Neutral Citation Number: [2019] EWHC 3407 (Admin)

Case No: CO/2895/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 December 2019

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE QUEEN
on the application of

AMRIK SINGH GILL

(ON BEHALF OF THE SIKH FEDERATION UK) **Claimant**

- and -

CABINET OFFICE **Defendant**

UK STATISTICS AUTHORITY **Interested Party**

- -

- -

David Wolfe QC and Ayesha Christie (instructed by **Leigh Day**) for the **Claimant**
Neil Sheldon QC and Jonathan Auburn (instructed by the **Government Legal Department**) for the **Defendant** and the **Interested Party**

Hearing dates: 12 & 13 November 2019

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Approved Judgment

Mrs Justice Lang :

1. The Claimant applies for judicial review of “the contemplated exercise of Her Majesty’s discretion to direct a census, based on [an] Order in Council made on the basis of a draft which does not include a Sikh ethnic tick box on the basis of the reasoning detailed in the White Paper” (section 3 of the Claim Form).

2. By way of relief, the Claimant seeks a declaration from the Court that “it would be unlawful for Her Majesty to make an Order in Council which follows the reasoning of the White Paper so as not to include the Sikh ethnic group tick box in the “particulars to be stated in returns” section of the Order” (section 7 of the Claim Form).

3. The Claimant brings the claim on behalf of the Sikh Federation UK, in his capacity as Chair of the Federation. The Sikh Federation is a prominent and influential organisation which has campaigned for the inclusion of a Sikh ethnic group tick box response in the census, in the hope that funding and public services will then be more effectively focused on meeting the needs of the Sikh community.

4. The UK Statistics Authority’s (“UKSA”) proposal not to include a Sikh ethnic group tick box response in the census was set out in the White Paper “*Help Shape Our Future The 2021 Census of Population and Housing in England and Wales”* Cm 9745, published by the Cabinet Office in December 2018, and presented to Parliament by the Minister for the Constitution, on behalf of the Minister for the Cabinet Office.

5. In summary, the Claimant’s claim is that the Office for National Statistics (“ONS”), which is the executive office of the UKSA, adopted an unlawful approach in assessing whether or not the 2021 census questions about membership of ethnic groups should include a specific tick box response option for Sikhs, in addition to the option of entering “Sikh” in the space marked “other”.

6. Responsibility for making a final decision on the content of the proposed census questionnaire rests with the Minister for the Cabinet Office. Once a decision has been made, a draft Order in Council, and supporting regulations, will be laid before Parliament. Once approved by Parliament, the Queen, if so advised by the Privy Council, may direct that a census shall take place by means of an Order in Council, made in pursuance of powers conferred by section 1(1) of the Census Act 1920 (“the 1920 Act”).

7. Thus, this claim is a pre-emptive challenge to the exercise of the Queen’s powers under section 1(1) of the 1920 Act, before the Minister has made a final decision on the form of the census questionnaire, or laid the draft delegated legislation before Parliament, and before Parliament and the Queen in Council have had an opportunity to consider it. The Defendant submits that the claim is premature, and in breach of Parliamentary privilege, as a declaration in the terms sought would not respect the separation of powers between the legislature and the judiciary.

8. Permission to apply for judicial review was granted by Thornton J. on the papers on 6 September 2019.

Facts

9. The UKSA is a non-ministerial Department sponsored by the Cabinet Office. It has statutory responsibility for conducting a census. It makes recommendations to the Minister and the Cabinet Office about the content of a proposed census and how it should operate.

10. The ONS is the executive office of the UKSA. It is the recognised national statistical institute of the United Kingdom ("UK") and has responsibility for collecting and publishing a wide range of statistics, including the UK's National Accounts (including GDP), price statistics (including the retail and consumer price indices) and vital events (births, marriages, and deaths).

11. The ONS undertakes the census every ten years in England and Wales. The census provides valuable data which informs the provision of funding and services by central and local government. It affords insight into the social condition and fabric of the population, which is used for many different purposes, in both the private and public sector.

12. The ONS draws on its experience and expert technical knowledge in assessing and advising upon the content of proposed census questionnaires. The subject matter of the census is divided into topics, under which questions are asked. Large topics are divided into sub-topics. There are different methods of capturing responses in the census form: either a list of possible answers from which respondents may choose the answer which applies to them by ticking the box, or a blank space for respondents to write in their own answer, in their own words. Tick boxes assist respondents by providing quick and convenient means of identifying the desired answer, and they promote consistency of responses.

13. The majority of topics to be covered by the census remain largely the same over time. However, where a need is identified through consultation, research and evidence-gathering, new topics may be added. For example, ethnic group was added as a topic in 1991, and religion and health were added as topics in 2001. In 2011, topics were added relating to passports held, national identity and language. For the forthcoming census, ONS has proposed three new topics covering veteran status, sexual orientation and gender identity.

14. For each census, the ONS undertakes a formal non-statutory consultation exercise on which new census topics to include. It does not undertake a formal consultation on the response options, but it engages with stakeholders, community groups and members of the public in meetings, correspondence and website publications, where *inter alia* response options are discussed.

The 2011 census

15. The last census was held in 2011. Under the topic of religion, the questionnaire asked "what is your religion?" and there was a list of tick box response options, including one for "Sikh". 423,158 respondents ticked the Sikh response option.

16. Under the topic of ethnic group, respondents were asked the question "what is your ethnic group?" by selecting one section from A to E: A: White; B: Mixed/multiple ethnic groups; C: Asian/Asian British; D: Black/African/Caribbean/Black British; E: Other Ethnic Group. Then respondents were asked to "tick **one** box to best describe your ethnic group", from a list of tick box response options and a write-in option. The relevant section for Sikhs was most likely C: Asian/Asian British. The tick box response options were: Indian; Pakistani; Bangladeshi; Chinese; and then a write-in option for "Any other Asian background", where Sikh could be written, if desired.

17. In the 2011 census, 4,225,179 respondents ticked an 'other specify' box in response to the ethnic group question in 2011, of whom 83,362 respondents wrote in 'Sikh' (of these 76,500 had also identified as Sikh under the religion question).

18. According to Mr Iain Bell, Deputy National Statistician and Director General of Population and Public Policy at the ONS, prior to the 2011 census there was some demand for a Sikh tick box response option, mainly from Sikh community organisations, including the Sikh Federation. Other views were expressed by organisations and individuals. The ONS also considered that a different picture emerged from the cognitive testing by Ipsos MORI, commissioned for the Scottish census, in which most of the seven Sikh respondents ticked the Indian response option, and were uncomfortable at having to choose between 'Indian' and 'Sikh'. Some felt that Sikhism was a religion and were confused about its inclusion as an ethnic group.

19. In March 2009 the ONS published an Information Paper '*Deciding which tick-boxes to add to the ethnic group question in the 2011 England and Wales census'* ("the March 2009 Information Paper") containing its recommendation that only 'Gypsy or Irish Traveller' and 'Arab' be added as tick box responses. It summarised its evaluation of the case for and against a Sikh tick box response, along with numerous other similar requests.

