Neutral Citation Number: [2016] EWHC 957 (Admin)

Case No: CO/1431/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/04/2016

Before :

LORD JUSTICE LLOYD JONES
MR. JUSTICE BLAKE

- -

Between :

(1) HARRY SHINDLER MBE **(2) JACQUELYN MACLENNAN**	**Claimants**
- and -	
(1) CHANCELLOR OF THE DUCHY OF LANCASTER **(2) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS**	**Defendants**

- -
- -

Aidan O'Neill QC, Christopher Brown and **Anita Davies** (instructed by **Leigh Day**) for the **Claimants**
James Eadie QC and **Jason Coppel QC** (instructed by **the Government Legal Department**) for the **Defendants**

Hearing date: 20 April 2016

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Approved Judgment

Judgment Approved by the court for handing down.

LORD JUSTICE LLOYD JONES :

1. This is the judgment of the court to which both members of the court have contributed.

2. In these proceedings the claimants, Harry Shindler MBE and Jacquelyn MacLennan, seek permission to challenge the legality under EU law of section 2, European Union Referendum Act 2015 ("the 2015 Act") which makes provision for the franchise in the forthcoming referendum on whether the United Kingdom should remain a member of the European Union ("the EU referendum"). Section 2 adopts certain rules from those governing the franchise for UK Parliamentary elections. In particular it excludes from the franchise for the EU referendum British citizens who are resident abroad and who were last registered to vote in Parliamentary elections in the United Kingdom more than 15 years ago ("the 15 year rule"). The claimants, whose names have not appeared on a United Kingdom register of electors for more than 15 years, submit that the 2015 Act restricts their directly effective EU law rights of freedom of movement in a manner that is not objectively justifiable.

The Parties

3. The first claimant, Mr. Shindler, was born in London in 1921. He is a British national, holds a United Kingdom passport and is not a national of any other State. He spent much of his working life as a member of the British armed forces and is a veteran of the Allied landings at Anzio during World War II. On his retirement, in exercise of his free movement rights, he moved to live in Italy and has resided there ever since. Mr Shindler pays taxes to Her Majesty's Revenue and Customs on his pension. In 2014, Mr Shindler was awarded an MBE for his services to Anglo-Italian relations. His name last appeared in the United Kingdom register of electors in 1982.

4. The second claimant, Ms. MacLennan, was born in Inverness in 1961. She is also a British national with a United Kingdom passport, and is not a national of any other State. After her graduation from the University of Edinburgh she qualified as a solicitor and notary public in Scotland. In November 1987, in exercise of her free movement rights, she joined a legal firm based in Brussels. Ms MacLennan has lived and worked in Brussels ever since, specialising in EU competition and environmental law, and is now a partner in the Brussels office of a global law firm. Her name last appeared in the United Kingdom register of electors in 1987.

5. The defendants are the Chancellor of the Duchy of Lancaster (who acts in this matter with the Minister for Constitutional Reform) and the Secretary of State for Foreign and Commonwealth Affairs (who acts in this matter with the Minister for Europe). They are the relevant government ministers with responsibility for electoral matters, so far as the EU referendum is concerned.

The Claim

6. The 2015 Act received royal assent on 17 December 2015. On 16 March 2016 the claimants filed a claim form applying for permission to apply for judicial review seeking declaratory relief. The claimants' case is that the 15 year rule as applied to eligibility to vote in the EU referendum constitutes a restriction on their rights of free movement, and that this restriction is not, and cannot be, objectively justified as a

proportionate means of achieving a legitimate objective. The claimants seek a declaration that section 2 of the 2015 Act is incompatible with their directly effective EU law rights. They state that their objective in bringing these proceedings is to secure new legislation amending the 2015 Act so as to remove the 15 year rule prior to the date of the EU referendum.

7. On 8 April 2016, Cranston J. ordered that the application for permission to proceed with a claim for judicial review be heard by a Divisional Court with the substantive application to follow immediately thereafter if leave is granted. That rolled up hearing took place before us on 20 April 2016.

The Legislation

8. We have been referred by the parties to a helpful summary of legislative initiatives contained in a briefing paper for the House of Commons Library by Isobel White 'Overseas Voters' (No 5923 March 2016) from which we note the following:

(1) Until the coming into force of the Representation of the People Act 1985, eligibility to vote in elections for local government, the United Kingdom Parliament and the European Union depended on qualifying residence in the United Kingdom at the relevant time for inclusion in the electoral list.

(2) Proposals to extend the franchise to British citizens abroad were discussed in the 1970s but no specific recommendations were made by the Speaker's Conference in 1973-4.

(3) The Home Affairs Select Committee recommended in 1983 that the right to vote in UK Parliamentary elections be extended to British citizens resident in what was then the European Economic Community. The government of the day did not accept the recommendation but proposed that British citizens resident outside the United Kingdom anywhere in the world should have the right to vote for a limited period after leaving the place where they were formerly resident unless posted abroad on qualifying military or civil service.

(4) The Representation of the People Act 1985 provided for British citizens resident abroad to be able to remain on the electoral register for a period of five years.

(5) The Representation of the People Act 1989 extended the period to 20 years.

(6) The Political Parties Elections and Referendums Act 2000 reduced the period to 15 years.

(7) In 2015 an Overseas Voters Bill was presented to Parliament as a private member's bill, proposing the removal of the 15 year limit to the ability to register. The legislation did not proceed but the government expressed sympathy with the aim.

9. This active scrutiny by Parliament has been noted by the European Court of Human Rights when it has considered whether the 15 year rule in its application to the Parliamentary franchise is consistent with such individual rights to vote as are afforded by Article 3 of Protocol No. 1 to the European Convention on Human

Rights. (See *Doyle v UK* (2007) 45 EHHR SE3; *Shindler v United Kingdom* (2013) 58 EHHR 9.)

10. Section 2 of the 2015 Act provides in relevant part:

> "(1) Those entitled to vote in the referendum are—
>
> (a) the persons who, on the date of the referendum, would be entitled to vote as electors at a parliamentary election in any constituency,
>
> (b) the persons who, on that date, are disqualified by reason of being peers from voting as electors at parliamentary elections but—
>
> (i) would be entitled to vote as electors at a local government election in any electoral area in Great Britain,
>
> (ii) would be entitled to vote as electors at a local election in any district electoral area in Northern Ireland, or
>
> (iii) would be entitled to vote as electors at a European Parliamentary election in any electoral region by virtue of section 3 of the Representation of the People Act 1985 (peers resident outside the United Kingdom), and
>
> (c) the persons who, on the date of the referendum—
>
> (i) would be entitled to vote in Gibraltar as electors at a European Parliamentary election in the combined electoral region in which Gibraltar is comprised, and
>
> (ii) fall within subsection (2).…
>
> (2) A person falls within this subsection if the person is either—
>
> (a) a Commonwealth citizen, or
>
> (b) a citizen of the Republic of Ireland."

