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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY RYAN McKINNEY FOR JUDICIAL REVIEW

Before Kerr LCJ, Sheil LJ and Deeny J

KERR LCJ

Introduction

[1] This is an appeal from the judgment of Weatherup J dismissing the appellant's judicial review application challenging the decision of the Secretary of State to restrict his participation as a candidate in the Northern Ireland Assembly elections because he was a civil servant.

Factual background

[2] The appellant began employment with the Northern Ireland Civil Service on 20 March 2001. He is an administrative officer in the Child Support Agency where his position involves mostly routine clerical work. He is a member of the Socialist Environmental Alliance and he was selected by the party as their candidate for West Belfast in the Northern Ireland Assembly elections held in November 2003. However, by notice dated 21 October 2003, he was informed of the restrictions which applied to candidature in the Assembly elections. As a result he did not stand for election. In this appeal, he challenges those restrictions.

Statutory Background

[3] The Civil Service (Parliamentary and Assembly Candidature) Order (Northern Ireland) 1990 prohibits certain members of the civil service from publicly announcing themselves as candidates in certain elections including the Northern Ireland Assembly elections. This prohibition applies to the appellant. Article 3 of the Order provides: -

"3 (1) No person to whom this Article applies shall issue an address to electors or in any other manner publicly announce himself or allow himself to be publicly announced as a candidate or prospective candidate for election to –

(a) parliament for any parliamentary constituency; or

(b) the European Parliament for any European Parliament constituency; or

(c) the Assembly for any assembly constituency; or

(d) the new Northern Ireland Assembly for any constituency which returns members thereto.

(2) Subject to paragraph (3), this Article applies to any person who for the time being is employed in the Northern Ireland Civil Service, whether in an established capacity or not and whether for the whole or part of his time.

(3) This Article does not apply to –

(a) a person employed in an industrial grade or in such a grade as may be certified by the department concerned with the approval of the Department of Finance and Personnel to be an industrial grade for the purposes of this Order; or

(b) a person employed in such a grade as may be certified by the department concerned with the approval of the Department of Finance and Personnel to be a non-office grade for the purposes of this Order".

[4] The Northern Ireland Disqualification Act 1975 provides that members of the civil service are disqualified from membership of the Assembly. Section 1 (1) (b) provides: -

> "A person is disqualified for membership of the Northern Ireland Assembly who for the time being is employed in the Civil Service of the Crown".

[5] Under the Parliamentary Election Rules contained in Schedule 1 to the Representation of the People Act 1983 (as amended by the Northern Ireland Assembly (Elections) Order 2001), a candidate's consent to nomination must be given in writing. Paragraph 8 (1) of the Parliamentary Election Rules provides: -

> "8(1) A person shall not be validly nominated unless his consent to nomination is given in writing on or within one month before the day fixed as the last day for delivery of nomination papers…"

[6] Under paragraph 8 (3) (b) of Schedule 1 to the Representation of the People Act 1983, a candidate must declare that: -

> "…he is aware of the provisions of the Northern Ireland Assembly Disqualification Act 1975 and that to the best of his knowledge and belief he is not disqualified for membership of the Northern Ireland Assembly".

The Northern Ireland Pay and Conditions of Service Code

[7] Article 3 of the Parliament and Assembly Candidature Order must be considered in conjunction with certain provisions of the Code made under the Civil Service (Northern Ireland) Order 1999. In relation to political activities, paragraph 964 of the Code includes a statement of intent, as follows: -

> "Civil servants owe their allegiance to the Crown. In its executive capacity, the authority of the Crown is exercised through the government of the day. Civil servants are therefore required to discharge loyally the duties assigned to them by the government of the day of whatever political persuasion. For the Civil Service to serve successive governments of different political complexions it is essential that ministers and the public should have confidence that civil servants' personal views do not cut across the discharge of their official duties. The intent of the rules governing political activities by civil servants is to allow them the greatest possible freedom to participate in public affairs without infringing these fundamental

> principles. The rules are concerned with political activities liable to give public expression to political views, rather than privately-held beliefs and opinions".

