Instead, the Government gave an undertaking to the European Commission to change the system, presumably in the context of threatened infringement proceedings (see §23 above).
83. The decision not to honour that undertaking is a serious matter. At best, it is indicative of a misplaced confidence in the willingness of Parliament to authorise the UK’s departure from the EU at a date of the Executive’s choosing, which would be consistent the statements quoted above at §24. This is not a valid reason, and in any event cannot excuse failure to reform the system from 1 April 2019 when contingency plans, however embryonic, were being made. Below at 105(9) and (10) we seek an explanation for the apparent inaction and cavalier disregard of EU law from that date onwards.

#### **Unlawful discrimination**

84. The operation of the UK’s system was unlawfully discriminatory. Neither the discrimination nor its legality has been addressed by the Government to our knowledge.
85. As to EU law, the specific non-discrimination provisions of Articles 20(2)(b) and 22 TFEU, Article 39 of the Charter and the Voting Directive required EU24 citizens to be permitted to vote *“under the same conditions”* as

nationals of the UK: see §§2, 47 to 51 above. Only EU27 citizens from the Republic of Ireland, Cyprus and Malta and dual UK/EU27 citizens were able to do so. This also offended against the general prohibitions on nationality discrimination in Articles 18 and 45 of the TFEU and Article 21(2) of the Charter and Article 2(1) read with 3(1)(h) of the Equality Directive. It is impossible to identify a lawful basis for the difference in treatment on anything other than prohibited nationality grounds. The concern cannot be a risk of double voting, because that would need to be addressed by requiring declarations of British Citizens with more than one place of residence and citizens of Malta, Cyprus and Ireland. There can be no lawful reason to treat citizens of EU Member States other than Ireland, Malta or Cyprus less favourably. Nor is there any good reason to treat EU24 citizens less favourably than dual UK/EU27 citizens. Any assumption that EU24 citizens are inherently more likely to double vote would itself be an unlawful racial stereotype.

86. These principles apply equally when the difference in treatment is examined against Article 14 ECHR read with Article 3 of Protocol 1. Nationality and national origins are forms of 'status'. Different treatment requires justification. As in *Matthews*, seeking to identify superficial, but ultimately hollow, differences based on history or geography will not suffice.
87. As to section 29(1), (2) and (6) of the 2010 Act read with section 9(1)(b), there are multiple elements of the system that did not require by law, Ministerial arrangement or condition EU24 citizens being treated differently from British Citizens (except when they are citizens from the Republic of Ireland, Cyprus and Malta) (see Equality and Human Rights Commission, *Services, Public functions and Associations: Statutory Code of Practice* at §13.16). In particular, the 3million highlights the discriminatory effects of:
  - (1) the failure to provide clear and accurate information prior to the 2019 Elections in sufficient time to enable EU24 citizens to comply with the requirements of the Declaration Form system (see §§24, §26 above);
  - (2) the failure to require the distribution of Declaration Forms to all EU24 citizens who were registered to vote in the 2019 Elections; and
  - (3) the failure to accept the submission of Declaration Forms after 7 May 2019 (a deadline which is not contained in the legislation) (see §26 above).

#### **Public sector equality duty breach**

88. There was a failure to discharge the public sector equality duty set out in section 149 of the 2010 Act. The Government was well aware that there was a risk of unlawful discrimination from its discussions with the Electoral Commission and European Commission. The Law Commission's identification of this issue in 2016 should have left it in no doubt. The duty



was therefore triggered: see *R (Elias) v Secretary of State for Defence* [2005] EWHC 1435 (Admin) (High Court) at §98.