11. Section 2(1)(a) adopts as a starting point for the EU referendum the franchise for UK Parliamentary elections. Sections 2(1)(b) and 2(1)(c) then provide for limited extensions of this franchise. The franchise for UK Parliamentary elections is established by a range of legislative provisions, the most relevant of which are sections 1 and 4 of the Representation of the People Act 1983 ("the 1983 Act") and section 1 of the Representation of the People Act 1985 ("the 1985 Act").

12. Section 1 of the 1983 Act provides in relevant part:

> "(1) A person is entitled to vote as an elector at a parliamentary election in any constituency if on the date of the poll he—
>
> (a) is registered in the register of parliamentary electors for that constituency;
>
> (b) is not subject to any legal incapacity to vote (age apart);
>
> (c) is either a Commonwealth citizen or a citizen of the Republic of Ireland; and
>
> (d) is of voting age (that is, 18 years or over). …"

13. Section 4 of the same Act provides in relevant part:

> "(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. …"

14. Section 1 of the 1985 Act extends the Parliamentary franchise beyond those who are resident in a constituency to specified "overseas electors". To qualify as an overseas elector a person must show that he was, or but for his age could have been, registered to vote in a constituency in the United Kingdom within the last 15 years. Section 1 provides:

> "(1) A person is entitled to vote as an elector at a parliamentary election in any constituency if–
>
> (a) he qualifies as an overseas elector in respect of that constituency on the date on which he makes a declaration under and in accordance with section 2 of this Act ("the relevant date");
>
> (b) on that date and on the date of the poll–
>
> (i) he is not subject to any legal incapacity to vote, and
>
> (ii) he is a British citizen; and

(c) on the date of the poll he is registered in a register of parliamentary electors for that constituency.

(2) For the purposes of this Act and the principal Act a person qualifies as an overseas elector in respect of a constituency on the relevant date if–

(a) on that date he is not resident in the United Kingdom, and

(b) he satisfies one of the following sets of conditions.

(3) The first set of conditions is that–

(a) he was included in a register of parliamentary electors in respect of an address at a place that is situated within the constituency concerned,

(b) that entry in the register was made on the basis that he was resident, or to be treated for the purposes of registration as resident, at that address,

(c) that entry in the register was in force at any time falling within the period of 15 years ending immediately before the relevant date, and

(d) subsequent to that entry ceasing to have effect no entry was made in any register of parliamentary electors on the basis that he was resident, or to be treated for the purposes of registration as resident, at any other address.

(4) The second set of conditions is that–

(a) he was last resident in the United Kingdom within the period of 15 years ending immediately before the relevant date,

(b) he was by reason only of his age incapable of being included in any register of parliamentary electors in force on the last day on which he was resident in the United Kingdom, and

(c) the address at which he was resident on that day was at a place that is situated within the constituency concerned and a parent or guardian of his was included, in respect of that address, in a register of parliamentary electors or a register of local government electors in force on that day.

(5) The reference in subsection (1) above to a person being subject to a legal incapacity to vote on the relevant date does not include a reference to his being under the age of 18 on that date… ."

Rights of free movement in EU law

15. In both his written and oral submissions on behalf of the claimants Mr. Aidan O'Neill QC has made clear that this case is about, and only about, the compatibility of the claimants' exclusion from the right to vote in the EU referendum with their rights under EU law as EU citizens who have exercised and continue to rely upon their EU rights of free movement. The claimants' case stands or falls on the issue of whether the 15 year rule in its application to the EU referendum is in EU law an unjustified restriction on the rights of free movement secured to EU citizens.

16. The claimants rely on the following provisions of the Treaty on the Functioning of the European Union ("TFEU"). Article 20(1) TFEU provides:

> "Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship."

Article 20(2)(a) TFEU provides in relevant part:

> "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 and reside freely within the territory of the Member States …
>
> These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder."

Article 21(1) TFEU provides:

> "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(1) TFEU provides

> "Freedom of movement for workers shall be secured within the Union".

Article 49 TFEU provides in relevant part:

> "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. …"

<u>The issues</u>

17. The case raises four issues for this court to determine:

(1) Does section 2 of the 2015 Act fall within the scope of EU law?

(2) Is section 2 of the 2015 Act a restriction on the rights of free movement enjoyed by the claimants as EU citizens?
(3) If section 2 of the 2015 Act is such a restriction is it objectively justified as a proportionate means of achieving a legitimate objective?
(4) Have the claimants delayed in bringing their claim with the result that they should not be entitled to any remedy?

To obtain the remedy they seek the claimants must succeed on all four issues.

(1) Does section 2 of the 2015 Act fall within the scope of EU law?

18. The defendants submit that the provisions of the 2015 Act fall entirely outside the scope of EU law and that, accordingly, the rights of free movement conferred by EU law cannot be engaged. For this reason it is submitted that the claim fails *in limine*.

19. A similar submission was advanced in *R (Preston) v. Wandsworth London Borough Council* [2013] QB 687 where it was rejected by the Divisional Court and the Court of Appeal. In that case the claimant, a British national who had resided in Spain for over 15 years, sought judicial review of the decision of the defendant authority to refuse to register him as an overseas elector in UK Parliamentary elections. He contended that the 15 year rule unlawfully restricted his directly effective EU rights of freedom of movement and residence within the European Union.

20. The Divisional Court (Elias LJ and King J) rejected a submission that the rights of freedom of movement could not as a matter of principle be engaged by the rule of domestic law (per Elias LJ at [35]–[36]). While the scope of the franchise in a general election is a matter for each Member State to determine, each State's competence to define who may vote must not be exercised in a way which defeats rights conferred by EU law. It was not a satisfactory response to the free movement argument that the scope of the franchise is exclusively within the competence of the United Kingdom. If the claimant could show that the 15 year rule unjustifiably interferes with the rights of free movement, the court would have to set it aside.

21. Similarly, the Court of Appeal (Mummery, Sullivan LJJ, Sir David Keene) declined to dismiss the claim on the ground that the 15 year rule could not, in principle, engage the right to free movement and residence, that it fell outside the scope of application of the economic and citizenship rights of free movement and that it was therefore immune from all scrutiny under EU law. In the court's view it did not follow from the fact that the right to vote is created and conferred by domestic law that Member States could lay down in their electoral law the conditions of the Parliamentary franchise without regard to the impact that the conditions may have on the exercise of fundamental rights that exist by virtue of the TFEU.

