

**IN THE MATTER OF A LOCAL GOVERNMENT ELECTION FOR THE
BORDESLEY GREEN WARD OF THE BIRMINGHAM CITY COUNCIL
HELD ON 10TH JUNE 2004**

**AND IN THE MATTER OF A LOCAL GOVERNMENT ELECTION FOR THE
ASTON WARD OF THE BIRMINGHAM CITY COUNCIL HELD ON 10TH
JUNE 2004**

JUDGMENT

[This is the final and definitive version of the judgment. No further versions are authorised or necessary.]

Introduction

1. This election court was convened to try the election Petitions brought under s.127 of the Representation of the People Act 1983 ("the 1983 Act") for the Wards of Bordesley Green and Aston respectively, being Wards of Birmingham City Council. In each Petition, the Petitioners challenge the election of three Labour Party councillors to Birmingham City Council at the election held on 10th June 2004.

2. In the Bordesley Green Petition, four electors of the Ward challenge the election of
 - (a) Mr Shah Jahan
 - (b) Mr Shafaq Ahmed

(c) Mr Ayaz Khan

("the Labour Party Respondents").

3. In outline the Bordesley Green petitioners say that the election should be set aside and a new election held on the grounds that:

(a) the election of the three Labour Party Respondents was procured by corrupt and/or illegal practices on the part of these Respondents or their agents or by "general corruption" in the Ward designed to secure their election; and/or

(b) the conduct of the election by the Birmingham Returning Officer, Ms Lin Homer, was so flawed as to necessitate the election being run again.

4. As In Bordesley Green, the Aston Petition is brought by four electors in the Ward against:

(a) Mr Mohammed Nazrul Islam

(b) Mr Muhammed Afzal

(c) Mr Mohammed Amin Kazi

("the Labour Party Respondents").

5. Again as in Bordesley Green, the Aston Petitioners say that the election should be set aside and a new election held on the grounds that:

(a) the election of the three Labour Party Respondents was procured by corrupt and/or illegal practices on the part of these Respondents or their agents or by "general corruption" in the Ward designed to secure their election; and/or

- (b) the conduct of the election by the Birmingham Returning Officer, Ms Lin Homer, was so flawed as to necessitate the election being run again.
6. In October 2004 I was appointed as Commissioner for the trial of the two Petitions under s.130 of the 1983 Act.
 7. It is an essential part of electoral law that election Petitions should be heard as soon as practicable after the election itself. The reasons are obvious. If a councillor has been improperly elected, the sooner his election is set aside the better: by the same token, if the charges against him are false, his name should be cleared for the benefit both of himself and the constituents he represents.
 8. Furthermore, if criminal offences are disclosed in the course of the Petition, quick action needs to be taken because there is a time limit of one year on the prosecution of most electoral crimes.
 9. Given the size and complexity of the two cases, I felt the best that could be achieved was to try to bring the case to a conclusion within nine to ten months of the election. In the event we have met this target, largely, it must be said, through the wholehearted co-operation of the parties.
 10. The first step in an election Petition is to conduct an exercise known as "the Scrutiny". Such is the importance of the present case that, unusually, I was asked, as Commissioner, to conduct the Scrutiny myself. At the Scrutiny, which took several days for each Petition in November

2004 and again in January 2005, there was a prolonged examination of original election documents, particularly ballot papers.

11. Various factual findings were made about the documents and were incorporated into formal Scrutiny Reports which I submitted to the High Court in December 2004 and January 2005. Those Reports are public documents and I have adopted a number of my factual findings from the Scrutiny in this Judgment.
12. As will be seen, the urgency of these proceedings meant that I had to impose and enforce a strict timetable and I resisted attempts to postpone the trial, particularly attempts to postpone it until after the probable date of the forthcoming General Election.
13. I conducted the trials of the two Petitions, first Bordesley Green and then Aston, between 21st February and 22nd March 2005. As there are many issues common to both Petitions, I have decided to give a single judgment, while still treating the allegations in each Petition separately.
14. In both Petitions the allegations concern postal votes. In essence it is said that the Labour Party Respondents and their agents engaged in massive, systematic and organised fraud whereby literally thousands of bogus Labour votes were recorded and counted. Without those votes, it is said, none of the Labour candidates would have been elected in either Ward.

15. If the allegations are true, then all the voters whose votes were "stolen" by these frauds were disenfranchised. As will be seen, on polling day countless voters did turn up at polling stations to vote, only to be told, to their amazement and fury, that someone had put them on the postal voters' list and they could not cast their vote.
16. In both Petitions it is also said that serious errors on the part of the Returning Officer and her staff compounded the frauds and made a mockery of the election.
17. My task was to sort out the truth and to decide whether either or both of the elections should be set aside.
18. Before coming to the events of May and June 2004, it is necessary to set out the history of postal voting on demand and to describe the ways in which it may be used for fraudulent purposes. As this judgment will show, the system of postal voting is a recipe for fraud. How did this come about ? Ironically it came about by a well-meaning attempt to solve an increasingly serious democratic problem.

The problem: voter apathy B and its possible remedy

19. Voter apathy is a serious problem in most of the democracies of the developed world. Heedless or unaware of the historic struggles for universal suffrage, electors do not make the effort to exercise their hard-won right to vote, even if asked only once every four or five years. In the 2001 General Election in the United Kingdom barely 60% bothered to cast a vote. These

figures were similar to those in the 2001 German Parliamentary elections, the 2002 French Presidential and Parliamentary elections and the 2004 United States Presidential and Congressional elections.

20. Local democracy fares even worse. In English local elections a turnout of about 30% is the norm and, in local bye-elections, the turnout can drop below 10%.
21. Furthermore, the trend in all these countries is downwards. Fewer seem to vote each time there is an election.
22. Understandably, this has worried the political class. Much thought has gone into finding a way to reverse the trend. Clearly, one option is to make voting compulsory, with sanctions for those who fail to vote, the solution adopted in (amongst other places) Australia. Other options attempt, while keeping voting voluntary, to make it easier and more attractive to the electorate.
23. In Britain, and in particular, England, the solution has been seen to lie in postal voting. Before 2001 an elector who wished to vote by post had to have a good reason for doing so - absence, illness, disability and so forth. The criteria were not particularly onerous nor were they adhered to with maximum vigour but nevertheless some cause had to be shown why the elector could not attend his local polling station on election day.

24. In 1999 a working party known as the Howarth Working Party reviewed the 1997 General Election and made a number of recommendations. These recommendations in turn led to the Representation of the People Act 2000 ("the 2000 Act") which modified the 1983 Act. The detail was contained in the Representation of the People (England and Wales) Regulations 2001¹ ("the 2001 Regulations")². One of the main changes brought about by the latter was the introduction of what has been referred to as "postal votes on demand". In short, anyone could apply for a postal vote without having to give a reason.
25. This change was brought about by s.12 and Schedule 4 to the 2000 Act. Paragraph 2 of the Schedule lists the manner in which an elector may vote and gives a free choice whether to vote in person at a polling station (which will be referred to as a "personal vote") or to vote by post (a "postal vote") or to vote by proxy (a "proxy vote") or, in certain defined circumstances, to cast a personal vote at a polling station other than the one to which he is assigned.
26. The detailed mechanics of obtaining and exercising a postal vote will be set out later in this judgment. At this point suffice it to say that it involves a complex procedure in several stages and that it is not at first sight readily apparent why this should appear more attractive to the lazy or apathetic voter (particularly an urban voter) than walking down to his local primary school or community centre and placing one or more crosses on a ballot paper.

¹ S.I. 2001 No 341. These came into force on 16th February 2001.

² Unless otherwise stated any reference to a regulation by number is a reference to the 2001 Regulations.

27. None the less, since the introduction of postal votes on demand, which had all-party support, there has been an apparent increase in turnout - not spectacular, but sufficient to justify the claims of the scheme's supporters. Whether the increase is apparent or real is a question that may possibly have to be re-visited in the light of this judgment.

The relevant officers

28. Each Parliamentary constituency and each local authority must have a Returning Officer and an Electoral Registration officer ("the ERO"). For Birmingham City Council, as for many local authorities, the position of ERO, together with the position of Returning Officer, is held by the Chief Executive³, currently, and in June 2004, Ms Linda (Lin) Homer, who is a Respondent to both Petitions.
29. The department tasked with carrying out these functions is the Elections Office, whose leader is Mr John Owen, the "Elections Officer". In 2004 the Elections Office had a permanent staff of 14, split into two areas: registration and elections. In the run-up to an election, the Elections Office is greatly expanded. Temporary staff are taken on and employees from other Council departments are seconded to the Elections Office.

The absent voters' list

30. The absent voters' list, like the general electoral register, is the responsibility of the ERO for the parliamentary constituency or local authority.

³ In Birmingham referred to as "the Head of Paid Services".

31. Under paragraph 5 of Schedule 4 to the 2000 Act the ERO must keep a special list, referred to in the Schedule as "the absent voters' list", which consists of two sub-lists, the first being postal voters and the second being proxy voters. For the purposes of these Petitions, the court is only concerned with the former.
32. The process of registration on the absent voters' list is initiated by an application made under Reg 51. This will be dealt with in more detail later and it is enough at this stage to say that the regulation specifies the information which has to be supplied with the application.
33. The application is checked by the ERO's staff. If the application appears to come from a voter properly on the current electoral register and contains the formal requirements of Reg 51, the voter is entered on the absent voters' list. This is a purely mechanical process; the ERO has no discretion in the matter.
34. The compilation of the absent voters' list is a continuing process up to the deadlines set by Reg 56. For most postal votes, applications may be received up to 5.00 pm on the sixth day before the date of the election⁴. Thus, if, as here, election day is Thursday 10th June, the deadline is 5.00 pm on Wednesday 2nd June.

⁴ Under Reg 56(6) this excludes weekends and holidays.

35. This deadline may well have seemed reasonable to the draftsman of the 2001 Regulations who cannot have foreseen the postal vote explosion that was to occur. In Birmingham in 2004, this proximity of the deadline to polling day was a recipe for chaos. The ERO and her staff were totally overwhelmed by an influx of tens of thousands of applications in the final days before the 2nd June deadline. The staff had not only to process the applications and add the applicants to the absent voters' list but they had also to prepare and send out the voter packages to which the absent voters were entitled. This problem was particularly acute in the Bordesley Green Ward and reference will be made to the relevant evidence below.

36. At this point it should be noted that, on polling day, polling stations are supplied with copies of the absent voters' list to ensure that someone registered for a postal vote does not also cast a personal vote. The rule is inflexible. If the voter is registered on the absent voters' list, that voter will not be allowed to vote at a polling station even if he has not received his postal vote or, having received it, has chosen not to use it.

The mechanics of postal voting

Step 1 - Application

37. The first step is for the voter to apply to be included on the absent voters' list. There is an official form, which is admissible both in original and in photocopy, but it is not obligatory to use the official form provided that all the information required by Reg 51 is given.
38. In the case of a postal (as opposed to a proxy) vote the information required by Reg 51 is (in summary)
- (a) the full name of the applicant
 - (b) the address of the applicant as it appears on the electoral register
 - (c) the address to which the ballot paper is to be sent
 - (d) a statement as to whether the application is made for an indefinite period (in which case stating whether for parliamentary or local elections or both) or whether it is made for a specific identified election
 - (e) the signature of the voter.

39. Three features of this system stand out immediately. The first is that the address to which the ballot package is to be sent need not be the same as the elector's address. This provision was understandable in the era before postal voting on demand. If a voter in Manchester is working on a six-month assignment in Plymouth and cannot be in Manchester at the time the postal ballots are despatched, it makes sense for the ballot to be sent to his Plymouth address. The same can be said for a voter in hospital. Whether any thought was given to the wisdom of retaining this provision with postal voting on demand is doubtful.
40. The second feature is that, although the application must be signed, this is, in practice, a completely useless precaution. The ERO does not have any specimen signature with which to compare the applicant's signature. All the ERO's staff can do is to establish that there is something that appears to be a signature. Beyond that, they cannot go. Clearly, if the application form contains a patently frivolous signature such as "Mickey Mouse", it might be rejected but otherwise it is not the ERO's job to match the signature with the name or to reject an apparently correctly signed application.
41. The third feature is that there is no control over the way in which the application form is returned to the Elections Office. It can be handed to someone else to deliver and the practice has become common for canvassers of all political parties to "sign up" postal voters and to collect the application forms for onward transmission.

42. Once the application form is received and successfully processed, the voter's name is entered on the absent voters' list and an acknowledgement sent to the voter. In theory the acknowledgement is sent to the voter's actual address, rather than the nominated address and, again in theory, this might alert a voter who had not applied for a postal vote to the fact that someone had been using his name. In reality, however, as these Petitions show, virtually nobody whose name has been misused in this way does protest when the acknowledgement is received. The norm is for the elector to treat it as "yet another meaningless piece of paper from the Council" and to bin it.

Step 2 - despatch of the postal votes to electors

43. Postal votes are sent out by the Returning Officer; again, in practice this means the Elections Office. Under Reg 71, with ordinary postal votes, the Returning Officer is to issue the ballot documents "as soon as reasonably practicable after [she] has granted the application to vote by post". There are two obvious limitations on this provision. The ballots cannot be prepared or sent out until after nominations for the election have closed. With local elections, nominations close at noon on the 19th day before polling day. At the other end of the process, the ballots cannot be sent out too late for them to be returned by post by the close of poll. There is thus, necessarily, a short "window" for postal ballots to be sent to electors.

44. The package each voter receives contains at least five documents:

- (a) a ballot paper for the local election (in Birmingham on yellow paper): this bears a unique number

- (b) an envelope to contain the completed ballot paper marked "A" ("the A envelope"): this bears the same unique number as the ballot paper
- (c) a declaration of identity ("the DOI"): this bears the unique number of the ballot paper and of envelope A: the top part of the DOI shows the voter's name and address and the instructions tell the voter to tear this off before processing the lower part of the DOI which is the part to be returned to the Elections Office: (except where the context makes the contrary obvious, subsequent references in this judgment to "the DOI" are to this lower part)
- (d) an envelope for returning the documents to the Elections Office marked "B" ("the B envelope"): this has a window to display the return address and, in the case of Birmingham, had purple "flashes" on two corners to identify it to the Royal Mail and the Elections Office
- (e) a sheet of instructions on how to deal with the other documents.

45. In the case of the 10th June 2004 election in Birmingham, there were two further documents: a ballot paper for the European parliamentary elections (in Birmingham, on white paper) and a sheet translating the instructions into other languages. Each European ballot paper had its own unique number which also appeared on envelope A and on the DOI. This was different from the local ballot paper number; thus both envelope A and the DOI carried two numbers. Any reference in this judgment or in the documents cited to a ballot paper or DOI number will always be to the local election number.

Step 3 - the elector's task

46. The elector then completes the paperwork:
- (a) he marks the ballot paper(s) with his chosen candidate(s)
 - (b) he puts the ballot paper(s) into envelope A and seals it
 - (c) he signs the DOI in the presence of a witness
 - (d) the witness enters his name and address on the DOI and signs it
 - (e) envelope A (now containing the ballot paper) and the DOI are put into envelope B and envelope B is sealed
 - (f) envelope B is then despatched to the Elections Office.
47. Provided the completed paperwork arrives at the Elections Office, the law appears to be indifferent as to how it gets there. It may be posted, it may be taken by the elector to the Elections Office, it may be given to a kind person who undertakes to deliver it to the Elections Office or it may be handed in to a polling station on polling day (thereby, one would have thought, nullifying the entire purpose of obtaining a postal vote in the first place). Consequently there is nothing inherently unlawful in some person other than the voter being in possession of a completed ballot package provided that the outer envelope (envelope B) is sealed and unopened and the contents are not then tampered with.
48. There are no rules as to the identity of the witness to the voter's signature. He does not have to live in the same Ward as the voter or even in the same country. Provided the DOI contains a name, something that looks like an address and something that looks like a signature of the

witness, it will be treated as validly witnessed. Again, there is no mechanism for checking signatures.

Step 4 - processing the postal ballots

49. When each postal ballot arrives, the Returning Officer is obliged by Reg 82 to place it unopened in a sealed "postal voters' ballot box". The good sense of this is self-evident: this box is the equivalent of the ballot box at the polling station. The practicalities of the rule if there is a large postal vote are entirely another matter, as this election proved.
50. The Returning Officer does not have to leave all the postal voters' ballot boxes sealed until the count. Under Reg 83, he can open boxes and process the contents provided that at least one sealed box remains for last minute postal ballots which there is not going to be time to process before the count. Reg 83(3) obliges this "last postal voters' ballot box" to be taken to the count with the postal ballot box(es) (i.e. those containing fully processed ballot papers). Thus, if Reg 83 is carried out, all that should arrive at the count in respect of postal ballots are
- (a) box(es) of fully processed ballot papers
 - (b) one or more "last" postal voters' ballot boxes containing unprocessed postal ballots
- and all of them must be sealed. Failure or inability to comply with Reg 83 was a cause of serious problems at the count of the Aston votes and added to the problems at the Bordesley Green count.
51. The Returning Officer (in effect the Elections Officer) decides on times and dates for opening the postal voters' ballots boxes before the count and processing the contents. These dates are formally notified to the candidates who are entitled to be present or to have agents present at the opening. Where there are large quantities of postal ballots or where ballots come in at the

last minute, it may be necessary to have several opening sessions (as proved to be the case in Birmingham).

52. Elections Office staff open the postal voters' ballot boxes and remove the envelopes. They slit open the top envelope (envelope B) and remove the contents. Each envelope should contain one DOI and one sealed A envelope and nothing else. If it does not, the B envelope together with any contents is put to one side. If all the B envelope contains is an A envelope, the A envelope is opened to see whether it contains a DOI and a ballot paper. If it does, the DOI and the A envelope (with ballot paper) go on to the next stage. If, however, the B envelope does not contain both a DOI and either an A envelope or a ballot paper, it is to be marked "provisionally rejected" and placed in a "receptacle for rejected votes" - Reg 84(4).
53. The next stage is to examine the DOI. If this is irregular on its face (e.g. lacking the signature of the voter or of the witness), the postal vote is rejected. Under Reg 85(2) the Returning Officer is to mark the DOI "rejected" and put it, with its accompanying documents in the receptacle for rejected votes.
54. Assuming the DOI is regular on its face, the unique number on the DOI is compared with that on the A envelope. If they match, the DOI is put in one receptacle and the A envelope in another - Reg 85(4). If they do not match, they are initially put to one side.

55. There follows the opening of the ballot paper envelopes - the A envelopes (Reg 86). The number on the ballot paper is compared with the number on the envelope. If it matches, the ballot paper is placed in a "postal ballot box" for onward transmission to the count. As stated above, these boxes should be sealed. The used A envelopes are discarded once a valid ballot paper has been removed.
56. If the ballot paper does not match the A envelope, it should be marked "provisionally rejected" and put in the appropriate receptacle.
57. Unmatched DOI and ballot papers are, as one would expect, not automatically rejected from the poll. The Regulations contemplate a sorting and matching process. This is clearly essential because members of the same household often become muddled by the paperwork and, not realising that the DOI, envelope A and the ballot paper should all have the same number, mix up the documents and send one ballot paper with a differently numbered DOI and so on.
58. The correct procedure under Reg 87 is for the Returning Officer to make two lists, the first recording the unique numbers of the unmatched ballot papers and the second the unique numbers of the unmatched DOI. Under Reg 88, the Returning Officer should compare the two lists and marry up any pairs found.
59. The Regulations, however, are not complete. If carried out to the letter, they would only provide for matching in the event that

- (a) the DOI and the A envelope did not match (in which case the DOI would be listed);
- (b) the A envelope, when opened contained a ballot paper which matched the A envelope but not the DOI (in which case the ballot paper would be listed);
- (c) on comparing the lists, an orphaned DOI could be married up with an orphaned ballot paper.

60. The Regulations provided no means of matching where the DOI and the A envelope matched but the ballot paper in the A envelope did not match the envelope itself. If a Returning Officer were to play the game pedantically to the rules, any ballot paper which did not match the A envelope would have to be rejected. Indeed, if the rules were being followed literally, once the DOI and A envelope were found to match, the DOI should be consigned to the receptacle for satisfactory DOI rather than be left out for "matching". There would be no requirement to list anything at that stage.

61. Patently, this would disenfranchise voters who had become confused and put the wrong ballot paper in the A envelope but that is the effect of the Regulations.

62. In Birmingham, the Elections Office tried to work round this. If a ballot paper did not match the A envelope in which it was found, an attempt was made to find a matching DOI and, if this was successful, the ballot paper was treated as valid. I shall deal with the consequences of this later.

63. It was common ground in both Petitions that the Elections Officer and his team did not mark the unmatched documents "provisionally rejected" and they did not make the lists required by Reg 88. The reason advanced is that the number of postal ballots was so unexpectedly vast that these procedures became unworkable and matching was carried out as a continuing process by separate staff to whom the unmatched documents were handed.
64. Where documents have been successfully matched, the ballot papers go into the postal ballot boxes with the previously processed ballot papers and proceed to the count. The matched DOI are put with the other regular DOI. Any ballot paper or DOI that remains unmatched, is placed in the appropriate receptacle for rejected documents and they play no part in the count.
65. Thus, by the start of the count, there should have arrived at the venue for the count:
- (a) sealed ballot boxes from the polling stations
 - (b) sealed postal ballot boxes from the Elections office containing processed ballot papers
 - (c) one or more sealed "last" postal voters' ballot boxes containing unprocessed ballots.

Step 5 - the count

66. At the count arrangements should be made (and were made in Birmingham) for areas to be set aside on every table designated for the counting of the votes of each Ward to be used for the processing of the last postal voters' ballot boxes. The method of processing them is precisely the same as for the packages opened at the Elections Office and at the end of the process, all

that should be left on the table are the ballot papers, both personal and postal, for the counting to take place.

67. The rules relating to the ballot papers themselves are widely drawn so as to ensure that nobody is disenfranchised by mistake. Almost any mark in the box next to the candidate will be taken as a vote: the voter need not put a cross. More controversially, the Returning Officer can and will accept an altered ballot paper provided that, despite alteration, it shows a clear vote in a box next to a candidate and shows no more votes than the election permits. Thus an elector who places his cross in error, scribbles it out and puts another cross against the candidate he intended to choose will have his vote counted. This is another aspect of voting which may have to be reconsidered.
68. The votes are then counted and the results declared.

Summary of the mechanics

69. Although my description of the mechanics is long, it omits several details irrelevant to my enquiry and it elides others. The recital shows, however, that postal voting is a complex system both for the elector and for the Returning Officer. The procedures required of the Returning Officer are very time-consuming and labour intensive. The system as laid down in the 2001 Regulations, though undoubtedly workable in theory, is highly vulnerable at a number of critical points. If, as happened in Birmingham in 2004, a very large number of postal ballots are requested (or

purportedly requested) by electors - *a fortiori* if a high proportion of them are requested at the last minute - the system rapidly becomes overloaded and breaks down.

70. The following elements of the system are fundamental and contain the key to much that occurred in the 2004 election:

- (a) an application to be included on the absent voters' register must be signed by the voter himself
- (b) the DOI must be signed by the voter himself
- (c) only the voter himself is entitled to use the DOI and the ballot paper(s) issued to him by the Elections Office.

71. There are, of course, adequate provisions for helping with those with difficulties, such as people who are illiterate or blind or do not speak fluent English, but the three elements remain central to a postal ballot.

Cheating the system

72. From the description of the system given above it will be immediately apparent that cheating the system would scarcely require the talents of Professor Moriarty. As was said by Mr John Hemming, the leader of the Liberal Democrats on Birmingham Council (and Deputy Leader of the Council): "the system invites fraud".

73. In the course of his opening in the first trial, I explored with Mr Philip Coppel (counsel for the Returning Officer in both trials) a possible scheme which would deliver a simple, effective and elegant method of rigging an election.
74. The following scenario was envisaged. The (mythical) Birmingham Ward of Sidfields, is hotly contested by the Radical Party and the Diehard Party. A few hundred votes either way will secure the Ward. The unscrupulous Mr Smith determines to ensure that the Radicals will win and assembles a small team of Radical supporters to help him.
75. Smith's first move is to obtain a copy of the Electoral Register for the Ward from the Elections Office. This he can do perfectly lawfully: as a citizen and a voter he is entitled to the information.
76. The team then select, say, one thousand names at random. Prudence would dictate that those names might best be selected from areas of Sidfields known to be apathetic at election time but cunning might also suggest that traditionally Diehard areas might also be targeted.
77. An official application to vote form (an "ATV") is obtained and a thousand copies run off on the photocopier. The team sets to work completing them for the thousand names. In each case the team fills in the box on the form requiring ballot papers to be sent to an address other than that of the voter. Smith is no fool: he realises that the Elections Office will smell a rat if all the votes are sent to him at Smith Cottage. He therefore chooses a modest number of accommodation addresses which are randomly entered in the ATV as the addresses to which the ballots are to

be sent. Smith knows that the Elections Office will not have the resources to monitor the situation and, the closer the election approaches, the more frantic the Elections Office will become. Consequently he adopts the tactic of waiting to send off as many as possible of the ATVs until the final days before the deadline (six days before polling day). The later they arrive, the less likely it is that any questions will be asked.

78. The ATVs arrive at the Elections Office. They are opened and checked. They contain all the information required by Reg 51 and each is signed. The Elections Office staff have no idea whether the signatory is indeed the voter. They have to take it on trust. As the ATVs appear in order, each voter is placed on the absent voters' list and the ballot address noted. Smith now controls one thousand postal votes.
79. Once the nominations have closed, the Elections Office will send out the ballot packages as soon as practicable after registering the postal voter. The ballots are thus sent to the accommodation addresses from where the Smith team collect them.
80. The Smith team then proceeds to complete the ballot documents. If, as in 2004, it is a three-candidate election, the ballot paper is marked with three crosses for the three Radical candidates and placed in the A envelope.

81. A member of the team then removes the top of the DOI (which helpfully states the name of the voter). In the bottom half he inserts a signature resembling the voter's name, a bogus name of witness, a bogus address of witness and a bogus signature in the name of the witness.
82. The DOI and the A envelope are put into the B envelope which is sealed. All the completed packages are then put in the post or delivered to the Elections Office.
83. Before (or possibly on) the day of the count, the Elections Office staff carry out an opening of the postal votes, including the Smith votes. Each of the Smith B envelopes is opened. The staff check the DOI: it appears to be completely in order. They then check the number of the DOI against that of the A envelope: it matches. The DOI is put in the receptacle for valid DOI and the A envelope in the receptacle for valid A envelopes. The A envelopes are opened and the number on the ballot paper checked against that on the envelope: again they match. The ballot papers are put into the receptacle for valid ballot papers and go forward to the count.
84. Meanwhile, on polling day itself, several of Mr Smith's unconscious victims visit their polling stations to vote. The staff at the polling stations tell them politely but firmly that their names are on the absent voters' lists and they cannot vote at a polling station. Protests are in vain. The best the elector gets is a slip of paper with a contact name and telephone number at the Elections Office if he wishes to take it further. In reality all those electors have been disenfranchised.

85. The count arrives: the votes are counted. The Radical candidates are returned to represent Sidfields Ward by a majority of two or three hundred. Mr Smith has procured the result he wants and not the result the voters wanted.
86. This scenario represents the sophisticated approach to election fraud. There are, however, other, cruder but no less effective ways of manipulating the vote.
87. These divide into two categories. The first involves obtaining the ballot packages in their unused state and the second obtaining the ballots in their completed state. It will be noted that, for the purposes of this exercise, I am totally ignoring the tactic of visiting the elector and deceiving, bullying or threatening him into completing the documents in a particular way (usually referred to as "undue influence"). Although there were suggestions that this had happened in both the Wards with which I am concerned (and elsewhere in Birmingham), no evidence was led on the subject and I shall not consider it further. It should merely be noted that undue influence remains a huge and apparently irradicable problem with postal voting, especially in vulnerable communities, including some of those with ethnic minority electors.
88. I am therefore concentrating on fraud rather than undue influence.
89. Obtaining the unused ballot packages in turn divides (using Theft Act terminology) into "theft" and "obtaining by deception". Outright theft is simple but effective. The despatch of ballot packages to postal voters is a predictable event and the packages are clearly distinguishable.