20. Importantly for the purposes of this challenge, the Information Paper described in some detail the "prioritisation tool" used in the evaluation (following an independent Equality Impact Assessment), which assessed the ethnic groups against "principles", grouped into "themes". One of the themes was "Clarity and quality of the information collected and acceptability to respondents". Paragraph 3.2 at page 3 referred to acceptability as follows:

> "The addition of the tick-box and/or revised terminology is clear and acceptable to respondents (both in wording and in the context of the question, for example providing mutually exclusive categories) and provides the required information to an acceptable level of quality."

21. In January 2010, the Sikh Federation published a 28 page critique of the ONS's Information Paper, commenting on the prioritisation tool and its application to Sikhs. It concluded that "[w]hile the principles of the tool appear to be well reasoned and coherent the evidence base for Sikh scores and the scoring process applied are inconsistent, contradictory and not transparent.".

The 2021 census

22. The ONS conducted a consultation on the topics to be included in the 2021 census between June and August 2015.

23. In its "Response to Consultation" dated May 2016, it stated (at page 2) that its aim was "promoting discussion and encouraging the development of strong cases for topics to be included in the 2021 Census. The focus was on information required from the 2021 Census, not the detailed questions that should be asked on the questionnaire".

24. The evaluation criteria for the Topic Consultation were split into three groups: User Requirements; Other Considerations and Operational Requirements. The Claimant's challenge was based on a criterion in "Other Considerations":

> "Impact on public acceptability.
>
> The census should not ask sensitive or potentially intrusive questions that have a negative impact on response or may lead to respondents giving socially acceptable rather than accurate answers. It should also not enquire about opinions or attitudes.
>
> Additionally, the census is carried out for statistical purposes. It should not collect data that would deliberately promote political or sectarian groups, or sponsor particular causes."

25. Applying the evaluation criteria, the ONS concluded that the census should once again include the ethnic group sub-topic, and that asking questions about ethnic group identity was publicly acceptable.

26. In a section headed "Next steps" (page 27), the Report set out its future development activity for the ethnic group sub-topic, including consideration of whether there was sufficient need for additional response categories.

27. In May 2016, the ONS also published a topic-specific report giving further details of its evaluation as to whether the ethnic group sub-topic should be included in the census, called "The 2021 Census Assessment of initial user requirements on content for England and Wales Ethnicity and National Identity topic report". Although the consultation had been confined to topics, consultees had voluntarily included requests for further tick box response options within the ethnic group. Under the heading "Next steps", at page 23, it set out its proposals for consideration of ethnic response options, as follows:

> "• ONS intends to undertake a review of the ethnic group response options, and will consider this alongside the national identity and religion response options. This will involve consultation with stakeholder groups that have expressed an interest in this question.
>
> • The review will follow a similar format to that undertaken prior to the 2011 Census whereby response options were prioritised. This methodology is described in the Information Paper

> "Deciding which tick-boxes to add to the ethnic group question in the 2011 England and Wales Census". This methodology will be reviewed and updated to reflect current legislation. This will involve engagement with key stakeholders to ensure data needs to support the Public Sector Equality Duty under the Equality Act 2010 are well understood.
>
> • Any changes to the response options, proposed as a result of this review, will then be tested to evaluate how well the response options are understood and how they work together as a set.
>
> • There will also be consideration of the impact of any proposed changes on other users of the harmonised question on ethnic group.
>
> • In parallel, there will be investigation of the best approach to presenting the current ethnic group question online on a range of devices …"

28. There was also a hyperlink to the Information Paper "Deciding which tick-boxes to add to the ethnic group question in the 2011 England and Wales Census". The Defendant submits that this description of the ONS' assessment process, combined with the detailed account in the March 2009 Information Paper, prepared for the 2011 Census, was sufficient to meet any legal obligation to publish its "policy", relied upon by the Claimant.

29. In Autumn 2016, the ONS conducted an internal review of the 2011 prioritisation tool and updated it for the 2021 census. The revised tool was discussed with the Equality and Human Rights Commission and the Ministry for Housing, Communities and Local Government. In January 2017, the ONS created the 2021 Census Ethnic Group Assurance Panel, and gathered stakeholder views on the development of the prioritisation tool.

30. The evaluation criteria in the 2021 prioritisation tool (later published in the "Information Paper: The ethnic group prioritisation tool: 2021 Census in England and Wales" June 2019) were as follows:

> "1 Strength of user need for information on the ethnic group
>
> 1.1 Group is of particular interest for equality monitoring and/or for policy development (for example group is particularly vulnerable to disadvantage)
>
> 1.2 Group is of particular interest for service delivery and/or resource allocation
>
> 2 Lack of alternative sources of information
>
> 2.1 Write in answers are not adequate for measuring this group
>
> 2.2 Other census information is inadequate as a suitable proxy (for example country of birth, religion, national identity, citizenship, and main language)

> 3 Data quality of information collected
>
> > 3.1 Without this tick box respondents would be unduly confused or burdened and so the quality of information would be reduced (for example if a large, well known, or highly distinct group was left out, and respondents from this group ticked a variety of options instead)
>
> 4 Comparability with 2011 data
>
> > 4.1 There will be no adverse impact on comparability
>
> 5 Acceptability, clarity and quality
>
> > 5.1 The addition of the tick-box and/or revised terminology is acceptable to respondents, clear (both in wording and in the context of the question, for example mutually exclusive categories), and provides the required information to an acceptable level of quality."

31. Some adjustments were made to the weighting to be applied to the different factors, differing from the weightings applied in the 2011 tool. The 2021 prioritisation tool retained the 'acceptability' principles from the 2011 prioritisation tool, with no material changes. At page 11, the Information Paper described the principle further, stating:

> "Tick-boxes need to be acceptable and clear to the groups they are measuring, to elicit a high and consistent response and a data set that represents a distinct population."

32. The ONS received suggestions from the topic consultation and stakeholder follow-up survey for, in total, 55 different new tick box response options. For reasons of space and usability, the ONS considered it was not possible to accommodate so many tick boxes in the census questionnaire.

33. Mr Bell described how the ONS engaged in an extensive process of research and engagement with numerous communities, to decide which (if any) of the 55 proposed tick box response options should be included. The account which I set out below is illustrative, not comprehensive.

34. BMG Research was commissioned to conduct an online survey of two areas with high numbers of Sikhs: Hounslow and Wolverhampton.

35. The ONS held approximately nine meetings with the Sikh Federation and the Sikh Network over a three year period from January 2016. There was disputed evidence as to what was said at those meetings by Mr Bell, which could not be resolved in a claim for judicial review. However, Mr Bell was able to locate slides from a presentation given to the Sikh Federation on 17 August 2016 which explained that the review of the ethnic group response options would be similar to that undertaken in the 2011 Census, as set out in the Information Paper of March 2009, but reviewed and updated.

36. In January 2017, Mr Bell met the Chair of the All Party Parliamentary Group for Sikhs ("APPG") and explained the proposed criteria, and subsequently had meetings and exchanges of correspondence with the APPG, including Preet Kaur Gill MP. In his second witness statement, Mr Bell referred to a letter to Preet Kaur Gill MP, dated 23

October 2017, referring her to the May 2016 report (paragraph 27 above) in the context of the work which was being undertaken on assessing tick box responses. In October 2017, Mr Bell met Lord Singh, a Sikh member of the House of Lords. It was suggested to Mr Bell in these meetings that there was a divergence of opinion within the Sikh community on this issue.