> "Even within areas falling within their national sovereignty, the exercise of competence by a member state is subject to the applicable provisions of EU law, in particular the provisions that confer fundamental rights" (per Mummery LJ at [72]).

22. This conclusion is consistent with an established line of authority before the Court of Justice of the European Union ("CJEU"). Case C-135/08 *Rottmann v. Freistaat Bayern* [2010] QB 761 concerned the withdrawal of German nationality with

retrospective effect from Mr. Rottmann who had previously possessed Austrian nationality, on the ground that he had obtained German nationality by deception. The ECJ held that while it is for each Member State to lay down the conditions for the acquisition and loss of its nationality, it must nevertheless have due regard to Community law. The situation in which his loss of German nationality could cause him to lose his status as a citizen of the EU fell, by reason of its nature and its consequences, within the ambit of EU law. It was for EU law to determine the conditions in which an EU citizen may, because he loses his nationality, lose his status as an EU citizen and thereby be deprived of the rights attaching to that status (at [39]–[47]). Similarly, in Case C-192/06 *Tas-Hagen* [2006] ECR I–10451, the ECJ held that, while the grant of compensation to civilian war claimants falls within the competence of Member States, that competence must be exercised in accordance with EU law, in particular the right of free movement (at [21]–[24]). (See also, by way of example, Case C-503/09 *Stewart v. Secretary of State for Work and Pensions* [2012] PTSR 1 at [81]; Joined Cases C-11/06 and C-12/06 *Morgan* and *Bucher* [2007] ECR I-9161at [24]; Case C-359/13 *Martens* [2015] 3 CMLR 3 at [21] – [24].)

23. The defendants seek to distinguish *Preston* and this line of authority in Luxembourg by reliance on Article 50(1), TEU which provides:

> "Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements."

The defendants submit that the constitutional requirements of the United Kingdom relating to the decision whether or not to withdraw from the EU are contained in the 2015 Act, which includes provision for a franchise which adopts the franchise for a UK Parliamentary election, including the 15 year rule. They submit that it would be surprising if EU law were to constrain the decision by the United Kingdom whether it wishes to be bound by EU law. Accordingly, they submit that it is only once a decision has been taken to leave the EU that EU law, in the shape of Article 50(2)-(5) TEU applies in order to determine the procedure and timescale for disengagement. In their submission *Preston* is to be distinguished because in that case there was no specific provision of EU law making clear that Member States could adopt their own constitutional rules.

24. The United Kingdom undoubtedly has a sovereign right to determine for itself whether it wishes to remain a party to the EU treaties and to determine the constitutional procedures which shall be followed in determining this question. These are, both in EU law and in domestic law, pre-eminently matters within the competence of the United Kingdom. A natural reading of Article 50(1) TEU confirms this. However, it does not follow that the manner in which such a competence of a Member State is exercised is incapable of engaging EU law. On the contrary, *Preston*, *Rottmann* and *Tas-Hagen* among other authorities demonstrate that a Member State when acting within a field of national sovereign competence must nevertheless have regard to the impact of the manner of exercise of that competence on fundamental rights in EU law. In this way, EU law may be engaged in principle. This is the case even where the most fundamental issues of national competence are concerned, such as the grant or withdrawal of nationality or determining the franchise for a national Parliamentary election. Contrary to the submission on behalf of the defendants, we do not consider that Article 50(1) goes further and confers on a Member State a total exemption from EU law in this regard. The words of Article 50(1) in their natural

meaning do not support such a result. If such a striking departure from established principles of EU law were intended very clear words would be required and they are not present here. Moreover, we have not been referred to any *travaux préparatoires* or other admissible materials which support such a reading.

25. The defendants further submit that the decision in *Preston* that the 15 year rule is within the scope of EU law has been undermined by subsequent authority establishing that EU law does not confer any right to vote and so may not be relied upon to establish a right to vote in an electoral process which is outside the scope of EU law. In this regard they refer to *Moohan v. Lord Advocate* [2015] AC 901. (See, in particular, Lord Hodge at [24]). However, neither the challenge in *Preston* nor the present challenge to the 2015 Act depends on the existence of a right to vote in EU law. On the contrary, they depend on the impact of national legislation in the field of national competence on the fundamental right of freedom of movement in EU law.

26. Accordingly, we consider that in principle the manner in which the United Kingdom exercises its sovereign competence in this regard is capable of engaging EU law. In our view, however, the real issue here is whether in reality there is any basis on which it could be maintained that the conditions set for the referendum franchise are capable of interfering with any fundamental rights in EU law. It is to that issue that we now turn.

(2) Is section 2 of the 2015 Act a restriction on the rights of free movement enjoyed by the claimants as EU citizens?

27. The 15 year rule is neither an express restriction on free movement nor is it in substance a disguised or inherent restriction on free movement. The claimants maintain, however, that their disenfranchisement in the EU referendum is a penalty against citizens of the United Kingdom who have exercised their rights of free movement in EU law and, as such, violates their rights as EU citizens. They submit that their exclusion from the EU referendum franchise on the basis that they have exercised their EU free movement rights for too long falls within the scope of and is incompatible with EU law because it disadvantages them for having exercised their rights in EU law and discourages them from continuing to exercise their free movement rights by requiring them to return home to the United Kingdom in order to be able to vote in the EU referendum.

28. A long and consistent line of authority before the CJEU establishes that a national measure which is liable to dissuade or deter EU citizens from exercising their rights of free movement will constitute a restriction which requires objective justification under EU law. For example, in C-192/05 *Tas-Hagen* [2006] ECR I-10451 the Court held that a Netherlands measure which made entitlement to a benefit for civilian war victims conditional on residence in the Netherlands at the time of application required to be justified. The Court explained the principle in the following terms:

> "30 With regard to the scope of Article 18(1) EC, the Court has already held that the opportunities offered by the Treaty in relation to freedom of movement cannot be fully effective if a national of a Member State can be deterred from availing himself of them by obstacles raised to his residence in the host Member State by legislation of his State of origin penalising the fact that he has used them (Case C-224/02 *Pusa* [2004] ECR I-5763, paragraph 19).

> 31 National legislation which places at a disadvantage certain of the nationals of the Member State concerned simply because they have exercised their freedom to move and to reside in another Member State is a restriction on the freedoms conferred by Article 18(1) EC on every citizen of the Union (Case C-406/04 *De Cuyper* [2006] ECR I-6947, paragraph 39).
>
> 32 The WUBO constitutes just such a restriction. In making payment of the benefit to civilian war victims conditional on the fact that applicants are resident in the territory of the Netherlands at the time when their application is submitted, this Law is liable to dissuade Netherlands nationals in a situation such as that of the applicants in the main proceedings from exercising their freedom to move and to reside outside the Netherlands.