Properties in multiple occupation often have communal post facilities: the post is left on a table in the lobby and the packages may be gathered at will. Postmen often fail to push bulky envelopes completely through house letter boxes: small boys may be easily persuaded for a modest payment to follow the postman down the street collecting the envelopes sticking out of the doors (indeed Mr Hemming produced photographs he had taken showing envelopes protruding in this way).

90. A lot of trouble may be saved by the expedient of bulk theft. Postmen are only human after all. A postman may sympathise with a particular party and be persuaded by that party to cooperate. A postman may succumb to physical threats. A postman might be an immigrant whose legal status as a UK resident is less than 100% watertight and thus open to blackmail. Inducing a postman to hand over a sackful of ballot packages is much cheaper and less labour intensive than the method involving small boys and letterboxes.
91. More subtle is the obtaining by deception. This may best be practised in communities where electors are unsophisticated or poorly educated or have little understanding of the voting process. In certain ethnic minority communities the task may be facilitated by concentrating on those with a poor command of English. The party representative, who may be a well known and respected member of the community, visits the elector and persuades him to hand over his ballot packages (better still the ballot packages of the whole family) on the basis that the representative can be trusted to do whatever is necessary. In some cases, particularly gullible

electors may be fooled into handing over unused packages by people claiming to be official "collectors" entitled to go round collecting them.

92. Once the unused ballot packages are obtained, they are processed in the same way as those obtained by Mr Smith in the scenario above.
93. The law's indifference as to the method whereby the completed ballot package reaches the Elections Office provides another opportunity for fraud. Representatives of the candidates are lawfully entitled to call on electors and offer to collect their completed packages and deliver them to the Elections Office. Indeed some parties (not confined to the Labour Party by any means) actually encouraged their helpers to do this.
94. Once, of course, the completed ballot packages come into the possession of the unscrupulous, their contents can be "checked". If a voter has voted the right way, his package can be re-sealed and despatched to the Elections Office with no more ado. If, however, he has been so unenlightened as to vote for the wrong party, the fraudster has the choice of simply consigning the package to the dustbin or of altering the ballot paper to remove the wrong votes and substitute the right votes.
95. The value of alteration is obvious. The fraudster knows that, provided the ballot paper contains the correct number of crosses, the Returning Officer will ignore alterations and accept the votes.

At the same time, the elector is genuinely on the absent voters' list and the voting package is (save for the altered crosses) absolutely genuine.

96. I have dealt at some length with the (main) methods of cheating with postal votes. It must be emphasised that this is not an academic *jeu d'esprit* by ingenious lawyers discussing possibilities in the calm of a courtroom. The reason I have described these frauds in detail is that most, if not all, of them actually occurred in Birmingham in the summer of 2004.

Electoral offences

97. It goes without saying that all the methods of cheating the postal ballot are unlawful. Most of them involve the commission of criminal offences.

98. Personation has always been criminal. Section 60 of the 1983 Act provides:

- (1) *A person shall be guilty of a corrupt practice if he commits, or aids, abets, counsels or procures the commission of, the offence of personation.*
- (2) *A person shall be deemed to be guilty of personation at a parliamentary or local government election if he -*
- (a) *votes in person or by post as some other person, whether as an elector or as proxy, and whether that other person is living or dead or is a fictitious person; or*
- (b) *votes in person or by post as proxy -*
- (i) *for a person whom he knows or has reasonable grounds for supposing to be dead or to be a fictitious person; or*

(ii) when he knows or has reasonable grounds for supposing that his appointment as proxy is no longer in force.

(3) For the purposes of this section, a person who has applied for a ballot paper for the purpose of voting in person or who has marked, whether validly or not, and returned a ballot paper issued for the purpose of voting by post, shall be deemed to have voted.

99. A conviction for personation after trial on indictment carries a maximum sentence of two years imprisonment⁵.

100. Personation is a perennial problem and the Elections Office in Birmingham were on the alert for it. Traditionally, however, personation has involved personal voting (i.e. at a polling station) although proxy fraud is not unknown. The staff in Birmingham were thus alive to the dangers of personation at polling stations and had taken precautions against it.

101. Personation at polling stations is necessarily a small-time business. It is also a risky business. There is always a danger that the staff at the polling station may recognize the imposter or that some other elector may do so. If the personator is using the identity of a living voter resident in the area, the true elector may show up at the polling station and the fraud come to light. If the identity is assumed of someone who is dead or has left the district, these facts may be known to polling staff.

⁵ S. 168(1) of the 1983 Act.

102. Well organised fraudsters may get away with, say, a score of personated votes but it is only in exceptional circumstances that the game would be worth the candle.
103. Personation with postal votes, on the other hand, as will be seen, carries very few risks and can be carried out on a large - indeed on an industrial - scale. Only rarely will a score of bogus votes be guaranteed to decide an election: but when the bogus votes can be entered in hundreds or even thousands, the chances of success are clearly much improved.
104. Almost all of the methods of fraud set out above involve personation. Any use of the ballot paper and/or its accompanying DOI by a person other than the voter to whom they were issued involves personation. Purporting to witness the signature of the voter on a DOI when the witness knows that the real voter is not signing makes the witness a party to the personation.
105. Alteration of a ballot paper by substituting one vote for another is not only personation under s.60 of the 1983 Act but also a voting offence under s.65(1)(a). Destruction of ballot papers is also an offence under s.65(1)(b) as is the fraudulent defacing or destroying of a DOI. Supplying a ballot paper to a person without authority is an offence under s.65(1)(c) as is fraudulently putting into a ballot box any paper other than the ballot paper which the person is authorised by law to put in under s.65(1)(d).
106. Any person who destroys, takes, opens or otherwise interferes with a packet of ballot papers contravenes s.65(1)(f).

107. Schedule 4 to the 2000 Act deals with absent voting and paragraph 8 makes it an offence to make a statement one knows to be false in "any declaration or form used for any of the purposes of this Schedule". This covers any person who makes an application for a postal vote in a name other than his own. It will be noted that knowledge of falsity is sufficient to constitute the offence. No other mental element (e.g. dishonesty, intention to deceive etc) is required.
108. There is a distinction between "corrupt practices" and "illegal practices". Personation is, as stated in s.60(1) a corrupt practice. There are further corrupt practices with which I am not concerned here, including bribery, treating and undue influence. The other offences listed above are illegal practices.
109. There is a time limit on prosecutions imposed by s.176 of the 1983 Act of one year from the commission of the offence. This is one of the reasons why election Petitions should always be heard as soon as practicable after the election to which they relate.
110. In addition to the offences created by the 1983 and 2000 Acts, there are the offences of the general criminal law such as:
- (a) theft
 - (b) forgery
 - (c) criminal damage
 - (d) conspiracy to defraud.

111. Indeed, during the trial of these Petitions the press reported the conviction of a man in Blackburn and Darwen for committing just the kind of postal vote fraud alleged in the Petitions and the reports indicated that he had been charged with conspiracy to defraud rather than a specific electoral offence.

112. In summary, the principal methods of electoral fraud involving postal voting are all criminal and carry sanctions which include imprisonment.

Election Petitions

113. In addition to criminal sanctions, an election tainted by electoral fraud may be the subject of an election Petition such as the two Petitions involved here.

114. A parliamentary election may be questioned by a Petition under s.120 of the 1983 Act and a local election by a Petition under s.127. Section 127 provides:

An election under the local government Act may be questioned on the ground that the person whose election is questioned -

(a) was at the time of the election disqualified, or

(b) was not duly elected,

or on the ground that the election was avoided by corrupt or illegal practices or on the grounds provided by section 164 or section 165 below, and shall not be questioned on any of those grounds except by an election Petition.

115. Under s.159 where a candidate who has been elected is reported by an election court personally guilty or guilty by his agents of any corrupt or illegal practice, his election shall be void.

116. As to the grounds provided by ss. 164 and 165, I need not deal with s.165 here but s.164 is crucial. It states:

- (1) Where on an election Petition it is shown that corrupt or illegal practices or illegal payments, employments or hirings committed in reference to the election for the purpose of promoting or procuring the election of any person at that election have so extensively prevailed that they may be reasonably supposed to have affected the result -*

 - (a) his election, if he has been elected, shall be void, and*
 - (b) he shall be incapable of being elected to fill the vacancy or any of the vacancies for which the election was held.*
- (2) An election shall not be liable to be avoided otherwise than under this section by reason of general corruption, bribery, treating or intimidation.*
- (3) An election under the local government Act may be questioned on the ground that it is avoided under this section.*

117. Petitions are heard by an election court and s.145(1) provides:

At the conclusion of the trial of a Petition questioning an election under the local government Act, the election court shall determine whether the person whose election is complained of, or any and what other person, was duly elected, or whether the election was void, and the determination so certified shall be final to all intents as to the matters at issue on the Petition.

118. Returning to s.127, therefore, the section makes it clear that an election Petition is the only way of having the election of a local councillor set aside. Conviction of an election offence of itself will not have this effect, although it will oblige the offender to vacate his office (s.173).
119. There are strict time limits on bringing an election Petition (in general 21 days from the date of the election - s.129). A contested Petition is likely to prove expensive, although public funding is available in appropriate cases to bring or defend a Petition (as happened in the Bordesley Green Petition).
120. Although it has a public character, an election Petition is, in all but name, a civil action. It is governed by the Civil Procedure Rules. The trial is, in essence, adversarial and the Petitioners undertake the burden of proving their case.
121. For this reason, election Petitions are not common and frequently founder before reaching trial.

Grounds for setting aside an election

"Not duly elected"

122. I am not concerned with questioning elections on the ground that the person elected was disqualified at the time - s.127(a). Paragraph (b), however, deals with the case where the person concerned was "not duly elected".
123. In broad terms this encompasses two situations. The first is where sufficient of the votes cast for the successful candidate can be shown to void (for example because of personation) as to reduce the candidate's total below that of some other candidate. This used to be the norm of election Petitions. The loser in a close contest would put in issue enough votes cast for the winner to enable him to overtake the former winner and be declared winner in his place. In those circumstances, the correct course for the election court, if satisfied of the claim, is to unseat the Respondent and to declare the Petitioner elected. There is no new election.
124. The second situation, which was present in both Petitions, is where the Petitioner alleges that the conduct of the election was so flawed as to make the result unsafe and thus necessitate a new election being held.
125. In both Petitions, the Petitioners question the conduct of the election by the Returning Officer and her staff. This is undoubtedly ground for setting aside an election but the ground is very closely circumscribed. The relevant parts of s.48 state:
- (1) No local government election shall be declared invalid by reason of any act or omission of the returning officer or any other person in breach*

of his official duty in connection with the election or otherwise of rules under section 36 ... above if it appears to the tribunal having cognizance of the question that -

- (a) the election was so conducted as to be substantially in accordance with the law as to elections; and*
 - (b) the act or omission did not affect its result.*
- (2) A local government election, unless questioned by an election Petition within the period fixed by law for those proceedings, shall be deemed to have been to all intents a good and valid election.*

126. I shall return to the construction of s.48 in due course. It is sufficient to note for these purposes that if a Petitioner can establish that there were acts or omissions on the part of the Returning Officer which pass the tests set by the section, he may have the election set aside irrespective of the conduct of the candidates and without proof of any wrongdoing on their part.

Corrupt or illegal practices and general corruption

127. If a Petitioner proves corrupt or illegal practices on the part of the successful candidate or his agents, the court may set aside the election of that candidate and declare the election of the next candidate in the poll in his place or it may declare the whole election void, leading to a new election taking place.

128. If the Petitioner proves general corruption within s.164, the normal course would be to set the election aside and order a new election.

129. Section 164 goes wider than the successful candidate: it encompasses corrupt or illegal practices for the purpose of promoting or procuring the election of any person at the election. Thus corrupt practices by a *losing* candidate may, if they can be reasonably supposed to have affected the result, lead to an election being declared void.
130. If it is proved that corrupt or illegal practices were employed by the successful candidate or his agents or, even, under s.164, for the benefit of an unsuccessful candidate, in each case the person concerned is debarred from standing in the new election.
131. Finally on this point, if the Petition contains a charge of corrupt or illegal practices, under s.145 the election court must render a report to the High Court under ss.158 and 160 of the 1983 Act. The court must report whether any corrupt practices have, or whether there is reason to believe that any corrupt practices have, extensively prevailed at the election in the area of the authority for which the election was held or in any electoral area of that authority's area.
132. Under s.158, the report must state whether any corrupt or illegal practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate in the election and whether any of the candidates has been guilty of a corrupt or illegal practice by his agents (with some safeguards as to actions of agents without the knowledge or consent of the candidate). Section 160 obliges the court to state the name of any person proved at trial to be guilty of a corrupt or illegal practice (this includes the candidates).

133. The consequence of being named in the report under s.145 is that the person is deprived of his vote and debarred from standing for Parliament or any other elective office (including that of councillor) and must vacate any office held immediately - s.160(4). Where the person is guilty of a corrupt practice the ban lasts for five years and where he is guilty of an illegal practice for three - s.160(5). There are further adverse consequences for Justices of the Peace - s.161 - members of legal and certain other professions - s.162 - and persons holding certificates under the Licensing Acts - s.163.

Election Petitions - summary

134. It is thus apparent that commission of the kinds of fraud in the use of postal votes I have described above exposes those responsible to an election Petition which may have the consequences of unseating the successful candidate or of causing the entire election to be avoided and a new election held.

135. A Petition may also lead to the result that the successful candidate (and others) are effectively disqualified from election at any new poll.

136. In theory therefore an election Petition carries with it potentially Draconian consequences for a candidate elected in a flawed election and for others.

Detection and sanction

137. It may be said that there are adequate safeguards against the kind of postal vote fraud I have described. An offender faces the might of the criminal law. A candidate who secures an election by fraud may face an election Petition with serious results.
138. No sanctions are of any real value, however, unless elections can be policed. As became very apparent in the trial of these Petitions, in real terms the policing of electoral fraud is minimal, to the point of being almost non-existent.

The Returning Officer

139. The Returning Officer has no duty to investigate electoral offences and no resources to do so either. More to the point, as Mr Coppel rightly submitted in his opening in Bordesley Green, the Returning Officer has no power to investigate.
140. The matter was succinctly summarised by the Electoral Commission when, on 16 April 2004, it published its *Draft code of conduct for political parties, candidates and canvassers on the handling of postal voting applications and postal ballot papers*:
- 29. Any suspicion of electoral malpractice that has substance should in the first instance be brought to the attention of the Returning Officer. However, the Returning Officer has no duty or discretion to investigate allegations of offences under electoral law. Accordingly, allegations of offences under electoral law should be made to the police. (emphasis added)**
141. In Mr Owen's first witness statement, he stated:

39. *This statement by The Electoral Commission accorded with my view in June 2004 as it does with my view now: the Returning Officer has neither duty nor discretion to investigate such matters. From this it follows that the Returning Officer cannot go yet one step further and reject ballot papers on the basis of mere allegations of offences under electoral law.*

142. This will be confirmed by my recital of the procedures. In outline the Returning Officer cannot:

- (a) check the signature on the application to vote;
- (b) investigate whether an ATV is genuine;
- (c) disallow any ATV which appears regular on its face;
- (d) refuse to enter an applicant on the absent voters' register;
- (e) refuse to send a ballot package to a voter on the absent voters' register;
- (f) refuse to accept a B envelope and contents delivered (by whatever means) to the Elections Office before close of poll;
- (g) reject any DOI which appears regular on its face;
- (h) reject any ballot paper which matches its relevant A envelope and DOI;
- (i) reject any ballot paper which has been altered so long as it still shows a vote against the name of a candidate.

143. The Returning Officer has thus no policing function whatsoever.

The Police

144. There can, of course, be no doubt as to the powers and duties of the police to investigate fraud and electoral offences. How effective is this in practice ?
145. As was confirmed by the police officers who gave evidence in the Aston Petition, ordinary rank-and-file officers are normally given no training in electoral law or in determining whether conduct might amount to an electoral offence.
146. Nor is the position of their superiors much better. There may be one or two more senior officers - say a Detective Inspector - with some training in electoral law, probably (as in Birmingham) in the fraud or economic crime department. Even for such an officer, however, electoral concerns are likely to form a minor and very occasional part of his duties.
147. Quite apart from the lack of training, there is a marked reluctance on the part of the police to involve themselves in electoral matters. If they are presented by somebody else with hard evidence of fraud, they will investigate but they tend not to go out of their way to look for it.
148. This is not helped by the invidious position in which a police force is put when investigating electoral fraud in a local authority context. The alleged fraudsters may, after all, be members of the political authority to which the force is answerable. The noble cop who fights corruption at City Hall at risk of his career may well be a staple of Hollywood movies but he is much rarer in real life.

149. In the case of the Birmingham elections of 2004 the attitude of the West Midlands Police to allegations of fraud could, at the kindest, be described as one of Olympian detachment. A number of political parties - in particular the Liberal Democrats - made it clear well before the election that they expected serious electoral fraud. In the course of the election, the police were presented with a large number of complaints. Mr Hemming himself told me he had presented some fifty dossiers to the police.
150. The reaction of the police can be best summed up by drawing attention to the code name they gave to the complaints of malpractice - *Operation Gripe*. This indicates better than anything else their view that the whole business was a complete waste of their time and that Mr Hemming and the other complainants were a tiresome nuisance.
151. I shall deal in detail at the appropriate time with the episode of the warehouse which is central to the Aston Petition. Suffice it to say that the police participation in this episode amply justifies the strictures set out above.
152. That said, two factors must in fairness be advanced in favour of the police.
153. The first is obvious. The West Midlands area is a large urban area with all its inherent policing problems. The police force is, I am sure, overstretched and under-resourced and has many more pressing crimes to investigate than poll-rigging. By a macabre coincidence, the trial of the Aston Petition took place at the same time as the trial of the four young men charged with (and

subsequently convicted of) murdering two young women with machine-guns in the course of gangland violence in the very area - Aston - of the Petition itself. Patently, policemen who are dealing with that kind of crime must give it priority.

154. Secondly, as these Petitions have shown, establishing electoral fraud is difficult. It requires long, expensive and careful investigation. In both Petitions, the core of the case has been established by the conduct of the Scrutiny followed by extensive document examination by handwriting experts. This kind of enquiry would normally require resources which a police force would only feel it appropriate to deploy in the case of serious financial fraud.
155. In the Bordesley Green Petition, evidence was gathered by house-to-house visits of supposed postal voters to find out whether they had obtained a postal vote and, if so, whether they had exercised it. The vast majority of those visited were members of the Asian community and many had poor English and, in some cases, I was told, poor literacy. Added to this would be the sensitivities necessarily involved in investigating whether (and if so how) people have voted. It must surely be any detective constable's nightmare.
156. Consequently, while I feel I must be critical of some aspects of police involvement - or, more accurately, non-involvement - in the 2004 election, I am fully aware of the difficulties they faced and the priorities they (justifiably) chose.

157. The point is, however, that the rôle of the police in monitoring elections and preventing electoral fraud, whatever may be the theoretical position, is, in practice, marginal. If an open-and-shut case is presented to them, they will act and act promptly but they cannot and, it seems, will not be remotely proactive.

What is left ?

158. If the Returning Officer cannot act and the police will only act in limited circumstances, what is left ? In reality, all that is left as a safeguard is the right of a disgruntled losing candidate or an aggrieved voter to Petition.
159. As I have explained, Petitions are very cumbersome and expensive and, when all is said and done, they are private legal actions.
160. As a means of controlling electoral fraud, they are both inappropriate and ineffective. Very few Petitions are brought and the difficulties of bringing them are such that very few Petitioners persist. Although the current Petitions were not, as some enthusiastic newspapers claimed, the first of their kind in a hundred years, there certainly have been very few fully fought out Petitions where serious electoral malpractice has been alleged in that period.
161. It is thus clear that the policing of electoral fraud by anyone is minimal.
162. What is equally clear is that any potential electoral fraudster can easily work out that the policing of electoral fraud is minimal.
163. To suggest an analogy, consider the Olympic Games. Drug abuse is a constant problem. Let us for a moment assume that

- (a) the International Olympic Committee does not have the power to control drugs or to order drug tests (and thus no power to disqualify abusers);
- (b) the police will only act when someone presents them with a clear case of drug use and, even then, have only limited powers, after the event, to seek drug samples;
- (c) the only real remedy is an action in the civil courts by the losers against the winners in which the losers would have to prove drug abuse to the criminal standard of proof by assembling evidence long after the race has been run.

164. If all that were the case, one would expect drug use to be universal among athletes at the Games. The race would not be to the swift: it would be to the country with the best chemists.

165. If electoral fraud is easy and is minimally policed, it will be widespread.

166. If there are virtually no means whereby fraud can be brought to light and sanctioned, then "hard evidence" of fraud is inevitably going to be scarce. Whether, in those circumstances, it is prudent (or even honest) to regard absence of "hard evidence" as proving that the problem does not exist is, of course, another question entirely.

A problem foreseen

167. As already stated, devising methods of cheating the postal voting system requires no great ingenuity. The moment postal voting on demand was introduced, the likelihood of fraud - and of other problems such as undue influence - was immediately detected.

168. In his principal witness statement in both Petitions Mr Owen sets out a summary of the involvement of the Electoral Commission from the inception of the postal vote changes. It does not make happy reading. Neither time nor space make it possible for me to reproduce it in this judgment but I would commend it to anyone interested in seeing how the events of 2004 in Birmingham were clearly predicted. In this section and in the section dealing with the Birmingham elections in general, it must be assumed (unless otherwise stated) that any document I refer to is one which has been produced by Mr Owen and is an exhibit to one of his witness statements.
169. Although Mr Owen discussed them in his statement, I need not consider the various pilot schemes for all postal voting elections. It is enough to say that the problems inherent in all postal voting under the 2000 Act were to be found in the pilot schemes as well.
170. The starting point is that postal voting on demand was introduced with, essentially, no additional safeguards being put in place. Although elaborate provisions for the mechanics of postal voting were introduced by the 2001 Regulations, the method of voting itself was essentially that in force before 2001. The DOI, for example, dated back to (at least) the 1983 Act and the Local Elections (Principal Areas) Rules 1986 ("the 1986 Rules").
171. The system of registration by household with no identification of those being placed on the electoral register was retained. As pointed out above, while the scheme required voter

signatures on both the ATV and the DOI, the absence of any requirement for a validating signature to be lodged on registration, made this precaution futile.

172. The 2001 local authority elections occurred too soon after the introduction of postal voting on demand for any meaningful evaluation of the change to be carried out. By the time of the May 2002 elections, however, fraud had already raised its ugly head.
173. On 20th August 2002, Mr Owen wrote to the Chairman of the Electoral Commission expressing concern about postal vote fraud and informing him of the allegations of personation and other fraud occurring in the May 2002 elections.
174. In October 2002 the Electoral Commission published a consultation document entitled *Absent Voting Review. A review of postal and proxy voting in Great Britain*. On 19th November 2002 Birmingham City Council (on Mr Owen's advice) responded stating that the problem of enlarged opportunities for electoral fraud were recognised. Although the Elections Office did want to be empowered to play a more intense role in identifying fraud, it recognised that the legislative arrangements prevented the office from so doing.
175. In March 2003 the Electoral Commission published its report, *Absent voting in Great Britain. Report and recommendations*. It made a number of important recommendations to tighten the integrity of the postal ballot process.

176. In July 2003 the Electoral Commission published its evaluation of the 2003 electoral pilot schemes *The shape of elections to come. A strategic evaluation of the 2003 electoral pilot schemes*. This document recognised the real dangers of fraud and made a number of detailed recommendations to combat it. The Commission promised to develop in conjunction with political parties a Code of Practice in relation to the handling of postal ballots by representatives of political parties.
177. The Government formally responded in September 2003 in *The Government's Response to The Electoral Commission's report: The Shape of Elections to Come - A Strategic Evaluation of the 2003 Electoral Pilot Schemes* (Cm 5975).
178. At the same time as evaluating the pilot schemes, the Electoral Commission also published a document entitled *Voting for Change. An electoral law modernisation programme*. This stated:
- Our central recommendation in relation to enhancing security of the electoral process is that we must move from the existing system of household registration to one of individual registration. Current law on electoral registration is still very much based on that introduced in the nineteenth century with more recent changes grafted on. The household canvass, for example, is a throwback to a time when the franchise was based on property ownership. Individual registration is vital to security because it will allow for the first time individual identifiers to be provided by every voter - at minimum a signature and date of birth. In our view, reform of voter registration is the key to providing the appropriate level of security for all elections, and particularly in relation to absent voting....***

179. On 21 October 2003 the Electoral Commission published, principally to returning officers and electoral registration officers, Circular EC32/2003 entitled *Code of conduct for political parties, candidates and canvassers on the handling of postal voting applications and postal ballots* and on 16 April 2004 it published its general *Draft code of conduct for political parties, candidates and canvassers on the handling of postal voting applications and postal ballot papers*.

180. In the latter, under the heading "Background to the Code", the Commission made a number of remarks worth repeating:

The Commission is also aware that some political parties, and other bodies promoting postal voting, encourage electors to return the application form to them rather than the local electoral registration officers. This can provide parties and candidates with early and comprehensive information about those voters who choose to vote this way. However, the Commission has strong concerns about this approach. During the 2001 general election when postal voting "on demand" was available for the first time, applications were sent to the wrong authority, arrived after the deadline or caused great inconvenience for the electoral registration officer's staff when large bundles were held back and only delivered at the last minute ...

22. *The Commission is aware that there have been instances where postal ballots have been directed to one or more "warehousing" addresses to enable parties or candidates to take them out personally to electors and so encourage their completion. This inevitably delays receipt and can give rise to allegations of impropriety. Electoral administrators and the Royal Mail should be alert to instances where a large number of postal ballots are delivered to a single*

address and should bring any suspicions to the attention of the police for investigation.

23. *The Commission is strongly of the view that under no circumstance should candidates or canvassers handle ballot papers. Handling a ballot paper is not at present a criminal offence, but it is a criminal offence to:*

- *unduly influence a voter*
- *fraudulently complete a ballot paper; or*
- *prevent or interfere with the return of a ballot paper...*

The Commission believes that avoiding any direct contact with ballot papers is the easiest way to avoid allegations - whether founded or unfounded - of electoral fraud in this context ...

26 *As long as witnessed declarations of identity are used, the Commission believes that political parties, candidates and canvassers should not volunteer to witness a voter's declaration of identity, but should only do so where asked and where the individual is known to them. Equally, the Commission believes that a single individual should not act as witness to large numbers of declarations of identity. The same witness signature on multiple declarations can raise suspicions when the ballot papers are verified, and may be challenged or referred to the police for investigation.*

181. As will be seen, these remarks clearly condemn all the practices adopted (in the teeth of the Code) by the political parties in Birmingham in 2004.

182. In August 2004 the Electoral Commission published its report into postal voting, entitled *Delivering democracy? The future of postal voting*. In his Preface, the Chairman of the Commission said:

As our polling shows, public confidence in postal voting has declined as a result of the June experience in comparison with previous levels, so it is vital that future voting arrangements can command high levels of public confidence

...

the Commission believes that work can and must be done to improve the process of postal voting on demand, improve security and the capacity of electoral administrators to manage the throughput of postal votes.

In particular, the Commission urges the Government to agree to introduce a system of individual electoral registration, which is the key building block on which safe and secure remote elections can be delivered.

183. The Government formally responded in December 2004 in a document entitled: *The Government's Response to The Electoral Commission's report: Delivering democracy? The future of postal voting* (Cm 6436).