37. In 2017, the ONS held a number of roadshows in cities across the UK. The slides used stated that the evaluation of requests for additional tick box responses would be done using a similar approach to that adopted in the 2011 Census. Those slides were posted on the ONS website.

38. The ONS hosted an open meeting on the '2021 census and statistics about the Sikh Community'. In December 2017, ONS held meetings with a Gurdwara in the Midlands and one in London.

39. In 2018, the APPG presented to Mr Bell the results of its survey of Gurdwaras which showed 100% in favour of a Sikh tick box response to the ethnic group question in the census.

40. The initial long list of 55 potential new tick boxes was reduced, on an assessment against 'user need', to a final eight of Gypsy, Irish traveller, Jewish, Kashmiri, Korean, Roma, Sikh and Somali.

41. In December 2017 the ONS's "Census topic research" report discussed the ethnicity topic and explained that the eight tick boxes had been reduced down to a final four for consideration: Jewish, Roma, Sikh and Somali.

42. The ONS commissioned independent research from Kantar Public, a social research agency, to conduct a qualitative study in respect of the final four ethnic group categories. In the brief to Kantar, the ONS advised:

> "There is evidence to suggest that Sikhs are experiencing significant disadvantage in several areas of life including employment, housing, health and education. Having Census data on the ethnically Sikh population would allow improvements to service planning and commissioning to better meet the needs of the Sikh population."

43. The ONS instructions to Kantar set out the key objectives of the testing including an assessment of "acceptability, clarity and quality of tick boxes". The ONS asked Kantar to conduct a number of focus groups and provided a list of research questions including: "Do the target sample identify with the term and are likely to use that tick box over others presented in the ethnic group question?"; "Is a Sikh ethnic tick box acceptable?"; "Are respondents uncomfortable with the term?"; "What is the impact of having 2 tick boxes?"; "Is the box in the appropriate location?"; "Does a Sikh ethnic group tick box result in greater or fewer respondents unsure/uncertain/confused about which tick box to tick?". Kantar's guidance to interviewers included exploring the acceptability of the tick box response, including questions such as "How well does it allow them to answer what they want to" and "How well does it capture how they see themselves".

44. Kantar's report defined the acceptability criterion as "Are respondents comfortable or uncomfortable with this term?". It described how responses varied, depending on generational and gender differences. Older, male participants, who viewed Sikhism as an important part of their background, favoured a Sikh tick box, while second generation participants identified as British and were less likely to want Sikh included under ethnicity. Some raised concerns that Sikhism was not an ethnic identity. Having to choose between 'Sikh' and 'Indian' could cause confusion, as both could be important but overlapping markers of their identity.

45. Kantar applied a red/amber/green ("RAG") rating to the responses to assess any change from the 2011 census evaluation. For the acceptability criterion, this meant: Green - more acceptable than the 2011 census response options; Amber – the same as the 2011 census response options; and Red - less acceptable than the 2011 census response options.

46. The ONS also conducted an online survey of the general population to assess the acceptability of a Sikh tick box response. 88% found it acceptable.

47. The recommendation in the ONS December 2018 research update was that a tick box be included in the ethnic group sub-topic for Roma, but not for Sikhs, Somalis and Jews. At page 36 the ONS stated "We committed to undertake a review of the ethnic group response options … We also confirmed we would use similar methodology to that used prior to the 2011 Census. The prioritisation evaluation considered user need, alternative sources, data quality, public acceptability and comparability with the previous census.".

48. The UKSA Board accepted the ONS recommendations and they were included in the White Paper "*Help Shape Our Future The 2021 Census of Population and Housing in England and Wales"* Cm 9745, published by the Cabinet Office in December 2018.

49. The reasons for not recommending a Sikh tick box to the ethnicity question in 2018 were similar to the reasons for reaching the same conclusion in 2009, in respect of the 2011 census. They were as follows:

> "3.89 Following the topic consultation, a further exercise was held to gather evidence of the need for new response options within the ethnic group question. Requests were prioritised initially against strength of need, and further against additional criteria including the availability of alternative data sources, data quality, and comparability. In this exercise, 55 possible new response options were requested, with four of those taken forward for further investigation. The four areas with highest user need were Roma, Somali, Sikh and Jewish. The case for each of these has been examined in depth.
>
> 3.90 ONS recognises the needs from all four areas. ONS will meet the user needs for all four groups but in different ways following testing."
>
> "***For the Sikh population***

3.101 ONS has always provided an "other, specify" box within the ethnic group question, to allow respondents to answer as they wish to (such as defining their ethnicity as Sikh). With the online census in 2021 ONS is developing the "search-as-you-type" capability which will make it easier to use this option, making it easier for respondents to self-define their ethnic group (when a specific response option is not available).

3.102 The 2021 Census will continue to include a religion question, with a specific Sikh response option. Flexible data outputs will allow analysis of those who define their religious affiliation as Sikh (through the religion response option) and those who define their ethnic group as Sikh through the use of the "search-as-you-type" capability on the online ethnic group question.

3.103 ONS will estimate the Sikh population using alternative data sources to assess the numbers who may declare themselves of Sikh background but not through the religion question. ONS will strengthen the harmonisation guidance on the collection of religion alongside ethnicity data across government. ONS will also increase the analytical offering and outputs for all ethnic groups, through flexible outputs.

3.104 The proposals on utilisation of the Digital Economy Act 2017 (see Chapter 3, paragraph 3.183) will ensure that data on the Sikh population is available across public services. ONS will work with members of the Sikh population to encourage wider participation in the census and raise awareness of the options of writing in their identity in the ethnic group question.

3.105 ONS does not propose adding an additional specific response option to the 2021 Census ethnic group question because of the evidence that this would not be acceptable to a proportion of the Sikh population. ONS considers that the estimates of the Sikh population can be met through data from the specific response option in the Sikh religion question.

3.106 The proposals meet the user needs expressed to ONS and follow extensive investigation. Leaders of Sikh groups have provided information which has fed into the analysis. There are differing views within the Sikh population as to whether a specific response option should be added to the 2021 Census, and views on each side are passionately held.

3.107 ONS received information from a survey of Gurdwaras enquiring about acceptance of a Sikh ethnic group tick-box, which showed a high acceptance for inclusion. The survey gave ONS more insight into the views of leaders of Sikh groups, alongside ONS's other research. Independent research was

> undertaken for ONS to further understand the acceptability of the Sikh response option within the ethnic group question.
>
> 3.108 Focus groups were conducted, with over 50 participants from Leicester, Birmingham and London who were spread across age, gender and life stages. These found:
>
> • that the inclusion of Sikh tick-box, without other religion tick-boxes, within the ethnic group question was viewed as unacceptable – particularly amongst younger, second-generation participants
>
> • younger second-generation participants wanted to express their Sikh background through the religion question as this was how they expected Sikh identity to be recorded
>
> • a small number of older, male participants were keen to express their Sikh identity with an ethnicity Sikh tick-box and many stated that it was one of the most important aspects of their background
>
> • there was increased respondent burden with some participants confused about having to choose between an Indian and Sikh identity, and felt that they were being asked to make a choice when they felt they were both
>
> 3.109 Additional, quantitative survey findings show there is no evidence that the religious affiliation and ethnic group questions are capturing different Sikh populations. All respondents who stated they were ethnically Sikh (in question versions with or without a specific Sikh response option) also stated their religious affiliation was Sikh. This is in line with findings from the 2011 Census data (where only 1.6% of those who had recorded themselves as ethnically Sikh had a religious affiliation other than Sikh)."