(See to similar effect the following Grand Chamber decisions which are referred to further below: Case C-2012/06 *Government of the French Community v. Flemish Government* [2008] 2 CMLR 31; Joined Cases C-11/06 and C-12/06 *Morgan* and *Bucher* EU: C: [2007] ECR 1-9161.)

29. A similar submission to that of the claimants in the present case failed in *Preston* where both the Divisional Court and the Court of Appeal concluded that the 15 year rule when applied to Parliamentary elections in the United Kingdom did not create a restriction which had to be objectively justified under EU law. In the Divisional Court Elias LJ considered that the claimant had to show that the 15 year rule was an obstacle which could fairly be said to deter persons from exercising their rights.

> "38…Not every disadvantage to those who move to live in another member state resulting from the discriminatory application of domestic laws on residence grounds amounts to an interference sufficient to require justification. The court has held, for example, that in order to constitute an interference with the freedom of movement of workers, the rule which is said to create the restriction must affect access to the labour market in a way that is not too indirect or uncertain: see *Graf* [2000] ECR 1-493. I see no reason why that principle should not apply where the rights of free movement derived from citizenship are being relied upon."

He considered that in that case the restriction was too indirect and uncertain and had not been established on the evidence. There was no evidential basis for saying that the rule created a barrier of any kind to freedom of movement.

30. In the Court of Appeal Mummery LJ, with whom the other members of the court agreed, started from the position that the 15 year rule did not expressly restrict free movement and was not a rule that, by its very nature, restricted free movement. He considered that the Divisional Court had been correct to consider the potential effect of the 15 year rule on free movement in practice. He observed:

> 79. I agree with Mr Subiotto that what is effectively a suspension of the right to vote of those British citizens who voluntarily choose to reside in another Member State for more than 15 years can be characterised as a "disadvantage." It does not follow, however, that every disadvantage of non-residence in the UK is a restriction on or deterrent to free movement. Further, as disenfranchisement is only triggered after the passing of 15 years' residence overseas, a long term view

> has to be taken when considering whether the prospect of ceasing to be eligible as an overseas voter after the end of 15 years of non-residence in the UK could deter free movement.
>
> 80. That question obviously does not have to be answered in terms of statistical evidence or specific evidence of actual cases of deterrence. In practice 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 is 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. Every British citizen knows that, over a period of 15 years, he or she will be potentially affected by so many unforeseeable circumstances, combinations of circumstances and changes in circumstances that it is simply not possible for a court or anyone else to conclude that the 15 year rule could deter British citizens from going to reside and work in other Member States of the EU, or from doing so for as long as they like.
>
> 81. Disenfranchisement by reason of 15 years non-residence in the UK is, in my view, both qualitatively and quantitatively different from those more direct, certain and immediate obstacles and barriers to basic day-to-day living that are set up by social benefits rules requiring the claimant to be present in the UK at the date of claiming the benefit and/or resident in the UK for a relatively short period before the date of claiming the benefit. Such rules have been held to amount to restrictions on free movement that must be justified. I agree with the Divisional Court that the 15 year rule differs from those rules and does not create a restriction that has to be objectively justified under EU law.

31. We find the reasoning of the Court of Appeal, which is in any event binding on us, compelling. We note that in the present case Mr. O'Neill, on behalf of the claimants, has not directly challenged the conclusion in *Preston* that the 15 year rule in its operation in relation to Parliamentary elections was not liable to deter British citizens from exercising their rights of free movement. He has, however, sought to circumvent the decision of the Court of Appeal in a number of ways.

32. First, the claimants seek to distinguish *Preston* on its facts. They submit that the observations of Mummery LJ in *Preston* can only relate to a rule disenfranchising voters in UK Parliamentary elections. It is submitted that in the present case the court has different facts and a different context. We are, however, unable to see how this can assist the claimants. When considered in their context of the EU referendum the claims of Mr. Shindler and Ms. MacLennan seem to us to be weaker than that of Mr. Preston in this regard. Mr. Preston complained of his inability to vote in Parliamentary elections occurring at relatively regular intervals not exceeding 5 years. If the inability to vote in such elections could not reasonably be considered liable to dissuade or deter British citizens from exercising their rights of free movement, it is

difficult to see how the inability to vote in a once occurring referendum on membership of the EU could be considered to be capable of such an effect.

33. Secondly, the claimants submit that the Court of Appeal in *Preston* imposed an unwarranted burden on the claimant to establish the fact of restriction of rights of free movement. In particular, complaint is made of an approach which proceeds on the basis that uncertainties in life make it too speculative to say that disenfranchisement is capable of restricting free movement. It is submitted that on that approach many of the domestic rules found by the CJEU to constitute restrictions on rights of free movement would be too uncertain in their effect. It seems to us, however, that the reasoning of Mummery LJ is correct. When a court is considering whether a particular measure is capable of having a deterrent effect on the exercise of rights of free movement it has to take a realistic view of the degree of likelihood that conduct may be influenced by the particular matter under consideration. The possibility of an occurrence which is speculative, remote or indefinite cannot provide a satisfactory basis for a finding of infringement of rights of freedom of movement because it is not reasonably capable of influencing decisions. The same point was made by Elias LJ in the Divisional Court where he stated that the restriction must have an effect which is not too indirect or uncertain. Here he was drawing on the decision of the ECJ in Case C-190/08 *Graf* [2000] ECR 1-493 where the Court considered that a future and hypothetical event, the termination of employment otherwise than at the worker's own initiative or attributable to him, was too uncertain and indirect a possibility to be regarded as liable to hinder freedom of movement (at [24]-[25]). The degree of likelihood of an occurrence and its likely impact on the exercise of rights of free movement will be a matter for evaluation and decision on the particular facts of each case.

34. Thirdly, the claimants submit that the Court of Appeal in *Preston* restricted its consideration to whether the 15 year rule would deter British nationals from exercising their rights of free movement in the first place and failed to consider the dissuasive and penalising effect of the rule on those who have exercised and continue to exercise such rights. This is, in fact, a misreading of *Preston*. Mr. Preston's case was put squarely on the basis that those who have exercised their rights of free movement are penalised after 15 years by being deprived of a fundamental constitutional right, thereby rendering the right to free movement less attractive and deterring those who wish to exercise the right. Both the Divisional Court and the Court of Appeal considered and rejected both aspects of this submission. In the Court of Appeal Mummery LJ observed:

> "As Elias LJ pointed out …, Mr. Subiotto accepted before the Divisional Court that "it was unrealistic to suggest that the possibility of being denied the right to vote 15 years down the line would in practice deter anyone from leaving the UK to live in another member state". Nor, as Elias LJ observed, would the rule discourage someone who has been resident overseas for almost 15 years from staying abroad in another member state: "it is inherently unlikely that the loss of the right to vote would be sufficient to cause them to up sticks and return to the United Kingdom." (at [77])

It is clear therefore that the Court of Appeal in *Preston* did consider the matter from the position of those who have exercised and continue to exercise their rights of free movement.

