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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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

WEATHERUP J

The application

[1] By this application for judicial review the applicant, an Administrative Officer in the Northern Ireland Civil Service, challenges restrictions that applied to his candidature for election to the Northern Ireland Assembly in November 2003.

[2] The applicant commenced employment with the Northern Ireland Civil Service on 20 March 2001 and is an Administrative Officer in the Child Support Agency. The applicant is also a member of the Socialist Environmental Alliance and he was selected by the party as their candidate for West Belfast in the last Northern Ireland Assembly elections. However by notice dated 21 October 2003 the applicant was informed of the restrictions applied to candidature in the Assembly elections. In the event the applicant did not stand for election to the Northern Ireland Assembly.

The legislation

[3] Members of the Civil Service are disqualified from membership of the Assembly. The Northern Ireland Assembly Disqualification Act 1975 Section 1(1)(b) provides that:

> "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".

The Representation of the People Act 1983 (as amended by the Northern Ireland Assembly (Elections) Order 2001) provides that a candidate's consent to nomination be given in writing and shall state that he is aware of the provisions of the Northern Ireland Assembly Disqualification Act 1975 and to the best of his knowledge and belief he is not disqualified from membership of the Northern Ireland Assembly.

[4] There is also a statutory prohibition applied to certain members of the Civil Service on candidature for election to the Assembly. The prohibition applies to the applicant. The Civil Service (Parliamentary and Assembly Candidature) Order (Northern Ireland) 1990 is an Order made by the Secretary of State in exercise of powers conferred by letters patent of Her Majesty dated 20 December 1973. Article 3 provides:

> (i) No person to whom this Article applies shall issue an address to electors or in any other manner publically announce himself or allow himself to be publically announced as a candidate or prospective candidate for election to –
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> > (a) parliament for any parliamentary constituency; or
> >
> > (b) the European Parliament for any European parliamentary constituency; or
> >
> > (c) the Assembly for any Assembly constituency; or
> >
> > (d) the new Northern Ireland Assembly for any constituency which returns members thereto. (as added to the 1990 Order by the Civil Service (Parliamentary and Assembly Candidature) (Amendment) Order (Northern Ireland) 1998).
>
> (ii) Subject to paragraph (iii) 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.
>
> (iii) 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 purpose 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 an non-office grade for the purposes of this Order.

The Code

[5] The Northern Ireland Pay and Conditions of Service Code is made under the Civil Service (Northern Ireland) Order 1999. In relation to political activities it provides -

(i) A statement of intent that states (paragraph 964) -

> "Civil servants own their allegiance to the Crown. In its executive capacity, the authority of the Crown is exercised by 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 complexities 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 the privately held beliefs and opinion."

(ii) National political activities are subject to restrictions and these include (paragraph 965) – "Public announcement as a candidate or prospective candidate for parliament or the European Assembly or any Northern Ireland legislative and/or elected body." Further activities subject to restriction include holding, in party political organisations, offices which impinge wholly or mainly on party politics and speaking in public on matters of national political controversy and expressing views on such matters in letters to the press or in books, articles or leaflets and canvassing on behalf of a candidate in national elections.

(iii) There are similar restrictions on local political activities (paragraph 966).

(iv) Civil Servants are divided into three groups. The applicant is in the intermediate group referred to at (c) below. The groups are permitted to undertake political activities as follows (paragraph 967) –

> "(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, 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." (underlining added)

(v) The intermediate group distinguishes between politically sensitive posts and non politically sensitive posts (paragraph 970). The applicant is in a non politically sensitive post. Sensitive areas are those where the political impartiality of the Civil Service could be most at risk and accordingly permission to undertake political activities cannot normally be granted. This applies to staff closely engaged in policy assistance to Ministers and staff who regularly speak for the Government or Department in dealings with various groups and staff who represent HM Government in dealings with overseas governments and staff whose official duties involve a significant amount of face-to-face contact with the public.
In non-sensitive areas it is stated to be the general intention that standing permission should be applied to undertake political activities.