184. This stated:

... There are concerns about electoral fraud in the context of postal voting (and particularly all-postal voting), in June those concerns were certainly exacerbated by press reporting of supposed malpractice (often actually in non-pilot regions), but the concerns are not justified by objective evidence. That is not to say that the public's concerns, and the level of public confidence in any innovation, is not of critical importance: of course it is. But the facts should not be ignored when considering policy for the longer term.

185. As of the date of this judgment, no significant change has been made to the postal voting system, no safeguard has been introduced and not one of the recommendations of the Electoral Commission has been adopted. The response of the Government has been that problems of

electoral fraud are more apparent than real and are the product of a combination of irresponsible media scares and public resistance to innovation.

186. To say "the concerns are not justified by objective evidence" is to gloss over two major factors:
- (a) (as stated above) where there are ineffective means for bringing fraud to light, then "hard evidence" of fraud is inevitably going to be scarce;
 - (b) no serious independent investigation was ever carried out into postal vote fraud.
187. In short, there is likely to be no evidence of fraud, if you do not look for it. Especially if a policy decision is made not to look for it.

Summary

188. Both the Electoral Commission and Mr Owen not only warned about fraud but actually drew attention to the particular aspects of the system that were vulnerable to fraud. On several occasions the Electoral Commission made detailed practical recommendations for tightening the law and warned of the consequences if this were not done. No action was taken.

The 2004 Birmingham Elections

Background

189. Birmingham is the largest local authority in England and Wales with approximately 720,000 electors, 11 Parliamentary constituencies and currently 40 local government Wards. Birmingham's Wards, each with approximately 18,000 electors, are three times bigger than

most local authorities. 33% of the population in Birmingham is from Black or Minority Ethnic communities and within this population a large number of citizens do not speak English as their first language.

190. Birmingham is a metropolitan district which now has 120 councillors in 40 Wards (3 councillors per Ward). Metropolitan district councils retire in thirds so under normal circumstances there would be one vacancy in each Ward at the annual elections (held in May). Councillors are elected for a 4 year term so every fourth year is a fallow year.
191. For about twenty years prior to 2004, Birmingham City Council had 39 Wards and operated the system whereby in each of three years out of every four, one councillor in each Ward retired and a new election was held, although, of course, the outgoing councillor was normally eligible for re-election if he chose to stand. There had not been a full Council election during that period.
192. Following a periodic electoral review, however, Birmingham's electoral arrangements were updated and the number of Wards increased from 39 to 40 with new Ward boundaries. This affected all Ward boundaries, though some more than others. Comparisons made in this judgment between the position in 2004 and that in earlier years must be seen in the context that there had been boundary changes, though in the event little of significance turns on those changes.

193. The Statutory Order confirming the new boundaries was not made until November 2003 and the annual revised electoral register was required to be published, based on the new boundaries, by 1st December of that year as usual. The Elections Office had to undertake a full review of polling district boundaries and polling station locations (during January and February 2004) resulting in a different allocation of electors to polling stations and the publication of a further revised register by 1st March 2004. This was a major piece of work, which involved carefully checking boundaries, reducing the number of polling stations from 658 to 525 and reallocating electors to the new polling districts and then to the polling stations.
194. The Statutory Order obliged the Council to conduct a "whole council" election. All three seats in each new Ward would be open to election. The difficulties arising from this situation are self-evident. A three-candidate election is a completely different prospect from three one-candidate elections held on an annual basis. Each voter has three votes and there will be a multiplicity of candidates. The major parties will try to field three candidates per Ward and there will be minor parties, *ad hoc* parties and independent candidates. Voters do not always vote a "straight ticket" but sometimes spread their votes across the parties.
195. Organising a multi-candidate election involves a much greater logistical exercise. The performance of the Birmingham Elections Office in 2004 must therefore be viewed in the context that this was the first full-council election in (virtually) a generation and the first since the introduction of postal voting on demand.

196. But this was not all. The Government announced at a very late stage that the elections to the European Parliament would be held on the same day as the local authority elections - 10th June 2004. I do not consider the words "very late stage" to be unfair in the light of the following table of statutory instruments implementing this decision (most of them coming into force only a day or so after being made):

- (a) the European Parliamentary Elections Regulations 2004 were made on 22nd March 2004 and came into effect on 23rd March 2004
- (b) the Representation of the People (Combination of Polls) Regulations 2004 were made on 22nd March 2004 and came into effect on 23rd March 2004
- (c) the European Parliament (Number of MEPs) (United Kingdom and Gibraltar) Order 2004 was made on 27th April 2004 and came into effect on 1st May 2004
- (d) the Local Elections (Principal Areas) (Amendment) Rules 2004 were made on 4th February 2004 and came into force on 1st March 2004
- (e) the European Parliamentary Elections (Local Returning Officers' Changes) (Great Britain and Gibraltar) Order 2004 was made on 6 May 2004
- (f) the European Parliamentary Elections (Returning Officers) Order 2004 was made on 14 March 2004.

197. Ms Homer was designated as the Returning Officer for the West Midlands Region, an area with over four million voters.

198. Thus, Mr Owen and the Elections Office had to face the prospect of handling:

- (a) the first full-council election for twenty years
- (b) an election with new Wards and new boundaries
- (c) a simultaneous European election.

Furthermore the timescale for organising these elections was very short. In practical terms, most of the arrangements could only be made in the last three months before polling day.

Mr Owen's preparations

199. Given that both Petitions contain serious criticisms of the organisation of the poll on the part of the Returning Officer, it is necessary to set the picture by outlining the preparations made by Mr Owen and the Elections Office.

200. Let me start by dealing with Mr Owen himself. On any showing, he is one of this country's foremost experts on election practice. In a career devoted to elections stretching over 30 years, he has spent the last 14 handling elections in Birmingham (as stated above, England's largest local authority).

201. His statement sets it out:

I regularly speak at national seminars on electoral matters and was the editor and chief writer of a well-respected guide to the 2001 Regulations that introduced rolling registration and postal voting on demand. When the Association of Electoral Administrators ("AEA") first introduced its qualifications I was one of the first to attain Diploma level and went on to be a Qualifications Board Examiner. I am also an AEA accredited trainer. I have

developed good working relationships with relevant government departments and the Electoral Commission and have membership of numerous national working groups including:

The Electoral Commission's Training Strategy Advisory Group

The Association of Electoral Administrators' Management Board

The Department of Constitutional Affairs' General Election Preparation Project Advisory Group.

I have represented the Government and the European Union as an international elections observer on 3 occasions (twice in Romania and once in Ghana).

202. Mr Owen issued clear and detailed written guidance to the Elections Office staff:

- (a) *Instructions for the Verification of the European and City Council Ballot Papers and The Counting of the City Council Ballot Papers;* (provided to those handling the count)
- (b) *Combined European Parliamentary and Birmingham City Council Elections - 10 June 2004. Polling Agents: Note to Presiding Officers* (provided to Presiding Officers and Polling Agents and also to election agents of candidates in the Wards within which any Polling Agent was appointed)
- (c) *Combined European Parliamentary Election (West Midlands Region) and City Council Elections - 10 June 2004. Ballot Box Collection Arrangements.*

203. In addition, a training programme was instituted. All polling staff (presiding officers and polling clerks) attended a training session and were given the following handbooks:

- (a) *Parliamentary election handbook for presiding officers and poll clerks in Great Britain combined elections*
- (b) *A quick guide for polling station staff in Great Britain*
- (c) a training booklet entitled *Role of a poll clerk (PC) in a traditional election*
- (d) a training booklet entitled *Role of a presiding officer (PO) in a traditional election.*

204. Presiding Officers also received additional instructions, namely:

- (a) *Additional Instructions to Presiding Officers, and*
- (b) (for Presiding Officers in Wards where Polling Agents were appointed) *Polling Agents: Note to Presiding Officers (POs).*

205. In relation to postal votes, Mr Owen held briefing sessions and issued a formal instruction document *Postal Opening Instructions.*

206. With regard to general preparations for the June 2004 elections, therefore, it is hard to see what more Mr Owen could have done and I would be surprised if many of his fellow Elections Officers in other local authorities had matched his standards of information and training. I shall deal with the postal voting problems separately.

Preparations for dealing with postal votes

207. When postal voting on demand was introduced in 2001, its opportunities (both for honest voting and for fraud) were not fully appreciated. Consequently in 2001 only about 7,000 postal votes were issued in Birmingham.
208. In May 2002, the number of postal votes had risen to 20,047. It was at this election that the question of postal vote fraud first arose and was reported by Mr Owen to the Electoral Commission (see above).
209. Matters remained much the same in 2003. The number of postal votes was now 28,019, an increase of about 25%. Concerns about postal vote fraud had increased but nobody seems to have taken any action about this.
210. In 2004, however, things were clearly going to be different. The whole council was up for election and the Ward map had been re-drawn. Although I shall return to this later, it was clear that (at least) the Labour Party and perhaps others were going to take active steps to encourage postal voting.
211. Mr Owen had expected and planned for a substantial rise in postal votes. One of the necessary tasks was to arrange for the printing of ballot papers. For sound administrative reasons the sequentially numbered ballot papers were always assigned first to postal voters and second to polling stations. Thus it would be known that the first tranche of ballot papers represented postal

voters. It was this which enabled the court to separate the postal votes from the personal votes at the Scrutiny.

212. Mr Owen's estimate was that the number of postal votes might rise to 40,000 but his long experience in the business gave him a hunch that the numbers might be much higher, say 50,000. In the end, from an abundance of caution, his printing plans allowed for 60,000 postal votes.
213. It was felt that the existing premises of the Elections Office at 150 Great Charles Street were insufficient to cope with the predicted numbers of postal votes and alternative accommodation should be found. As a result a large room (5,000 square feet) at One Victoria Square was rented during the 2004 election period. This was approximately a 5 minute walk from the Elections Office.
214. The Elections Office hoped to recruit sixty staff and for the last three weeks before polling day between thirty and sixty were engaged in dealing with postal votes. Staff were drafted in from other departments of the Council.
215. Having considered the large volume of evidence relating to the preparations made by the Elections Office for the 2004 elections, I have no hesitation in stating my conclusions that:
- (a) the predictions of the likely number of postal votes made by Mr Owen were wholly reasonable - indeed, given that he had provided for a doubling of the number from 2003, some would have said that he was being unduly cautious;

- (b) the training given to staff by the Elections Office was thorough and detailed and cannot be faulted;
- (c) the arrangements for handling postal vote applications and the processing of the votes themselves were adequate for the predicted number of postal votes.

216. In short, the Elections Office planned for what was reasonably foreseeable. In the event, what happened was not reasonably foreseeable.

Political composition of the Council

217. Before the June 2004 election, the Council was controlled by the Labour Party. The party leader and Leader of the Council was Sir Albert Bore. In fact, Labour did not have an absolute majority. Of the 117 councillors, Labour had 56 (59 would have been a majority), the Conservative Party 35 and the Liberal Democrat Party 24. The remaining two seats were held by a small party formed by members of the Kashmiri community. Originally known as "Justice for Kashmir", by 2004 the party had become "the People's Justice Party" or "PJP". I understand that the echoes of the political alignment in India are intentional.

218. Both PJP councillors represented the Ward of Small Heath. This Ward name disappeared at the time of the boundary changes and the Ward became (with new boundaries) the Ward of Bordesley Green and I shall refer to it as "Bordesley Green" even in its pre-2004 incarnation.

219. The PJP had very strong local support in Bordesley Green. With two outgoing councillors out of three, the party might reasonably have hoped for a clean sweep in 2004.
220. Given the strengths of the parties, the 2004 election was always likely to be a close-run thing. Labour's hold on the City might be thought to be precarious, particularly given the well-known phenomenon that, in the mid term of a Parliament, local voters often vote against the party of the current Government, irrespective of local issues.
221. What made the election more open was the effect of the war in Iraq. Both nationally and in Birmingham, there was considerable opposition in the Muslim community to the war and to the Labour Party. I was told, and it bears out what is generally believed, that in ordinary times Muslims are more likely to vote for Labour than for the other parties. The resentment generated by the Iraq war, therefore, was translated into Muslim voters deserting Labour and either voting for other parties or simply abstaining.
222. This effect was amply demonstrated in the two Wards with which I am primarily concerned. In May 2002, matters went well for Labour. In Bordesley Green, Mr Shah Jahan won the seat for Labour from the PJP, polling 46% of the vote. The PJP could do no better than 30%. By May 2003, however, the tables were turned. The outgoing PJP councillor, Mr Shouket Ali Khan, was returned with nearly 50% of the votes, more than double the votes for the Labour candidate and three times those for the Liberal Democrat.

223. Nor was it different in Aston (where the PJP was not involved). In May 2002, the contest was unusual. Mr Naim Ahmed had been provisionally nominated as the Labour candidate. He got into dispute with the Party and at the last minute he was passed over in favour of the outgoing councillor, Mr Kennedy. Mr Naim Ahmed decided to stand as a rival Labour candidate - thus producing "official" and "unofficial" Labour candidates. In the event, Mr Kennedy polled 43% (and was elected) and Mr Naim Ahmed 32%. Thus the two rival Labour candidates polled 75% between them. The Liberal Democrats were a poor third at 9%. The evidence before me was that Mr Naim Ahmed had a considerable personal following in the Ward and this accounted for the high level of support for him, even when he became an "unofficial" (in effect an independent) candidate.
224. As a footnote to this last election, it should be noted that Mr Naim Ahmed became disillusioned with the Labour Party and left it. After a short flirtation with the PJP, he joined the Liberal Democrats. As will be seen, he was one of the Liberal Democrat candidates for Aston at the 2004 election and the party hoped that his personal following would turn out for him in his new party.
225. Then the Iraq war intervened. In May 2003 Mr Ayoub Khan was selected as the Liberal Democrat candidate. The Liberal Democrats campaigned on (among many other issues) an anti-war ticket. The result was devastating for Labour. A safe Labour seat was lost. Mr Ayoub Khan polled over 50% of the votes with Labour trailing at 38%.

226. Thus the expectation of the public and of the political parties in 2004 was that the Labour Party would find it exceedingly difficult to maintain its support in predominantly Muslim Wards. It would be fair to say that any bookmaker would have given very long odds indeed against there being a swing *in favour of* Labour in those Wards.
227. The political realities in Birmingham as they were perceived in the summer of 2004 are essential background to what was to occur at the June election.

The postal vote avalanche

228. On 20th May 2004 Mr Owen's election team started work in earnest. This date (14 days before poll) had been chosen because nominations had only closed 19 days before poll and it was necessary to get all the ballot documents printed. This entailed, of course, printing not only the ballot papers but the other documentation (including the DOI). It must be recalled that four of the documents - the two ballot papers, the DOI and the A envelope - had to be printed with matching numbers.
229. Before 20th May some 30,000 applications for postal votes had already been processed. The team started to send out the postal ballot packages to those voters.
230. The closing date for postal vote applications was Wednesday 2nd June 2004. In the thirteen days between 20th May and 2nd June (which included two week-ends) what can only be

described as an avalanche of postal vote applications engulfed the Elections Office. Over 40,000 applications arrived. In all over 70,000 postal votes were applied for.

231. That the Elections Office was able to process the applications, enter the names on the absent voters' list and despatch the ballot packages was little short of a miracle. It is fair to say that when I suggested to Mr Owen in the witness box that it was "all hands to the pumps", he did not dissent.

232. At this point I can adopt the final submissions of Mr Coppel in the Bordesley Green Petition:

In the fortnight before 10th June 2004, Mr Owen picked up signs of an extraordinary increase in the number of postal vote applications. Immediately he set about putting everything in place to deal with this changing landscape. On 2nd June 2004, Mr Owen e-mailed the Returning Officer requesting her to flex her muscle as the Chief Executive to encourage each of the seven local authority directorates to provide seven staff for four days before the count and two staff on the day of the count.

The Returning Officer actioned Mr Owen's request a few hours later that same day. She sent an urgent e-mail message to each of the seven heads of Council department asking them to make staff available. To make the request more enticing, Mrs Homer departed from precedent. She offered staff who agreed paid time off with additional pay: an extra £25 per day for Victoria Square counts; an extra £100 per day for the count at the NIA.

A total of about 700 people were brought into service.

233. It would have been bad enough if the postal vote explosion had been evenly spread across the Wards: but it was not. Nor did it follow the patterns of 2003 or 2002. In Bordesley Green there

were no fewer than 8,647 applications for postal votes. The figures were 900 in 2003 and 299 in 2002. There was thus a ninefold increase from the previous year in the postal votes for Bordesley Green. At least half of those applications came in during the last three days before the deadline.

234. Aston was very similar. In 2002 only 996 postal votes had been registered and in 2003 (when Mr Ayoub Khan won) the number had actually dropped to 560. In 2004, however, the number of postal votes rocketed to 5,241. Again an increase of nearly ten times.

235. Other Wards were equally startling. Washwood Heath (329 in 2002 and 478 in 2003) applied for 5583 postal votes, almost a elevenfold increase. The increase in Lozells and East Handsworth was of the same magnitude.

236. At the other end, Oscott (376 in 2002 and 498 in 2003) only rose to 766 and Perry Barr (309 in 2002 and 474 in 2003) to 778.

The postal votes arrive

237. I shall cover the treatment of the postal votes in the two Wards under consideration later in this judgment. This section will deal with the general picture.

238. The system envisaged by the 2001 Regulations is very straightforward. When postal vote packages arrive, they are to be put unopened into the postal voters' ballot box which should be

locked and sealed. There are then, as set out above, proper procedures for dealing with the packages.

239. It is common ground in this case that Mr Owen decided not to follow the Regulations to the letter. The reason is quite simple. The huge flood of postal votes could not possibly have been dealt with had he done so. For a start he did not have (and, despite efforts, could not obtain) sufficient ballot boxes.

240. What happened was very informal indeed. The postal votes (B envelopes) arrived at the Elections Office. They were then transported to One Victoria Square, often in the mailbags in which they had been delivered which were loaded on to a trolley and trundled through the streets of central Birmingham to One Victoria Square, often by temporary staff. This was confirmed by Ms Cheryl Mulvihill, one of Mr Owen's team leaders who said:

When postal votes were taken over from the elections office to Victoria Square they would be transported in a large trolley, nearly always by two people tasked to do this, usually a temp or a member of staff who had been tasked with the job and whoever else was available. Once at Victoria Square postal distribution centre the postal votes were sorted into ballot boxes for each day by a varying number of temps depending on the volumes in preparation for the pre-count openings that took place during the week of polling day.

241. Once sorted into Wards the B envelopes were stored in a variety of containers pending opening.

242. Before polling day, Mr Owen had scheduled times for the opening of the B envelopes on a Ward basis. The candidates and their representatives were invited to attend. The contents of the various containers were opened and processing took place.
243. I need not detail the Elections team's problems with matching ballot documents. Suffice it to say that, for good or ill, Mr Owen decided that the making of lists as required by the 2001 Regulations was not practicable whether electronically or manually and it was abandoned. Similarly the marking of documents "provisionally rejected" was not carried out.
244. The difficulties with not following the rules about matching are twofold. Firstly there is no "paper trail", making subsequent audit impossible. Secondly, however, and more importantly, it vastly increases the scope for human error. Once a ballot paper and DOI have been matched, they are separated and put in their respective receptacles. If they are matched in error, the two documents are still put in those separate receptacles. Thus improperly matched ballot papers can wrongly go through to the count and once in the count cannot (without an impossible amount of labour) be detected as wrongly admitted.
245. Given the pressure under which the Elections Office team was working in the days before the poll, I consider it inevitable that this informal matching process must have led to votes being improperly admitted. How many votes it is impossible to say and I shall discuss later whether this comes within the criteria of s.48 of the 1983 Act.

246. The Elections team processed as many of the postal ballots as possible before the count. Nevertheless there were substantial quantities of unprocessed B envelopes at One Victoria Square and some unprocessed B envelopes at the Elections Office premises by 10.00 p.m. on 10th June 2004 when the polls closed. In particular, a policy decision had been taken by Mr Owen for Bordesley Green that an opening session planned for 10th June would be cancelled and all unprocessed Bordesley Green postal votes would be transported to the count and processed there.
247. Consequently, whereas the Regulations certainly contemplate the existence of a final poster voters' ballot box being taken to the count to be processed there (see above), in practice a very large quantity of such boxes (by no means all of them proper ballot boxes) were taken to the count. As will be seen in the Aston Petition, the transport of the final B envelopes to the count descended from the informal to the chaotic.
248. Taking stock at this point, it is apparent - indeed it is admitted - that Mr Owen and his team drove a coach and horses through the scheme carefully detailed in the 2001 Regulations. The reason for this lies in Mr Owen's philosophy of elections. He is passionately of the view (and this was stated many times in court) that valid votes must be counted or voters will be disenfranchised. One can well imagine that any politician would cheer at this.
249. This philosophy necessarily leads Mr Owen, when faced with a wholly exceptional situation such as occurred in June 2004, to bend or even break the rules to secure the desired ends. This

does not mean that Mr Owen was careless of security. He reiterated both in his witness statements and in his oral evidence, that he had security at the forefront of his mind at all times and did his best to ensure security even when highly informal methods had to be employed to process the votes.

250. It has to be recognized that the system devised by the 2000 Act and the 2001 Regulations was hopelessly inadequate to deal with the explosion in postal votes. At this point it should be interjected that the system would have been even less realistic if the Returning Officer had actually been charged with checking the validity of postal vote applications or the postal vote packages themselves.

251. That said, the prospect of votes being wheeled through public streets in sacks by temporary staff or being carted to the count in plastic bags dumped in the boot of a car driven by the husband of a member of the Elections team, does create considerable unease.

252. In argument I posed the question of how it would be regarded if votes cast at a polling station were simply handed over to the poll staff instead of being inserted into a locked and sealed ballot box or if such votes were simply stuffed into shopping bags to go to the count. It was generally agreed that this would be quite unacceptable. There was, however, a considerable reluctance to admit that there might be any correlation between my hypothetical case and what did happen to postal votes.

253. I was left with the strong impression that, in some way, postal votes were regarded as different from personal votes and less worthy of strict control.

254. I shall consider later whether these admitted breaches of electoral law should have any effect on the result of the elections in the two Wards.

The election campaign

255. This court was told by all sides, with, it has to be said, a certain amount of satisfaction, that 2004 was "the dirtiest election ever". Long experience of elections, however, leads me to believe that all elections are said at the time to be "the dirtiest election ever". I therefore took this assertion with a large pinch of salt.

256. That said, there is no doubt that some of the other parties, particularly the Liberal Democrats and the PJP, went into the election convinced that the Labour Party was going to cheat. Rightly or wrongly, they believed that Labour had been guilty of electoral fraud in 2003 and had got away with it. They were thus expecting larger and more ambitious frauds on Labour's behalf in June 2004.

257. The suspicions harboured by the Liberal Democrats and the PJP are not, of course, evidence by themselves that fraud did occur. Their relevance is that, throughout the campaign, the Liberal Democrats and the PJP decided to keep a close watch on the Labour candidates and their

supporters. It is as a result of their watchfulness that the evidence was obtained which was later used in the Petitions.

258. Matters were not helped by a widely reported comment by the Labour Leader, Sir Albert Bore which all parties assured me had been correctly reported. It was much relied on by the Aston Petitioners. Sir Albert was recorded as saying:

As a candidate I am allowed to apply for postal voting on your behalf, collect the forms, have it delivered to my address, fill it in for you, put it together and deliver it to the elections office. There is nothing illegal about it but it looks and it feels wrong. That is why the system needs to be looked at again.

259. Sir Albert was not called as a witness by any of the parties. There is no evidence before me to implicate him in any of the unlawful conduct which is alleged against his Party's candidates and supporters. In his absence, therefore, I would not dream of making any adverse findings against him.

260. That said, if Sir Albert did make the statement I have quoted, it was incredibly foolish of him to do so. As a statement of the legal position, Sir Albert could scarcely have got the matter more wrong. Anyone following his advice would be committing at least three and, on one view, four criminal offences, most of which carry sentences of imprisonment.

261. I cannot help feeling that some of the more irresponsible of the Labour Party supporters must have encouraged by this statement to believe that, if they set about vote-rigging, they would

have the blessing of the leadership. I am sure that nothing could have been further from Sir Albert's mind than encouragement of fraud but that is how his statement was taken, certainly by his political opponents.

262. As is unavoidable with local elections in England, the major parties campaigned on national as well as local issues. In the Wards with large Muslim populations, those parties opposed to Labour, particularly the Liberal Democrats, made the Iraq war a plank in their election platforms. The election occurred not long after the revelations of abuse of Iraqi prisoners by the US Military at Abu Ghraib prison, and graphic pictures of hooded prisoners were well to the fore in Liberal Democrat election literature.
263. This court is indifferent to the political merits of the campaigns waged by the rival candidates. The only relevance of the war and subsequent occupation of Iraq is that in 2004 these remained important political issues in Muslim areas of Birmingham, as they had been in 2003. Opposition to the course taken by the Government was still strong in sections of the Muslim community. I have no doubt that this affected both the perceptions and the conduct of the political parties campaigning in those areas.
264. As set out above, in the course of the campaign the Liberal Democrats asserted on several occasions that the Labour Party candidates and their supporters were cheating. Mr Hemming and his team made their complaints to the police and the police largely ignored them.

265. Mr Hemming also complained to Mr Owen, to be told, politely but firmly (and certainly correctly), that the Elections Office could not intervene.
266. Consequently as polling day approached, the Liberal Democrats and the PJP were convinced that Labour had been engaged in massive fraud throughout Birmingham and that the various authorities either could not or would not help them. This led to suspicion and unpleasant incidents at polling stations. It also seriously affected attitudes at the count on 11th June.

Polling day

267. Mr Owen had anticipated that there might be problems on polling day. In particular, he was concerned with the possibility of personation. Polling station staff were briefed and police officers were in attendance at some stations.
268. In the event, personation at polling stations did not prove to be a problem, possibly for reasons that will become apparent.
269. What did happen at polling stations, however, although not fully appreciated at the time, gives a strong clue (with hindsight) to the realities of the election. Electors turned up at polling stations in droves only to discover that their names were on the absent voters' list and they were ineligible to vote. There were ugly scenes at some polling stations as electors realised that they had been disenfranchised.
270. Although the individual polling station staff knew what was going on at their own station, they did not have the overall picture. Now, thanks to the evidence filed by the Returning Officer, we know that there was a pattern across the polling stations of voters being refused a ballot paper because, unknown to them, they had been placed on an absent voters' list.
271. Mr Mark Woods, the Presiding Officer at the polling station at Methodist Church Hall in Blake Lane counted at least 70 people who were turned away as being on the absent voters' list but

perhaps the most telling was Ms Richenda Roberts, the presiding officer at Starbank Primary School:

The second issue I had during the day was with regard to the postal votes. I eventually lost count of how many people turned up to vote but could not as they were listed as having applied for, and received, a postal vote. Many of the people who were affected by this problem were not the group I would personally (purely subjective) consider to be readily receptive to changing their voting habits. For instance pensioners and full-time mothers/housewives...

272. On polling day, the flood of postal votes continued to arrive at the Elections Office. By the time the polls closed at 10.00 pm there were piles of postal votes at the Office. The decision was taken to leave them locked up in the Elections Office overnight and take them to the count the following morning. This, in turn, created problems in Aston.
273. Both Petitions contained several detailed allegations of misconduct on the part of polling office staff. In particular in Aston there was a major row about the non-admission of a Liberal Democrat agent, Mrs Mir, to a polling station, supposedly for lack of the proper documentation.
274. At the trials, I felt I had to take a strong line with these allegations. Whether true or false, it was soon apparent that, whatever the failings of the polling station staff, those failings could not be shown to have affected the result of the election in any way. I therefore strongly discouraged the investigation of behaviour at polling stations (somewhat perhaps to the disappointment of Mrs Mir). It was clearly essential to concentrate on the real issues in the Petitions.