35. Fourthly, the claimants submit that the decision in *Preston* is inconsistent with the fundamental rights of free movement which have, more recently been clarified by the CJEU in Case C-359/13 *Martens* [2015] 3 CMLR 3. M, a Netherlands national, moved with her parents in 1993 to Belgium where her father was employed and where the family remained. A Netherlands law enacted in 2000 made eligibility for funding for higher educational studies pursued outside the European Netherlands dependent on the student being resident in the Netherlands for at least 3 out of the 6 years preceding the commencement of the course of study. In 2006 M enrolled on a degree course at the University of the Netherlands Antilles in Curacao for which she obtained a grant from the Netherlands authorities. When the authorities later discovered that she had not fulfilled the residence requirement they revoked the grant. The referring court asked the CJEU whether national legislation such as that in issue was precluded by EU law. The CJEU (Third Chamber) held that although the organisation of national educational systems fell within the competence of Member States they had to exercise that competence in accordance with EU law and in particular the Treaty provisions on freedom of movement. Although EU law does not impose any obligation on Member States to provide a system of funding for higher education, where it does so it must ensure that the rules do not create an unjustified restriction of the right of free movement. It continued:

> "25 In that regard, it is apparent from settled case-law that national legislation which places certain nationals at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State constitutes a restriction on the freedoms conferred by Article 21(1) TFEU on every citizen of the Union (judgments in *Morgan and Bucher*, EU: C: 2007:626, paragraph 25, and *Prinz and Seeberger*, EU: C: 2013:524, paragraph 27).
>
> 26 Indeed, the opportunities offered by the Treaty in relation to freedom of movement for citizens of the Union cannot be fully effective if a national of a Member State could be dissuaded from using them by obstacles resulting from his stay in another Member State because of legislation of his State of origin penalising the mere fact that he has used those opportunities (see, to that effect, judgments in *Morgan and Bucher*, EU:C:2007:626, paragraph 26, and *Prinz and Seeberger*, EU:C:2013:524, paragraph 28)."

The Court considered that M had continued to exercise her right of free movement throughout the time she lived in Belgium.

> "31 By making the continued grant of funding for studies abroad subject to the three-out-of-six-years rule, the legislation at issue in the main proceedings is liable to penalise an applicant merely because he has exercised his right to freedom of movement and residence in another Member State, given the effect that exercising that freedom is likely to have on the possibility of receiving funding for higher education (see, to that effect, judgments in *D'Hoop*, EU:C:2002:432, paragraph 30; *Prinz and Seeberger*, EU:C:2013:524, paragraph 32; and *Thiele Meneses*, EU:C:2013:683, paragraph 28)."

It considered it irrelevant that considerable time had elapsed since M had exercised her right of free movement. It therefore concluded that the Netherlands law constituted a restriction on the EU rights to freedom of movement and residence.

36. On behalf of the claimants Mr. O'Neill submits that in *Martens* the Netherlands law was held to be a restriction notwithstanding the fact that neither M nor her family could have been influenced by that law in deciding whether to exercise their rights of free movement. Furthermore, he submits that the Court's judgment provides a clarification of the previous case law in that paragraphs 25 and 26, cited above, demonstrate that the principle applied has two alternative limbs. Accordingly, a restriction will exist if national legislation places individuals at a disadvantage simply because they have exercised a right of free movement or if it could dissuade EU citizens from exercising such rights.

37. We are unable to accept this submission. First, so far as the facts of *Martens* are concerned, it is correct that the Netherlands law did not exist at the time the Martens family first exercised their rights of free movement but they continued to exercise those rights after the legislation came into force. Moreover, as Mr. O'Neill points out in another context, regard must also be had to the possible effect generally on those who continue to exercise their rights of free movement. In any event, the principle applied by the CJEU does not require that the individual concerned should actually have been deterred from exercising his rights of free movement. What matters is that the measure is liable to have that effect. As Advocate General Sharpston explained in Case C-2012/06 *Government of the French Community v. Flemish Government* [2008] 2 CMLR 31 at [65]:

> "I do not think that the Court should try to evaluate the precise extent to which such a measure affects the individual worker's decision. Otherwise, the fact that some workers may not be daunted by a particular measure could always be used as a reason for holding that that measure's effect on access to the labour market was potentially too uncertain and indirect. Moreover, it is difficult to see how the Court would go about conducting such an evaluation. It seems to me that, for a measure to constitute an obstacle, it is sufficient that it should be reasonably likely to have that effect on migrant workers."

This passage was endorsed by the Court at [51].

38. Secondly, we do not consider that the CJEU in *Martens* was laying down a test comprising alternative limbs either of which could independently lead to the conclusion that a measure constitutes a restriction.

(1) The test as enunciated and applied by the CJEU in a long series of decisions demonstrates that the potential deterrent effect of a measure is an integral element of the test to be applied. A recent authoritative statement of the principle is to be found in Joined Cases C-11/06 and C-12/06 *Morgan* and *Bucher* where a Grand Chamber of the CJEU (at [25]–[26]) stated the principle in terms almost identical to those employed by the Third Chamber in *Martens*. The Grand Chamber went on to apply the principle in the following terms:

> 30 The [requirement of German law] is liable, on account of the personal inconvenience, additional costs and possible delays which it entails, to discourage citizens of the Union from leaving the Federal Republic of Germany in order to pursue studies in another Member State and thus from availing themselves of their freedom to move and reside in that Member State, as conferred by Article 18(1) EC.

> 31 Thus, the requirement that students spend one year at an educational establishment in Germany before they are entitled to receive assistance for an education or training course attended in another Member State is liable to discourage them from moving subsequently to another Member State in order to pursue their studies. This is *a fortiori* the case where that year of study in Germany is not taken into account for the purposes of calculating the duration of studies in the other Member State.