(vi) As all Civil Servants including the politically free group are disqualified from election to parliament and the Northern Ireland Assembly, to prevent their election being held to be void a politically free Civil Servant should submit his or her resignation before giving consent to nomination (paragraph 990). Civil Servants in the politically free group elected to parliament or the Northern Ireland Assembly will, on ceasing to be elected members, be entitled to be re-instated in the Civil Service if certain conditions are satisfied (paragraph 991). Civil servants in the politically free group, if not elected to parliament or the Northern Ireland Assembly, will on application be re-instated in their previous capacity (paragraph 992).

(vii) Civil Servants in the intermediate or the politically restricted groups "have no right to re-instatement, but applications for re-instatements may be considered when postings to non-sensitive areas of work are possible" (paragraph 992). In the earlier version of paragraph 992 issued in February 1986 it was provided that Civil Servants in the intermediate or politically restricted group who resign their Civil Service posts on being adopted as parliamentary candidates would not normally be re-instated in the Civil Service.

[6] In summary, the applicant occupies a post in the intermediate group that is not in a politically sensitive area. Accordingly under paragraph 967(c) of the Code he is eligible for freedom to engage in any or all of the national or local political activities, other than candidature, by permission of the Department, for which he has standing permission. However he is excluded from candidature for the Westminster parliament or the European Assembly or any Northern Ireland Assembly. He must resign on adoption as a candidate, and if unsuccessful apply for reinstatement, which is a matter of discretion. Were he in the politically free group he would have a right to reinstatement.

The applicant's grounds for judicial review

[7] While the application for judicial review as drafted was wide ranging, the challenge presented at the hearing was more focused. Mr R Lavery BL on behalf of the applicant contends that the Code at paragraph 967(c) should not make an exception for candidature to the Northern Ireland Assembly so that those in the intermediate group would be eligible to stand for election to the Northern Ireland Assembly by permission of the department. The applicant contends that those Civil Servants not engaged in politically sensitive areas, such as the applicant, should have standing permission to undertake candidature for the Northern Ireland Assembly (as is otherwise provided by paragraph 970). However the exception for candidature in the intermediate group reflects the Secretary of State's Order of 1990 which prohibits candidature for the Northern Ireland Assembly to all civil servants other than those in, or certified to be in, industrial grades or non-office grades.

Further the applicant contends that paragraphs 991 and 992 should apply to those in the intermediate group so as to provide a right to re-instatement to successful and unsuccessful candidates in the same manner as applies to the politically free group. The applicant's approach is that Civil Servants such as the applicant who become candidates for election should be granted leave of absence and re-instatement. Accordingly the applicant seeks declarations that the Code should provide that those in the non political area of the intermediate group should be treated in the same manner as those in the politically free group.

[8] A Notice was issued under Order 121 of the Rules of the Supreme Court (Northern Ireland) in relation to a declaration of incompatibility under Section 4 of the Human Rights Act 1998 in respect of Section 1(1)(b) of the Northern Ireland Assembly Disqualification Act 1975 and the Civil Service (Parliamentary and Assembly Candidature) Order 1990. The 1975 Act was not an issue at the hearing. The challenge to the operation of paragraph 967(c) of the Code, in excluding candidature from permitted political activity, reflects the terms of the 1990 Order. The compatibility of the 1990 Order with the European Convention is an issue.

[9] At the hearing the issues resolved to whether the distinction between the intermediate grades, who were excluded from candidature and have no right to reinstatement, and industrial grades and non-office grades, who are permitted candidates and have a right to reinstatement, was arbitrary and irrational; and whether the approach to candidature represented a breach of the applicant's right to freedom of expression under Article 10 of the European Convention and of the applicant's right to freedom of peaceful assembly and freedom of association under Article 11 of the European Convention and of the right to free elections under Article 3 of the First Protocol to the European Convention.

Article 10 of the European Convention

[10] Article 10 provides for freedom of expression as follows:-

> (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 frontier. 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 rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Restrictions on local government officers in England.