89. Once that duty was triggered, you were obliged to take a series of steps.
90. To begin with, you should have gathered and assessed information to properly understand any discrimination, equality or good relations problem, its degree and extent (*R (Lunt) v Liverpool City Council* [2009] EWHC 2356 at §44, *Rahman v Birmingham City Council* [2011] EWHC 944 (Admin) at §35 and *R (Green) v Gloucestershire CC, R (Rowe & Anor) v Somerset CC* [2011] EWHC 2687 (Admin) at §§121 to 127). You should then have considered all information you had with the specific statutory considerations in mind (*R (Harris) London Borough of Haringey* [2010] EWCA Civ 703 at §40).
91. Part of this analysis should have involved identifying any actual unlawful discrimination or risks of it arising and, similarly, the risks and actual negative (or positive) consequences in terms of equality of opportunity and good relations of the courses of action being contemplated (*Elias* (Court of Appeal) at §274, *R (Kaur & Shah) v London Borough of Ealing* [2008] EWHC Admin 2026 ('Kaur') at §§23-24 and *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at §25). You should also have balanced any consequences for equality of opportunity against the other benefits of proceeding, or not (*R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA (Civ) 141 at §31 and *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) at §81. Last, you should have considered whether, and if so how, any identified negative consequences can be mitigated (*Kaur* at §43).
92. As far as we are aware, none of this was done: see §§21 and 23 above. Instead, there appears to have been a positive decision to give no regard to these matters and to “focus” exclusively on other issues: see §43 above. It is also striking that the 2019 Elections were assessed as having no consequences of any kind, less still on terms of section 149. We say this because the impact assessment of the 2019 Order says simply:

**“12. Impact**

12.1 *There is no, or no significant, impact on business, charities or voluntary bodies.*

12.2 *There is no, or no significant, impact on the public sector.*

12.3 *An Impact Assessment has not been prepared for this instrument because there is no impact on business.”*

93. If, contrary to all appearances, thought and effort was given to the discharge of the public sector equality duty in the context of the 2019 elections there will presumably be some record of the steps taken by decision makers in seeking to meet the statutory requirements: *R (BAPIO*

*Action Ltd) v Secretary of State for the Home Department* [2007] EWHC 199. We request any such records below at §105(13).

#### **PART IV: REMAINING PRE ACTION PROTOCOL ISSUES**

##### **Reference details, legal advisors and address for reply and service of Court documents**

94. Please mark all correspondence relating this matter with reference THE/156.1. Correspondence should be directed to John Halford, Partner, and Verity Cannell, Paralegal, who can be contacted on 020 7833 4433 or via email at j.halford@bindmans.com and verity.cannell@bindmans.com. Our postal and DX addresses are given above.
95. We assume that you will be represented by the Government Legal Department, 1 Kemble St, Holborn, London WC2B 4TS.

##### **Details of the matter being challenged**

96. The unlawful maintenance and operation of the system described at §§9 to 12, 24 to 26 and 59 to 71 above in the 2019 Elections.

##### **Parties to the proposed claim**

97. Your details are given above. If you dispute you are the appropriate Defendant minister, please indicate this by return giving reasons.
98. All disenfranchised EU24 nationals are interested parties to this claim. It is impractical to serve them with this letter or issued proceedings, but the3million will publish the letter's contents and, if there is a claim, the claim form and grounds. Individual disenfranchised EU24 nationals may wish to join the claim as interested parties or co-claimants. If you consider there are other interested parties to this claim, please identify them in your response.
99. The letter will be sent for information to the European Commission, Electoral Commission and all the local authorities named above.

##### **The action that you, as proposed Defendant, are being asked to take**

100. You are asked to:

- (1) candidly acknowledge that the system described at §§9 to 12, 24 to 26 and 59 to 71 above is unlawful in the respects identified at §§75 to 92 above, that this led to large scale disenfranchisement and that this arose through a failure of the Government to reform it, as it committed to do;
- (2) apologise publicly, in a statement to the House or otherwise, for this occurring;

- (3) accept section 149(1) was not discharged when the arrangements for the 2019 Elections were made;
- (4) agree to put in place a system for straightforwardly considering complaints by disenfranchised EU24 nationals and, where appropriate, apologising direct to them and providing for the payment of compensation to them in accordance with EU law, the Human Rights Act 2010 and the 2010 Act; and
- (5) agree to a timetable for legislative reform to eliminate the disenfranchising and discriminatory effects of the system ahead of the next European Parliament elections in the event the UK does not leave the EU before then (we appreciate that it remains Government policy that it will do so).