The count

275. For the count, Mr Owen had (as was customary with elections in Birmingham) taken over the National Indoor Arena ("the NIA"). The body of the arena had been divided by temporary partitions into separate rooms, referred to as "pens". For the 2004 count, eight pens had been built, (Pens A to H) in two rows of four with a corridor between the two rows. The objective was to conduct the count for five Wards in each pen. In general, each pen was dedicated to five contiguous Wards.
276. At an early stage, the decision was taken nationally to delay the count of the European Parliamentary election to Sunday 13th June (to coincide with the count in those EU countries which vote on Sundays). As stated earlier, Mr Owen had also decided that it was preferable to start the local election count on the morning of 11th June, rather than to try to do it overnight. I have no doubt that this was the correct decision.
277. The pens themselves were generously proportioned. Even so, they were very crowded. Each pen contained five tables, one for each Ward. At one end of the table, election staff were engaged in processing the "last postal voters' ballot boxes" (i.e. the B envelopes and their contents) and the rest of the table was left for the actual counting of the votes.
278. In the pen for Bordesley Green (Pen D), the huge number of last minute postal votes, which had led Mr Owen to decide to abort the opening session on 10th June, necessitated the installation of a sixth table, for the sole purpose of processing the last Bordesley Green postal votes.

279. The conditions in the pens left much to be desired. At each table were a dozen or more tellers to which were added supervisors and other election officials. Each candidate had the right to attend with his or her agent. In virtually every Ward there were at least ten candidates and in some Wards, many more. In Bordesley Green there were fourteen. The three main parties fielded three candidates in each Ward and, in Bordesley Green, the PJP did likewise. The Green Party put up candidates and there were independents.
280. With five Wards to a pen, the number of people in a pen at any one time could be well over one hundred people. It was a warm June day. In Wards such as Aston and Bordesley Green, feelings were already running high. The candidates and their agents were in an excitable and volatile mood. Some of the election staff were upset and resentful at what they saw as "hassle" or even interference by the politicians: Mrs Harding at the Aston table, to whom I shall return, was particularly annoyed at the behaviour of the Liberal Democrat team.
281. At both the Bordesley Green count and the Aston count there were serious incidents, both of which form major allegations in the respective Petitions. Given the nightmarish conditions in the pens, it is surprising that there were not more. I shall have in due course to evaluate the evidence in relation to those incidents but it is essential to view them in the context of the feverish atmosphere of the counting pens. I shall deal with these two incidents at the count at the appropriate stage of this judgment.

282. Mr Owen had hoped that the count could be concluded in the early afternoon. His hopes were dashed. It was not until late in the evening of 11th June that the count was complete and all the results declared. At one stage Mr Owen seems to have contemplated adjourning the count to 12th June but decided that the logistical difficulties were too great.

The results

283. To deal globally with the results, they were not entirely as the Labour Party had hoped. They had retained 53 seats but the Conservatives and Liberal Democrats had amassed sufficient seats to be able to take over the government of Birmingham. Mr Hemming became Deputy Leader of the Council.

284. But were those results fair ?

285. In Bordesley Green the results were as follows:

Shah Jahan (Labour Party) - 4432

Shafaq Ahmed (Labour Party) - 4150

Ayaz Khan (Labour Party) - 3976

Shaukat Ali Khan (People's Justice Party) - 3535

Mohammed Saeed (People's Justice Party) - 3492

Choudhry Zaker Ullah (People's Justice Party) - 3164

Sultan Mahmood Chaudry (Liberal Democrat Party) - 1596

Mohammed Abdul Kadir Abul (Liberal Democrat Party) - 1438

Nazar Hussain (Liberal Democrat Party) - 1398

Amar Nawaz (Independent) - 958

James James (Conservative Party) - 668

Alan Clawley (Green Party) - 645

Abid Mahmood Khan (Conservative Party) - 397

Arshad Zaman (Conservative Party) - 360

286. In Aston the results were as follows:

Mohammed Nazrul Islam (Labour Party) - 3794
Muhammed Afzal (Labour Party) - 3606
Mohammed Kazi (Labour Party) - 3548
Adbul Aziz (Liberal Democrat Party) - 3034
Naim Saeed Ahmed (Liberal Democrat Party) - 2885
Ayoub Khan (Liberal Democrat Party) - 2844
Zafar Ali (Independent) - 685
Richard Frank Banks - 392
Anne Alexandra Dunstan (Green Party) - 386
Jahid Choudrey (Conservative Party) - 331
Mohammed Omar Shariff-Malik (Conservative Party) - 238
Karen Ann Harwood (Independent) - 230
Peter John Edmunds (Independent) - 229

287. These results were little short of astounding. There were three surprises, two obvious at the time and the third later.

288. The first surprise was the number of votes cast. A comparison with the turnout in 2003 showed:

- (a) in the case of Bordesley Green an increase of over 100%
- (b) in the case of Aston a staggering increase of over 350% (in Aston 45% of the electorate appeared to have voted, say 1.5 times the national average).

289. It may fairly be said, of course, that there is likely to be more enthusiasm for a whole-council election than for a single-councillor election as in 2003. Supporters of the postal vote would doubtless argue that the introduction of postal voting on demand was having its hoped-for effects. Nevertheless, this huge increase in turnout went far beyond what might reasonably be predicted.

290. Secondly, and even more surprising, was that these two Wards showed an enormous swing to Labour. I am no psephologist and leave it to others to compute the figures but a mere uninformed glance at the figures would be enough to show that the swing to Labour must be considerably greater than that which returned Labour to power with a landslide at the General Election of 1997.
291. On the face of it, therefore, two predominantly Muslim Wards where feelings about the Iraq war still ran high, had swung massively in favour of the political Party seen to be responsible for that war.
292. In his evidence in the Aston Petition, Mr Muhammed Afzal asserted that this result was a tribute to the sterling qualities of himself and the other Labour candidates and to the wisdom of spreading the candidates among the ethnic groups (the candidates' family origins were respectively India, Pakistan and Bangladesh). I was not wholly convinced by this.
293. The third surprise, though hinted at after the election, was verified when the Scrutiny was conducted in each of the Petitions (about which I shall say more later). It emerged that the number of postal votes had greatly exceeded those cast at polling stations in both Wards.
294. These results confirmed the worst fears of the Liberal Democrats and the PJP. To them, the results were proof positive that Labour had cheated: Labour candidates had been elected by

introducing into the poll vast quantities of false postal votes. Both in Bordesley Green and in Aston the losers decided to launch an election Petition.

295. As stated above, in both Wards the losing party was also deeply unhappy about aspects of the conduct of the elections by the Returning Officer and her staff. It was decided that these complaints would be added to the Petitions.

The procedural history of the Petitions

296. A Petition may be brought by a losing candidate or by four electors of the Ward - s.128 of the 1983 Act.

297. The Petition in **Bordesley Green** was launched on 28th June 2004. The Petitioners were four supporters of the PJP who were voters registered in the Ward. In the course of the Petition, there was (with the permission of the High Court) a substitution of one of the Petitioners but essentially the Petition remained that of four electors.

298. The Bordesley Green Petition joined the three victorious Labour Party candidates as the first three Respondents, the three losing PJP candidates as the fourth to sixth Respondents and the Returning Officer as the seventh.

299. In summary the Bordesley Green Petition alleged that:

- (a) the Labour Party Respondents had obtained a large number of blank ballot papers by a variety of unlawful means and used them to personate the true voters and cast their votes;
- (b) the Labour Party Respondents had obtained and altered completed ballot papers and the Returning Officer had wrongly accepted the altered ballot papers into the count;
- (c) the Returning Officer had failed to conduct the election properly in a variety of ways but primarily by accepting into the count three boxes of postal votes which had mysteriously appeared in the middle of the count.

300. The Petition in **Aston** was launched on 23rd June 2004. Here the Petitioners were also four electors. The three winning Labour candidates were the first three Respondents and the Returning Officer the fourth.

301. The Aston Petition was a much more extreme document than the Bordesley Green Petition. It contained a wide variety of allegations of electoral misconduct and, unlike the Bordesley Green Petition, made the bold assertion that the misconduct was not confined to the Aston but was the product of a Birmingham-wide campaign by the Labour Party to win seats by the massive use of fraudulent postal votes.

302. In summary, therefore, the Aston Petition alleged that:

- (a) there had been massive electoral fraud by the Labour Party throughout Birmingham and particularly in Aston where the candidates and their supporters had obtained a large

number of blank ballot papers by a variety of unlawful means and used them to personate the true voters and cast their votes;

- (b) the Labour Party Respondents had obtained and altered completed ballot papers and the Returning Officer had wrongly accepted the altered ballot papers into the count;
- (c) the Labour Party Respondents and others had been caught vote-rigging in a warehouse in an industrial estate during the night of 8th/9th June 2004;
- (d) there had been instances of bribery and undue influence by the candidates and their supporters;
- (e) the Returning Officer had failed to conduct the election properly in a variety of ways but primarily by accepting into the count postal votes which had been found at the count in a plastic shopping bag.

303. The PJP unsurprisingly did not have the funds to sustain an election Petition. The Bordesley Green Petitioners, therefore, applied for public funding. I shall deal below with the problems they faced in maintaining this to trial. These Petitioners instructed Ms Fatema Patwa to act as their solicitor.

304. In Aston the local Liberal Democrat Party agreed to fund the Petition but they too had little money. The conduct of that Petition was done throughout on a shoestring. Indeed the backbone of the case was Mr Ayoub Khan, the victor in the 2003 election and one of the losers in 2004. He was working as a legal executive for Midlands Solicitors while reading for the Bar and took

upon himself (subject to the supervision of his principals) most of the work of preparing and conducting the Petition.

305. The Labour Party instructed the solicitors it normally instructed in election matters, Messrs Steel & Shamash, to represent the Labour Party Respondents in both Petitions.

306. The Returning Officer instructed CMS Cameron McKenna to act in both Petitions.

307. I was appointed by the Election Rota Judges to be the Commissioner appointed to hear both Petitions.

The Scrutiny

308. In most election Petitions, the trial of the Petition is preceded by an exercise called "the Scrutiny". This is a procedure whereby an officer of the Court conducts an examination of original election documents to ascertain a factual basis on which the trial can be held. For example, if a Petition turns on the improper admission or rejection of spoiled ballot papers, they can be formally examined and reported on. The parties to the Petition and their lawyers are entitled to attend the Scrutiny and, where appropriate, to make representations to the person conducting the Scrutiny.

309. In the past, the Scrutiny has been a relatively simple process, normally conducted by the Senior Queen's Bench Master and rarely lasting more than a few hours. The nature of the allegations

in the two Petitions, however, made it clear that the Scrutiny here was going to be a much more protracted affair. The Rota Judges decided that the Scrutiny in both Petitions should be conducted by the Commissioner himself.

310. In the event, each of the Scrutinies took several days and was attended by all the parties both in person and by lawyers. My findings in each Scrutiny were incorporated in a separate Report (in Aston with a supplementary Report) to the High Court and I shall refer to my findings in this judgment.
311. The Scrutinies concentrated on the postal votes cast in each Ward and revealed a number of very unusual features. At the Bordesley Green Scrutiny, it became apparent that there was a huge disparity between the numbers of postal votes and personal votes. With both the Labour Party and the PJP, the ratio was about six postal votes for every vote cast at a polling station. For the other candidates, the numbers were about even, with possibly a slight majority being cast at polling stations.
312. At Bordesley Green, a surprisingly high number of ballot papers had been altered in favour of Labour candidates. At one stage, in order to help out the enumerators whose tasks I was supervising, I decided to list the altered ballot papers by number.
313. The result of this exercise was very instructive. My list showed patterns of two, three or four consecutively numbered ballot papers and, in each group, the ballot papers had been

identically altered in Labour's favour. I raised this matter with the parties and their lawyers and they suggested that I marry my list with the list of issued ballots. This showed that each "group" of ballot papers had been issued to a single household. My list appears as Appendix X to my Report of the Bordesley Green Scrutiny.

314. This phenomenon was clearly going to call for explanation. For it to have happened honestly at a single household, the following would have had to occur:
- (a) each member of the household completes his or her ballot paper, voting (let us say) on a straight PJP ticket - three votes for the PJP;
 - (b) at some stage - but before the votes are despatched back to the Elections Office - a representative of the Labour Party calls at the house and persuades all the inhabitants of the error of their ways: they are all now convinced that they should vote Labour;
 - (c) the ballot papers are rescued from the A envelopes (and possibly from the B envelopes as well);
 - (d) *one single person* alters all the ballot papers by crossing out the non-Labour votes and putting crosses against the names of the three Labour candidates;
 - (e) the ballot papers are then returned to the A envelopes, the packages completed and sent off to the Elections Office.
315. One has only to posit this scenario to realise that it is (at best) wildly improbable. Whereas it might just possibly occur with one easily persuadable household, the more examples that are found, the more incredible the scenario becomes. The likelihood of a score of households all

undergoing this kind of mass Damascene conversion is non-existent, particularly when some involve an apparent conversion from supporting the Conservative Party to supporting the Labour Party.

316. Elementary common sense dictated that here were ballots which had been intercepted between the voters and the Elections Office and deliberately altered.
317. The Aston Scrutiny was equally interesting. On examining the DOI it became apparent to the Petitioners' lawyers that there were large numbers of DOI which appeared to have been completed by a very small number of people. Although identical handwriting appeared for the witnesses' names and addresses on many ballot papers, the names and addresses used were not the same. It seemed that a number of individuals had been filling out DOI using a variety of aliases. The Scrutiny was at one stage re-opened to marry up the numbers on the suspect DOI with the relevant ballot papers. As my supplementary Report shows, the overwhelming majority of the ballot papers to which these suspect DOI related showed votes for the Labour candidates.

Scrutiny to trial

318. The Scrutiny made it clear that handwriting evidence was going to be essential and, at the directions hearing on 29th November 2004, I ordered the appointment of a jointly instructed handwriting expert.

319. With the consent of all parties to both Petitions I decided to carry out the bulk of the case management electronically. Although, therefore, there were some formal Case Management Conferences ("CMC") in open court, most of the decisions were made by an exchange of emails. This speeded up the procedure considerably as decisions could be made within a day of a problem arising, occasionally within hours. I wish to place on record that I received complete and wholehearted co-operation from all the lawyers involved, with the consequent saving of large amounts of time and of legal costs.
320. That said, there is no doubt that attempts were made procedurally to stifle these Petitions. In particular Messrs Steel & Shamash put great pressure on the Legal Services Commission to refuse to continue the funding of the Bordesley Green Petitioners to trial. Although I do not suggest that they stepped over the line into legal impropriety, I was very disquieted by their approach and authorised the Petitioners' solicitor to inform the LSC that I considered it was in the public interest that they be permitted to continue the Petition as recipients of legal aid.
321. The LSC and, in particular the gentleman dealing with the case, Mr Redding, refused to be bullied and continued legal aid for the Bordesley Green Petitioners. I would also like to commend Mr Redding for the promptness with which he dealt with all the various applications made to him during the case.
322. As will be apparent below, when the reports from the handwriting experts began to arrive, it became clear that they were going to support the thesis of widespread document fraud. The

Bordesley Green Petitioners also filed witness statements from over two hundred potential witnesses who were apparently prepared to say either that they had not applied for a postal vote or had not voted by post.

323. The Director of Public Prosecutions is customarily invited to decide whether he would wish to be represented at the trial of an election Petition. Consequently I had (with the parties' agreement) issued such an invitation following the 29th November 2004 directions hearing. There seemed to be some difficulty in conveying to the DPP's department the gravity of the allegations being made in the two Petitions. The matter was passed to a junior official of the West Midlands branch of the Crown Prosecution Service whose letter declining to participate displayed a complete lack of understanding of the rôle of the Director in election Petitions.
324. I felt obliged myself to write to the Director personally inviting him to reconsider and his reply made it clear that the first invitation had not reached him. In the end, at the parties' request I asked the DPP to send a representative to attend a CMC to show cause why I should not order the Director's attendance under s.181 of the 1983 Act. At that hearing, Counsel for the Director, seeing which way the wind was blowing, graciously agreed that the Director would be represented at the trials without the need for a formal order of the court.
325. At trial the DPP was represented by Mr Matthew Brook whose attendance I found invaluable.

326. Given the volume and strength of the evidence that had been served, it was no great surprise when, at what was scheduled to be the last CMC, counsel for the Labour Party Respondents in both Petitions applied for the trial of both Petitions (the first being fixed to commence on 21st February 2005) to be adjourned, preferably until after 5th May 2005 (widely believed to be the probable date of a General Election). For reasons I set out in a detailed ruling, I refused the application.
327. At mid-day on Monday 14th February 2005 I received an email from Messrs Steel & Shamash briefly informing me that they were ceasing to act for the Labour Party Respondents in both Petitions. They said the Respondents would now be acting in person. No reason was given.
328. As I discovered the following day, however, a press release had been issued at about the same time. It suggested that legal support was being withdrawn because a few of the enthusiastic supporters of all parties might have fallen below the "high standards" that were to be expected at an election. This press release, which appeared to prejudge the outcome of the case, can only be regarded as inappropriate.
329. On the first day of the trial of the Bordesley Green Petition, the three Labour Party Respondents, Mr Shah Jahan, Mr Shafaq Ahmed and Mr Ayaz Khan appeared by Counsel (Mr Suggett) who had undertaken to appear, without fee, to make an application for an adjournment. It was made clear that the adjournment sought was not simply until after 5th May

but was an indefinite adjournment. I delivered a detailed ruling refusing the adjournment and need not repeat it here.

330. Although I did my best to persuade the three Respondents to remain and to participate in the trial, assuring them that the Court would see that their case was properly heard, they decided to walk out, which they did with a great flourish to the benefit of the television cameras outside the court.

331. At the trial of the Bordesley Green Petition I was therefore obliged to be somewhat more interventionist than I would normally have liked because I felt that, in the absence of any representation for the Labour Party Respondents, I had to hold the ring and to see that the questions that ought to be asked on their behalf were put to the witnesses. In this I was assisted by Mr Graham Brodie, for the Petitioners, who conducted his case with scrupulous fairness, and Mr Philip Coppel, for the Returning Officer, who frequently acted as an unofficial *amicus curiae*.

332. The Labour Party Respondents in the Aston Petition took advantage of the fact that their trial would not start until Bordesley Green had finished to arrange for Counsel to represent them. In the event Mr Jerry Hayes undertook the cases of Mr Islam and Mr Kazi and Mr de Mello the case of Mr Afzal. Both Counsel made light of the fact that they had had to get up their respective cases on virtually no notice and they represented their clients with skill and verve. I was greatly indebted to them for their help.

333. The decision to withdraw legal support from the six Labour Councillors one week before trial was, in my view, inexcusable. Whether or not the allegations against them were well founded, they were loyal members of the Labour Party and had served it well. In the case of Mr Afzal, he had been a Labour Councillor for over 20 years and had held high office on the Council. None the less, these gentlemen had been, in the striking phrase of one of the Counsel in the case, "left to swing in the wind". When this was combined with a press release strongly suggesting their guilt, the situation is even more disquieting.

334. For completeness I should mention that, a couple of days after taking themselves off the record, Messrs Steel & Shamash sent me two files of documents with a covering letter stating that they contained allegations of wrongdoing against the Petitioners in the two Petitions. I considered that it was improper for solicitors who had already withdrawn from the case to seek to put material before the court, particularly as they had not seen fit to raise any such allegations when they were on the record. The files remained unopened and unread.

Election Petitions - three legal issues

Burden and standard of proof

335. In respect of the claims made both against the Labour Party Respondents and against the Returning Officer, the burden of proof rested on the Petitioners. This was not a matter of any controversy at trial.

336. With regard to the claims made against the Returning Officer it was common ground between Counsel that the correct standard of proof was the civil standard, namely the balance of probabilities. I agree and have applied that standard.
337. There was some discussion about the standard of proof in respect of the claims against the Labour Party Respondents, and Mr de Mello addressed me with a detailed and beautifully reasoned argument based on the Human Rights Act 1998 ("the HRA"). In the event, however, it became clear that, as the allegations against those Respondents encompassed conduct which amounted to criminal offences, the only proper course was for the court to apply the criminal standard of proof, namely proof beyond reasonable doubt.
338. I would have been persuaded that this was the correct approach, even if the matter were free from authority, but in fact the matter was definitively decided by the Court of Appeal in *R v Rowe, ex parte Mainwaring*⁶, a decision binding on this court.

Who is an agent ?

339. A candidate in an election is, in many situations, liable for the acts of his agents. The concept of agency is much wider in election law than in other areas of the law such as contract.
340. This wider concept of agency is well summarised in *the Wakefield Case XVII*⁷ in a passage which Mr de Mello sets out in his final submissions:

⁶ [1992] 1 WLR 1059.

By election law the doctrine of agency is carried further than in other cases. By the ordinary law of agency a person is not responsible for the acts of those whom he has not authorised, or even for acts done beyond the scope of the agent's authority ... but he is not responsible for the acts which his alleged agents choose to do on their own behalf. But if that construction of agency were put upon acts done at election, it would be almost impossible to prevent corruption. Accordingly, a wider scope has been given to the term "agency" in election matters, and a candidate is responsible generally, you may say, for the deeds of those who to his knowledge for the purpose of promoting his election canvass and do such other acts as may tend to promote his election, provided the candidate or his authorised agents have reasonable knowledge that those persons are so acting with that object.

341. "Agent" is thus not by any means restricted to the candidate's official "party agent" but covers a wide range of canvassers⁸, committees⁹ and supporters¹⁰. The candidate is taken to be responsible for their actions even though he may not have appointed them as agents. Knowledge of what they are doing does not need to be proved against a candidate for him to be fixed with their actions.

⁷ (1874) 2 O'M&H 100.

⁸ See for example *Westbury Case* (1869) 20 LT 16 and *Tewkesbury Case, Collings v Price* (1880) 44 LT 192.

⁹ See for example *Stalybridge Case, Ogden Woolley and Buckley v Sidebottom* (1869) 20 LT 75.

¹⁰ See for example *Great Yarmouth Borough Case, White v Fell* (1906) 5 O'M & H 176.

342. Mr de Mello accepts that it is open to the court to find corrupt and/or illegal practices on the part of a candidate in this case if it is shown, for example, that agents in this wide sense have been engaged in forging voting documents even if it cannot be shown that the candidate participated in the forgery or authorised it or knowingly permitted it to continue. Although he uses this situation to support his case of incompatibility with the HRA, he concedes that the court is bound by precedent to apply the wider definition of agency applicable to election law.

Is election law incompatible with the Human Rights Act ?

343. In a bold and overarching submission Mr de Mello contends that most of the provisions of the 1983 Act which concern election Petitions and the sanctions that an election court may visit on electoral misconduct are incompatible with the HRA and he goes so far as to invite this court to make a declaration of incompatibility under s.4 of the HRA.

344. Mr de Mello is constrained to admit that this novel argument does not seem to have occurred to any other local (or Parliamentary) candidate faced with an election Petition but argues (rightly) that novelty is no bar to correctness.

345. Before summarising Mr de Mello's arguments, I must express considerable doubts as to my jurisdiction. True, under s.130(5) of the 1983 Act an election court has "for the purposes of the trial the same powers and privileges as a judge on the trial of a parliamentary election Petition" and parliamentary elections are, under s.123, to be tried by the two High Court Judges on the rota with the full powers of the High Court as a "court of record". I consider that my High Court

powers under these sections are very much limited by the words "for the purposes of the trial" and would not stretch as far as exercising the powers of the High Court to declare primary legislation (the 1983 Act) incompatible with the HRA and the Convention.

346. Despite that, I shall set out Mr de Mello's contentions and rule on them so that, if the question should arise again, they are properly recorded.
347. Mr de Mello relies first on Art 6 (Right to a Fair Trial). It is under this Article that he bases his submissions on the standard of proof, contending that proceedings under the 1983 Act are to be classed as criminal rather than civil because of the sanctions they visit on those found "guilty" of electoral misconduct.
348. I intend no disrespect to Mr de Mello if I do not expound his lengthy and careful arguments in full because I take it to be settled law that proceedings in an election court are civil and not criminal, notwithstanding that they can result in an order that an elected candidate vacate his office or an order debarring a person from voting or standing for election. The fact that the court may apply the criminal standard proof, following *ex parte Mainwaring*, does not alter the essential character of the proceedings.
349. Insofar as Mr de Mello argues that it is incompatible with Article 6 for proceedings with adverse consequences for the Respondent to be treated as civil proceedings, I consider that such an argument is misconceived. There are other civil proceedings with disqualificatory consequences

- disqualification of company directors is a good example - but this does not alter their juridical character.

350. Mr de Mello mentions Article 3 of the First Protocol (the Right to Free Elections), Article 8 (Right to Respect for Private and Family Life) and Article 11 (Freedom of Assembly and Association) to which I shall return.

351. The main thrust of Mr de Mello's argument, however, is that many of the provisions of the 1983 Act are inconsistent Article 14:

The enjoyment of the rights and freedoms set for in this Convention shall be secured without discrimination of any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, birth or other status.

352. In a nutshell what Mr de Mello says is this. The rules relating to challenging the election of a Member of the European Parliament ("MEP") are different from and stricter than the rules relating to challenging the election of a local councillor. Position as an MEP and as a councillor is a matter of "status". If the local authority rules allow wider grounds for disqualifying a candidate or subject him to a different and more unfavourable category of proceedings, they "discriminate" against the local councillor.

353. The principal differences of treatment relied on are:

- (a) an election Petition cannot in general be brought on grounds of corrupt or illegal practices at a European Parliamentary election other than for personation or voting offences, the grounds for avoiding local elections being wider;
- (b) an election court is carrying out an inquisitorial function in that it must enquire into such matters as general corruption in the Ward or even in the general electoral area: it is not (as is submitted to be the case with a court trying an European election Petition) purely an adversarial tribunal;
- (c) it is not a pre-condition to avoiding a local election that the candidate should first be convicted of an election offence;
- (d) an election can avoid an election for general corruption rather than establishing a specific offence against the candidate: in this context the local candidate is prejudiced by the wide concepts of agency.

354. Mr de Mello considers his argument has additional poignancy by reason of the fact that, fortuitously, both local and European elections were held in Birmingham on 10th June 2004.

355. Though the case is attractively argued with a wealth of (it has to be said, somewhat peripheral) authority, in my judgment it is totally misconceived. The fact that there may be different rules for local and European elections cannot, in my judgment, amount to discrimination on the ground of "status". Even if a position as a councillor or as an MEP were a matter of "status" within Article 14, which it is not, different provisions for challenging elections cannot amount to discrimination on the grounds of status.

356. In any event, the fact that elections are governed by different rules is not discrimination in any sense recognized by the Convention. Each election necessarily serves its own purpose. There are differing qualifications for candidature and for the right to vote, depending on the nature of the election. The European Union may well treat elections to the European Parliament in a way which differs from that of Parliamentary or local elections in the member states. Indeed, even within England, the rules for election themselves differ. In Parliamentary and local elections, the voters vote for individual candidates and in European elections they vote for "lists".
357. Ingenious though this argument undoubtedly is, therefore, I consider that the claim of breach of Article 14 is misconceived.
358. Returning to Article 3 of the First Protocol, Article 8 and Article 11, Mr de Mello's argument is simply that "the penalties imposed on the candidate" under ss.159(1), 160(4) and s.164 "are horrendously disproportionate". In short it is a breach of the human rights of a candidate both in his private life and in his right to stand for election for him to be unseated and disqualified from re-standing on the ground of corrupt and illegal practices. "There is sufficient to punish those who have done the misconduct without punishing the Respondent by voiding his election or avoiding the elections."
359. In this context, Mr de Mello relies on the fact that an "innocent" candidate can be unseated and disqualified for the acts of his agents even if he has not authorised those acts.