50. The Equality Impact Assessment, which was published with the White Paper, stated:

> "Options for specific response options are evaluated by means of a prioritisation tool (first used in 2011 – see details in Annex B), alongside engagement with stakeholders to understand specific requirements, comparability of data and operational impacts of changing the question for collectors of data."

The criteria used in 2011 were set out in Annex B.

51. In March 2019, the summary of the stakeholder follow-up survey, conducted between November 2016 and January 2017 was published. The evaluation tool and criteria used to assess the ethnic group tick boxes was published in June 2019 in the "Information Paper The ethnic group prioritisation tool: 2021 Census in England and Wales".

Statutory framework

52. The 1920 Act makes provision for the taking from time to time of a census.

53. Section 1(1) of the 1920 Act enables the Queen, by Order in Council, to direct the taking of a census:

> "(1) Subject to the provisions of this Act, it shall be lawful for His Majesty by Order in Council from time to time to direct that a census shall be taken for Great Britain, or for any part of Great Britain, and any Order under this section may prescribe—
>
> (a) the date on which the census is to be taken; and
>
> (b) the persons by whom and with respect to whom the returns for the purpose of the census are to be made; and
>
> (c) the particulars to be stated in the returns:
>
> Provided that—
>
> (i) an order shall not be made under this section so as to require a census to be taken in any part of Great Britain in any year unless at the commencement of that year at least five years have elapsed since the commencement of the year in which a census was last taken in that part of Great Britain; and
>
> (ii) no particulars shall be required to be stated other than particulars with respect to such matters as are mentioned in the Schedule to this Act."

54. The Schedule to the 1920 Act sets out the matters in respect of which particulars may be required. Paragraph 3 includes "Nationality, birthplace, race, language". Paragraph 6 includes "Any other matters with respect to which it is desirable to obtain statistical information with a view to ascertaining the social or civil condition of the population."

55. Section 1(2) of the 1920 Act requires a draft Order to be approved by both Houses of Parliament before an Order in Council can be made. It provides:

> "(2) Before any Order in Council is made under this section, a draft thereof shall be laid before each House of Parliament for a period of not less than twenty days on which that House has sat, and, if either House before the expiration of that period presents an address to His Majesty against the draft or any part thereof, no further proceedings shall be taken thereon, but without prejudice to the making of a new draft Order: Provided that, if by part of any such Order it is proposed to prescribe any particulars with respect to any of the matters mentioned in paragraph six of the Schedule to this Act, that part of the Order shall not have effect unless both Houses by resolution approve

> that part of the draft, or, if any modifications in that part are agreed to by both Houses, except as so modified."

56. The effect of section 1(2) is that the inclusion of "particulars to be stated in the returns" which fall within paragraphs 1 to 5 (including 5A to 5C) of the Schedule to the 1920 Act shall be subject to the draft negative procedure. This includes the inclusion of certain ethnic groups, as a matter falling within paragraph 3 of the Schedule. Any particulars which are included in the census under paragraph 6 must be approved by affirmative resolution.

57. Section 2(1) of the 1920 Act provides that it is the duty of the Statistics Board (previously the Registrar-General) "to make such arrangements and to do all such things as are necessary for the taking of a census in accordance with the provisions of this Act and of any Order in Council or regulations made thereunder …".

58. The UKSA holds the statutory powers of the Statistics Board, and acts through the ONS as its executive office (established under section 32 of the Statistics and Registration Service Act 2007). The ONS has responsibility for the delivery of the census.

59. Section 2(2) of the 1920 Act provides that the Statistics Board (in effect, the ONS) is subject to the control of the Minister. The Minister has responsibility for the drafting of the census secondary legislation and laying it before Parliament.

60. Section 3(1) of the 1920 Act empowers the Minister to make regulations providing for the conduct of the census, including the forms to be used in the taking of the census (at (f)). Section 3(2) requires the regulations to be laid before both Houses of Parliament and to be subject to the negative resolution procedure.

Grounds of challenge

The Claimant's grounds

61. The Claimant submitted that it would be unlawful for the Queen to exercise her discretionary power to make an Order in Council under the 1920 Act if the particulars to be stated in the census return (and scheduled to the Order) did not include a Sikh ethnic group tick box response, as proposed in the White Paper, because that proposal was based upon "unlawful reasoning" as follows.

62. <u>Ground 1:</u> Unlawful failure by the ONS to apply the evaluation criteria it published and said it would apply (and until that final point had applied), including its published "public acceptability" test, when recommending not to include a Sikh tick box in the 2021 Census.

63. The ONS promised, in public documents dating from May 2016 to March 2019 (as well as in correspondence during this period), to apply its specifically defined "public acceptability" criterion to the assessment of both whether to continue to include the ethnic group sub-topic in the 2021 Census, and whether to include any additional tick boxes within the ethnic group question.

64. However, contrary to that published policy and approach, the ONS then applied a different "acceptability" test when finally rejecting the proposal to include a Sikh tick box. In June 2019, after receiving pre-action correspondence in this claim, the ONS published (for the first time in the 2021 Census consultation process, and indeed after that process had concluded) a "prioritisation tool", which contained different criteria to those previously published and promised for the 2021 Census, which it claimed to have applied in the 2021 process to the Sikh tick box question. The ONS's failure to follow its published policy, and instead to follow an unpublished policy, was contrary to the principles established by the Supreme Court in *R (on the application of Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245. Therefore reliance on its recommendation not to include a Sikh tick box would be unlawful.

65. Ground 2: Unlawful failure by the ONS to apply its "public acceptability" criterion consistently across the questions and response options considered for inclusion under various topics/sub-topics in the 2021 Census.

66. The ONS treated the existence of negative responses as fatal to satisfying the "public acceptability" criterion in respect of the Sikh ethnic group question, whilst taking a different approach to negative responses received in respect of the gender identity and sexual orientation questions. It is well-established that policy must be consistently applied. Reliance on a recommendation resulting from an inconsistent application of the "public acceptability" criterion would be unlawful.

67. Ground 3: Unlawful reliance by ONS, when recommending not to include the option of a Sikh tick box, on a report by Kantar, a research agency commissioned to conduct focus groups to assess the inclusion of additional ethnic group tick boxes.

68. Kantar's report (in addition to applying a different definition of "public acceptability" to that promised by ONS), displays material internal inconsistencies, inaccuracies, and a failure to apply its own stated criteria and assessment methodology, in particular, in respect of the RAG ratings.

69. It was unlawful for Kantar to have regard to the view expressed in the focus groups that Sikhism was a religion, rather than an ethnic group. They were bound to proceed on the basis that Sikhs were an ethnic group, following the decision of the House of Lords in *Mandla v Dowell Lee* [1983] 2 AC 548 that Sikhs were members of a racial group, defined by reference to ethnic origins, within the meaning of the Race Relations Act 1976, although they were not biologically distinguishable from the other peoples of the Punjab.