(See by way of further examples, Case C-224/98 *D'Hoop v. Office National de l'Emploi* [2002] ECR I-6191; Case C-102/95 *Tas-Hagen* [2006] ECR I- 10451 at [30], [32]; Case C-503/09 *Stewart v. Secretary of State for Work and Pensions* [2012] PTSR 1 at [84], [85]; Joined Cases C-523/11 and C-585/11 *Prinz* and *Seeberger* [2014] 1 CMLR 16 at [27], [28], [32].) That a potential deterrent effect is an integral part of the test is also apparent from the Opinion of Advocate General Sharpston in *Martens* itself where she concluded (at [113]) that the Court should answer the question to the following effect:

> "Article 45 TFEU and Article 7(2) of Regulation 162/68 on freedom of movement for workers with the Community preclude the Netherlands from denying study finance to the dependent child of a frontier worker holding Netherlands nationality on the basis of the three-out-of–six–years rule as long as he is a frontier worker. Where that frontier worker ends his employment in the Netherlands and exercises his freedom of movement for workers in order to take up full-time employment in another Member State, and irrespective of his place of residence, Article 45 TFEU precludes the Netherlands from applying measures which, unless they can be objectively justified, have the effect of discouraging such a worker from exercising his rights under Article 45 TFEU and causing him to lose, as a consequence of the exercise of his free movement rights, social advantages guaranteed them by Netherlands legislation, such as portable study finance for his dependent child."

(2) The language employed by the Third Chamber in *Martens* does not support the view that it intended any departure from this consistent line of authority. It is not expressed in terms of alternative routes to a conclusion. On the contrary it repeats the statement of the Grand Chamber in *Morgan* almost verbatim and expressly refers to *Morgan* and *Prinz* as authority.

(3) More fundamentally, it is the potential for deterrence which constitutes the mischief and provides the justification for the rule. It is what is capable of giving rise to a restriction. It is the fact that a national measure is capable of hindering or rendering less attractive the exercise by EU nationals of their fundamental rights of free movement and residence which renders it incompatible with the fundamental rights of free movement guaranteed by the TFEU. (See, for example, the judgment of the Grand Chamber in Case C-212/06 *Government of the French Community v. Flemish Government* at [45].)

39. Accordingly, we consider that the Court of Appeal in *Preston* was correct in seeking to identify whether the 15 year rule as applicable to Parliamentary elections was liable to have a deterrent effect on rights of free movement or whether any interference resulting therefrom was too direct or uncertain to require justification.

40. We share the view of the Court of Appeal that the 15 year rule in its application to the Parliamentary franchise is not liable to restrict free movement within the European Union. In our view it is totally unrealistic to suggest that this rule could have the effect of deterring or discouraging anyone considering whether to settle or remain in another Member State. In this regard we note that according to the Parliamentary briefing paper, referred to at paragraph 8 above, in the period 1987 to 2014 the highest number of overseas voters registered in any one year has been 34,454 and the current number is 26,918. By contrast, the number of British citizens resident in other Member States of the European Union alone is estimated at between 1 and 2 million. The 15 year rule in its application to the franchise for the EU referendum is, in our view, an *a fortiori* case. We are unable to accept that the prospect of disenfranchisement in a one-off referendum is a factor which could influence a decision whether to settle or remain in another Member State. We conclude, therefore, that it is not a measure which requires to be objectively justified under EU law.

(3) If section 2 of the 2015 Act is a restriction on rights of free movement in EU law, is it objectively justified as a proportionate means of achieving a legitimate objective?

41. In light of our conclusion that the 15 year rule does not, in its application to the EU referendum constitute a restriction on the rights of free movement in EU law, the basis on which we decide this application, it becomes rather artificial to consider whether, if it were to constitute a restriction, it would be objectively justified. However, we propose to set out our views on this further issue which was fully argued before us.

42. The claimants submit that, although the 15 year rule in the context of Parliamentary elections has been held to be objectively justified both by the Court of Appeal in *Preston* and by the Strasbourg court in *Shindler*, the purpose, rationale and proportionality of any general rule which would limit the fundamental rights otherwise associated with citizenship in any constitutional democracy are necessarily context dependent. The EU referendum is unavoidably concerned with whether British citizens, including the claimants, retain or lose their status as EU citizens. Mr. O'Neill submits that the legitimacy of confining the UK Parliamentary franchise to citizens with an ascertainable, continuing, close and objective connection with the United Kingdom arises from the fact that the resulting government and Parliament make decisions and laws which most directly affect those citizens resident in the United Kingdom. In the present case, however, the British citizens who will be most directly affected by the outcome of the referendum, he submits, are those, including the claimants, who depend on their rights as EU citizens to live and work in other Member States. Furthermore, he submits that the 15 year rule is arbitrary, disproportionate and fails to achieve a legitimate aim in a consistent and systematic manner.

43. Mr. Eadie QC, for the defendants, basing himself on Mummery LJ in *Preston* (at [89-92]) and the judgment of the Strasbourg court in *Shindler* (at [116]-[118]), submits that the legitimate aim of any restriction in the present case is that of testing the strength of a citizen's links with the United Kingdom over a significant period of time. He further submits that residence is a rational and practicable criterion for assessing the closeness of the links between a British citizen and the United Kingdom, that the 15 year period represents a substantial opportunity for continued voting, whether in Parliamentary elections or in *ad hoc* referendums, and that it would be

impracticable to adopt a more nuanced rule which assesses closeness of links in each individual case. He further submits that adopting the 15 year rule represents a legitimate and proportionate decision by Parliament which is well within its broad margin of appreciation. Parliament has adopted a franchise, each element of which relates to groups of voters entitled to be registered to vote in one or more elections, and did so following Parliamentary debate specifically on this issue. He submits that the difference of context cannot place that legislative solution outside the range of permissible solutions.

44. In *Preston* the Court of Appeal held that the 15 year rule in the context of Parliamentary elections had a legitimate aim, namely "to test the strength of a British citizen's links with the UK over a significant period of time by measuring past commitment to the UK and seeing whether it was sufficiently diminished or diluted to justify removal of the right to vote in parliamentary elections". Residence was held to be a relevant, rational and practicable criterion for assessing the closeness of links and the 15 year rule was held to be proportionate to the aim. The court also considered that it was impracticable for the franchise criteria to be other than bright line rules capable of reasonably consistent practical application. (See Mummery LJ at [89]-[92].) Although, given the difference in context between Parliamentary elections and the EU referendum, we are not bound to reach the same conclusion on this issue as the Court of Appeal in *Preston*, we are bound by its statement of the relevant legal principles governing the assessment of justification, in the absence of any material development in EU law by the CJEU on the point. While Mummery LJ fully recognised the distinction between the decisions on the European Court of Human Rights on Article 3 of Protocol No. 1, and issues relating to the justification of restrictions on free movement rights in EU law, he nevertheless concluded, as did the Divisional Court, that "the convention cases in the electoral context are "highly material" to justification of the 15 year rule" (at [87]).