360. Mr de Mello had the grace to concede that this was not an attractive argument. The proposition that a candidate elected by fraud has a "human right" to keep his seat or to stand again for the same constituency or Ward is certainly one which would surprise the average member of the public.
361. I am quite satisfied that this argument cannot succeed. It cannot possibly be disproportionate for an election to be set aside on the ground of fraud even if the candidate himself is ignorant of or not a party to the fraud. I am not impressed with the agency argument. The wider "Wakefield" concept of agency was devised expressly to combat the difficulties of proving actual authority of the candidate when party supporters engineer a fraudulent election.
362. I have dealt with Mr de Mello's arguments on agency and its effects on the human rights of the candidates but, as will be seen below, in the event I have not found it necessary to rely on "Wakefield" agency in this case. Whatever wrongdoing I find proved will turn out to have been committed either by the candidate or with their full knowledge and consent.
363. Interesting though they are, the arguments raised by Mr de Mello to the effect that the relevant provisions of the 1983 Act contravene the HRA and the Convention are wrong.

Treatment of the Petitions

364. The case made against the Returning Officer in the Petitions is twofold. First it is said that there were specific incidents in each case (mainly connected with the count) which affected the proper conduct of the election. Secondly there are criticisms of the conduct of the Birmingham elections as a whole, based on the various decisions taken by Mr Owen (with, it must be emphasized, Ms Homer's full approval) to disregard or circumvent the electoral rules in the interests of securing the enfranchisement of as many electors as possible.
365. The treatment of these cases will necessarily involve a consideration of the law governing the circumstances in which the misconduct of an election by a Returning Officer can lead to the poll being avoided. This consideration will be common to both Petitions.
366. I shall therefore deal first with the case made in the two Petitions against the Labour Party Respondents and set out my conclusions in each Petition. I shall then deal with the allegations against the Returning Officer with regard to the election as a whole and then with regard to the incidents specific to the individual Petitions.

Bordesley Green

The case against the Labour Party Respondents

367. As Mr Brodie rightly said in his closing submissions, his case against the Labour Party Respondents is very simple. He alleges personation. This personation was achieved by a number of different techniques, employing most of those described above under the heading "Cheating the system".

368. What the Petitioners seek to prove is that:
- (a) personation by the mis-use of postal votes was committed on a large scale in Bordesley Green;
 - (b) such personation was committed for the benefit of the Labour Party Respondents and with the intention of getting them elected;
 - (c) those responsible were the Labour Party Respondents themselves and persons acting as their "agents" for electoral purposes;
 - (d) there was thus the commission of corrupt and illegal practices on the part of the candidates;
 - (e) there was also general corruption.
369. If the court is satisfied that this case is made out, the court is asked to avoid (i.e. set aside) the election.
370. The evidence relied on by the Petitioners falls into two main categories:
- (a) evidence obtained from the documents themselves, principally the ATV, the DOI and the ballot papers;
 - (b) corroborative evidence of wrongdoing.
371. The first category consists of the evidence of the handwriting expert Mr M. J. Allen and of a research and scheduling exercise carried out by Ms Barbara Holland at the request of the

Petitioners' solicitor. Ms Holland is not a handwriting expert and, in compiling her schedule, she used ordinary techniques of comparison and a great deal of common sense. Her guiding principle was to treat writing as different only when the differences are blatantly obvious to the naked eye.

372. Mr Allen's task was severely limited by constraints of time and I consider it little short of amazing that he (and, in the Aston Petition, Mr Cosslett) managed to achieve as much as he did. Where his work can be compared with that of Ms Holland, in about 80% of the cases Mr Allen is able to confirm her conclusions on a "conclusive basis"¹¹ and he accepts that there is evidence for her views in most of the rest.

373. In addition I have myself checked a number of Ms Holland's findings against the documents themselves and her schedule performed well on this check.

374. Ms Holland gave evidence before me and impressed me as a careful and thorough lady whose approach had been, as I say, cautious throughout.

375. I am entitled, therefore, to place considerable reliance on Ms Holland's evidence and I do.

376. The second category itself divides into two classes:

(a) eye-witness evidence of malpractice;

¹¹ The terms are defined below in relation to Mr Cosslett's evidence.

- (b) evidence from voters ("individual voters") in whose names postal votes were cast and who were prepared to say that:
- (i) they never applied for a postal vote; or
 - (ii) they never used their postal vote; or
 - (iii) their ballot paper had been altered after leaving them; and
- in each case, the vote in question was not their vote.

377. I have described this second category of evidence as "corroborative" because I accept Mr Brodie's general thesis that the first category - documentary evidence - is so strong that, if accepted, it greatly diminishes the need for other evidence.

378. Although I was anxious to ensure that nothing that could properly be said on behalf of the Labour Party Respondents should go unsaid in their (voluntary) absence from the proceedings, I did not feel that this extended to compelling the Petitioners to call every one of the individual voters whose statements were tendered. They numbered well over 200 and most of those statements consisted of one paragraph confirming, for example, that the witness had not applied for a postal vote. I did, however, take oral evidence from a representative selection of the individual voters.

379. A considerable number of the statements of the individual voters were taken shortly after the election by supporters of the PJP and possibly also of the Liberal Democrats. The Petitioners' solicitor had neither had the time nor the resources to double-check these statements.

380. At a very late stage in the trial - indeed after the evidence had closed - I was informed by Mr Brook for the DPP that information had come into the possession of the police which indicated that some of the witness statements of the individual voters might not be genuine. He sought and I granted permission for the police to visit as many of these witnesses as time permitted to see whether their statements could be verified. Consequently, between the close of evidence (14th March 2005) and final submissions (22nd March 2005) the police visited roughly 150 witnesses.
381. I was informed that 68 witnesses had confirmed that their statements were genuine and I was given their names. I was told that other witnesses (a smaller number) had either disavowed their statements or could not now recall whether they had or had not given the statements. These enquiries were made more difficult for the police because several of those visited had a poor command of English or became confused at being interviewed by the police.
382. It was obviously not in anybody's interests for me to adjourn the Bordesley Green trial and to delay judgment while this problem was resolved. Indeed Mr Brook indicated that the police would find their job easier if I did not.
383. I therefore announced in open court at the conclusion of the final submissions that I proposed to take the following course:

- (a) where a witness had appeared before me in person, I would evaluate his or her evidence and make up my own mind as to its credibility (none of the witnesses visited by the police came into this category);
- (b) where a witness statement from one of the individual voters had been verified by the police, I would consider myself entitled to take it into account as corroborative evidence;
- (c) where a witness statement from one of the individual voters had not been verified by the police (for whatever reason, including the fact that the police had not yet seen that witness), I would totally disregard it.

384. This course was accepted by Mr Brodie as being a fair way to treat the evidence of the individual voters.

The types of fraud

385. Mr Brodie identified fifteen types of fraud. I shall examine the first fourteen in sequence, compare them with the documentary and other evidence and indicate my conclusions. The fifteenth concerned events at the count and will be dealt with in the section dealing with the case against the Returning Officer.

Type 1: the DOI signed by a different person from the ATV

386. Evidence established that over 1600 postal votes were cast in favour of the Labour Party candidates in which the signature of the purported elector set out on the declaration of identity

differed from the signature for that elector set out on the application for a postal vote submitted in their name. This is confirmed by several Reports of Mr Allen and the entries marked "N" in the column entitled "Sigs match" in Ms Holland's schedule.

Type 2: multiple DOI witnessing with the same name but different addresses

387. Here the evidence established that there were over 280 postal votes in favour of the Labour Party candidates in which the same individual was purported to witness the completion of a number of DOI but in which the address of that purported witness set out in the declaration of identity varied. These can be found in the entries marked "x" in the column entitled "MWS diff. address" in Ms Holland's schedule.

Type 3: multiple DOI witnessing with the same name and address but different witness signatures

388. In some ways this is the mirror image of Type 2. There were over 350 postal votes cast in favour of the Labour Party candidates in which the same individual purported to witness a number of declarations of identity but in which the signatures of the purported witness varied. These are set out in the entries marked "x" in the column entitled "MWS sigs vary" in Ms Holland's schedule and are confirmed by Mr Allen.

389. In his report dated 20th January 2005 Mr Allen deals with the documents purporting to be signed by Mr Gul Mohammed and this gentleman gave evidence before me in person, confirming that all bar one of these purported signatures were indeed forgeries.

390. In his report dated 27th January 2005 Mr Allen confirms the differing signatures of Pinnu Khan, Mohammed Bashir, Zahir ul-Hassan, Sagheer Ahmed, Shabir Ahmed, Amir Hamzah Ahmed and Mohammed Akram.

Type 4: the same person writes the signatures on the DOI of both the voter and the witness

391. The entries marked "x" in the column entitled "Vot/wit. sigs similar" in Ms Holland's schedule show that more than 430 postal votes were cast in favour of the Labour Party candidates in which the signature on the declaration of identity of the purported voter and the signature of the purported witness were similar.

Type 5: the same person writes the signatures of the voter on several different DOI

392. In this instance the entries marked "x" in the column entitled "Identical sigs" in Ms Holland's schedule show that more than 20 postal votes were cast in favour of the Labour Party candidates in which the signature on the declaration of identity of a purported voter was identical to the signature of another purported voter.

Type 6: altered ballot papers

393. The Scrutiny established that 146 postal votes were cast which had been physically altered in favour of the Labour Party candidates - see Appendix 5 to the Scrutiny Report. Corroborative evidence both oral and written established that a high proportion of these had been unlawfully altered after the real voter had completed and despatched them.

394. The evidence of identically altered ballots from the same household appears in Appendix 6 to the Scrutiny Report and has been discussed above. In these cases, the fraud is self-evident.

Type 7: forged signatures of witnesses on the DOI

395. Mr Allen, in his report dated 20th January 2005, identifies instances where postal votes were cast in favour of the Labour Party candidates in circumstances in which signatures of those who purported to witness the DOI were forged.

Type 8: postal votes apparently cast by voters who had not applied for a postal vote

396. Even when allowance has been made for the reduction of the long witness list of voters to the figure of 68 verified statements set out above, there is a wealth of evidence from voters that they had not applied for a postal vote or had not cast their postal vote.

397. Perhaps typical was Ms Saima Ishaq a young lady, clearly of strict Muslim principles, who gave evidence before me. She had not applied for a postal vote and indeed had been sent a polling card. She had attended the designated polling station with her parents but was told that, as her name was on the absent voters' list, she could not vote. Her father protested on her behalf, to no avail, and subsequently complained to the Elections Office. Ms Ishaq was clearly telling the truth and exemplifies the fact that fraudulently diverting an elector's vote not only benefits the fraudster but also disenfranchises the true elector.

398. I should also draw attention to the evidence of Mr Asaf Mahmood of Kenelm Road. He did not ask for nor did he use a postal vote because, sadly, he happened to be in prison at the time. None the less Mr Mahmood's vote mysteriously appeared at the poll with a DOI apparently witnessing his signature.

399. In addition there is considerable evidence from the polling station staff (see above) of the unprecedented numbers of voters turning up at polling stations only to learn to their amazement and fury that someone had placed them on the absent voters' lists and they could not vote.

Type 9: postal votes apparently cast by voters who had not received a postal vote

400. This is the corollary of Type 8 and concerns voters who had applied for a postal vote but never received the ballot package. None the less votes appeared to have been cast in their name.

401. A good example of this category is that of Mr John Timms and his wife Susan. At this point it is right to interject that the evidence of "stolen" votes was by no means confined to the Asian community. The list of electors who were the victims of these frauds includes all ethnic groups, white, Asian, Afro-Caribbean and Chinese.

402. Mr & Mrs Timms were persuaded to sign forms which must have been ATV. They did not receive their ballot packages so assumed that something had gone amiss so Mr Timms went to vote in person. Mr Timms was told that he was on the absent voters' list and could not vote at the polling station. He protested that he had not been sent his postal vote but the presiding officer was adamant. Mr Timms later complained to the Post Office and was told that his vote might well have been lost in the post or stolen. The records show that Mr and Mrs Timms's votes were cast (for Labour) but they were not cast by Mr and Mrs Timms.

Type 10: collection of completed postal ballot documents by Labour supporters

403. By itself collection of completed postal ballot documents, though strongly discouraged by the Electoral Commission, is not unlawful. When, however, there is a large body of evidence of completed ballot papers being unlawfully altered, it does become objectionable.

404. This aspect of the fraud was well supported by evidence. I heard evidence on the subject from (amongst others)

- (a) Mr Shaukat Ali Khan (one of the PJP candidates and a Respondent) who gave oral evidence;
- (b) Mr Kaneez Akhtar;
- (c) Mr Mohammed Ilyas Afaqi;
- (d) Mr Safdar Hussain;
- (e) Mr Sabdar Hussain;
- (f) Mrs Tracey Eales who speaks as to collection not only from her family but from other families in the same street.

Type 11: theft of postal ballots

405. There was direct evidence of the theft of unused postal ballot documents.

406. Mr Shaukat Ali Khan (see above) stated in the witness box:

On 22nd May 2004, at about 9.30 pm, I saw one of the Labour Party candidates, Shah Jahan and his nephew, at the corner of Somerville Road and Charles Road. I decided to follow them as they went up Charles Road and they

turned right into Coventry Road. They drove to a bus stop and pulled up there. I saw Shah Jahan collecting a black bag from a postman. The postman appeared to me of either Jamaican or Somalian origin, he was dark skinned. I assume the bag contained postal votes. I rang Shah Jahan and I said to him that they were not acting fairly and that they should stop cheating in the elections. He said that I did not know what was going on and he drove away.

...

Mr Zulfikar and I decided to visit the manager of the local post office depot. I told him about I had seen one of the postmen hand Shah Jahan a black bag and that I was worried that postal ballot papers were being handed to the candidates and their supporters. I also complained to the manager that his postmen should put all letters in through the post boxes and not hand the post to anyone. The manager told us that he had already told his postmen not to hand any post to anyone but that he would tell them again.

On Monday 7th June 2004, I received about ten to fifteen telephone calls of an incident on Dora Road, Small Heath, Birmingham. A postman was seen to be handing a bundle of postal ballot papers to Shah Jahan (a Labour Party candidate) and his younger brother outside Shah Jahan's brother's (Arshad Ali's) house. By the time I arrived, there were about 200 people and I was told the police had already been called. I questioned the postman as to what he was doing but he did not reply. The police arrived soon afterwards.

407. There is more in the same vein. I heard Mr Shaukat Ali Khan's evidence and, although his evidence was not tested by cross-examination on behalf of the Labour Party Respondents, I saw no reason to disbelieve him.

408. Mr Arif Choudhry speaks as to theft of postal ballots by boys. There is evidence of theft from Mr Sultan Mahmood Chaudry, who is an important witness in the case against the Returning Officer and whose evidence will be discussed in detail at that point.
409. Further corroboration comes from Mr Mohammed Ali of Somerville Road and Mr Shafaq Ali of Heather Road. Both give first-hand eye-witness accounts of Mr Shah Jahan and his brother obtaining postal voting packages from a postman.
410. I consider that there is an overwhelming case of theft of postal packages either by unlawfully obtaining them from dishonest or frightened postmen or by straightforward theft from the electors' premises.

Type 12: unlawful possession of ballot packages by Mr Shah Jahan

411. This is closely linked to the case on theft and is supported by much the same evidence.

Type 13: opening of completed postal ballot papers by a person who had collected them

412. A good example of this can be found in the evidence of Mrs Eales (above).

Type 14: unlawful possession of ballot packages by Mr Shafaq Ahmed

413. There is evidence of the possession by a Labour Party candidate and the Respondent Mr Shafaq Ahmed on or around the 22nd May 2004, of seven to ten sets of unused postal ballot documents. This appears from the evidence of Mr Shaukat Ali Khan and, even more

significantly, from the disclosure of police records which show that the police found him in possession of them.

414. In the light of this evidence, I am satisfied beyond reasonable doubt that the Petitioners have established that:

- (a) fraudulent applications for postal votes were made and electors' names improperly entered without their knowledge or consent on the absent voters' list;
- (b) unused ballot packages were improperly diverted by a wide variety of means;
- (c) the improperly diverted ballot packages were fraudulently used by completing the ballot papers and their attendant DOI and despatching them to the Elections Office;
- (d) completed ballot packages (B envelopes) were improperly diverted;
- (e) improperly diverted B envelopes were opened and the contents fraudulently altered (in particular by obliterating votes cast by the elector and substituting votes for other candidates).

415. All the documents concerned in these frauds were established at the Scrutiny to be documents which resulted in ballot papers with votes for one or more of the Labour Party Respondents being admitted into the count.

416. Consequently Mr Brodie has established that all the ballot papers to which this fraud related were entered into the count as a result of a corrupt practice, namely personation contrary to s.60 of the 1983 Act.

417. In short, all those Labour votes were false.
418. How many ballot papers were involved ? It is very difficult to say with certainty. In particular, the exigencies of time meant that Mr Allen could only examine sample packages of ballot papers and Ms Holland's researches were subject to the admitted constraint that she is not and does not claim to be a handwriting expert herself.
419. The best estimate I can give is that the number of ballot papers bearing bogus Labour votes cannot be less than 1,500 and may be well over 2,000. One has only to recall that the votes recorded for the three successful candidates were 4432, 4150 and 3976 to realise that as many as half those votes may have been fraudulent - certainly over one third.
420. When one adds to this the fact that the difference between the lowest vote for Labour (3976) and the highest vote for the PJP (3535) was only 441, it is quite obvious that this electoral fraud did more than affect the result of the poll. It determined the result in favour of the Labour Party Respondents.

The involvement of the Labour Party Respondents

421. The suggestion has flitted through this Petition and the Aston Petition that the postal vote frauds might be the work of a small band of enthusiastic party supporters, operating without the knowledge or consent of the candidates or of the Ward Labour Party.

422. Before examining the evidence, I have to say that, in the light of the scale of the proven frauds, such a suggestion must be improbable to the point of absurdity. Frauds of this magnitude required a considerable degree of organisation and manpower, not to mention supervision and co-ordination. It would be unthinkable for them to be the work of a few hothead activists, working behind the backs of the candidates and their Party.
423. Even if there were no direct evidence of personal involvement of the candidates, the only rational inference to be drawn from the scale of the organisation needed to carry out these frauds is that they were the result of a campaign of vote rigging deliberately embarked upon by the Ward Labour Party with the full knowledge and co-operation of the candidates.
424. But there is, of course, considerable direct evidence of the candidates' personal involvement. I need only to refer to the evidence summarised under Mr Brodie's fourteen types of fraud above.
425. If further evidence is needed, it is provided by the documents themselves. One of the features of ethnic minority communities such as the Asian community in Bordesley Green is that everyone knows everyone else and knows who is related to whom.
426. The Petitioners were easily able to compile a survey of a large number of bogus DOI which showed that they had been "witnessed" by people who were close relatives by blood or by

marriage of the three Labour Party Respondents. Of course it is theoretically possible that some evil-minded stranger has deliberately adopted the names of the Labour Party Respondents and their relatives in order to incriminate them in forging Labour votes, but such a suggestion does not belong in the real world. The fact is that the Labour Party Respondents drafted in their families and friends to assist with the frauds, in the reasonable (though, in the event, mistaken) belief they would not be caught out.

427. What is also clear is that the candidates were not above trying to double-cross each other. Mr Shah Jahan was particularly given to this. As the Scrutiny showed (Appendix 4), there was a significantly large number of ballot papers on which only one vote had been cast instead of the three to which the elector was entitled. Of these "single vote" papers, the overwhelming majority were votes for Mr Shah Jahan (80 for Mr Shah Jahan, as against 7 for Mr Ayaz Khan and 3 for Mr Shafaq Ahmed). No doubt Mr Shah Jahan considered that, having gone to the trouble to get the votes from the postman (see above), it was only fair that he should be allowed to use them for his own benefit.
428. A number of the altered ballot papers in Appendices 5 and 6 to the Scrutiny Report were altered to record only one vote for Labour and, significantly, most of those were in favour of Mr Shah Jahan.
429. Similarly nobody will be surprised to learn that several of the "single-vote" ballots for Mr Shah Jahan figure in the lists of bogus documents identified by Mr Allen or Ms Holland. No doubt

this accounts in part for the large gap (282) between his tally and that of Mr Shafaq Ahmed who came second.

Conclusions on the case against the Labour Party Respondents - Bordesley Green

430. I am therefore satisfied beyond a reasonable doubt that:

- (a) there were corrupt and illegal practices committed by the Labour Party Respondents and their agents;
- (b) there was general corruption within s.164 of the 1983 Act in that corrupt or illegal practices committed in reference to the 10th June 2004 election for the purpose of promoting or procuring the election of the Labour Party Respondents at that election have so extensively prevailed that they may be reasonably supposed to have affected the result.

431. I shall therefore certify that the election for the Bordesley Green Ward held on 10th June 2004 shall be declared void in respect of all three seats.

432. I shall also certify that each of the three Labour Party Respondents, Mr Shah Jahan, Mr Shafaq Ahmed and Mr Ayaz Khan was guilty of corrupt and of illegal practices, with the consequence that they shall all be incapable of being elected to fill the vacancy or any of the vacancies caused by the avoiding of the election.

433. Furthermore each of the three Labour Party Respondents will be named by me in my report to the High Court under ss.145 and 158 of the 1983 Act as guilty of corrupt and illegal practices with the consequences laid down by ss.160 to 163.

Aston

The case against the Labour Party Respondents

434. The original Petition contained a plethora of allegations of misconduct against the Labour Party Respondents, against their Ward organisation and against the Labour Party in Birmingham generally. Whether or not the allegations were true, no admissible evidence was adduced to substantiate most of them and I can make no ruling on them.

435. Mr John Hemming, the Liberal Leader, who gave evidence in the Aston Petition, was one of the authors of the Petition. The Petition was launched (necessarily so) very shortly after the election and, from an abundance of caution, it included every allegation of misconduct that had been thrown up by the election campaign. Parts of the Petition were, it has to be said, pretty wild.

436. Mr Hemming was in no way abashed by this. When giving evidence he was quite prepared to testify to the scandalous doings of the Birmingham Labour Party not only in Aston but in Mr Hemming's own Ward (South Yardley), happily for Mr Hemming to no avail because he was triumphantly returned to office and is now Deputy Leader of the Council. Most of Mr Hemming's evidence was, as he cheerfully admitted, hearsay and I made clear both at the time

and in closing submissions that, to the extent it was hearsay, I was going to disregard it completely.

437. In the event Mr Sukul, Counsel for the Petitioners, opened his case on two bases:
- (a) an incident involving a warehouse which occurred on the night of 8th/9th June 2004 ("the Warehouse Incident");
 - (b) the documentary evidence, largely established by the evidence of the handwriting expert, Mr Allen's colleague, Mr Steve Cosslett.

438. Such is the prominence that the Warehouse Incident played in the Aston Petition, emphasized by Mr Sukul's distinctive, not to say Baroque, style of advocacy, that it seems wiser to deal with that first and the documentary evidence second.

439. When dealing with this Petition it must be borne in mind that, unlike the case in Bordesley Green, the Labour Party Respondents were represented by Counsel: each of the Respondents gave evidence and witnesses were called on their behalf.

The Warehouse Incident

440. At about 1.30 in the early hours of the morning of 9th June 2004, four police officers of the West Midlands force attended the "NT" warehouse on the Wrylie Trading Estate off Birch Road East. On this, otherwise deserted, estate, there were several cars outside that particular

warehouse. The officers saw two men about to get into one of the cars and spoke to them. The officers were then taken to a first floor office in the warehouse.

441. In the office were several men sitting at a table. They had documents on the table in front of them which the police recognized to be election documents.

442. How had this arisen ? Who were the men ? What were they up to ?

The story as told by the Petitioners' witnesses

443. Evidence was given by two of Mr Ayoub Khan's brothers, Mr Asif Iqbal and Mr Naser Iqbal. There was a witness statement from a third brother, Mr Tariq Hussain but in the end he did not give evidence and I do not take his statement into account.

444. In summary, what the Iqbal brothers said was as follows. Believing that the Labour Party candidates were up to mischief, on the evening of 8th June 2004 they decided to watch the Ward Labour Party campaign office, a lock-up shop in Witton Road. I have seen photographs of this shop. It is secured by an iron shutter which covers the entire front of the shop. It stands in a well lit main road near a bus-stop.

445. As they arrived in Witton Road, the Iqbal brothers saw the Ward organiser Mr Zulfiqar (sometimes spelled "Zulfigar") Khan and the Respondent Mr Mohammed Afzal sitting in Mr

Afzal's Primera car outside the campaign office. They described Mr Zulfiqar Khan as looking "anxious and uneasy". The Iqbal brothers parked further up the road and kept watch.

446. A Volvo then arrived, owned and driven by the Respondent Mr Nazrul Islam, with a passenger. Mr Nazrul Islam and his passenger got out of the car and one of them retrieved a carrier bag, placed it under his clothing and walked into the campaign office.

447. Some time later, several men came out of the campaign office. Mr Afzal placed a carrier bag in the boot of his Primera and he, Mr Zulfiqar Khan and Mr Nazrul Islam (with one other) got into the Primera. One of the other cars was a Carina owned and driven by the Respondent Mr Kazi. The cars drove off and the Iqbal brothers decided to follow the Primera.

448. They followed the Primera to the trading estate and saw it drive in. Shortly thereafter, the Iqbal brothers drove into the trading estate to look for the Primera. They found it with Mr Afzal in the driving seat. The Iqbal brothers parked on a road outside the estate and saw a BMW car arrive and a Mercedes car with a number plate "NAJ 1B" (clearly, "Najib"). They saw a Lexus arrive at the estate and then Mr Kazi's Carina. At this point the police arrived.

The story as told by the police officers

449. The police were summoned by telephone calls which alerted them to the Primera, BMW and Lexus cars and said that Labour councillors were "rigging blank ballot papers"¹² at the NT warehouse.

450. In summary, five officers in total attended the warehouse: PS Rattenberry, PC Parsons, PC Harrison, WPC Bradley and WPC Grundy. They initially attended at about 12.30 am on 9th June. They discovered a number of Asian men in an office on the first floor of the warehouse. In their statements and in court they were able to identify Mr Nazrul Islam, Mr Kazi and Mr Zulfiqar Khan.

451. WPC Grundy identified:

...one person in specific who was sitting on a sofa. I remember this man as being chubby, bald and wearing glasses. He was being very obstructive and he was speaking in a different language.

452. I asked WPC Grundy in the witness box whether she could recognize this person again. She immediately identified Mr Afzal and said that she had recognized him when she had arrived at court that day.

453. On the table before the men in the warehouse the police saw a number of documents. WPC Grundy again:

¹² This is taken from the Police log.

On a large oval shaped table in the room I could see a lot of different coloured including white and yellow paperwork scattered about in piles. I saw plenty of ballot papers with crosses on them and I saw unsealed envelopes that were of A5 size. The other papers were approximately A4 sized.

454. PC Harrison saw yellow voting papers as did WPC Bradley who said:

I could see a substantial amount of papers and unsealed envelopes scattered all over. The envelopes were of A5 size and the other papers were approximately A4 sized.

I knew the A4 papers were ballot papers because I have voted by post in the past and I was familiar with the ballot papers that I saw. I do not know exactly how many ballot papers there were but it looked like hundreds. As far as I could see they had crosses on them but I did not touch any of them nor did I examine them.

455. PS Rattenberry also saw marked ballot papers.

456. The officers asked those present for an explanation. The men said that it was all "legitimate"¹³. They were helping voters who were unable to vote because of disability or inability to speak English. They were just checking that the papers were filled in correctly.

457. The police officers were in a quandary. As they all accepted in the witness box, they had no knowledge of or training in electoral law and no experience whatsoever of dealing with elections in a police capacity. They had no idea whether what they were witnessing was legal or illegal.

¹³ WPC Grundy's statement.