[8] Paragraph 965 of the Code imposes a restriction on the following national political activities (in this context 'national' means not only the United Kingdom as a whole but Northern Ireland as an entity): -

> "a. public announcement as a candidate or prospective candidate for Parliament or the European Assembly or any Northern Ireland legislative and/or elected body;
>
> b. holding, in party political organisations, offices which impinge wholly or mainly on party politics in the field of Parliament or the European Assembly or any Northern Ireland legislative and/or elected body;
>
> c. speaking in public on matters of national political controversy;
>
> d. expressing views on such matters in letters to the Press, or in books, articles or leaflets;
>
> e. canvassing on behalf of a candidate for Parliament or the European Assembly, or any Northern Ireland legislative and/or elected body or on behalf of a political party".

[9] Paragraph 966 of the Code imposes restrictions on local political activities similar to those imposed on national political activities under paragraph 965 of the Code. Paragraph 967 refers to three groups of civil servants: the politically free group, the politically restricted group and the intermediate group. The appellant is in the intermediate group. The permissible range of political activities for each group is set out as follows: -

> "(a) those in the politically free group are completely free to engage in the activities defined in Code paragraphs 965 and 966; this group comprises all industrial and non-office grades, and any other grades determined by departments with the approval of the Department of Finance and Personnel.

(b) those in the politically restricted group are debarred from engaging in national political activities but free to seek permission of the department under the terms of Code paragraphs 974 and 975 to engage in local political activities; this group comprises Principal and equivalent grades and above, and also Administration Trainees and Staff Officers (A).

(c) those in the intermediate group are eligible for freedom to engage in any or all of the national or local political activities, except the candidature for national Parliament or the European Assembly, or any Northern Ireland legislative and/or elected body, by permission of the department in accordance with the special considerations in paragraphs 970 – 973 and 975; this group comprises all civil servants not in either of the other two groups."

[10] As outlined in paragraph 970 of the Code, there are politically sensitive and non-politically sensitive posts within the intermediate group. Departments may grant or refuse permission to staff in the intermediate group to undertake political activities according to the nature of their current duties. The politically sensitive category includes posts in respect of which the political impartiality of the civil service could be most at risk and, accordingly, permission cannot normally be granted in respect of such areas as listed in sub-paragraphs a – d in paragraph 970 of the Code. These include, for instance, staff working in the private offices of Ministers or senior officials, those closely engaged in policy assistance to Ministers, staff who regularly speak for the Government or Department in dealings with various groups, staff who represent HM Government in dealings with overseas governments and civil servants whose official duties involve a significant amount of direct contact with the public. The appellant's work has been designated as a non-politically sensitive post and in such non-sensitive areas it is stated to be the general intention that permission should be given to undertake political activities.

[11] Under paragraph 990 of the Code all civil servants, including the politically free group, are disqualified from election to Parliament and the Northern Ireland Assembly. In order, therefore, to prevent their election being held to be void, a politically free civil servant should submit his or her resignation before giving their consent to nomination. Pursuant to paragraph 991 civil servants in the politically free group elected to Parliament or any Northern Ireland legislative and/or elected body, on ceasing to be elected members, will be entitled to reinstatement in the civil service on the satisfaction of certain conditions. Under paragraph 992 civil servants in the politically free group, if not elected to Parliament or any other Northern

Ireland legislative and/or elected body, will on application be reinstated in their previous capacity. Civil servants in the intermediate or the politically restricted groups have no right to reinstatement but applications for reinstatement may be considered when postings to non-sensitive areas of work is possible, as follows: -

> "992….Civil servants in the intermediate or the politically restricted groups who resign their Civil Service post on being adopted as a Parliamentary candidate have no right to reinstatement, but applications for reinstatement may be considered when postings to non-sensitive areas of work (Code paragraph 970) are possible".