The Defendant's response

70. In response to the criticisms of the UKSA and ONS proposals, the Defendant submitted that the Claimant's grounds were based on a fundamental misconception. The "impact on public acceptability" criterion was one of a set of criteria which the ONS applied to evaluate the topics on which census questions were to be asked. A tick box response is not a topic or a question. It is an answer to a question. A different set of criteria were applied to evaluate whether more tick box responses should be introduced in answer to the questions about ethnic group, or whether respondents should continue to write in for themselves any ethnic group which was not specified.

71. The criteria were different because topics and tick box responses have different functions. The decision as to which topics to include is primarily driven by what information needs to be collected in the census, but also by any possible effect on the census response rate and other issues connected to the quality and nature of the information. In contrast, tick box responses are concerned with how the data is captured, for example, to help people answer the questions, and to provide consistency in responses. The decision whether or not to include a particular tick box needs to take into account the ways in which people self-identify, and how they interpret, relate to and respond to the questions.

72. Ground 1 This ground was built upon the Claimant's misconception as to the appropriate criteria. The ONS never promised to apply the topic criteria to evaluate the proposed additional tick box responses for ethnic groups. It expressly stated in its published documents that it would use similar methodology to that used in preparation for the 2011 Census, subject to review and updating. This was made clear to stakeholders and all those organisations and individuals who engaged with the ONS on this issue, including the Sikh Federation. The Sikh Federation was well aware of the details of the prioritisation tool used by the ONS in preparation of the 2011 Census as it was actively involved in lobbying for the inclusion of a Sikh ethnic group tick box response and published a report criticising the ONS's application of the prioritisation tool (though not the criteria used).

73. There was no legal obligation on the ONS to publish in advance the relatively minor adjustments made to the methodology used for the 2011 census. The report on this work - "Information Paper The ethnic group prioritisation tool: 2021 Census in England and Wales" – was not deliberately withheld, nor was it manufactured as a response to the Claimant's claim. Its publication, in June 2019, well before any ministerial decision to lay a draft Order before Parliament, and two years prior to the census, was neither delayed nor late.

74. Ground 2 Sexual orientation is a topic, not a response option. In any event, there was no valid comparison between the sexual orientation question and the Sikh tick box response. The sexual orientation question was looking at the addition of a new topic and associated questions, in respect of which no census data currently existed. The value of adding the sexual orientation question outweighed the negative responses. In contrast, the data collected from the Sikh response option could be collected in other ways, by respondents writing it in themselves, and/or ticking the Sikh box in response to the question about religion.

75. Ground 3 The complaints about Kantar's research were based upon a misunderstanding of the criteria and methodology used, particularly in respect of the RAG rating. Its research was qualitative, not quantitative. The RAG ratings did not refer to the number of people who would have used the tick box. Rather, it was based upon the views expressed by those in the focus groups as to whether the tick box was more or less acceptable, compared with the response options offered in the 2011 census. Kantar and the ONS were entitled to have regard to the views expressed in the focus group as to whether Sikhs were an ethnic group.

76. Kantar was entitled to have regard to the views expressed by members of the focus groups that they considered their ethnic identity to be Indian or British, not Sikh, and that they considered Sikhism to be a religion rather than an ethnic grouping. The

criterion of acceptability is a broad concept, which takes into account subjective feeling and opinions, which transcend legal definitions.

77. In any event, none of these points call into question the legality of the ONS's approach. At most, they are fine-grained merits points about the work of a research company, whose input was only one part of the material considered.

Parliamentary privilege

The Defendant's submission

78. The Defendant raised a preliminary objection to the Court determining the claim, on the ground that it is premature, as no ministerial decision or Order in Council has yet been made, and that it would be in breach of Parliamentary privilege to do so as a declaration in the terms sought by the Claimant would not respect the separation of powers between the legislature and the judiciary. The Defendant submits that the pre-emptive declaration which the Claimant seeks will:

i) prevent the Minister for the Cabinet Office from laying any draft Order and regulations before Parliament which accords with the recommendations in the White Paper by not including a Sikh ethnic group tick box in the census questionnaire;

ii) prevent Parliament from scrutinising any such draft Order and regulations, and voting upon it;

iii) prevent the Queen, sitting in the Privy Council, from making an Order in the terms of the Minister's draft.

The law

79. The principle of the separation of powers is an established constitutional convention. As Lord Mustill explained in *R v Secretary for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513, at 567:

> "It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts each have their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks fit. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed."

80. In *R v Her Majesty's Treasury ex parte Smedley* [1985] 1 QB 657 Sir John Donaldson MR said at 666B-D

> "Although the United Kingdom has no written constitution, it is a constitutional convention of the highest importance that the legislature and the judicature are separate and independent of one

> another …..It therefore behoves the court to be ever sensitive to the paramount need to refrain from trespassing upon the province of Parliament or, so far as this can be avoided, even appearing to do so…
>
> Against that background, it would clearly be a breach of the constitutional conventions for this court, or any court, to express a view, let alone take any action, concerning the decision to lay this draft Order in Council before Parliament, or concerning the wisdom or otherwise of Parliament approving that draft."

81. Nonetheless, the Court of Appeal went on to determine the claim, holding that the draft Order in Council which had been laid before Parliament, but not yet been made, was not *ultra vires*. Sir John Donaldson's reasons for determining the claim were as follows:

> "However, Mr. Laws, appearing for the Treasury, took the matter a little further when he submitted that, at the present stage when no Order in Council has been or could yet be made, it is premature for the court to consider Mr. Smedley's application. There is obvious force in this submission, but it requires some further examination. It is the function of Parliament to legislate and legislation is necessarily in written form. It is the function of the courts to construe and interpret that legislation. Putting it in popular language, it is for Parliament to make the laws and for the courts to tell the nation, including members of both Houses of Parliament, what those laws mean. Furthermore, whilst Parliament is entirely independent of the courts in its freedom to enact whatever legislation it sees fit, legislation by Order in Council, statutory instrument or other subordinate means is in a quite different category, not being Parliamentary legislation. This subordinate legislation is subject to some degree of judicial control in the sense that it is within the province and authority of the courts to hold that particular examples are not authorised by statute, or as the case may be by the common law, and so are without legal force or effect.
>
> At the present moment, there is no Order in Council to which Mr. Smedley can object as being unauthorised. All that can be said is that it seems likely that if both Houses of Parliament approve the draft Order in Council, Her Majesty will be advised to make and will make an Order in the terms of the draft, whereupon the courts would without doubt be competent to consider whether or not the Order was properly made in the sense of being intra vires.
>
> In many, and possibly most, circumstances the proper course would undoubtedly be for the courts to invite the applicant to renew his application if and when an order was made, but in some circumstances an expression of view on questions of law which would arise for decision if Parliament were to approve a

> draft may be of service not only to the parties, but also to each House of Parliament itself. This course was adopted in *Rex v. Electricity Commissioners, Ex parte London Electricity Joint Committee Co. (1920) Ltd.* [1924] 1 K.B. 171. In that case an inquiry was in progress, the cost of which would have been wholly wasted if, thereafter, the Minister and Parliament had approved the scheme only to be told at that late stage that the scheme was ultra vires.
>
> Similar considerations apply in the present case. It is apparent from the terms of the Undertaking that the provision of the money is considered a matter of urgency. If we defer consideration of Mr. Smedley's application until after both Houses of Parliament have considered the somewhat different question of whether each approves the draft Order in Council, we shall only have contributed an avoidable period of delay should the correct view be that an Order in Council in the terms of the draft would be valid and should only have contributed to what might be thought to be a waste of Parliamentary time if the correct view is that such an Order in Council would be invalid."