I cannot see that they are personally in any way to blame for this: it was quite outside the normal run of their police work.

458. What happened next was, frankly, surrealist. PS Rattenberry took what was described as a "dip sample" of the documents and PC Parsons and PC Harrison were sent off to see the person named in them. Although the evidence is somewhat garbled at this point, it seems to me that, unless he was shown a DOI with the top part showing the voter's name and address still attached, the Sergeant must have been shown a DOI with a witness name and must have gone to see the witness rather than the voter.

459. This surreal incident led me to ask a few questions of PC Parsons myself:

THE COMMISSIONER:

Give me a flavour of this. Did you warn this chap you were going round or did you bang on his door at 1.30 in the morning and say, "Is this your vote?" That must be a slightly alarming thing to happen.

- A. *Unfortunately, sir, that is what I was directed to do.*

THE COMMISSIONER:

I am just anxious I get a flavour of it. So you go round to this address, you knock on the door. Did you get any impression that the person who answered the door was expecting you?

- A. *He would not have been expecting me, I would not have thought.*

THE COMMISSIONER:

Unless of course somebody had phoned him, saying, "By the way, the police are coming round to see you".

- A. *He was up, I recall that.*

THE COMMISSIONER:

Fully dressed?

A. *Yes.*

THE COMMISSIONER:

And what did you show him?

A. *I showed him the white piece of paper to confirm that I was at the correct address and those were his details, because I read his name off the white sheet, and then on the ballot sheet I showed him that also, to say, "Is this your vote?"*

THE COMMISSIONER:

And he confirmed that it was?

A. *Yes.*

460. Comment seems superfluous.

461. Whoever the officers saw seems to have satisfied them because, when they returned to the warehouse, PS Rattenberry concluded that no offence had been committed and the officers left the warehouse at about 1.30 am. Before leaving, they took names and addresses. The police list showed the names of Mr Kazi, Mr Nazrul Islam, Mr Zulfiqar Khan, Mr Mohammed Najib, Mr Wahid Najib and Mr Tariq Hussain. It did not mention Mr Afzal.

462. When the officers reported back to the station, the matter was referred to senior officers and it was realised that the documents should at least have been taken into police possession. So back the police went to the warehouse just before 4.00 am. Some of the men were still there and the documents were still on the table but by now they were all in the B envelopes and

properly sealed. They were not, however, in a safe and nobody mentioned a safe either at that visit or at the earlier visit. The police took possession of 275 B envelopes.

463. Later that morning PS Nevin, the only officer to have doubts about the matter¹⁴, took the packet of votes to the Elections Office and handed them to Mr Owen. Mr Owen seems to have received a very limited account of events at the warehouse. He accepted the votes and they were later processed.

The story as told by Mr Islam, Mr Kazi and their witnesses

464. Evidence was given by Mr Nazrul Islam, Mr Kazi, Mr Mohammed Najib, his son Wahid Najib and his brother Tariq Hussain.

465. Their evidence may fairly be summarised as follows. Labour canvassers had collected a large number of completed postal packages from voters. The reason why they had collected them was twofold. By the evening of 8th June it was by no means certain that the vagaries of the British postal service would ensure delivery of the packages by close of poll on 10th June and also there were serious worries about the safety of the post, given that a pillar box had been set alight in the neighbouring Ward of Washwood Heath, apparently in order to destroy postal votes.

¹⁴ Which he put in an email that afternoon: "I would be surprised if there are no offences for what these people have done as voting is a private affair and with this system vote rigging could be paramount".

466. These votes had been taken to the campaign office but Mr Kazi, Mr Nazrul Islam and Mr Zulfiqar Khan did not believe it to be secure. They had seen the Iqbal brothers skulking around Witton Road and they knew that the lock on the metal shutter was unreliable. They feared that, were they to put the votes in the campaign office, Mr Ayoub Khan's (admittedly large) band of brothers would burgle the shop and remove them.
467. So the decision was taken to enlist Mr Mohammed Najib, who owned this secure warehouse and he was duly contacted. For reasons that were not entirely clear, Mr Mohammed Najib required his son Wahib and his brother Tariq Hussain to come to the warehouse. There was much confused evidence about keys which never really got sorted out.
468. The votes were taken to the warehouse. Eventually all six men were in the upstairs room. Although the intention had been to put the documents in the safe, it was thought wise to count them first so the men sat down at a table and asked young Wahib to get them cold drinks. They were still counting them when the police arrived.
469. The five witnesses confirmed that the police had been given the explanation that the documents were merely being checked and also the incident of the "dip sample". They denied, however, that there were any ballot papers on the table although they admitted that some of the envelopes were open.

470. Mr Nazrul Islam said that he left at the end of the first incident and one of the police officers gave him a lift home. The police officers did not recall this but nothing turns on it.
471. Mr Mohammed Najib remembered the police returning but disputed that it was as late at 3.55 am. He recalled it as being only about 20 or 30 minutes after they had first left.
472. None of the witnesses however could account for what had been happening between 1.30 am and 3.50 am if the police log had stated the times correctly. Similarly none of the witnesses could explain why the documents never got into the safe.

The story as told by Mr Afzal

473. Were this a criminal trial, Mr Afzal could be said to have set up a plea of alibi. His witness statement, signed 14th February 2005 said:

On Tuesday 8th June 2004, two days before the Election, I was campaigning as normal. At about 8 to 8.30 pm, I went to an informal meeting of Indian Muslims at the request of Cllr Kazi to discuss the Labour Government's actions affecting Muslims both at home and abroad. I believe I left the meeting between about 10 and 10.30. Cllr Kazi was still there when I left. I was not feeling well that day so I drove straight home and went to bed after taking a hot drink and some medication.

At about 9 o'clock in the next morning, I was telephoned by Amjad Hussain, the Labour Party candidates' election agent. He began describing an incident involving the police at a warehouse which I had already known to be owned by a Mr Najib. I asked Mr Hussain to come to my house and explain in detail what had happened. I had not been involved in the decision to take postal

ballot envelopes to the warehouse on the night before nor had I been aware of the storage of postal ballot envelopes anywhere outside the campaign office.

474. In short, Mr Afzal was not in Witton Road, he did not drive his Toyota Carina car to the warehouse and he was not in the warehouse. He was peacefully asleep at home. The first he knew of the Warehouse Incident was at 9.00 am the following morning.

Where does the truth lie ?

475. I shall start with Mr Afzal and consider whether he was telling me the truth.

476. If his statement were true, it would successfully distance Mr Afzal from any possible wrongdoing with the votes in the warehouse. The identification by WPC Grundy could be put down to mistake and the absence of Mr Afzal's name from the list of names and addresses taken by the officers would corroborate his story.

477. Given a fair wind and, more to the point, given the burden and standard of proof required to incriminate him, this story might well have worked.

478. The Petitioners' lawyers, however, had a brainwave. They knew that, as a councillor, Mr Afzal had a mobile telephone provided by the Council. They applied for, and I granted, an order for the Council to disclose the records for Mr Afzal's mobile telephone for the night of 8th/9th June 2005. When this arrived, it blew Mr Afzal's carefully crafted alibi out of the water, because, far from showing Mr Afzal asleep in bed at home, the records showed him as being very active

between the hours of 10.00 pm on 8th June and 5.00 am on 9th June. It appeared to show him telephoning home at a time when he claimed he was already at home. It showed him telephoning Mr Mohammed Najib at about 11.00 pm.

479. When Mr Afzal went into the witness box, he knew what was coming: Mr Sukul had opened his case by referring to the mobile telephone records and had cross examined Mr Najib on the topic. Mr Afzal took a bold course. He disavowed his witness statement. It had, he said, been put together by Messrs Steel & Shamash just before they took themselves off the record: these solicitors were, he claimed, more interested in protecting the position of the Labour Party than the position of their supposed clients (including himself). The true story, he said, was quite different.
480. It would perhaps be kinder to draw a veil over Mr Afzal's attempts to explain his activities over the period between 10.00 pm on 8th June and 5.00 am on 9th June. When questioned by Mr Sukul with some interventions from myself, Mr Afzal's evidence became wilder and wilder and less and less credible. Obvious lie followed obvious lie until even Mr Afzal realised that he was doing himself no favours.
481. The brutal fact is that he could not account satisfactorily for his movements on the night nor could he account for the telephone calls that had been disclosed by the records.
482. Why did he lie ? And where was he on the night ?

483. Before answering those questions I will return to the evidence of the other Labour Party Respondents and their witnesses. Were they telling the truth ?
484. The difficulty with their story was that it was inherently incredible. They had no real explanation as to their possession of these votes late on the evening of 8th June, and their account of fearing to keep them in the lock-up shop with its steel shutter did not ring true. I was unable to understand why, for example, one of the Respondents did not simply take the envelopes home with him if they were genuinely worried that the Liberal Democrats would burgle Party headquarters and steal the votes (a suggestion for which, I might add, there was not the slightest foundation).
485. Why on earth was it necessary to ring Mohammed Najib and get him, together with his son Wahid Najib and his brother Tariq Hussain, all round to a warehouse in the early hours of the morning, simply to put one packet of papers in a safe ? Why did it need six men to go to the warehouse and why, when they got there, did they not put the documents straight into the safe and go home to bed ? Surely this does not require the men to sit round a table and get the youngest to serve them soft drinks.
486. There are several other unanswered questions, even if the evidence of the Respondents and their witnesses stood alone. Why should it be necessary to count the envelopes - or, if this was necessary, why had they not been counted in the time they were at Party headquarters ? Why

were people still at the warehouse when the police returned shortly before 4.00 am and why were the documents not in the safe by then, if this had been their intention ?

487. When these questions were asked of the five men who gave evidence that they had been at the warehouse, they could not give any satisfactory answers.

488. Another significant question to be asked was why Mr Zulfiqar Khan had chosen not to give evidence. He was said by Mr Afzal to be the "Ward organiser" and everybody agreed he had been at the warehouse (his name was on the police list). Although Mr Hayes had opened his case on the basis that I would hear from all six men at the warehouse, Mr Zulfiqar Khan did not appear. I raised this matter with Mr Hayes who told me that he had hoped to call Mr Zulfiqar Khan but that, after consulting his own solicitors, Mr Zulfiqar Khan had declined to testify.

489. I return to the question of whether Mr Afzal was at the warehouse. It will be recalled that WPC Grundy had given a description of a man "chubby, bald and wearing glasses". In the course of cross examination of the police officers, the suggestion had been floated that perhaps she might have been identifying Mr Tariq Hussain, who was a balding, middle-aged Asian gentleman. This suggestion might well have succeeded in planting a doubt in my mind, had not Mr Hayes, for reasons of his own case, decided actually to call Mr Tariq Hussain.

490. The moment Mr Tariq Hussain went into the witness box, any suggestion of mistaken identification disappeared. He is some ten years younger than Mr Afzal and looks more. Far

from being "chubby", he is of slim build and appears quite fit. True his hair is getting a bit thin and he does wear glasses. But the killer point was that Mr Tariq Hussain sports a well-cut black beard, whereas Mr Afzal is clean-shaven. I was moved to comment, perhaps facetiously, that Mr Tariq Hussain would be ill advised to enter a "Councillor Afzal look-alike competition". The suggestion that WPC Grundy had mistaken him for Mr Afzal was ludicrous.

491. Once that had been established, it was clear that none of the six men who claimed to be at the warehouse could possibly fit WPC Grundy's description. Mr Afzal, though, did.

What really happened

492. I have no doubt whatsoever that the three Labour Party Respondents and their witnesses have told me a pack of lies. Having seen them in the witness box and having heard their attempts to answer questions about the obvious holes in their evidence, I cannot accept their evidence as truthful.

493. I do believe the witnesses called by the Petitioners, even accepting that the Iqbal brothers, as supporters of the Liberal Democrats and brothers of Mr Ayoub Khan, have an obvious axe to grind. I accept their account of what happened in Witton Road as essentially correct.

494. Similarly, I accept the evidence of the police officers of what happened at the warehouse.

495. Thus I find as facts:

- (a) Mr Afzal and his Primera car were in Witton road at about 11.00 pm on 8th June 2004;
- (b) Mr Afzal, Mr Kazi, Mr Islam and Mr Zulfiqar Khan drove in more than one car to the warehouse with a quantity of votes in at least one package in the boot of a car (probably Mr Afzal's Primera but which car is irrelevant);
- (c) Mr Afzal was at the warehouse and was correctly identified by WPC Grundy;
- (d) when the police saw the documents on the table
 - (i) the B envelopes were unsealed;
 - (ii) there were A envelopes on the table;
 - (iii) there were DOI on the table; and
 - (iv) there were yellow ballot papers on the table.
- (e) when the "dip sample" exercise took place, the officers visited (as the men in the warehouse intended) a "stooge" who was tipped off by mobile phone: this is the only way to account for PC Parson's evidence quoted above.

496. Although I am, as I have said, satisfied that Mr Afzal was at the warehouse, how is it possible to account for the fact that his name did not appear on the police list ? There are several potential explanations and it is not necessary to make a definitive finding. By far the most probable explanation arises from WPC Grundy's recollection that the "chubby" man was speaking a language other than English and was being "obstructive". Mr Afzal, realising that the police officers had not recognized him, told the others to give a false name, preferably that of someone like Mr Najib's brother who could be relied on to back up the story if necessary. The police were given Mr Tariq Hussain's name and particulars (which would, of course, be known

to his brother). Those present almost certainly believed that, as turned out to be the case, if they put a bold face on things, the police would lose interest and go away.

497. As I say, I do not have to make any definitive finding, but a situation where the quick thinking of Mr Afzal led to a false name being given would not only account for the absence of his name from the police list but also for the difficulties the real Mr Tariq Hussain appeared to have in the witness box in recalling the events of that night.

498. In any event, having seen the three Labour Party Respondents in the witness box, I have no doubt which of them was regarded as "the boss". Mr Kazi did not impress me as a natural leader and Mr Islam, to be frank, seemed somewhat naive and pathetically grateful that his colleagues had been prepared to accept him, as a Bangladeshi, as one of the team. Mr Afzal, on the other hand, is a senior and very experienced politician. He has held "Cabinet" office on the Council: he was in command.

499. That being so, it is hard to believe that he would have refused to take part in the warehouse exercise. He would have wanted to be part of it: he would have wanted to run the show. In my view "running the show" is precisely what WPC Grundy described him as doing when she and her colleagues went to the warehouse.

What was going on at the warehouse ?

500. Mr Hayes, as an experienced criminal advocate, made great play with the fact that the conduct in the warehouse may have been suspicious but that a tribunal of fact had to be sure of what was actually going on before it could "convict" on an offence. This would probably be very effective with a jury but I took a more pragmatic view.
501. Taking as my starting point that I am satisfied that there were open envelopes and yellow ballot papers visible on the table when the police arrived, it seems to me that there are only two real possibilities as to what the men present were doing:
- (a) they were filling out blank ballot papers; and/or
 - (b) they were examining properly completed ballot papers with a view to altering or destroying those which did not vote Labour.
502. Both these activities constitute personation and consequently both constitute corrupt practices. I am quite satisfied that these men were not at the warehouse for any innocent purpose and that they were engaged in corrupt practices.
503. I am unable to make any finding as to how many ballot papers were involved. It is known that, at about 4.00 am on 9th June 2004, the police took possession of 275 B envelopes which were subsequently delivered to Mr Owen but whether they represented the totality of the documents present in the warehouse on the first occasion the police called, I have no idea. All I can say, therefore, is that *at least* 275 ballots were involved.

504. From this it follows that I am satisfied that each of the three Labour Party Respondents, together with Mr Zulfiqar Khan and the Najibs, father and son, were engaged in corrupt practices on that night. That said, I see no purpose in naming either the two Najibs or Mr Tariq Hussain in my report. At worst, they were mere foot soldiers in this fraud: the generals were the candidates and their "Ward organiser".

The Aston documentary evidence

505. In their initial trawl, the Petitioners' lawyers identified a number of different handwritings in the suspect documents. They referred to them provisionally as "Mystery A", "Mystery B" and so on.

506. It was in these categories that the documents were submitted to Mr Cosslett, the handwriting expert. I shall not deal with all Mr Cosslett's reports. Their conclusions were largely similar and concerned different identities of forgers. Mr Cosslett categorised his findings (in summary) as follows:

- (a) "conclusive evidence" means that a handwriting either definitely is (or definitely is not) the same as another handwriting with which it is compared;
- (b) "strong evidence" means that the possibility of a different conclusion cannot be ruled out so that the evidence, though strong, is less than "conclusive";
- (c) "limited evidence" is weaker again but still means that the expert considers on the balance of probabilities that the handwriting is (or is not) the same as the comparator.

507. In his report of 17th January 2005 referenced 24/05/A, Mr Cosslett examined the "Mystery A" documents, all DOI, roughly 162 in number. He concluded that in all except two of these DOI the name and address of the witness had conclusively been written by the same person.
508. Mr Cosslett then examined the purported witness signatures and decided that there was conclusive evidence that the same person had signed DOI in at least 34 different names (both male and female names were used). There was strong evidence of the same common authorship in other DOI.
509. Turning to the purported voters' signatures, Mr Cosslett found conclusive evidence that one forger had written six different voter's signatures, strong evidence that the same forger had written a further five signatures and limited evidence that he or she had written a further sixteen.
510. He concluded that report by saying in relation to the "Mystery A" documents:
- I cannot accept that either the Voter's signatures or the Witness's signatures have been written by the number of persons whose names appear on these forms.***
511. In a later report, Mr Cosslett carried out comparisons of signatures on DOI with the corresponding signatures on the ATV relating to the same voters. His reports of 20th January 2005 (24/05/CHART A1/1 and A1/2) set out the instances where, in his expert opinion, the signatures on the ATV and the DOI are not by the same hand. These are grouped in the same groups as his reports on the DOI.

512. "Mystery B" turned out not to be a mystery at all. It was the Respondent Mr Nazrul Islam. Mr Cosslett's report on these documents was also dated 17th January 2005 and was referenced 24/05/B.

513. What Mr Cosslett had found was as follows:

- (a) Mr Islam (or someone using his name) had witnessed a large number of documents, using no fewer than five different forms of signature and two separate addresses (one of which was indeed Mr Nazrul Islam's home address, 16 Little Oaks Road);
- (b) the same handwriting could be found being used in the names of
 - (i) M. H. Ali of 9 Albert Road,
 - (ii) M. D. Ashab of 28 Elmscote Road (but not necessarily all signatures in that name);
 - (iii) Kala Miah of 25 Sutton Street (but not necessarily all signatures in that name);
 - (iv) Abdul Rahim of 267 Frederick Road (but not necessarily all signatures in that name);
 - (v) (possibly) Anwar Ali of both 72 Selton Road and 98 Ettington Road;
 - (vi) (possibly - and later admitted by Mr Nazrul Islam) B. Miah of 62 Bromfield Close.

514. Mr Cosslett had compared the questioned writing with the known handwriting of Mr Nazrul Islam on court documents and concluded that they were by the same hand. On the face of it,

therefore, Mr Nazrul Islam had adopted a variety of different identities to complete witness statements on DOI. Given that he must be taken to know when he signs in somebody else's name that it is not his own, this would seem to be a clear indication of deliberate falsification of a vital electoral document.

515. Mr Cosslett's report 24/05/CHART A1/2 listed 27 instances on the "Mystery B" list where the signature on the DOI did not match than on the corresponding ATV.
516. As with Mr Afzal and the telephone records, Mr Nazrul Islam was able to see the difficulties in advance of his giving evidence (indeed, given the timing, in advance of his completing his witness statement).
517. His explanation can fairly be summarised as follows:
- (a) I do use a variety of different versions of my name and a variety of signatures - there is nothing wrong in that;
 - (b) although I live at 16 Little Oaks Road, the second address I used (22 Jardine Road) is my family home and I still regard it as "home";
 - (c) I accept I completed the witness name and address in names other than my own but in each case the real witness to whom the name and address related was present and asked me to do it for him;

- (d) I accept that I actually signed in several names which were not my own but this was either an oversight when filling in the name and address section or was done at the request of and in the presence of the real witness;
- (e) in every case the genuine voter signed the DOI in my presence and the ballot paper is valid.

518. Mr Hayes submitted a small file of corroborative witness statements from some of those whose names, addresses and signatures had been entered in DOI by Mr Nazrul Islam.

519. This was all very plausible but I did not believe a word of it. In the witness box Mr Nazrul Islam was unable to give any satisfactory explanation of his use of five different versions of his name and five different signatures. His attempts to account for his writing other people's witness names and addresses in DOI became more and more garbled and incredible. He was totally unable to account for the fact that a considerable number of DOI which he swore had been witnessed by him in the presence of the true voter bore a voter's signature by a different person from the person who had signed that voter's ATV.

520. Mr Hayes attempted to portray Mr Nazrul Islam as a somewhat naive man who did not really understand the niceties of the DOI system but acted throughout honestly and with the best of intentions. I felt this sat ill with the fact that his client had become a councillor in England's largest local authority.

521. I have no doubt that Mr Nazrul Islam knew very well what he was doing when he completed these DOI. I have similarly no doubt that a very high proportion of the DOI completed by him in this wide variety of aliases were completed in the knowledge that the DOI and the ballot paper were not being used by the voter to whom they had been issued.
522. In short I am satisfied that Mr Nazrul Islam participated in personation by the fraudulent use of the DOI and the ballot papers which had come with them.
523. I need not I think, recite the rest of Mr Cosslett's conclusions. In a series of further reports he paints the same picture as with "Mystery A" and "Mystery B": DOI completed by the same person using a variety of aliases. The two reports referenced "CHART A1" are similarly damaging. With the "Mystery A" documents, for example, Mr Cosslett was able to identify 79 cases where the ATV and DOI voter signatures did not tally.
524. There is no equivalent in the Aston case of Ms Holland's schedule. The principal evidence consists of those documents which Mr Cosslett was able to examine in the very limited time available. A common sense approach permits me to treat Mr Cosslett's findings, which were consistent from report to report, as indicating a pattern of forged ATV, forged DOI and, consequently, false ballot papers.

525. It is rather more difficult to estimate the number of false ballot papers in Aston. Doing the best I can on the figures, it is unlikely that number is under 1,000 but how much higher than 1,000 is almost impossible to tell.

526. Patently the false votes affected - indeed, as in Bordesley Green, determined - the result. Only 514 votes separated the third from the fourth in the poll.

The involvement of the Labour Party Respondents

527. This presents even less of a problem than in Bordesley Green. Each of the three Labour Party Respondents was involved in the Warehouse Incident, together with Mr Zulfiqar Khan, the campaign organiser. They were, in effect, caught red-handed rigging votes.

528. Similarly Mr Nazrul Islam's involvement in the "Mystery B" documents implicates him directly in personation.

529. Even without that, what I said for Bordesley Green holds good for Aston. The only rational inference to be drawn from the scale of the organisation needed to carry out these frauds is that they were the result of a campaign of vote rigging deliberately embarked upon by the Ward Labour Party with the full knowledge and co-operation of the candidates.

Conclusions on the case against the Labour Party Respondents - Aston

530. I am therefore satisfied beyond a reasonable doubt that:

- (a) there were corrupt and illegal practices committed by the Labour Party Respondents and their agents;
- (b) there was general corruption within s.164 of the 1983 Act in that corrupt or illegal practices committed in reference to the 10th June 2004 election for the purpose of promoting or procuring the election of the Labour Party Respondents at that election have so extensively prevailed that they may be reasonably supposed to have affected the result.

531. I shall therefore certify that the election for the Aston Ward held on 10th June 2004 shall be declared void in respect of all three seats.

532. I shall also certify that each of the three Labour Party Respondents, Mr Mohammed Nazrul Islam, Mr Muhammed Afzal and Mr Mohammed Amin Kazi, was guilty of corrupt and of illegal practices, with the consequences that they shall all be incapable of being elected to fill the vacancy or any of the vacancies caused by the avoiding of the election.

533. Furthermore each of the three Labour Party Respondents will be named by me in my report to the High Court under ss.145 and 158 of the 1983 Act as guilty of corrupt and illegal practices.

534. I was also satisfied that corrupt and illegal practices were proved against Mr Zulfiqar Khan, the Ward organiser. He was given an opportunity to give evidence at trial but I was informed by Mr Hayes (who had hoped to call him) that he had declined to testify on the advice of his

solicitors. In the circumstances I consider that he has received sufficient notice under s.160(1) and may be named in consequence.

535. I must therefore formally name all four men under s.160(1) with the consequences that flow from that under ss.160 to 163 of the 1983 Act.

The Returning Officer

The relevant law

Which rules must be breached to found a Petition ?

536. This was the subject of detailed and very carefully argued submissions by Mr Coppel.

537. The starting point is s.48 of the 1983 Act. It will be recalled that subsection (1) provides:

(1) No local government election shall be declared invalid by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the election or otherwise of rules under section 36 ... above if it appears to the tribunal having cognizance of the question that -

(a) the election was so conducted as to be substantially in accordance with the law as to elections; and

(b) the act or omission did not affect its result.

538. Section 36 of the 1983 Act provides:

(1) Elections of councillors for local government areas in England and Wales shall be conducted in accordance with rules made by the Secretary of State.

(2) Rules made under this section shall apply the parliamentary elections rules in Schedule 1 to this Act, subject to such adaptations, alterations and exceptions as seem appropriate to the Secretary of State.

539. The main Rules made under s.36 are the Local Elections (Principal Areas) Rules 1986 ("the 1986 Rules").

540. The rules for Parliamentary elections are contained in Schedule 1 to the 1983 Act. The way the 1986 Rules legislate for local authority elections is somewhat complex. Under Rule 5 of the 1986 Rules, when a local authority election is not combined with another election, the Parliamentary Rules apply as modified by the rules set out in Schedule 2 to the 1986 Regulations. In the case of a combined poll, Rule 6 provides that the Parliamentary Rules as modified by Schedule 2 are applied but as further modified by Schedule 3 to the 1986 Regulations. Thus, to ascertain the rules for a combined election, it may be necessary to have regard to three sets of rules.

541. Mr Coppel argued that, in order to bring s.48 into play so as to entitle a Petitioner to argue that breaches of election law by the Returning Officer should lead to the election being set aside, it must be shown that she was in breach of rules made under s.36. If she was in breach of rules but they were not rules made under s.36, then the breaches could not found a Petition.

542. He then argues that the 2001 Regulations were not rules made within s.36 and thus that breaches of them cannot found a Petition. Section 36(3C) is undoubtedly listed as one of the

enabling provisions in Schedule 1 to the 2001 Regulations but, Mr Coppel argues, "rules" and "regulations" are different forms of subordinate legislation and mention of the former must, by definition, exclude the latter.

543. Another of the enabling provisions is paragraph 24 of Schedule 1 to the 1983 Act (the Parliamentary Rules) which empowers the Secretary of State to make regulations about postal ballots.

544. The suggestion that, if the Returning Officer completely disregards the provisions of the 2001 an aggrieved candidate or elector is completely without remedy, is deeply unattractive. Mr Coppel argues that there is a distinction to be made between mandatory provisions, breach of which would found a Petition, and directory provisions, breach of which would not.

545. Persuasively reasoned though it is, I consider this contention to be wrong.

546. First, I do not consider that the word "rules" in s.36(1) is rigidly confined either to rules made under s.36 or to rules so defined as to exclude regulations. In my judgment the 2001 Regulations come within the definition of rules and are encompassed by s.36 and by s.48.

547. Secondly, one can reach the same result by following the trail from s.36(2):

- (a) rules under s.36 must incorporate the Parliamentary Rules in Schedule 1 to the 1983 Act;

- (b) the 1986 Rules do in fact incorporate the Parliamentary Rules (Rule 5);
- (c) the Parliamentary Rules themselves empower the Secretary of State to make Regulations;
- (d) the 2001 Regulations are made by powers derived from (*inter alia*) the Parliamentary Rules.