45. The Strasbourg court has considered the 15 year rule in the context of UK Parliamentary elections and its compatibility with Article 3 of Protocol No. 1 in *Doyle v UK* (2007) 45 EHHR SE3 and more recently in a case brought by the first claimant himself, *Shindler v United Kingdom* (2013) 58 EHHR 9. Although Article 3 of Protocol No. 1 has no application to a referendum such as the EU referendum (*Mathieu-Mohin and Clerfayt v. Belgium* 10 EHRR 1 at [53]; *Moohan v. Lord Advocate* [2015] AC 901 at [18]) these decisions nevertheless cast light on the issue before us. In these cases the Strasbourg court concluded that there was no consensus generally within the Council of Europe about non-resident voting rights or the time limits for the exercise of those rights. National rules reflect the need to ensure both citizen participation and knowledge of the particular situation and vary according to the historical and political factors peculiar to each state. Contracting states therefore enjoy a wide margin of appreciation. The Strasbourg court endorsed the principles established in its case law developed in states where there were no rights for non-residents to vote (*Melnychenko v Ukraine* (2006) 42 EHHR 39; *Sitaropoulos v Greece* (2013) 58 EHRR 9).

46. A significant feature of these decisions is the acceptance of the principle that residence is a relevant criterion for the grant of the franchise in national elections and that the longer the absence from the national territory - it could be said in general terms - the weaker the links and the continuing interest in the affairs of the state of

nationality. In *Shindler v. United Kingdom* the Court explained that in previous cases it had found the imposition of a residence requirement compatible in principle with Article 3 of Protocol No. 1.

> "The justification for the restriction was based on several factors: first, the presumption that non-resident citizens were less directly or less continually concerned with their country's day-to-day problems and had less knowledge of them; second, the fact that non-resident citizens had less influence on the selection of candidates or on the formulation of their electoral programmes; third, the 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 fourth, the legitimate concern the legislature might have to limit the influence of citizens living abroad in elections on issues which, while admittedly fundamental, primarily affect persons living in the country (see *Hilbe* and *Doyle*, both cited above; and *Melnychenko*, cited above, § 56). The Court has recognised that it is possible in an individual case that the applicant has not severed ties with his country of origin and that some of the factors indicated above are therefore inapplicable to his case. However, it took the view that the law could not take account of every individual case but must lay down a general rule (see *Hilbe* and *Doyle*, both cited above), while never discounting completely the possibility that in some circumstances the application of a general rule to an individual case could amount to a breach of the Convention." (at [105])

47. In *Shindler* the Court conducted an extensive review of the history of the issue in the United Kingdom (including at [29]-[33] the decisions in *Preston*). It examined a considerable amount of material from the relevant institutions of the Council of Europe all recommending greater flexibility in affording voting rights to nationals of Contracting States who were resident abroad (at [37]-[59]). It also noted similar recommendations from the European Commission for Democracy through Law ("the Venice Commission") to similar effect (at [60]-[71]), and from the Venice Commission's own researches which established that there was a wide variety of practices amongst Member States of the Council of Europe (at [72]-[76]). The conclusions of the Strasbourg court may be summarised as follows:

(1) The 15 year rule pursued the legitimate aim of "confining the parliamentary franchise to those citizens with a close connection to the United Kingdom and who would therefore be most directly affected by its laws" (at [107]).

(2) The restriction did not impair the essence of the right to vote as it was open to the applicant to return to the United Kingdom to reside when he could once more vote again (at [108]).

(3) Despite "the growing awareness at European level of the problems posed by migration in terms of political participation in the countries of origin and residence ... none of the material forms a basis for concluding that , as the law currently stands, states are under an obligation to grant non-residents unrestricted access to the franchise." (at [114])

(4) The Court noted that there was extensive evidence that the UK Parliament had sought to weigh the competing interests and to assess the proportionality of the rule and had kept the matter under active review (at [117]).

(5) The 15 year rule adopted by the United Kingdom allows nationals to vote for a considerable period of time after they were last resident in the United Kingdom and the fact that the applicant may personally have preserved a high level of contact with the United Kingdom and have detailed knowledge of that country's day to day problems and be affected by them does not render the imposition of the 15 year rule disproportionate. While they require close scrutiny, general measures which do not allow for discretion in their application may nonetheless be compatible with the Convention (at [116]).

(6) "Having regard to the significant burden which would be imposed if the respondent State were required to ascertain in every application to vote by a non-resident whether the individual had a sufficiently close connection to the country, the Court is satisfied that the general measure in this case serves to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing interests on a case-by-case basis" (at [116])

(7) Having regard to the margin of appreciation available to the domestic legislature in regulating Parliamentary elections, the restriction was a proportionate response to the legitimate aim. The court was satisfied that the legislation struck a fair balance between the conflicting interests at stake, namely the genuine interest of the applicant, as a British citizen, to participate in elections in his country of origin and the chosen legislative policy of the United Kingdom to confine the Parliamentary franchise to those citizens with a close connection with the United Kingdom and who would therefore be most directly affected by its laws (at 118).

48. The CJEU has considered the suitability of residence as a criterion for the franchise for elections to the European Parliament in Case C-300/04 *Eman and Sevinger* [2006] ECR 1-8055. Netherlands legislation permitted Netherlands nationals to vote in European Parliament elections wherever they were resident in the world and permitted nationals of other EU Member States to vote if they were resident in the Netherlands. However, those resident outside the metropolitan territory of the Netherlands in the Netherlands Antilles were not permitted to vote in the European Parliament elections irrespective of nationality. The Court referred to the case law of the European Court of Human Rights and concluded that "the criterion linked to residence does not appear, in principle, to be inappropriate to determine who has the right to vote" (at [48], [49], [55]). The court concluded that the exclusion of Netherlands nationals resident in Aruba from having the right to vote, by comparison with such a national living elsewhere in the world, was discriminatory treatment requiring justification.

49. More recently, and since the Court of Appeal's decision in *Preston*, the CJEU has considered the justification and proportionality of restrictions on the right to vote in European Parliament elections in Case C-650/13 *Delvigne v Commune de Lesparre-Médoc* [2016] 2 CMLR 1, a case which concerned the vexed issue of votes for serving prisoners. The CJEU concluded, in agreement with the opinion of the Advocate General, that the disqualification was justified under EU law in general and the Charter of Fundamental Human Rights of the European Union in particular. Although

the Court did not refer to the Strasbourg jurisprudence, Advocate General Cruz Villalon drew extensively on it (at [117]-[123]). There is, therefore, good reason to suppose that the Strasbourg jurisprudence remains highly material to the issue of EU law which we have to decide.

50. The central question in this part of the case is whether Parliament was entitled to conclude that the application to the EU referendum of the 15 year rule applicable in Parliamentary elections is justified as a measure in support of a legitimate aim, namely requiring a relevant connection to the United Kingdom as a qualification for the franchise.