82. In *Office of Government Commerce v Information Commissioner* [2010] QB 98, Stanley Burnton J. confirmed that the principle of the separation of powers is an aspect of parliamentary privilege, at [46]:

> "46. These authorities demonstrate that the law of parliamentary privilege is essentially based on two principles. The first is the need to avoid any risk of interference with free speech in Parliament. The second is the principle of the separation of powers, which in our constitution is restricted to the judicial function of government, and requires the executive and the legislature to abstain from interference with the judicial function, and conversely requires the judiciary not to interfere with or to criticise the proceedings of the legislature…."

83. In *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin), the Divisional Court dismissed the claimant's claim that the Prime Minister was bound by a promise made in Parliament, and repeated outside Parliament, that the people would be consulted, by means of a referendum, on whether to ratify the Lisbon Treaty. Richards LJ referred to the passage in Stanley Burnton J's judgment in *Office of Government Commerce*, which I have cited above, and said:

> "47. The first of those principles is particularly relevant to the use to which certain Parliamentary material may be put, and is considered later. The second goes to the core of the claimant's case. In *R v Parliamentary Commissioner for Standards, ex p Al Fayed* [1998] 1 WLR 669, 670, Lord Woolf MR said it was clearly established that "the courts exercise a self-denying ordinance in relation to interfering with the proceedings of Parliament". In *R v Her Majesty's Treasury, ex p Smedley* [1985] QB 657, 666C–E, Sir John Donaldson MR said that "it behoves

> the courts to be ever sensitive to the paramount need to refrain from trespassing upon the province of Parliament or, so far as this can be avoided, even appearing to do so"; and against that background he went on to say, in relation to the particular Order in Council under challenge in those proceedings, that "it would clearly be a breach of the constitutional conventions for this court, or any court, to express a view, let alone take any action, concerning the decision to lay this draft Order in Council before Parliament or concerning the wisdom or otherwise of Parliament approving the draft". The court in that case was willing to consider whether such an Order, if approved by Parliament, would be *ultra vires* the enabling statute, but made very clear the care that needed to be exercised in relation to the limits of the court's role.
>
> …
>
> 49. In our judgment, it is clear that the introduction of a Bill into Parliament forms part of the proceedings within Parliament. It is governed by the Standing Orders of the House of Commons (see, in particular, standing order 57(1)). It is done by a Member of Parliament in his capacity as such, not in any capacity he may have as a Secretary of State or other member of the government. *Prebble* (cited above) supports the view that the introduction of legislation into Parliament forms part the legislative process protected by Parliamentary privilege. To order the defendants to introduce a Bill into Parliament would therefore be to order them to do an act within Parliament in their capacity as Members of Parliament and would plainly be to trespass impermissibly on the province of Parliament. Nor can the point be met by the grant of a declaration, as sought by the claimant, instead of a mandatory order. A declaration tailored to give effect to the claimant's case would necessarily involve some indication by the court that the defendants were under a public law duty to introduce a Bill into Parliament to provide for a referendum. The practical effect of a declaration would be the same as a mandatory order even if, in accordance with long-standing convention, it relied on the executive to respect and give effect to the decision of the court without the need for compulsion."

84. In *R (Unison) v Secretary of State for Health* [2010] EWHC 2655 (Admin), Mitting J. applied the Divisional Court's reasoning in *Wheeler* when rejecting Unison's claim that it had a legitimate expectation, arising from statements made by the Secretary of State in and outside Parliament, that he would conduct a consultation exercise before legislation was introduced to Parliament.

85. Mitting J. held that the relief sought was outside the scope of a judicial review, citing the judgments in *Smedley* and *Wheeler* in support of his analysis:

> "9 The ground rules are not controversial. The courts cannot question the legitimacy of an Act of Parliament or the means by

> which its enactment was procured: see British Railways Board v Pickin [1974] AC 765, and as to proceedings in Parliament, Article 9 of the Bill of Rights). Nor may they require a bill to be laid before Parliament: see Wheeler v Office of the Prime Minister and others [2008] EWHC 1409 Admin, paragraph 49 *[see above]*
>
> > "In our judgment, it is clear that the introduction of a Bill into Parliament forms part of the proceedings within Parliament. It is governed by the Standing Orders of the House of Commons (see, in particular, standing order 57(1)). It is done by a Member of Parliament in his capacity as such, not in any capacity he may have as a Secretary of State or other member of the government. Prebble (cited above) supports the view that the introduction of legislation into Parliament forms part the legislative process protected by Parliamentary privilege. To order the defendants to introduce a Bill into Parliament would therefore be to order them to do an act within Parliament in their capacity as Members of Parliament and would plainly be to trespass impermissibly on the province of Parliament."
>
> 10 The converse must also be true. The courts cannot forbid a Member of Parliament from introducing a Bill. To do so would be just as much an interference with Parliamentary proceedings as to require the introduction of a Bill.
>
> 11 The Unison challenge is not so blunt, but if successful it would require the Secretary of State to defer or delay introducing the Health Bill until he had consulted on its principle. Any court ordered prohibition would be conditional, but it would nevertheless be a prohibition. I consider that it would go against the restraint exercised by the judiciary in relation to Parliamentary functions, for the reasons explained by Sir John Donaldson MR in Her Majesty's Treasury v Smedley [1985] QB 657 at 666C to E. For that reason alone, I would decline to make a prohibitory or mandatory order which in any way inhibited the Secretary of State from introducing legislation to Parliament at a time and of a nature of his choosing."

86. In *R (H-S) v Secretary of State for Justice* [2017] EWHC 1948 (Admin), I applied the principles in *Wheeler* and *Unison* to a serving prisoner's claim for judicial review of the Secretary of State's powers under section 128 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to direct the release of prisoner serving sentences of imprisonment for public protection, by means of a statutory instrument, subject to the affirmative resolution procedure. Although *Wheeler* and *Unison* concerned primary legislation, I concluded that the same principle applied to delegated legislation. I held as follows:

> "51. I accept the Defendant's submission that these principles apply equally to the Claimant's case. Under Ground 1, the Claimant's case was that the Defendant was acting unlawfully by failing to lay an order before Parliament to relax the release test. If the Court upheld this ground, the Defendant would be obliged to lay an order to relax the release test, in order to comply with his legal obligation as found by the Court. Parliament would then be obliged to consider it, as an indirect consequence of the judgment of the Court. Under Ground 2, the Claimant's case was that the Defendant was legally obliged to consult before exercising his power to lay an order before Parliament. If the Court upheld this ground, it would have the effect of preventing the Defendant from laying an order before Parliament unless or until he had undertaken a consultation exercise, even though there was no statutory duty to consult, because otherwise he would be acting unlawfully. Thus, the consequence of allowing the Claimant's claim was an interference by the Court with Parliamentary proceedings, which was contrary to Parliamentary privilege and the separation of powers.
>
> 52. I do not consider that the Claimant has overcome this fundamental obstacle by abandoning his claim for mandatory relief and seeking declarations instead, for precisely the reasons which Richards LJ gave in *Wheeler*:
>
> > "49 ……Nor can the point be met by the grant of a declaration, as sought by the claimant, instead of a mandatory order. A declaration tailored to give effect to the claimant's case, would necessarily involve some indication by the court that the defendants were under a public law duty to introduce a bill into Parliament to provide for a referendum. The practical effect of a declaration would be the same as a mandatory order even if, in accordance with long-standing convention, it relied on the executive to respect and give effect to the decision of the court without the need for compulsion."
>
> 53. Although *Wheeler* and *Unison* were both concerned with the introduction of primary legislation, these principles apply equally to the introduction of secondary legislation. In *R v HM Treasury ex p. Smedley* [1985] 1 QB 657, in which the claimant challenged as ultra vires a draft Order in Council which had been laid before Parliament by the Treasury, but not yet approved, the Divisional Court accepted that it had jurisdiction to hold that subordinate legislation was unlawful. However, Sir John Donaldson MR said "it would clearly be a breach of the constitutional conventions for this court, or any court, to express a view, let alone take any action, concerning the decision to lay this draft Order in Council before Parliament or concerning the

> wisdom or otherwise of Parliament approving this draft" (at 666E)."

87. Sir John Donaldson's statement of principle in *Smedley* has recently been affirmed and applied in *R (on the application of Yalland and Ors) v Secretary of State for Exiting the European Union* [2017] EWHC 630 (Admin), where the Divisional Court refused the Claimants permission to apply for judicial review for a challenge to the "proposed decision to leave the European Economic Area without prior parliamentary authorisation" on the grounds that it was premature, and that it would rarely be appropriate to consider claims when the relevant legal events to which the claim relates have not yet occurred. Lloyd-Jones LJ said:

> "17. Following the decision in Miller, a bill has been introduced into Parliament which, if enacted in the terms of the draft, will authorise ministers to give notice of withdrawal pursuant to Article 50 of the TEU…..
>
> 18. It is also understood that a Bill will be introduced which, if enacted, will repeal or amend the 1972 Act. It may be (we do not know) that the Bill or another Bill will be introduced to deal with the remaining provisions of the 1993 Act, which makes other provision in relation to the implementation of the EEA Agreement in domestic law.
>
> 19. We emphasise that whether any legislation is to be introduced and the form that any such legislation should take is entirely a matter for Parliament itself and not a matter for the courts. Article 9 of the Bill of Rights provides that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.
>
> 20. In this regard, we also draw attention to paragraph 122 of Miller, to R (on the application of) Wheeler v The Prime Minister and the Secretary of State for Foreign and Commonwealth Affairs [2008] EWHC 1409 (Admin) and Wheeler v the Office of the Prime Minister and Others [2015] 1 CMLR 15.
>
> 21. As it was expressed by the then Master of the Rolls, Sir John Donaldson, in R v Her Majesty's Treasury, Ex parte Smedley [1985] QB 657 at page 666B to D:
>
> > "Although the United Kingdom has no written constitution, it is a constitutional convention of the highest importance that the legislature and the judicature are separate and independent of one another, subject to certain ultimate rights of Parliament over the judicature which are immaterial for present purposes. It, therefore, behoves the courts to be ever sensitive to the paramount need to refrain

> from trespassing upon the province of Parliament or, so far as this can be avoided, even appearing to do so. Although it is not a matter for me, I would hope and expect that Parliament would be similarly sensitive to the need to refrain from trespassing upon the province of the courts."

……

> 23. As a general rule, the courts are concerned in judicial review with adjudicating on issues of law that have already arisen for decision and where the facts are established. The courts will not generally consider cases which are brought prematurely because, at the time the claim is made, the relevant legal or factual events to which the claim relates have not yet occurred.
>
> 24. The courts may have jurisdiction to grant what is sometimes referred to as advisory declarations. That is declarations on points of law of general importance where there are important reasons in the public interest for doing so. Even here, the courts proceed with caution.
>
> 25. It will rarely be appropriate to consider such issues when they may depend in part on factual matters or future events since until those factual matters are established or the events occur, the courts will not be in a position to know with sufficient certainty what issues do arise in a particular case. Similarly, when matters may depend upon or be affected by future legislation, it would generally not be appropriate to make rulings on questions of law until the precise terms of any legislation are known."

Conclusions

88. In my judgment, the Court should not determine the Claimant's claim as it is plainly premature. A ministerial decision has not yet been made; no draft Order in Council has been published or approved by Parliament; and the Queen in Council has not made an Order under the 1920 Act. As Lloyd-Jones LJ said in *Yalland*, at [23], it is the long-established practice of this Court not to entertain anticipatory claims for judicial reviews in respect of events that have not yet occurred. There are sound practical and principled reasons for the Court's practice in this regard. I do not consider that there is any justification for making an exception in this case, for reasons I consider further below.

89. I also accept the Defendant's submission that a declaration in the terms sought by the Claimant would not respect the separation of powers between the legislature and the judiciary.

90. The claim as originally framed in the pre-action protocol correspondence sought the following:

> "a declaration that it would be unlawful for the Cabinet Office to lay before Parliament …. a draft census Order on the basis of the proposals … set out in the December 2018 White Paper …"

91. After the Defendant replied, explaining that the relief sought was a breach of Parliamentary privilege, the Claimant re-cast his claim so as to seek a declaration that "it would be unlawful for Her Majesty to make an Order in Council which follows the reasoning of the White Paper so as not to include the Sikh ethnic group tick box in the "particulars to be stated in returns" section of the Order".

92. The Minister has responsibility for deciding upon the final form of the census particulars and the census questionnaires, having regard to the recommendations made by the ONS. The particulars will be scheduled to the draft Order in Council, and the census questionnaires will be scheduled to the draft regulations. Once the Minister has made that decision, and the proposed legislation is drafted, the Minister is required to lay it before Parliament.

93. If this Court has made a binding declaration against the Defendant (the Cabinet Office) that it would be unlawful for the Queen to make an Order in Council which does not include a Sikh ethnic group tick box, it would be unthinkable for the Minister to approve, and then lay before Parliament, a draft Order in Council and regulations which did not include a Sikh ethnic group tick box in the particulars and questionnaires. The effect of the declaration would be to prevent him from doing so.

94. Thus, if the High Court grants the pre-emptive declaration which the Claimant seeks, it will have the effect of preventing the Minister for the Cabinet Office from laying any draft Order and regulations before Parliament which accords with the recommendations in the White Paper by not including a Sikh ethnic group tick box in the census questionnaire.

95. It is well-established that a declaration which has the effect of requiring a minister to introduce, or prohibiting a minister from introducing, draft legislation to Parliament, other than on the terms laid down by the court, is an impermissible interference with the proceedings of Parliament: see Sir John Donaldson MR in *Smedley* at 666E; Richards LJ in *Wheeler*, at [49]; Mitting J. in *Unison*, at [11]; and Lang J. in *H-S*, at [51]-[52].