548. I have therefore come to the conclusion that breaches of the 2001 Regulations (even when they are not simultaneously breaches of the 1986 Rules) are breaches which may found a Petition and bring into play the provisions of s.48.

The interpretation of s.48

549. I was referred to a number of authorities on the construction of s.48 of the 1983 Act, in particular *Re Kensington North Parliamentary Election*¹⁵, *Morgan v Simpson*¹⁶ and *Considine v Didrichesen*¹⁷.

550. Of these, *Morgan* was the most useful because the Court of Appeal considered how the two conditions laid down by s.48(1) operated in practice. In *Morgan*, the Petitioner had lost a local authority election by 11 votes because 44 ballot papers recording votes for her had, in error, failed to be stamped by the polling clerks with an official mark.

¹⁵ [1960] 1 WLR 762.

¹⁶ [1975] QB 151.

¹⁷ [2004] EWHC 2711.

551. As so often, Lord Denning MR cut to the heart of the matter. Speaking of s.37 of the Representation of the People Act 1949, the predecessor of s.48 of the 1983 Act and in substantially the same terms:

That section is expressed in the negative. It says when an election is not to be declared invalid. The question of law in this case is whether it should be transformed into the positive so as to show when an election is to be declared invalid. So that it would run: "A local government election shall be declared invalid (by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the local elections rules) if it appears to the tribunal having cognisance of the question that the election was not so conducted as to be substantially in accordance with the law as to elections or that the act or omission did affect the result".

I think that the section should be transformed so as to read positively in the way I have stated. I have come to this conclusion from the history of the law as to elections and the cases under the statutes to which I now turn, underlining the important points.¹⁸

¹⁸ Ibid at p.161.

Lord Denning went on:

Collating all these together, I suggest that the law can be stated in these propositions:

- (1) *If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected, or not. That is shown by the Hackney case, where two out of 19 polling stations were closed all day, and 5,000 voters were unable to vote.*
- (2) *If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls - provided that it did not affect the result of the election. That is shown by the Islington case where 14 ballot papers were issued after 8 pm.*
- (3) *But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls - and it did affect the result - then the election is vitiated. That is shown by *Gunn v Sharpe*, where the mistake in not stamping 102 ballot papers did affect the result.*

Applying these propositions, it is clear that in this case, although the election was conducted substantially in accordance with the law, nevertheless the mistake in not stamping 44 papers did affect the result. So the election is vitiated. The election of Mr Simpson must be declared invalid.¹⁹

552. Stephenson LJ said²⁰:

Any breach of the local election rules which affects the result of an election is by itself enough to compel the tribunal to declare the election void. It is not

¹⁹ Ibid at p.164.

²⁰ Ibid at p.168.

*also necessary that the election should be conducted not substantially in accordance with the law as to local elections. As such a significant breach of the rules is admitted, the appeal must be allowed on that ground... For an election to be conducted substantially in accordance with that law there must be a real election by ballot and no such substantial departure from the procedure laid down by Parliament as to make the ordinary man condemn the election as a sham or a travesty of an election by ballot. Instances of such a substantial departure would be allowing voters to vote for a person who was not in fact a candidate or refusing to accept a qualified candidate on some illegal ground or disfranchising a substantial proportion of qualified voters but not such an irregularity as was committed in this case or perhaps in *Gunn v Sharpe*.*

553. Thus I must be satisfied that:

(a) there was a breach of the rules or "mistake at the polls"

and either

(b) the election was not so conducted as to be substantially in accordance with the law as to elections

or

(c) the breach or mistake affected the result of the election.

Breaches of the rules by the Returning Officer - general

554. I need not go into great detail here because I have already set out the admitted breaches of the 2001 Regulations by the Returning Officer and her staff. In outline:

- (a) contrary to Regs 81 and 82, on arrival at the Elections Office, the postal ballot envelopes were not put in locked and sealed postal voters' ballot boxes;
- (b) contrary to Reg 82, the Returning Officer did not keep one or more locked and sealed "last postal ballot boxes" to transport the final unprocessed B envelopes to the count (transporting them in a variety of containers including plastic shopping bags);
- (c) contrary to Regs 84 to 86, no (or virtually no) document which should have been marked "provisionally rejected" was so marked;
- (d) contrary to Regs 87 and 88, no lists were made and no matching of ballot papers and DOI, effected by means of a list;
- (e) (arguably a breach) a ballot paper which emerged from the A envelope with a number which did not match the envelope itself was not rejected out of hand but put aside for matching, there being no provision for this in the Regulations.

555. Furthermore it emerged in the course of the pre-trial preparation that some 70 DOI (and consequently their accompanying ballot papers) had been wrongly accepted by the Returning Officer's staff. They had not on their face been properly completed and should have been rejected at the initial stage of the process.

556. These breaches are of varying degrees of seriousness. Provided that they were kept in secure custody, failure to keep the unopened B envelopes in locked and sealed postal voters' ballot boxes is not a very grave dereliction. Similarly it is difficult to become very excited about

documents not being physically marked "provisionally rejected" if they were otherwise treated properly.

557. On the other hand, the failure to keep lists is quite serious. As I have said, this is not because it deprives subsequent enquirers of an "audit trail". It is because, without lists, the possibility for error in matching up DOI and A envelopes or DOI and ballot papers (if permitted) is much increased and, once an error has occurred, it is, in practice, irretrievable.

558. The 70 wrongly admitted DOI, although within the scope of human error, were otherwise indefensible. Had the election been much closer, then, notwithstanding the approach of the Divisional Court in *Considine v Didrichesen*²¹ to the facts of that case, I would have been sorely tempted to say that this was an error which had affected the result, thus triggering s.48. As it was 70 votes *by themselves* would not have swung the outcome.

559. The failure to abide by the rules about the last postal voters' ballot boxes led directly to the main complaints made against the Returning Officer in both Petitions. Whether or not these breaches were sufficient to have the poll set aside, the disregard of the Regulations caused a major upset at the count in both Wards and has been much litigated in the Petitions.

560. Although, in general, I have expressed considerable sympathy for Mr Owen and the Elections Office in the unprecedented situation in which they found themselves in this election, I am bound

²¹ Above .

to say that using informal methods to transport unprocessed postal votes to the count in large quantities was an act of the direst folly, particularly as the Elections Office knew very well that there was considerable disquiet, not to say paranoia, on the subject of postal vote fraud.

561. Thus, even if they are vindicated on the issues raised by the Petitions, I cannot but regard the Returning Officer and her staff as having brought the Petitions on their own heads. If they had played this part of the procedure by the book, the incidents on which so much court time has been spent would never have occurred.

The case against the Returning Officer - the Bordesley Green count

562. As set out above, the volume of postal votes arriving at the last minute led Mr Owen to take the decision to cancel the last scheduled pre-count opening session of Bordesley Green postal votes and transport all the remaining unprocessed postal votes to be processed at the count.

563. No complaint is made about that decision: nor could it be. It was perfectly reasonable for Mr Owen to treat these postal votes as being within the "last postal voters' ballot box provisions".

564. Similarly, it was sensible, in view of the number of postal votes to be processed, to set up a sixth table in Pen D devoted to processing the Bordesley Green postal votes.

565. A considerable amount of evidence was given about the incident which occurred at the count but, in the event, much of what happened was common ground between the parties.

566. At about 11.00 am on 11th June the count was proceeding when three plastic ballot boxes were noticed both by Elections Office personnel and by the Bordesley Green candidates and their agents. There is some dispute as to whether they had their lids on or not (the Returning Officer's witnesses assert that they did and the Petitioners' witnesses that they did not) but it is common ground that, when noticed, they were neither locked nor sealed. It is also common ground that they were not marked as containing postal ballots. At this point I should say that, having heard all the relevant witnesses, I am quite satisfied that, at the point they were initially spotted (by the Liberal Democrat candidates as it happened) the lids were not on the boxes. It was that which raised the suspicion that there was something wrong about them.
567. The boxes seem to have been under the table set aside for the counting of the Bordesley Green votes (i.e. not the dedicated B envelope processing table). Thus, if they contained B envelopes or indeed any unprocessed ballots, they were in the wrong place.
568. The PJP and Liberal Democrat candidates and their agents became very perturbed at these boxes. They questioned their provenance.
569. Pausing there, much time was spent on whether all three boxes came to light at once or whether two came to light first with the third doing so sometime later. As all three boxes were in roughly the same place and turned out to have identical contents, I do not think that any useful purpose

is served in deciding whether they were found on one occasion or on two occasions separated by a short interval.

570. The Senior Deputy Returning Officer, Mr Jerome O'Ryan, took the initial decision that the contents of the three boxes should be processed on the dedicated processing table. He assumed that the three boxes had arrived at the count in a correct and secure way from the Elections Office (via One Victoria Square) and had been there from the outset of the count. On his own version of events, he seems to have made no enquiries of any kind before making his decision.
571. The PJP and Liberal Democrat candidates and agents disputed his decision to process the contents of the boxes. Mr Hemming, whose Ward was also being counted in Pen D, was brought in. The matter was referred to Mr Owen who was elsewhere in the NIA and Ms Homer was brought in. There was an ugly situation with a number of large angry men surrounding Mr Owen and Ms Homer, demanding that the boxes be rejected from the poll. It must have been alarming for Mr Owen and Ms Homer and they acted with firmness and, in my view, not a little courage.
572. With Ms Homer's blessing, Mr Owen confirmed Mr O'Ryan's decision that the three boxes should be processed. Again, neither Mr Owen nor Ms Homer seem to have carried out any independent enquiries as to the provenance of the boxes. It was simply assumed that they had been brought to the NIA in secure conditions the night before.

573. The candidates and agents continued to protest but were told curtly that if they did not like the decision, they could always bring an election Petition. This was not the soft answer that turneth away wrath and it didn't. The candidates became convinced that they had had a fast one pulled on them and eventually they left in disgust.
574. I have some sympathy for Ms Homer, Mr Owen and Mr O'Ryan in the circumstances. I have already described the conditions in the count and by late morning nerves and tempers were becoming frayed.
575. The boxes were tipped out on to the table. At this point there is a very marked conflict of evidence. The Petitioners' witnesses are all adamant that the boxes did not contain B envelopes in the usual way but contained only A envelopes and that, when these envelopes were opened, they were found to contain both a DOI and the two ballot papers. The Returning Officer's witnesses are clear that what emerged from the boxes were (with possibly a minimal number of exceptions) all B envelopes which were processed in precisely the same way as had occurred at the pre-count openings.
576. Clearly, if the Petitioners' witnesses are right, something was very wrong with the contents of the boxes. Nobody would dispute that. The boxes between them must have contained about 1,500 to 1,700 postal votes. If all of them had been A envelopes containing a DOI as well as ballot papers, then it would have been obvious to everyone, particularly the Elections Office

staff, that something had gone seriously wrong. I have no doubt that the Elections Office staff were under huge pressure to process the votes and get on with the count and may well have cut the odd corner on the way but 1,500 improperly filled A envelopes would be too much to swallow.

577. At some stage in the processing of the contents of the three boxes, Mr O'Ryan sought to allay the suspicions of the candidates and their agents by departing from practice and displaying the ballot papers face upwards after the number on the reverse had been checked so that everyone could see for whom the votes had been cast.

578. Suspicions were not allayed, however, because the PJP candidates and their agents saw (or thought they saw) that all the ballot papers emerging from the three boxes contained three crosses against the names of the Labour candidates of identical appearance and in identical ink. This was the last straw and it is when some of them walked out.

579. Returning to the question whether the boxes contained B envelopes with regular contents or only A envelopes containing DOI as well as ballot papers, I have to ask whether the Petitioners' witnesses are lying. Have they simply put their heads together and come up with a story which would vindicate their protests about the acceptance of the three boxes? I have seen the witnesses and I do not think they are lying and I am certain they are not conspiring to tell lies before me.

580. Similarly, I have heard the evidence of the Returning Officer's staff who dealt with the contents of the boxes. It seemed very unlikely that they would lie, even to cover up an irregularity in the count.
581. Someone, clearly, is mistaken - but who ?
582. In my view the key lies in the evidence of Mr Sultan Mahmood Choudhry. Mr Choudhry was one of the defeated Liberal Democrat candidates at Bordesley Green. Although the result must have been a disappointment, the Liberal Democrats seem to have accepted that Bordesley Green was essentially a two-horse race between Labour and the PJP. Accordingly, although very interested in the count, Mr Choudhry was resigned to not figuring among the winners.
583. I preface Mr Choudhry's evidence by saying that I found him a most impressive witness. He is a middle-aged professional man (a chartered accountant) and his evidence was measured and convincing. Although obviously appalled at the cavalier treatment of the three boxes, he resisted the temptation to exaggerate or to go along with suggestions which might put the Returning Officer's staff in a poor light if he disagreed with them. Although I was aware from the police disclosure that the police considered him a nuisance for his continuous complaints about misconduct on the part of the Labour Party, given my findings as to the rôle of the police in this sorry affair, I would certainly not hold that against Mr Choudhry. In general, therefore, I accepted his evidence as truthful.

584. I shall deal first with the decision to admit the boxes. In Mr Choudhry's witness statement he said:

Myself, Mr Ullah and Shaukat Ali all protested to the deputy officer. The deputy officer said, "Can one person talk?"

I then said to the deputy officer that we wanted to keep these votes separate and open them separately so that we can see the contents. He agreed to this and all the boxes were emptied separately. I do not think that they were matching up the codes. I particularly remember one address, 11 Third Avenue. I estimate that the total number of ballot papers in these boxes was 1,500 to 1,600. I examined them carefully and every ballot paper was marked for Labour with identical crosses. I noticed the same handwriting in the same ink, probably blue. We asked for these ballots to be stored separately along with their declaration forms because we wanted to challenge them. The deputy officer said, "I have no authority to do so, you have to see the chief election officer, John Owen". We demanded to know where he was. He told us his office was at the back. We immediately went to John Owen's office, we could not find him and came back.

The deputy officer told me that he had already spoken to John Owen and he would be here shortly. A few minutes later he arrived along with a lady officer who asked for one person to speak. I said that your deputy officer told us that these are unidentified, unaccounted, anonymous boxes of postal ballots that have just turned up at the count. He is not sure where they have come from. One of the officers then said these boxes were stored at Victoria Square overnight. I asked him for an inventory, he said there was no such thing. I said we wanted a full account of these votes and wanted them to be stored separately along with their declaration forms because we wanted to challenge their validity. He said he did not have the manpower and could not meet our demand. At this point I walked out.

585. Nothing better illustrates the clash of philosophies. Mr Owen's view, as he often stated at the trial, was that, provided the provenance of the postal ballots was in order, he had neither the power nor the duty to do anything but process them. Any doubt would be resolved in favour of the votes being processed and counted. The candidates' view was that suspicious documents should be fully investigated and any doubts decided against admission of the votes.
586. As a matter of law, I have no doubt that Mr Owen was, and is, right. Under the 1986 Rules he is obliged to accept postal ballots regular on their face and count them with the other ballot papers. If ballot papers emerge which give the clear impression that they have all been written by the same hand, provided they are regular, Mr Owen must accept them.
587. On the premise that the boxes and their contents had properly arrived at the count, the Returning Officer's staff had no option but to process them.
588. The PJP and Liberal Democrats considered that this was an appalling state of affairs and I am inclined to agree with them. To oblige a Returning Officer to accept postal votes which reek of suspicion but are none the less apparently regular on their face is simply to institutionalise connivance at fraud and to make the Returning Officer one of its victims.
589. The next question is whether Ms Homer, Mr Owen and Mr O'Ryan were right to treat the provenance of the boxes as established. I think Mr Coppel is right when he says that the

hierarchy of the decision-making process was unimpeachable. The matter was referred firstly to Mr O'Ryan and then up the chain to Mr Owen and eventually to Ms Homer.

590. All of them assumed that the boxes had come from One Victoria Square. Were they right as a matter of fact ? I have had the benefit of a considerable amount of evidence directed to showing that:

- (a) the boxes did indeed come from One Victoria Square and
- (b) it would be virtually impossible for any unauthorised person to acquire three ballot boxes, fill them with envelopes and surreptitiously introduce them into Pen D at the NIA.

591. On that evidence I am satisfied that the boxes did come from One Victoria Square and that their contents were envelopes that had arrived at the Elections Office before close of poll the preceding day.

592. Given that none of them made any enquiries as to the provenance of the boxes, were Mr O'Ryan, Mr Owen and Ms Homer right to proceed without making those enquiries ? I do not think this is anything like as straightforward as Mr Coppel argues. As we shall see with the problems with the Aston count, refusal to make enquiries is a risky course to take.

593. I have no doubt that it would have been a great deal better if the decision had been taken to put the three boxes on one side and to conduct an enquiry into their provenance in which the

protesting candidates would be invited to participate. I feel that the pressures on the Returning Officer and her staff to get the count over could, and should, have been resisted at least to that extent. There is always political and media pressure to finish the count and declare the result as soon as possible. There are those, however, who might prefer that the Returning Officer got it right even at the cost of some loss of time.

594. There was clearly a major failure of tact and sensitivity in dealing with the PJP and Liberal Democrat teams and I am not at all surprised that they felt the system was loaded against them. If a proper enquiry into the boxes which, after all, contained no fewer than 1,500 votes, had been carried out, a reasonable response could have been given to their concerns. This did not happen.

595. Does this, however, justify me in going so far as to hold that the three boxes and their contents should have been rejected ? This would be a serious step. Given the number of votes involved, such a decision would oblige me to set aside the Bordesley Green election (and indeed would do so even if there had been no misconduct on the part of the Labour Party Respondents).

596. I am satisfied that this is not the correct course. In my judgment, Mr Owen and Ms Homer were right to admit the three boxes. Their provenance was proper, even if the Returning Officer's team were wrong to assume this without further enquiry. Thus, if, as should have happened, an enquiry had been held, then the result would have been that the votes should be admitted. This might have taken longer but the outcome would have been the same.

597. I return to the question whether the boxes contained only A envelopes which in turn contained DOI as well as ballot papers. If I were satisfied that this was the case, then, irrespective of whether the initial decision to admit the boxes was correct (as I have held it was), I would hold the Returning Officer and her staff to have been wrong to proceed further with processing those envelopes. Indeed, a collection of 1,500 A envelopes each without its B envelope or its DOI would go well beyond what a Returning Officer could or should accept without enquiry.

598. Thus, if the boxes did only contain A envelopes, I would have no hesitation in ruling their acceptance to be wrong with the consequence that the 1,500 ballot papers should not have entered the count. From that it would follow that the election would have to be set aside.

599. To resolve the problem of the A envelopes, I return to Mr Choudhry:

THE COMMISSIONER:

Can you help with this: when the contents of the first box were tipped out, what actually were those contents? Were they the big envelope which is the one that comes through the post with the little window in and the flashes and should have inside the declaration of identity and the little envelope? Or was it just the little envelope or were there loose documents?

A. *No, they were postal ballots, the envelopes.*

THE COMMISSIONER:

They were big envelopes?

A. *Yes. They opened them up.*

...

MR COPPEL:

I understand that. What happened then was that the people sitting on the chairs, the election office people, started to get these envelopes, the B envelopes, and slit them open, is that correct?

A. *True.*

Q. *Perhaps not in every case, but mostly what came out of this envelope, the one with the purple corners, were two things: a declaration of identity, a white sheet of paper like this (indicating), and another envelope (indicating) like that. Is that correct?*

A. *True.*

Q. *The people at the table then started looking at the number which we see on envelope A and matching it to the number on the declaration of identity, correct?*

A. *I did not see them matching all of them, no.*

Q. *But they were doing something?*

A. *They were just putting them on the side and putting the ballot papers on the other side. I did not see anyone matching those.*

600. I accept this evidence. What I think happened was that, during the sorting process, the B envelopes were slit open and the contents removed, the DOI and the A envelopes were then moved up the table for the next stage and, once the two had been matched, the A envelopes were moved further up the table for opening. The PJP candidates and their agents were so worked up by this time that they convinced themselves that only A envelopes were being processed. As they could not account for the DOI which were also on the table, they thought the DOI must have come from the A envelopes. I am sure that they did get this impression (which increased their belief that skulduggery was going on) but it was a mistaken impression.

601. I find that (with possibly a negligible number of exceptions) what emerged from the three boxes were B envelopes which were then properly processed.
602. That said, I am also satisfied that the ballot papers did display a surprising homogeneity of appearance and were largely Labour votes. As I have said, there was nothing the Returning Officer's staff could do about this but it is a small piece of evidence to corroborate the findings I have already made that there were huge numbers of bogus Labour votes in the count.
603. I have spent a lot of time on this issue because it is a serious issue for the Returning Officer. At the end of the day, however, I find that the Petitioners' case arising out of the three boxes has not been made out.

The case against the Returning Officer - Aston

604. Two allegations are made in the Aston Petition which are worthy of being taken further. As I have already said, I am not concerned with alleged irregularities at polling stations because they cannot have affected the result of the poll.

The Warehouse votes

605. Complaint is made that Mr Owen should not have accepted the 275 packages seized (eventually) by the police at the warehouse at 4.00 am on 9th June 2004.

606. I can dispose of this complaint quite quickly. When the 275 packages were handed over to Mr Owen:

- (a) they consisted of B envelopes properly sealed and apparently completely in order;
- (b) the account given to Mr Owen of the circumstances of their seizure did not contain much of the material we now know the police possessed as to what had been going on at the warehouse.

607. Although Mr Owen was characteristically cautious when questioned on the subject, I have no doubt whatsoever that, if he had been told the facts of what happened at the warehouse as I have found them to be, he would have rejected the 275 packages out of hand. Clearly, on those facts, no Returning Officer, however minimal her powers to investigate wrongdoing, could accept votes which had patently been tampered with.

608. On the limited and (unintentionally) misleading information before him, Mr Owen had no choice but to accept the votes and to process them.

609. Mr Owen (and hence Ms Homer) is thus guiltless of any breach of the election rules on this score.

The Nickleby's bag

610. Nickleby's is a men's outfitters with a branch in the Palisades Shopping Centre. Arrivers at New Street Station walk past its door. If a large item of clothing, say a suit, is purchased, the shopper

carries it away in a distinctive stout green plastic bag bearing the name of the shop for publicity purposes. Nickleby's can scarcely have hoped for the nationwide publicity achieved by one of their bags in this election.

611. The history of the Nickleby's bag is difficult to disentangle. There are substantial conflicts of evidence between the witnesses for the Petitioners and those for the Returning Officer and there is no quasi-neutral witness in the category of Mr Choudhry to resolve the issue.
612. The Aston Pen was Pen E. Unlike Pen D, it contained only the five tables, one per Ward. Thus the last postal votes were being processed on the same table as the count of ballot papers.
613. To start with the bare bones, there seems no doubt that, some time reasonably early on the morning of the count, it was noticed that, on or near the Aston table, there was what was described as a "Post Office crate" (a plastic box without a lid) containing unprocessed B envelopes and a Nickleby's bag which seemed to be full of envelopes. Although the presence of the crate was both unusual and, given the strict régime of the 2001 Regulations, improper, nothing has turned on it in this Petition and I shall say no more about it.
614. It is common ground that the Nickleby's bag contained a large number of B envelopes (possibly as many as 300) and a wad of white European ballot papers secured by an elastic band. There is a dispute as to whether it also contained some loose yellow local ballot papers.

615. Moving to the end of the saga, everyone agrees that at some time or other (and the exact time and circumstances are hotly contested) the Returning Officer's staff, ignoring all protests, determined that the B envelopes in the Nickleby's bag would be processed and the ballot papers go into the count. This decision was ultimately taken (or confirmed) by Mr Owen. Ms Homer was not personally involved on this occasion.

616. Beyond that the matter is controversial.

617. To summarise the evidence for the Petitioners:

- (a) round about 10.30 am the Liberal Democrat candidates and their agents noticed the Nickleby's bag;
- (b) at that stage the contents were still in the bag: according to some of the witnesses, they included loose yellow local ballot papers;
- (c) the Deputy Returning Officer, Mrs Alison Harding, indicated that she intended to tip the bag's contents on to the table and process them with the rest of the unprocessed postal votes;
- (d) the candidates and agents protested;
- (e) the matter was referred to Mr Ken Moore, the Senior Deputy Returning Officer in Pen E;
- (f) Mr Moore took the view that the provenance of the Nickleby's bag was in order and the contents should be processed;

- (g) the matter was referred to Mr Mirza Ahmad, Birmingham's Chief Legal Officer and City Solicitor;
- (h) Mr Ahmad told the staff to suspend dealing with the Nickleby's bag until he had consulted Mr Owen;
- (i) Mr Ahmad went to consult Mr Owen but got into conversation with Sir Albert Bore, the Labour Leader (whose own Ward, Ladywood, fortuitously was also in Pen E) and Mr Afzal;
- (j) the candidates and agents believed that Mr Ahmad was discussing the Nickleby's bag with Sir Albert and Mr Afzal;
- (k) when contacted, Mr Owen discussed the matter with Mr Ahmad (there was some inconsistency as to whether Sir Albert and Mr Afzal were present at this stage): Mr Owen said that the bag must have come from a polling station, though he could not say which;
- (l) Mr Ahmad returned and said that the decision had been taken to continue processing the envelopes from the Nickleby's bag;
- (m) the contents were then mixed with other postal votes (including the ones from the crate);
- (n) on processing it appeared that they contained identically written votes for Labour.

618. Mrs Harding's account was totally different. She said that she had noticed the Nickleby's bag when she came into Pen E. It was already there with the crate. At about 9.00 am without consulting anybody she had the contents of the Nickleby's bag and the crate tipped on to the

table and processed. At that stage nobody objected or complained. She discovered the wad of white European ballot papers which were put to one side but no yellow local ballot papers.

619. It was not until about 10.30 am that objection was taken to the (by now empty) Nickleby's bag. Mrs Harding told the objectors that they had left it too late as the contents had been fully processed and were indistinguishable from the other ballot papers. None the less, the candidates continued to protest and took their case to Mr Ahmad and, through him, to Mr Owen who confirmed her initial decision as correct.

620. Mr Moore recalled that, at the time of the protests, the contents of the Nickleby's bag were already on the table but were still being processed.

621. Mr Ahmad's recollection was that, by the time he was called in, the contents of the Nickleby's bag may have been on the table but the situation was not irretrievable. He called an immediate halt to the process while he went to consult Mr Owen. He did not discuss the matter with Sir Albert Bore nor with Mr Afzal. He spoke with Mr Owen and obtained confirmation that the contents of the Nickleby's bag could be processed.

622. Although the matter is not entirely free from doubt, Mr Ahmad seems neither to have seen nor to have been told about the presence of the European ballot papers in the Nickleby's bag. In consequence he did not mention them to Mr Owen who made his decision in ignorance of their

having being in the bag. Mr Ahmad then returned to the Aston table and told Mrs Harding she should continue to process the contents of the bag.

623. Mr Owen agreed he had confirmed the decision to process the votes in the Nickleby's bag and also denied any discussion of the matter with Sir Albert Bore or Mr Afzal. He said he had believed at the time that the Nickleby's bag had probably come from a polling station and he saw no good reason why the contents should not be processed in the normal way.

624. There is a fair measure of agreement between the Petitioners' witnesses on the one hand and Mr Moore, Mr Ahmad and Mr Owen on the other as to the sequence of events (save for the episode involving Sir Albert Bore and Mr Afzal). The witness whose evidence does not fit in is Mrs Harding.

625. Starting from the end, I fully accept the evidence of Mr Owen. On this, as on all other matters, I considered him to be truthful and accurate in his recollection.

626. Turning to Mr Ahmad, it is hard to imagine a more impressive witness. He is not only a well respected local authority lawyer, he is a member of the General Council of the Bar and the lead officer for the Association of Council Secretaries and Solicitors, which is a national body, representing Chief Legal Officers. I would take his integrity as being beyond question. On the other hand, he was not asked to recollect these matters until early 2005 and, as he himself

accepted, there were things he could not recall clearly. None the less, on the essential questions I unhesitatingly accept his evidence.