[12] Under the Code, therefore, the appellant's post is in the intermediate/non-politically sensitive group. He is required to resign on adoption as a candidate and, if unsuccessful in the election, he must apply for reinstatement. Whether he will succeed in that application depends on the exercise of discretion. In contrast, for members of the politically free group, reinstatement is, essentially, a matter of right.

Guidance issued to Northern Ireland Civil Servants

[13] A circular from the Head of the Civil Service dated 21 October 2003 was sent to all Northern Ireland Civil servants in which guidance was provided for Northern Ireland Civil Servants in relation to their conduct regarding elections to the Northern Ireland Assembly. Paragraph 4 of the Guidance stated two overriding principles, as follows: -

> "Civil servants should not undertake any activity which could call into question their political impartiality; and …
>
> They should ensure that public resources are not used for party political purposes".

[14] Paragraph 6 of the Guidance highlighted the general principle of even-handedness to be observed by all civil servants: -

> "All civil servants should observe the general principle that there should be even-handedness in meeting requests for factual information from the different Northern Ireland political parties….".

Recent history of the control of political activities by civil servants

1. *Report from the Select Committee on Offices or Places of Profit under the Crown dated 14 October 1941*

[15] Paragraph 51 of this report suggested that the exclusion of civil servants from all active or public participation in party politics was a cardinal point in the constitution: -

> "51. The exclusion of civil servants from all active or public participation in party politics, and therefore from membership of the House of Commons, is such a cardinal point in the constitution that it is unnecessary to give reasons for it in this Report. But some attention should be given to the methods by which they are at present disqualified from membership of the House of Commons, and to the exact definition of the class which should be disqualified as civil servants…"

2. *Committee on Political Activities of Civil Servants – January 1978 (the 'Armitage Report')*

[16] The Armitage Committee carried out a review of the political activities of civil servants. At paragraph 79 the criterion to be applied to such activities is expressed thus: -

> "79. …we discuss which types of political activity should be subject to regulation……The criterion to be applied to each of these activities is whether, if a civil servant were to engage in them, it would publicly identify him as having a political commitment to a particular party or as someone of partisan views which could affect his official work".

[17] In respect of parliamentary candidature, the report stated: -

> "81. Under the Servants of the Crown (Parliamentary Candidature) Order 1960, all civil servants are required to resign before announcing candidature for election to Parliament (or in certain cases, before nomination day). Civil servants in the politically free category, if not elected, are entitled to reinstatement within one week of declaration day. If elected, a former civil servant in this category may, under certain conditions, be reinstated in his Civil Service post on ceasing to be a Member. However, staff in the restricted or intermediate categories are required to resign their posts on being adopted as parliamentary

> candidates, and there is no entitlement to reinstatement. It would seem that an application for reinstatement by a member of the politically restricted category would be most likely to be successful, and the same might also apply to a member of the intermediate category.
>
> 82. In its evidence to us, the Civil Service Department claimed that as the main focus and forum of national politics, Parliament was in a special position so that any relaxation of the rules regarding Parliamentary candidature would undermine not only the principles of political impartiality but also the traditional relationship between the legislature and the executive….
>
> 83. For these reasons, the Civil Service Department argued, Parliamentary candidature should remain subject to much stricter control than other, less overtly political activities…."

[18] The majority view of the committee was set out in paragraph 84: -

> "84. We cannot think that it would be right for a civil servant unless he were in the politically free category to remain in his post once it was publicly announced that he was a Parliamentary candidate. We feel that his political impartiality would have been compromised and, whether or not only a few cases occurred, the principle must hold. Similarly, we are not in favour of any change to the existing provisions regarding reinstatement. In view of the special position of Parliament in relation to the Civil Service, it would be difficult to reinstate, in his former post, a civil servant who had been a Member of Parliament (or, for that matter, one who had failed to become elected) since both the individual and the Civil Service would be placed in an invidious position".