51. We acknowledge the very real and personal interest which these claimants have in the outcome of the EU referendum. If the United Kingdom leaves the European Union, they, in common with an estimated 1 to 2 million British citizens currently resident in other Member States of the European Union, will certainly be deprived of their EU citizenship and the important rights which accompany that status. In these circumstances it would clearly have been open to Parliament to decide that the franchise for the referendum should be extended to all citizens of the United Kingdom resident in other Member States of the European Union who wish to register to vote. In this regard we note the distinction that Mr O'Neill urges on us between expatriates generally and those resident in other Member States who exercise rights of free movement within the European Union as British citizens.

52. Nevertheless, we have no doubt that, as the Strasbourg Court has affirmed in *Shindler* and as the Supreme Court has concluded in both *R (Chester) v Justice Secretary* [2013] UKSC 63, [2014] AC 273 and in *Moohan v Lord Advocate* [2014] UKSC 67 [2015] AC 901, the primary judgement on a matter of such constitutional significance is for Parliament and very considerable respect must to be given to the legislative choices it makes on the issue, particularly where, as here, it has kept the matter under constant and recent review.

53. The Strasbourg cases have accepted residence as an appropriate criterion for entitlement to vote. This is so even in cases where non-resident citizens are entirely excluded from the franchise (*Sitaropoulos*). By contrast Parliament has decided to adopt for the EU referendum the more generous provision applicable in Parliamentary elections under which non-residents may vote provided they have not been resident abroad for more than 15 years. While liability to be affected by the consequences of an election is one strand of the reasoning employed by the Strasbourg court in justifying a residence requirement (see *Doyle* and *Shindler*) it is only one of a number of factors taken into account and there is certainly no requirement in either the Strasbourg or the Luxembourg jurisprudence that the franchise for an election must extend to all those whose rights or interests are liable to be affected by the outcome. Furthermore, we do not accept the submission on behalf of the claimants that persons in their position are necessarily the most directly affected by the outcome of the EU referendum. Whatever the outcome of the referendum, the legal, economic and social consequences are likely to be at least as great for those British citizens resident in the United Kingdom as for those resident abroad.

54. In this regard we also note that the right to vote can be restored by resumption of residence in the United Kingdom and that dual residence in the United Kingdom and another Member State may be a possibility, at least for those who have acquired the

right of permanent residence in that Member State. (Directive 2004/38/EC (Citizenship Directive), Articles 16 and 20(3)).

55. Here it is also important to bear in mind two further considerations touched on earlier. First, as we have observed in relation to the first issue, it follows from Article 50(1) TEU that EU law recognises that the decision whether the United Kingdom should remain a member of the European Union and the constitutional procedures to be followed in making that decision are pre-eminently matters of constitutional law within the sovereign competence of the United Kingdom. This reinforces the need to respect the legislative choice of Parliament. Secondly, even if we are wrong in our conclusion in relation to the second issue that the 15 year rule is not capable of operating as a restriction on the exercise of rights of free movement in EU law, any deterrent effect on those rights would be marginal.

56. In the course of his submissions Mr. O'Neill placed great emphasis on recent statements on behalf of Her Majesty's Government which describe the 15 year rule as arbitrary and which show that it is committed to repealing it in its application to the Parliamentary franchise. However, in our view, this does not undermine the justification for Parliament's decision to retain the 15 year rule for the present referendum. We note that in *Sitaropoulos* the absence of a right to vote for Greek nationals residing in France was justified, despite the fact that the Greek legislature had decided in principle to provide for such a right but had not yet adopted the means to give effect to it. Similarly, in *Delvigne* the period of disqualification imposed was, in the circumstances, justified despite the fact that the period had been reduced by the legislature for more recent cases. This is not a situation in which only one legislative solution can be objectively justified. On the contrary, there is a range of permissible solutions within which a very wide discretion is allowed to the Member State concerned. Furthermore, we do not consider that the 15 year rule is arbitrary in any legally significant sense. No doubt, arguments could be advanced as to why the line should be drawn at 14 years or 16 years as opposed to 15 years. However, in attempting to identify a point at which extended residence abroad might indicate a weakening of ties with the United Kingdom, a bright line rule is required, drawing the line at some specific point. An approach based on evaluation of individual cases would, as the Strasbourg cases accept, be totally impracticable. The fact that some individuals may have maintained close links with the United Kingdom does not undermine the validity of a general rule that does not allow for discretion in its application.

57. Furthermore, we consider that there would be significant practical difficulties about adopting especially for this referendum a new electoral register which includes non-resident British citizens whose last residence the United Kingdom was more than 15 years ago. For example, we have been told that overseas electors are required to register in the constituency where they were last registered to vote. Electoral Registration Officers currently retain records of previous electoral registers for a period of 15 years. They have no straightforward means of checking the previous residence status of British citizens who have been resident overseas for longer than 15 years.

58. Having regard to all these considerations, we are satisfied that even if, contrary to our conclusion, the 15 year rule as applied to the EU referendum constitutes a restriction on rights of free movement in EU law, it is objectively justified in that it is a rational,

consistent and proportionate means of achieving a legitimate objective. In our view, Parliament could legitimately take the view that electors who satisfy the test of closeness of connection set by the 15 year rule form an appropriate group to vote on the question whether the United Kingdom should remain a member of the European Union or leave the European Union.

(4) Have the claimants delayed in bringing their claim with the result that they should not be entitled to any remedy?

59. In light of the conclusions to which we have come earlier in this judgment, it is not necessary to address this issue in detail. However, we would record our view that, as this claim falls within the ambit of EU law and seeks the vindication of the claimants' EU rights, it has been commenced in time for the purposes of CPR r. 54.5(1), because the proceedings were issued within three months of royal assent of the 2015 Act. An additional promptness requirement is incompatible with EU law. (Case C-406/08 *Uniplex (UK) Ltd. V. NHS Business Services Authority* [2010] ECR I-817 at [41]-[43]) Furthermore, in these circumstances there is no power to refuse relief on the grounds of delay in commencing proceedings. (*R (Berky) v. Newport CC* [2012] EWCA Civ. 378, [2012] 2 CMLR 44.)

Conclusion

60. Our principal conclusions may be summarised as follows:

(1) In principle, section 2 of the 2015 Act is capable of engaging EU law.

(2) Section 2 of the 2015 Act is not a restriction on the rights of free movement enjoyed by the claimants as EU citizens.

(3) In any event, if it were such a restriction, section 2 of the 2015 Act would be objectively justified.

61. For these reasons we grant the claimants leave to apply for judicial review but refuse the application.