627. I accept the evidence of Mr Moore as far as it goes.

628. Mrs Harding, I regret to say, was a most unsatisfactory witness. She came over as a rather high-handed young lady who clearly resented the presence of the candidates and their agents at the count, believing that they were simply getting in the way of her and those she was supervising.

629. Her own account of the matter, like that of the other witnesses for the Returning Officer, was one compiled from recollection early in 2005. Unlike the other witnesses, however, having formed her view of what happened, she stuck to it dogmatically, even when it was pointed out that her story, if correct, laid her open to criticism.

630. She brushed aside suggestions that she should have consulted her superiors before deciding to accept the contents of the Nickleby's bag (*a fortiori* that she actually had consulted them). When I mildly pointed out that, as a solicitor of the Supreme Court (which she is), she should have known that votes should not be brought to the count in plastic shopping bags, her reaction was to burst into tears.

631. I did not accept Mrs Harding's evidence at any point where it conflicted with that of the other witnesses.
632. What I find happened in relation to the Nickleby's bag is as follows. Firstly, I am satisfied that the bag was not emptied out at 9.00 am and its contents fully processed before anyone objected. For all her protestations and her high-handedness, I am sure that, on the day, Mrs Harding would not have taken the decision to deal with something as obviously irregular as the Nickleby's bag without referring the matter to her superiors. Had she done so, it would have been grossly irresponsible.
633. Secondly, it is wholly improbable that the candidates and agents would have failed to protest when the bag first appeared but would have let all its contents be processed before making any complaint. I am satisfied that they protested the moment the Nickleby's bag appeared and its contents were tipped on to the table. Indeed, if Mrs Harding's evidence were correct and the candidates only protested when the bag was already empty, I cannot see how the candidates could have known about the European ballot papers.
634. Thirdly, I am satisfied that the Nickleby's bag did not contain any loose yellow local ballot papers - the Petitioners' witnesses are mistaken about that.
635. Fourthly, when Mr Ahmad was brought into the dispute, the situation was still retrievable and he took the correct course of calling a halt while he sought the advice of Mr Owen. I consider

that, if Mr Ahmad or Mr Owen had decided that the contents of the Nickleby's bag should be rejected from the poll, this could have been achieved (albeit with some difficulty).

636. Fifthly, however, I am troubled about the episode with Sir Albert Bore. I do not think that the Petitioners' witnesses are lying about this in the sense of having made the whole thing up. On the other hand I am completely convinced that Mr Ahmad did not discuss the Nickleby's bag with Sir Albert or with Mr Afzal. What seems to me to be the most likely scenario is that, round about the time of the dispute, Mr Ahmad did have some sort of conversation with Sir Albert and possibly also with Mr Afzal. Mr Ahmad admits that there were occasions during the day when he spoke to Sir Albert, who was, after all, still Leader of the Council and thus, in a sense, Mr Ahmad's "boss".

637. By the time this occurred, the Liberal Democrat candidates and their agents, who were already convinced that they were the victims of a Labour plot to steal the election, were in a state of tension and, it must be said, mild paranoia. I have no doubt that they convinced themselves - wrongly, as I find - that Mr Ahmad was conspiring with Sir Albert and Mr Afzal.

638. On the balance of probabilities, therefore, I find that Mr Ahmad did speak to Sir Albert Bore and possibly Mr Afzal too at about the relevant time but that he did not discuss (indeed would not have contemplated discussing) the admissibility of the Nickleby's bag and its contents.

639. Sixthly, I am satisfied that neither Mr Ahmad nor Mr Owen had their attention drawn to the fact that the Nickleby's bag contained the European ballot papers.
640. Finally, it is quite clear that nobody in the Returning Officer's team from Mrs Harding up to Mr Owen carried out the slightest enquiry as to how a plastic shopping bag full of votes came to be at the count or as to where it had come from.
641. Before analysing the consequences of these findings, I will return to the history of the Nickleby's bag as it has been presented in this court. As to the bag itself, nobody seems to know where it came from. The first anyone seems to have noticed that one of the bags was a Nickleby's bag is on the morning of the count.
642. The Returning Officer did her best to trace the history of the bag and its contents and a number of witnesses dealt with the various links in the chain. I had evidence from Mrs Sheila Hurst, Mrs Lynne Taylor and Mrs Mulvihill. The first time each of these ladies was asked to recall the events of June 2004 was some time in January or February 2005. I have no qualms as to the honesty of any of them but they are recollecting events several months before and events which probably seemed quite unremarkable at the time.
643. Their evidence may be summarised as follows:
- (a) on polling day (10th June 2004) between 3.00 pm and 10.00 pm (when the polls closed) the equivalent of three carrier bags full of postal votes were delivered to the

reception desk at the Elections Office: they were not taken over to One Victoria Square but left at the Elections Office in Mrs Hurst's office;

- (b) the Elections Office was locked overnight;
- (c) at 7.30 am on 11th June 2004 Mrs Hurst and Mrs Taylor went to the Elections Office and retrieved the three carrier bags: they were put in the boot of his car by Mrs Hurst's husband and driven over to the NIA;
- (d) at the NIA the bags were taken to the nearest pen (by chance it was Pen E - the Aston Pen) and emptied on to a table for sorting into Wards: as it happened most of them turned out to be votes for the Aston Ward;
- (e) the Aston votes were put into the sturdiest carrier bag which was a Nickleby's bag;
- (f) the Nickleby's bag was left with the ballot boxes and postal crates for the Aston Ward behind the Aston table in Pen E;
- (g) where Mrs Harding found it.

644. Pausing there, both the Returning Officer's witnesses and Mr Coppel took all this history very lightly. The view they adopted was that, provided the votes were in a reasonably secure environment at the various stages of the process (seemingly including Mr Hurst's car for this purpose), then any breaches of electoral rules were trivial and irrelevant. This rather confirmed the impression that the Elections Office staff did in some way regard postal votes as different from personal votes cast at polling stations and believed that, as far as postal votes were concerned, they could be handled very much as the staff pleased.

645. This is not a view the court shares. Leaving votes lying about the Elections Office overnight and taking them over to the count in plastic bags in the car boot of a council employee's husband volunteered for the task is wholly deplorable. The public would rightly be horrified if they knew their votes were being handled in this casual manner. As I have said above, nobody would contemplate for an instant treating personal votes cast at polling stations in such a lackadaisical fashion.
646. It is a clear sign of the extent to which Mr Owen was ground down by this horrendous election that he does not take as grave a view as the court. I have little doubt that if, five years ago, someone had said to Mr Owen that he would be reduced to carting votes round Birmingham on trolleys or in plastic bags in the boots of cars, he would either have laughed that person to scorn or reacted with horrified denial.
647. Worthy though the attempts of the Returning Officer have been to construct an audit trail for the Nickleby's bag and the envelopes in it, there is a gaping hole in the story. No-one has been able to account for the European ballot papers being in the Nickleby's bag. Everybody agrees that they had no business to be there: nobody knows how they got there.
648. In the circumstances, I am not satisfied that the Returning Officer has properly explained the Nickleby's bag. If I accept in outline the evidence of Mrs Hurst and Mrs Taylor (as I do), I cannot accept the detail that the Nickleby's bag was one of those they used when they sorted

the votes that had come from the Elections Office. I am sure that they would not have put a wad of European ballot papers in with local authority election ballot papers to be processed.

649. The presence of the European ballot papers is crucial. It leads me to find that, although the witnesses have been doing their best to help me and, I am sure, do possess some recollection of the events of 10th/11th June 2004, their explanation of the Nickleby's bag cannot be right. I am thus left with no adequate explanation of that bag.
650. I cannot, of course, make any positive finding that the bag was improperly introduced into the count: what I can say is that this possibility has not been excluded. What is important, however, is not so much the findings I make *now* as the information that was available to the Returning Officer and her staff on 11th June 2004.
651. The failure of any member of the Returning Officer's staff to make any enquiries about the Nickleby's bag and its contents before deciding to process the envelopes in it is indefensible. For a start, *no* ballot envelopes should have been at the count in plastic shopping bags (or, for that matter, Post Office crates without lids). The moment such a plastic bag appeared, alarm bells should have rung from the level of Mrs Harding up to the level of Mr Owen.
652. Secondly, the Nickleby's bag and its contents should have been referred right up to Mr Owen (and possibly Ms Homer) *before* it was tipped out on to the table.

653. Thirdly, the most rigorous enquiries should have been made about the Nickleby's bag before any decision was made about it.
654. Fourthly, if, on making those enquiries, the provenance of the bag and its contents remained unclear, the decision should have been taken to disregard the bag and reject its contents.
655. In the case of the Bordesley Green ballot boxes, I was prepared to hold that, on balance, the Returning Officer had made the right decision because, if proper enquiries had been made, she and her staff could reasonably have been satisfied that their provenance was secure. That is not the case with Aston. If the material available to an enquirer on 11th June was no better than that which has been put before me, then there would have been no explanation for the European ballot papers. In the absence of an explanation those ballot papers, no reasonable person could have been sufficiently satisfied that the remaining contents of the Nickleby's bag could safely be processed.
656. There was a serious failure of the system on that occasion. I do not particularly blame Mr Owen or Mr Ahmad. They were wrong not to order an enquiry into the Nickleby's bag but the failure to tell them about the European ballot papers offers considerable mitigation. Mrs Harding's conduct, however, is inexplicable and cannot be condoned.

657. I have come to the clear conclusion that the only correct decision with regard to the Nickleby's bag would have been to reject it and its contents. It follows that the votes in that bag were improperly admitted into the count.
658. For completeness, I should briefly deal with the allegation that, when the votes from the Nickleby's bag were processed, they were identically written votes for Labour. The evidence on this is much less convincing than for Bordesley Green but, as with Bordesley Green, it is irrelevant to the claims against the Returning Officer. If she had been right to accept the envelopes in the Nickleby's bag and to process the contents forward to the count, there is nothing she could or should have done based on the appearance of the ballot papers themselves.

Does the Returning Officer's conduct come within s.48 of the 1983 Act ?

659. I have not accepted that the Returning Officer was in breach of electoral law in respect of the three boxes at the Bordesley Green count. The questions I had to ask myself therefore were:

- (a) are the Returning Officer's admitted general breaches by themselves such as to bring the case within s.48 in both Petitions so as to cause both elections to be set aside ?
- (b) if not, does the breach I have found to have occurred in respect of the Nickleby's bag, bring the Aston case within s.48 so as to cause that election to be set aside ?
- (c) if the answers to (a) and (b) are both negative, does the combination of those general breaches and the breach relating to the Nickleby's bag, bring the Aston case within s.48 so as to cause that election to be set aside ?

660. When considering each of those questions I must ask:

- (a) was the election so conducted as not to be substantially in accordance with the law as to elections ?
- (b) did the breach affect the result of the election ?

The general breaches

661. As I have indicated, I take a rather more serious view of the Returning Officer's breaches of electoral law than Mr Coppel would have me do. I am very disquieted by the way in which the postal votes were treated. I accept, of course, that Mr Owen operated throughout from the highest motives, and his desire that not one valid vote should go uncounted is surely laudable.

662. Are these breaches by themselves, however, enough to render the conduct of the election not substantially in accordance with the law as to elections ? I have found this difficult. On balance, however, I am persuaded that the breaches are not sufficient to vitiate the poll, unfortunate though they may be. Viewing the situation overall, the result was achieved that virtually every vote which was apparently regular on its face ended up at the count. It was not the Returning Officer's fault that so many of them were false votes and there was nothing she could have done about it.
663. Thus the general breaches of electoral law by themselves do not trigger s.48(1)(a).
664. None the less, did the breaches affect the result of the election ? The onus is on the Petitioners to show that they did rather than on the Returning Officer to show that they did not. This is important because, whereas it is quite clear that the Returning Officer's failure to abide by the rules must have had some effect on the number of votes counted, on the evidence before me it is not possible to say by how much or in which direction.
665. I am sure, for instance, that the very informal method of "matching" DOI and A envelopes together with the decision to match ballot papers in the wrong A envelope with DOI must have led to some votes getting through the net that should not have done so. The 70 improperly accepted DOI must have had some effect but no-one has sought to marry them up to any ballot paper and the effect on the totals cannot be judged.

666. The best I can do is to say that the Petitioners have not proved that the Returning Officer's breaches did affect the result of the poll. This is not wholly satisfactory but it is the only fair solution to the problem.

667. Thus the general breaches of electoral law by themselves do not trigger s.48(1)(b).

The Nickleby's bag

668. I do not think it can seriously be argued that the wrongful admission of the votes in the Nickleby's bag should cause a court to hold that the election as a whole was so conducted as not to be substantially in accordance with the law as to elections. Section 48(1)(a) does not apply.

669. More difficult is the question whether it affected the result of the election. I will assume, for the sake of argument, that all the votes in the Nickleby's bag have been shown to be for the Labour Party Respondents, though, as stated above, this is something of which I am not entirely convinced. Even on that assumption, the number of votes in the Nickleby's bag (at the highest) do not come anywhere near closing the gap between the lowest Labour "winner" and the highest Liberal Democrat "loser".

670. I cannot therefore be satisfied that this breach of the rules did affect the result of the poll. The Aston Petitioners have not made out their case under s.48(1)(b).

The combination of the general breaches and the Nickleby's bag

671. The Nickleby's bag incident adds nothing to the case under s.48(1)(a) as set out above. If the general breaches were insufficient to bring the case within that paragraph, the Nickleby's bag incident does not change that position.

672. As for affecting the result of the poll, it is a very close-run thing. In the end, though, the inability of all parties to show by how much the general breaches of electoral law altered the voting numbers makes it impossible for the Petitioners to satisfy the burden of proving that, combined with the Nickleby's votes, the general breaches affected the overall result.

673. No judge likes deciding a case on the burden of proof alone, if it can be avoided, but on this issue it cannot. The Petitioners cannot prove that sufficient votes were improperly admitted to close the gap between the two political Parties. Given that I have decided that the Aston election must be set aside because of the wrongdoing of the Labour Party Respondents, the "bottom line" is the same: there will be a new election. But it will not be set aside on the ground of breach of the rules by the Returning Officer.

Conclusions in respect of the Returning Officer

674. A great deal of forensic outrage has been expressed on behalf of the Returning Officer that she should have been subjected to the criticisms made in the two Petitions, but it seems somewhat misplaced. The Elections Office did not conduct the 2004 election in strict adherence to the

electoral rules. It may well be that the unforeseeable and unforeseen crisis with which they were faced made this inevitable but the fact remains that too many corners were cut.

675. Although, therefore, in the event, the case against the Returning Officer in both Petitions has not been made out to the satisfaction of the court, the shortcomings in the conduct of the election invited just the sort of trouble that has come upon the Elections Office. It was, of course, the Returning Officer's misfortune that these shortcomings coincided with the incidence of massive electoral fraud so that the spotlight has fallen on the Returning Officer as well as upon the fraudsters. None the less, as mentioned above, the Elections Office may fairly be regarded as the architect of its own misfortunes.

676. In summary the claims made against the Returning Officer in the Bordesley Green Petition and the Aston Petition have not been made out to the satisfaction of the court and will be dismissed.

The wider picture

677. It will be recalled that under ss.158 and 160 of the 1983 Act this court must report to the High Court whether any corrupt practices have, or whether there is reason to believe that any corrupt practices have, extensively prevailed at the election in the area of the authority for which the election was held or in any electoral area of that authority's area.

678. I have already indicated that corrupt practices prevailed extensively at the elections in Bordesley Green and Aston. The next question is whether they were more widespread.

679. This court is not empowered to do anything more than report. It cannot set aside the election in any other Ward of Birmingham City Council; still less can it require the entire election to be re-run.
680. Is the court able to form a view as to whether corrupt practices were widespread in Birmingham in June 2004 ? In my judgment it is.
681. The evidence before me is replete with references to malpractice throughout the Birmingham area. Mr Hemming gave evidence (one of the few pieces of his evidence that was *not* hearsay) as to vote-rigging in his Ward, South Yardley. The Labour Party Respondents themselves in the Aston Petition relied on an incident in the nearby Ward of Washwood Heath where a pillar box had been set alight in order to destroy ballot papers. Mr Choudhry's evidence mentioned a number of very unpleasant incidents of misconduct.
682. Perhaps the most telling piece of evidence comes from the nature of the frauds themselves. Here we have two Wards, some distance apart, in both of which the Labour Party organisation has conducted a large and skilful campaign of electoral fraud, using precisely the same techniques in each case. This cannot be coincidence. But did it go wider ?
683. In my view it does. This can be demonstrated by the extraordinary patterns of postal votes throughout Birmingham as demonstrated by Mr Owen's figures.

684. If one takes as a working hypothesis that the Labour Party organisation is bent on postal vote fraud to rig the election, one would expect three things.
685. Firstly, one would expect that, in safe Labour Wards, nobody would bother with fraud. Thus the number of postal votes would not mushroom between 2003 and 2004. Is this what we find ? In general it is. Safe Labour Wards like Erdington show a very small increase - 620 postal votes in 2003 and 907 in 2004, an increase of 46%.
686. Secondly, one would expect that, in safe Conservative Wards, nobody would bother with fraud. If a safe Conservative Ward suddenly swung to Labour (in the middle of a Parliamentary term to boot) then the public would smell a rat. Again, is this found ? It is. Take Bournville which I understand to be true-blue Conservative territory: in 2003, 692 postal votes and in 2004, 1083 postal votes (an increase of 56%).
687. Finally, in the marginal Wards (particularly those with a high Asian population), one would expect the mushroom effect. A good example is Washwood Heath (site of the burning pillar box incident). Before the 2004 election the Ward was split between Liberal Democrat and Labour and in 2003 the Liberal Democrat candidate had won. It was almost a carbon copy of nearby Aston, mirroring the victory of Mr Ayoub Khan in 2003. Washwood Heath had a high Asian population - adjacent to Bordesley Green it had had, until 2002, a PJP councillor.

688. What do we find in Washwood Heath ? In 2002 there were 329 postal votes and 478 in 2003. In 2004 no fewer than 5583 applications were made for postal votes - an increase of 1,068%
689. Lozells and East Handsworth is the adjacent Ward to Aston. The boundary changes from the former Ward of Handsworth had brought in some of the area of the pre-2004 Aston Ward. In the light of the 2003 result in Aston, Lozells and East Handsworth could fairly be regarded as a problematical Ward. The pattern here is the same as for Aston, Bordesley Green and Washwood Heath. In 2003 the postal votes for Handsworth were 328 but in 2004 they were 3898 (an increase of 1,088%).
690. Sparkbrook (pre-June 2004 split between Labour and Liberal Democrat) showed an increase from 1300 to 4483 (245%).
691. The pattern certainly seems to be there. Marginal, particularly Asian, Wards were the target of postal vote fraud. The conclusion appears inescapable that Bordesley Green and Aston were not isolated incidents but were part of a Birmingham-wide campaign by the Labour Party to try, by the use of bogus postal votes, to counter the adverse effect of the Iraq war on its electoral fortunes.
692. To conclude this section, however, I must make it abundantly clear that there is not the slightest evidence before me to show that the frauds of the Labour Party in Birmingham were known to or approved by the national Labour Party.

The Asian factor

693. Patently, most of the protagonists in these Petitions are members of the Muslim Asian community. Is this relevant ?
694. The way in which it is certainly not relevant is in showing any community disposition to fraud or misconduct. To suggest that Muslim Asians are prone to frauds of this kind whereas other communities are not would be racist and moreover would not be justified by any evidence before this court. I am aware that there are those on the fringes of politics who may seek to use this judgment for racist ends. There is no warrant for anyone to do so and I hope they will not.
695. There are, however, two ways in which the ethnic makeup of the communities in Bordesley Green and Aston is relevant, one minor and one major.
696. The minor factor lies in the structures of the Muslim Asian community. There is no doubt that this community retains, where others have lost, an ingrained respect for those in the community who are in positions of trust and responsibility. In normal circumstances this is wholly admirable, but it only works if those who are in such positions are worthy of the trust placed in them. It is clear that some community leaders in Birmingham must have abused the respect and trust of the community to persuade voters who were confused or had poor understanding of the process to hand over unused postal vote packages or to entrust party canvassers with completed votes.

697. The major relevance of the Asian factor is the Iraq war. It was the Iraq war which turned many Muslim Labour supporters away from voting Labour, in some cases towards voting for the Liberal Democrats or other parties who opposed the war, such as the PJP. The principal purpose of the campaign of electoral fraud waged by the Labour Party was to target precisely those formerly safe Labour Wards with large Muslim populations where the fraud would redress the balance.

698. The reason why the frauds were most blatant in Muslim Asian Wards was precisely because the voters were Muslim. They could no longer be trusted to vote the straight Labour ticket, so bogus votes had to be cast instead.

699. It seems inevitable that the considerations set out above must have applied in other electoral areas of England with large Muslim populations and it would be surprising if similar incidents did not occur in future elections in such areas.

Some people

700. Before coming to my conclusions, I ought to deal briefly with some of the characters in this drama.

Mr John Owen

701. I have had to be critical of some of the aspects of the conduct of the 2004 election by the Elections Office but it would not be fair to leave it without saying something about Mr Owen.

702. This case must be a tragedy for Mr Owen. He is, as stated above, one of the UK's principal experts in the law and conduct of elections. His experience and his expertise are unrivalled. He spent the five years since postal voting on demand was introduced warning that there were no real safeguards against fraud. All he foretold has come to pass but, sadly, it has come to pass in his own bailiwick.
703. It must be heartrending for Mr Owen to see massive electoral fraud committed, almost before his eyes, knowing that he was powerless to do anything about it. What is more he knows that, as no steps have been taken to improve the situation, he may face a re-run of the 2004 débâcle in the forthcoming General Election.
704. In my judgment the fact that in Birmingham the 2004 election was brought to a conclusion at all in the circumstances is a triumph for Mr Owen, whatever the outcome of this judgment. With a lesser man in charge, it is likely that the whole 2004 election would have collapsed in chaos and recrimination. It is not his fault that the election has resulted in a lengthy case: he was faced with an impossible situation and he coped better than anyone else could ever have done.
705. On a personal level I would like to record my thanks to Mr Owen for his wholehearted assistance with this case, particularly in providing the court with information whenever requested.

Mr John Hemming

706. I feel Mr Hemming deserves a mention. True, he was a dreadful witness. His evidence was largely inadmissible hearsay. He possesses an inability to give a straight answer to a straight question which would be the envy of a national politician appearing on the *Today* programme.

707. But, when all that is said and done, Mr Hemming was right and his critics were wrong. He said that there was massive, Birmingham-wide electoral fraud by the Labour Party and there was in fact massive, Birmingham-wide electoral fraud by the Labour Party. He may have played the part of Cassandra but, like Cassandra, his prophesies were true. He emerges from the case with credit which is more than can be said for those police officers who treated his complaints as no more than *Operation Gripe*.

Mr Muhammed Afzal

708. Although he is to be treated as the ringleader of the Aston vote-riggers and although he told barefaced lies in the witness box, Mr Afzal is not entirely undeserving of sympathy. Of the six councillors who will lose their seats and possibly their political careers as a result of this case, Mr Afzal had by far the most distinguished career. He held high office on the Council and narrowly missed selection for a safe Labour Parliamentary seat. At the time of the 2004 election he was not in good health (he produced a medical certificate to that effect).

709. It must have been galling for Mr Afzal to see the possible ruin of his political career in Aston because of what that other Birmingham politician Neville Chamberlain called "a quarrel in a

faraway country between people of whom we know nothing", but, after Mr Ayoub Khan's victory in 2003, the writing was on the wall. It was this which, in my judgment, led Mr Afzal into the courses of fraud which have brought him down.

Two ladies

710. I feel I should commend Ms Fatema Patwa, the solicitor for the Bordesley Green Petitioners. She faced enormous difficulties in preparing her case, not least the obstructions put in the way of her clients obtaining public funding. That she has managed to put such a well-documented and coherent case before the court in such a short time is worthy of the highest praise.

711. Secondly, the thanks of everyone in the case are due to Ms Joanne Marshall of CMS Cameron McKenna without whose calm efficiency the case would have become unmanageable.

CONCLUSIONS

712. The conclusions of what I realise is a very long judgment are as follows:

(a) The election for the Bordesley Green Ward on 10th June 2004 was avoided by corrupt and illegal practices on the part of the three Labour Party Respondents

(i) Mr Shah Jahan

(ii) Mr Shafaq Ahmed

(iii) Mr Ayaz Khan.

- (b) **The election for the Bordesley Green Ward on 10th June 2004 was also avoided for general corruption within section 164 of the Representation of the People Act 1983 in that corrupt and illegal practices for the purpose of promoting or procuring the election of the three said Labour Party Respondents have so extensively prevailed that they may reasonably be supposed to have affected the result of such election.**
- (c) **The election of each of the three said Labour Party Respondents for the Ward of Bordesley Green shall be void under sections 159(1) and 164(1)(a) of the said Act.**
- (d) **Each of the three said Labour Party Respondents shall be incapable of being elected to fill any of the vacancies for the Ward of Bordesley Green under section 164(1)(b) of the said Act.**
- (e) **The election for the Aston Ward on 10th June 2004 was avoided by corrupt and illegal practices on the part of the three Labour Party Respondents**
- (i) **Mr Mohammed Nazrul Islam**
 - (ii) **Mr Muhammed Afzal**
 - (iii) **Mr Mohammed Amin Kazi.**

- (f) The election for the Aston Ward on 10th June 2004 was also avoided for general corruption within section 164 of the Representation of the People Act 1983 in that corrupt and illegal practices for the purpose of promoting or procuring the election of the three said Labour Party Respondents have so extensively prevailed that they may reasonably be supposed to have affected the result of such election.**
- (g) The election of each of the three said Labour Party Respondents for the Ward of Aston shall be void under sections 159(1) and 164(1)(a) of the said Act.**
- (h) Each of the three said Labour Party Respondents shall be incapable of being elected to fill any of the vacancies for the Ward of Aston under section 164(1)(b) of the said Act.**
- (i) The claims of the Petitioners in the Bordesley Green Petition against the Returning Officer have not been made out to the standard required by section 48(1) of the said Act and are dismissed.**
- (j) The claims of the Petitioners in the Aston Petition against the Returning Officer have not been made out to the standard required by section 48(1) of the said Act and are dismissed.**

(k) There is reason to believe that corrupt practices have extensively prevailed at the elections of 10th June 2004 throughout the area of Birmingham City Council.

713. My conclusions will be embodied in the certificate of the court and will be the subject of my report to the High Court under sections 145, 158 and 160 of the 1983 Act.

Afterword

714. In this judgment I have set out at length what has clearly been shown to be the weakness of the current law relating to postal votes. As some parts of this judgment may be seen as critical of the Government, I wish to make it clear that the responsibility for the present unsatisfactory situation must be shared. All political parties welcomed and supported postal voting on demand. Until very recently, none has treated electoral fraud as representing a problem. Apart from the Electoral Commission, whose rôle I have described above, the only voices raised against the laxity of the system have been in the media, in particular *The Times* newspaper, and the tendency of politicians of all Parties has been to dismiss these warnings as scaremongering.

715. In the course of preparing my judgment, my attention was drawn to what I am told is an official Government statement about postal voting which I hope I quote correctly:

There are no proposals to change the rules governing election procedures for the next election, including those for postal voting. The systems already in place to deal with the allegations of electoral fraud are clearly working.

716. Anybody who has sat through the case I have just tried and listened to evidence of electoral fraud that would disgrace a banana republic would find this statement surprising. To assert that "The systems already in place to deal with the allegations of electoral fraud are clearly working" indicates a state not simply of complacency but of denial.

717. The systems to deal with fraud are not working well. They are not working badly. The fact is that there are *no* systems to deal realistically with fraud and there never have been. Until there are, fraud will continue unabated.