Academic commentary on control of political activity by civil servants

1. '*Civil Liberties and Human Rights in England and Wales' 2nd edition by David Feldman*

[19] This text book identified the central principle of maintaining a politically neutral civil service in the following passage at page 792: -

> "A functioning democracy may involve maintaining a politically neutral civil service. Depoliticizing the public service is particularly important where there is a historically well-founded fear that public servants will either favour or discriminate against people of particular political persuasions, but may be generally desirable in order to secure fair and impartial support and advice for people participating in democratic government, whatever their views".

2. '*Importing the First Amendment – Freedom of Expression in American, English and European Law' edited by Ian Loveland.*

[20] This work asserts that refusal of employment or confirmation of employment on political grounds lay outside the scope of the European Convention on Human Rights and Fundamental Freedoms. At page 111 the following passage appears: -

> "It is clear that restrictions on the political activities of public servants may, potentially, violate Article 10 of the ECHR … Most cases to date have turned on Article 10 … Most crucially, [the court] has held that applications concerning the refusal of employment, or confirmation of employment, on political grounds lie outside the scope of the Convention because they concern access to the civil service…"

[21] In a passage that considered the important case of *United States Civil Service Commission et al v National Association of Letter Carriers, AFL-CIO, et al* the author said this: -

> "In the 1973 landmark case of *United States Civil Service Commission et al v. National Association of Letter Carriers, AFL-CIO, et al.*, the plaintiffs challenged the validity of the Hatch Act prohibition against employees taking "an active part in political management or in political campaigns". The majority of the Supreme Court reaffirmed its earlier decision in *United Public Workers v. Mitchell* that plainly identifiable acts of political management and political campaigning on the part of federal employees may constitutionally be prohibited in order to secure an efficient public service. In the words of White J, who gave the Court's judgment: -

> 'Such a decision on our part would no more than confirm the judgment of history, a judgment made by this country over the last century that it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on the electoral process should be limited [pages 117 – 118]'."

Canadian case-law

[22] In *Re Fraser et al. v Attorney General of Nova Scotia et al* [1986] 30 DLR (4th) 340, the applicant, Frank Fraser, was a member of the Nova Scotia Government Employees' Union and a civil servant employed by the Nova Scotia Department of Social Services. Mr Fraser complained that the provisions of the Civil Service Act prevented him from seeking nomination as a candidate in a provincial or federal general election.

[23] The Civil Service Act restricted potential civil servants from engaging in partisan work in connection with any election and restricted candidature to any elective municipal office. Section 3 of the Canadian Charter of Rights and Freedoms provides for the right to be qualified for membership of the House of Commons or of a legislative assembly. Accordingly, it was necessary for the court to determine whether the interference with that right which the Civil Service Act presented was justified under section 1 of the Charter which provides: -

> "1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such that they are reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

[24] Grant J reviewed the various factors that arose on this issue in the following passage at pages 353/4 of his judgment: -

> "Here as in most cases there are competing interests and there are equities flowing in each direction.
>
> There is the public interest to be served as well as the private interest of the citizen. I feel that I must endeavour to weigh and balance the equities involved.

> One of the traditional cornerstones of responsible and democratic government has been the position of a politically neutral and impartial civil service which can be relied upon by the government to carry out its mandate. There is the interest of the individual civil servant that she and he have the right to non-partisan treatment and to be insulated from the effects of patronage. The individual members of the public have the right to expect and to receive treatment by civil servants in a non- partisan and non-political manner.
>
> The public has the right to have its politicians elected from the widest possible base of Canadian citizens. In reviewing the documents before me it appears that many of the members of the union have technical and specialist skills and training. Depriving society of political input of this body of Canadian citizens is, I find, of public interest. There is the corresponding restriction in the personal lives of the civil servants. They lose the ability to have meaningful input into the political process which determines their future and that of their families".