### ADR proposals

101. Provided the position of the 3million and individuals who are interested parties to this litigation can be satisfactorily protected whilst ADR takes place, the 3million would like to seek an agreed outcome to this dispute outside the court process and so formally proposes ADR in the form of round table discussions, mediation or early neutral evaluation.
102. We remind you of your obligation to give meaningful and clear reasons if you decide to decline such an ADR offer: see *PGF II SA v OMFS Company Ltd* [2013] EWCA Civ 1288. We also draw your attention to the mandatory terms of the Government's Dispute Resolution Commitment and the Guidance to Government Departments on compliance.

### Information and documents sought

103. We ask that you address the following requests and questions straightforwardly using the enumeration below. The reasons these requests are made are to help to narrow the facts and issues in dispute and, should litigation be necessary, to allow the 3million to plead its claim in a focussed and, as far as practicable, efficient way and limit the evidence and documents that needs to be filed.
104. When replying please bear in mind the third bullet point at page 4 of the Treasury Solicitor's 2010 *Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings*, *R (Bilal Mahmood) v SSHD* [2014] UKUT 439 at §23 and *Citizens UK v SSHD* [2018] 4 WLR 123, §§105-106(1)-(5). If you are unable or unwilling to address any particular request, please state why, giving full reasons.
105. Please:
  - (1) confirm that you accept the factual background as set out above at §§19 to 45, or if any part of it is disputed, please give details;

- (2) state whether or not you accept the views of the Electoral Commission set out at §§12, 25 and 44 above are correct or, if they are disputed in any way, please give details;
- (3) confirm you accept the Declaration Form system operates as described at §§9 to 12, 24 to 26 and 59 to 71 above;
- (4) supply correspondence exchanged with the EU Commission and Electoral Commission about EU24 citizen disenfranchisement during the 2014 European Parliamentary Elections and the means by which a repetition was to be avoided;
- (5) give details of the 'work' than began to that end alluded to in Lord Young's statement quoted at §21 and provide all related proposal and decision documents;
- (6) identify who took the decision to abort that work, when and on what authority and supply any decision documents;
- (7) state whether or not you accept that EU24 citizens resident in the UK who register to vote are disadvantaged by the Declaration Form system in respect of their ability to vote in European Parliamentary Elections when compared to British, Irish, Maltese and Cypriots, and dual British/EU27 citizens who are also registered to vote resident here (but who are not subject to that system);
- (8) if you accept the premise in (6), state whether or not you accept the disadvantage amounted to unlawful discrimination and, if you maintain it was lawful, give full details of the justification;

and, specifically in respect of the 2019 Elections, please:

- (9) set out the details of any steps taken after 1 April 2019 to ensure that the problems impacting on EU24 citizens' ability to vote that had been identified in 2014 would not reoccur;
- (10) supply any guidance issued by your office to EROs, RROs and LROs about:
  - (a) the operation of the Declaration Form system; and
  - (b) facilitating EU24 citizens exercising the right to vote;
- (11) supply any correspondence between the Government and other Member States, as well as correspondence between the Government and RROs and/or LROs, concerning the requirement under Article 13 of the Voting Directive to exchange information in advance of polling day;
- (12) supply, ideally in spreadsheet form, the data your office has collected from RROs and/or LROs about the data then in turn

gathered from Declaration Forms in respect of the 2019 Elections;  
and

- (13) supply any record made of compliance with section 149 in respect of the 2019 Elections including, but not limited to, any formal Equality Impact Assessment.

**Response dates**

106. Please acknowledge safe receipt of this letter by return and provide a substantive response by no later than close on 26 July 2019, as requested above.

Yours faithfully,

*Bindmans LLP*

Bindmans LLP