96. Turning now to proceedings before Parliament, after the draft Order in Council and draft regulations are laid before Parliament, they will be subject to scrutiny by the relevant Committees of the House of Commons and the House of Lords. The procedure was described by Lord Hope in R(Alvi) v Secretary of State for the Home Department [2012] 1 WLR 2208, at [34] – [37].

97. Under the negative resolution procedure, Parliament may seek to debate and pass a motion calling for the annulment of the draft legislation, within a prescribed period, in which case the draft legislation cannot proceed any further. Parliament has no power to amend the legislation itself; an amended version can only be presented by the Minister at a later date. Alternatively, Parliament may debate and pass a Motion of Regret in respect of some or all of the provisions of the draft legislation. In either case, Parliament has an opportunity to debate the merits of the proposals.

98. Although it is rare for draft legislation laid before Parliament under the negative resolution procedure to be debated, it is not unknown. If the draft legislation does not provide for a Sikh tick box response, the Sikh Federation has stated that it has sufficient cross-party support from Members of Parliament to win the argument in favour of including one (email of 15 January 2019 to Chloe Smith MP, Minister for the Constitution). The Sikh Federation stated in its report of January 2010:

> "….. a number of high profile lobbies, Early Day Motions and Parliamentary Questions have been raised in support of separate Sikh monitoring. Over 200 MPs from across the political spectrum have publicly indicated their support. The Conservative and Liberal Democrat parties and many Labour MPs have also expressed their support for the need for a separate ethnic category tick box for Sikhs that ONS appear to have ignored…"

99. Parliament will have the benefit of seeing the reasons for the ONS proposal not to include a Sikh tick box response in answer to the ethnic group sub-topic question as set out in the White Paper which was presented to Parliament in December 2018. The matter can then be debated by Parliament on the merits, if it considers it appropriate to do so.

100. However, if the Court makes the declaration which the Claimant seeks, Parliament will be prevented from scrutinising any draft Order and regulations, which follows the proposals in the White Paper in regard to the Sikh ethnic group tick box response.

101. In my view, a declaration which prevents Parliament from considering secondary legislation unless it is in a form which the court has previously approved, is clearly an impermissible interference with the proceedings of Parliament. As Sir John Donaldson MR said in Smedley, "it would clearly be a breach of the constitutional conventions for this court, or any court, to express a view, let alone take any action, concerning the decision to lay this draft Order in Council before Parliament or concerning the wisdom or otherwise of Parliament approving this draft" (at 666E). Applying this statement of principle, Lloyd-Jones LJ said in Yalland at [19], "[w]hether any legislation is to be introduced and the form it is to take is entirely a matter for Parliament itself, and not a matter for the courts".

102. Finally, the Claimant's judicial review challenge is directed at the "contemplated exercise of Her Majesty's discretion to direct a census" and the declaration sought will have the effect of preventing the Queen in Council, from making an Order under the 1920 Act which does not include a Sikh ethnic tick box response, in accordance with the proposal in the White Paper.

103. In my judgment, if the Court were to grant a declaration in these terms, it would be a clear interference with the Queen in Council's law-making function, contrary to the constitutional convention of the separation of powers. There is a fundamental constitutional distinction between the Court reviewing the lawfulness of an Order in Council once it has been made, and the Court making a declaration which curtails the Queen in Council's exercise of discretion when making law.

104. The Claimant relied upon *R v Electricity Commissioners* where the Court decided that a scheme which was under consideration by the Electricity Commissioners in an inquiry was *ultra vires* the enabling legislation, despite the fact that the scheme would not come into effect until confirmed by the Minister of Transport and approved by Parliament. The Court of Appeal held that the Electricity Commissioners were acting judicially in the holding of the inquiry and could only act within the limits prescribed by the legislation (per Atkin LJ, at [208]); that it was convenient to have the point of law decided before further expense and trouble was incurred (per Atkin LJ; at [210]); and that since Parliament had passed the relevant legislation, it would not object to the Court using its powers to keep the Commissioners within its limits (per Bankes LJ at [192]). Younger LJ added that the court's intervention would assist Parliament in relieving it from the risk of receiving schemes for approval which were *ultra vires* (at [213]).

105. In my judgment, *R v Electricity Commissioners* is plainly distinguishable from this case, since the purpose of that claim was to prevent the Electricity Commissioners from conducting the inquiry into the proposed scheme, which was contrary to the enabling legislation. The Claimant did not seek a declaration preventing Parliament from exercising its powers under the enabling legislation to approve the scheme.

106. The Claimant relied upon the decision in *Smedley*, in which the Court of Appeal decided that, exceptionally, it was appropriate for the Court to decide upon the Claimant's challenge to the validity of a draft Order before Parliament had approved it and the Queen in Council had made it, to avoid the delay which would be caused by a challenge after the Order was made (see paragraph 81 above). Although this was an *ultra vires* challenge, directed at the proposed determination of the Chancellor of the Exchequer, Slade LJ also described it as, in effect, a *Wednesbury* challenge to the exercise of discretion by the Queen in Council (at 673A). In my view, Slade LJ's reasoning undermined Mr Sheldon QC's submission that the court in *Smedley* was only prepared to make an exception because it was an *ultra vires* challenge which, if successful, would render the Parliamentary proceedings futile.

107. However, the Court of Appeal emphasised that the course which it adopted was an exception to the general rule. Sir John Donaldson said, at 667B-C, that in most circumstances the proper course would be to invite the applicant to renew his application if or when an order was made. Slade LJ said, at 672G, that the court's jurisdiction to intervene before Parliament had given its approval "must of course be exercised with great circumspection and with close regard to the dangers of usurping or encroaching on any function which statute has specifically conferred on Parliament or on the functions of Parliament in general".

108. In my judgment, this is not an exceptional case which justifies any departure from the general rule that this Court will respect the separation of powers and so not interfere with Parliamentary proceedings. Under this legislative scheme, no justiciable decision has been made. The Minister has not yet made a draft Order in Council, unlike *Smedley*. The claim is plainly premature. I do not consider that this conclusion unduly prejudices the Claimant. He chose to proceed at this stage, despite the risk of a finding of prematurity. As this claim concerns secondary, not primary legislation, the Claimant will be able to bring a challenge to the Order in Council once made, if the Sikh tick box response is not included, and if he has valid grounds on which to issue a claim. The Claimant submits that such a claim may jeopardise the timing for the census in two years time. In my view, the Defendant and the UKSA are best placed to decide whether

a legal challenge after an Order in Council is made would be so detrimental to the preparation of the 2021 census, because of the uncertainty and delay, that it would be preferable for the Claimant's claim to be determined now, on the merits. That is not the position which the Defendant and the UKSA have taken in these proceedings, since I have been invited to dismiss the claim on grounds of prematurity and parliamentary privilege. In those circumstances, I do not consider it would be appropriate to reject the Defendant's submission on grounds of urgency.

109. Therefore, for the reasons set out above, the claim is dismissed on the ground that it is premature, and in breach of parliamentary privilege and the constitutional convention of the separation of powers.