[25] On the issue of proportionality, the Supreme Court of Canada had outlined a three tiered approach in *R v Oakes* [1986] 1 SCR 103, 355: -

> "[1] [T]he measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. And they must be rationally connected to the objective.
>
> [2] [T]he means, even if rationally connected to the objective, should impair "as little as possible" the right or freedom in question.
>
> [3] [T]here must be a proportionality between the *effects* of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'.
>
> The more severe the deleterious effects of a measure, the more important the objective must be if the

> measure is to be reasonable and demonstrably justified in a free and democratic society".

[26] The court in *Fraser* applied this approach and was satisfied that the restrictions were rationally connected to the objective. In considering the proportionality of the measure the court compared the position in Nova Scotia's with the systems in place under other Canadian provinces and other countries including Great Britain. Having referred to the Armitage Report and the three categories of civil servants it had identified, Grant J concluded that the prohibition on all civil servants from standing as candidates in elections was too restrictive and did not satisfy the second and third tests of proportionality. He held that civil servants should be entitled to take leave of absence rather than be dismissed, saying at p 370: -

> "I find the restrictions … do not meet the second and third tests in the proportionality considerations relating to s.1. I find that they fail to impair 'as little as possible' the democratic right expressed in s. 3 of the Charter. That is in the proportionality between the object and the effects of [the restrictions]. I find the objective could be achieved by utilizing lesser means, i.e., leave of absence rather than dismissal."

[27] Grant J made the following further comments at p 372 on political candidature of civil servants: -

> "Unless the person is in a position where his or her presence is essential to the public interest, *i.e.* in a key position during wartime or when his knowledge, training and expertise is needed relating to an immediate and pressing problem, the consent [to stand as a candidate] should not be unreasonably withheld. Parallel and running with this would be the right to reinstatement if unsuccessful".

[28] The judge observed that the practice in England of establishing categories to which certain restrictions would apply appeared to work successfully there and commended it as a possible model to substitute for the blanket ban on political activities by civil servants in Nova Scotia.

Article 10 of ECHR

[29] Article 10 guarantees the right to freedom of expression: -

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold

> opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

European jurisprudence

1. *Ahmed v UK (2000) 29 EHRR 1*

[30] In *Ahmed* ECtHR held that the purpose of regulations made for the purpose of restricting political activities by local government officers holding 'politically restricted' posts was to underpin the long tradition of political neutrality which local government officers owed to elected council members and to preserve the impartiality of such officers. The court recognised the margin of appreciation enjoyed by the state in imposing such restrictions. Thus, while it found that there had been an interference with the applicants' article 10 rights, it considered that this was justified and proportionate: -

> "61. The Court's task is to ascertain … whether the restrictions imposed on the applicants corresponded to a 'pressing social need' and whether they were 'proportionate' to the aim of protecting the rights of others to effective political democracy at the local level. In so doing it must also have regard to the fact that whenever the right to freedom of expression of public servants such as the applicants is in issue the 'duties and responsibilities' referred to in Article 10(2) assume a special significance, which justifies leaving to the authorities of the respondent State a certain margin of appreciation in determining whether the impugned interference is proportionate to the aim as stated.

62…. The [Widdicombe] Committee [which had made recommendations to government in 1985 about the respective roles of elected members and officers of local government authorities] was concerned both about the impact which the increase in confrontational politics in local government affairs would have on the maintenance of the long-standing tradition of political neutrality of senior officers whose advice and guidance were relied on by the members elected to local councils as well as about the increased potential for more widespread abuse by senior officers of their key positions in a changed political context. … There was a consensus among those consulted on the need for action to strengthen the tradition of political neutrality either through legislation or modification of the terms and conditions of officers' contracts of employment….

63. As to whether the aim of the legislature in enacting the Regulations was pursued with minimum impairment of the applicants' rights under Article 10 the Court notes that the measures were directed at the need to preserve the impartiality of carefully defined categories of officers whose duties involve the provision of advice to a local authority council or to its operational committees or who represent the council in dealings with the media. In the Court's view, the parent legislation has attempted to define the officers affected by the restrictions in as focused a manner as possible and to allow through the exemption procedure optimum opportunity for an officer in either the second or third categories to seek exemption from the restrictions which, by the nature of the duties performed, are presumed to attach to the post-holder. It is to be observed also that the functions-based approach retained in the Regulations resulted in fewer officers being subject to restrictions than would have been the case had the measures been modelled on the Widdicombe Committee's proposal to apply them to principal officers and above as a general class and irrespective of the duties performed….."

2. *Vogt v Germany [1996] 21 EHRR 205*

[31] In *Vogt v Germany*, where the applicant had been dismissed from her employment as a teacher because of her membership of the Communist party, ECtHR discussed three principal interlinked themes: the right of civil servants to freedom of expression; the significance of the 'duties and responsibilities' rubric in article 10 (2) in the case of civil servants; and the margin of appreciation available to national authorities in this particular context in the determination of whether the interference with article 10 rights are proportionate to their expressed aim. At paragraph 53 the court said: -

> "53. … Although it is legitimate for a State to impose on civil servants, on account of their status, a duty of discretion, civil servants are individuals and, as such, qualify for the protection of Article 10 of the Convention. It therefore falls to the Court, having regard to the circumstances of each case, to determine whether a fair balance has been struck between the fundamental right of the individual to freedom of expression and the legitimate interest of a democratic State in ensuring that its civil service properly furthers the purposes enumerated in Article 10(2). In carrying out this review, the Court will bear in mind that whenever civil servants' right to freedom of expression is in issue the "duties and responsibilities" referred to in Article 10(2) assume a special significance, which justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference is proportionate to the above aim".

3. *Morissens v Belgium 56 D.R. 127*

[32] In *Morissens v Belgium*, Morissens, a teacher was relieved of her duties and her salary was suspended on account of a television broadcast in which she made statements in support of a particularly controversial topic. ECmHR discussed whether there was a proportionate relationship between the limitation placed on the applicant's exercise of her freedom of expression and the interests served by the limitation at 136 – 137: -

> "In the circumstances of the present case, the Commission considers that, in view of the particular professional responsibilities incumbent on the applicant and the specific nature of her work, the Belgian authorities were reasonably justified in invoking the harmful repercussions of her statements

> on the reputation of the establishment where she performed her teaching duties and on the reputation of the persons appointed to her stead, in order to impose the sanction at issue.
>
> Thus, a proper balance was maintained between the exercise of freedom of expression and the legitimate interests underlying the measure."

4. *Rekvényi v Hungary [1999] 6 BHRC 554*

[33] This case examined the restrictions of the article 10 rights of police officers. ECtHR considered that it was a legitimate aim to have a politically neutral police force, bearing in mind its role in society. Because of the recent political history of Hungary where "party membership on the part of the vast majority of serving [police officers] guaranteed that the ruling party's political will was directly implemented" the restrictions were deemed proportionate.

The appeal

[34] At the outset of the appeal Mr Michael Lavery QC for the appellant helpfully informed the court that the single issue at stake was whether the restriction on the appellant's political activities was proportionate to the aim (which he accepted was legitimate) of the need to ensure the political impartiality of public servants within the United Kingdom system of government. He suggested that this aim could be achieved by a less obtrusive means than that chosen by the government. In particular, he pointed out that civil servants in the politically free group enjoyed superior rights of reinstatement over those in the intermediate group without any obvious justification for the distinction. For the respondent Mr McCloskey QC suggested that this argument neglected the "hierarchical and functional differences between members of these groups". The discretion to reinstate enabled the Civil Service to make a full assessment of the kind of individual conduct and activities which had occurred between resignation from a post and the election. Such assessment was in the interests of the constitutional imperatives to be promoted and protected in that a judgment could be made about the ability of the person concerned to act in a politically neutral fashion.

Conclusions

[35] The need for political neutrality of civil servants must be recognised in both its aspects – actual and perceived. The commitment to carry out the administration of whatever sphere of government policy is involved in the work of the civil servant, unencumbered by any political belief or agenda, is an obviously indispensable prerequisite. Apart from this consideration, however, the need to ensure that the public has confidence in the way in

which civil servants discharge their duties is a paramount concern. Both aspects have been recognised in the reports of committees, the academic writings and the European case law that have been referred to earlier. The special significance of the role of the civil servant and its resonance in the public perception have been expressly recognised.

[36] These requirements must, of course, be balanced against the right of civil servants to engage in political activity which will not put in question their neutrality or impartiality. The dilemma lies in the selection of the point at which the balance is struck.

[37] Fashioning restrictions on the engagement of civil servants in political activity cannot be conducted on an individual basis. It is unrealistic to suggest that examination of the particular duties of a civil servant can provide the inevitable answer to the extent of the necessary restriction on political activities within the group. Comparing the position of the appellant (a member of the politically non sensitive intermediate group) with that of an industrial worker does not help the debate, therefore. Inescapably, a category of restriction will be required to cover a range of civil servants whose professional duties may vary not only in terms of their current position but also in relation to the posts to which they may be assigned in the future.

[38] These constraints must inform any review of the proportionality of the measures adopted in the present instance. Mr Lavery argued that the lack of an automatic right to reinstatement would operate as a powerful disincentive to civil servants in the category that the appellant occupied to engage in political activity. Even if this is so, the question arises whether this is a price that needs to be paid to secure the goal of a politically impartial civil service that is seen to be so.

[39] In this context it is relevant that the Civil Service has a disciplinary code that can be used if a political candidate offends its precepts and Mr Lavery suggested that this should be a sufficient bulwark against impermissible activity. But resort to the code would not be practicable where no offence was committed but the stance of the political candidate was nevertheless inimical to the requirement of political neutrality. It is precisely because of the need to assess this that the discretion as to reinstatement has been retained.

[40] It was submitted that the approach of the Supreme Court of Canada in the *Fraser* case was less restrictive than that adopted by the Civil Service in relation to the appellant. The statutory measure under challenge in that case was demonstrably wider and more draconian in its impact and effect than the restriction under consideration in this appeal. Moreover, most of the applicants in that case fell into the politically free category and but a few into the intermediate category. There is an obvious danger in transplanting

policies and practices from one country to another. While noting respectfully the reasoning in that case we do not consider that it impels us to a different conclusion from that which we have reached in the present appeal.

[41] A focus of Mr McCloskey's argument was the need for the court to acknowledge that in this field, an area of discretionary judgment as to the proportionality of the restriction should be accorded to the legislature. He relied on such cases as *Re A and Others* [2004] UKHL 56 and *Regina v BBC, ex parte Pro Life Alliance* [2003] UKHL 23 which, he suggested, underpinned his contention that in a case such as the present it was not the function of the court to substitute its opinion for that of the democratically elected legislature. We do not feel it necessary to dwell upon this debate. This court addressed some of the issues that arise on the vexed question of deference due by the courts to Executive and Parliamentary decisions in the case of *Department of Social Development v MacGeagh* [2005] NICA 28. There we expressed the view that the third element of the proportionality test *viz* that the means used to impair a convention right should be no more than is necessary to accomplish the legitimate objective was "one which the courts are well equipped to examine". We considered that a relatively restrained measure of deference was appropriate when addressing that issue. But we need not expatiate on this for we are satisfied that the particular restriction imposed on the appellant was entirely proportionate without feeling the need to defer to Parliament's will on the matter.

[42] The appeal is dismissed.

Counsel for the appellant: Mr CM Lavery QC and Mr Ronan Lavery
Counsel for the respondent: Mr Bernard McCloskey QC and Mr Paul Maguire