[11] The operation of these provisions has been considered by the European Court of Human Rights in relation to political restrictions imposed on local government officers in *Ahmed v United Kingdom* [2000] 29 EHRR 1. Statutory regulations created three categories of local government officers who are subject to political restrictions that include candidature in local and national elections. Category 1 comprises senior local government offices, category 2 is determined by a salary threshold and category 3 includes those below the salary threshold who are engaged in providing advice to councils and committees and in speaking to the media. These are function based restrictions that are subject to exceptions. It was not in dispute that the restrictions interfered with the applicant's rights under Article 10 and the issue was whether those restrictions were justified under Article 10(2). The ECHR observed that the interference gave rise to a breach of Article 10 unless it could be shown that the restrictions were "prescribed by law," pursued one or more of the legitimate aim or aims as defined in Article 10(2) and were "necessary in a democratic society" (para.42).

[12] Having examined the regulations the ECHR was satisfied that the interference was "prescribed by law" (para.48). In considering the legitimate aim of the restrictions the ECHR noted that the local government system had long rested on a bond of trust between elected members and a permanent core of local government officers who both advise on policy and assume responsibility for the implementation of the policies adopted; that relationship of trust stemmed from the right of council members to expect that they were being assisted by officers who were politically neutral and who were loyal to the council as a whole; members of the public also had a right to expect that those elected would discharge their mandate in accordance with commitments made to the electorate and that the mandate had not foundered on political opposition from advisors; that members of the public were equally entitled to expect that in their dealings with local government they would be advised by politically neutral officers who were detached from the politically fray (para.53). The ECHR concluded that the interference pursued a legitimate aim, namely to protect the right of others, council members and the electorate alike, to effective politically democracy at the local level (para.54).

[13] In determining whether the restrictions were necessary in a democratic society the ECHR stated its tasks as being to ascertain whether the restrictions corresponded to "pressing social need" and whether they were "proportionate" to the aim. In relation to pressing social need it was noted that there had been instances of abuse of power by certain local government officers and there was concern 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 politically neutrality of senior officers as well as the increased potential for more widespread abuse by senior officers. The ECHR accepted there was a pressing social need and that the adoption of the restrictions on certain categories of local government officers, distinguished by the sensitivity of their duties in forms of political activity, could be considered a valid response by the legislature to addressing that need (para.62). In relation to a proportionate response the ECHR considered whether the aim of the legislature in enacting the Regulations was pursued with "minimum impairment" of the applicant's rights under Article 10. The ECHR noted that the measures were directed at the need to preserve the impartiality of carefully defined categories of officers and that this had been done in as focused a manner as possible with a procedure allowing optimum opportunity for exemption (para.63). The ECHR found no breach of Article 10.

[14] Similarly the ECHR found no breach of the right to freedom of peaceful assembly and freedom of association under Article 11 (para.71). In relation to Article 3 of the First Protocol the ECHR noted that the free expression of the opinion of the people and the choice of the legislature implied a right to stand for election, which right was subject to implied limitations. The ECHR considered the content of the aim pursued by the legislature, namely to secure political impartiality; the aim was considered legitimate and the restrictions did not limit the very essence of the right having regard to the fact that the restrictions only operated for as long as the applicant occupied a politically sensitive post and an applicant wishing to run for elected office was at liberty to resign from his post (para.75). Without taking a stand on whether local authority elections or elections to the European Parliament are covered by Article 3 of the First Protocol the ECHR concluded that there had been no breach of Article 3 of the First Protocol (para.76).

Justification for the restrictions on candidature for the Northern Ireland Assembly.

[15] In the present case the restrictions on the intermediate group involve exclusion from candidature by virtue of the 1990 Order and no right to reinstatement after an unsuccessful candidature by virtue of the Code. It is not in issue that the restrictions interfere with the applicant's right to freedom of expression under Article 10. Accordingly the interference requires justification under Article 10(2). Such justification requires that the

restrictions are prescribed by law, pursue one or more of the legitimate aim or aims specified in Article 10(2) and are necessary in a democratic society as corresponding to a pressing social need and as being proportionate to the legitimate aim.

[16] It is not contested that the scheme is prescribed by law. The justification is stated on behalf of the respondent by Michael Daly, a Senior Civil Servant in the Department of Finance and Personnel, as follows –

> "(4) The justification for the legal position explained above lies in the need to ensure the political impartiality of public servants within the United Kingdom system of government which for this purpose includes the devolved system of government in Northern Ireland. There has long been a constitutional practice that members of the Civil Service should at all times act in a politically neutral way. Civil servants must serve the government of the day with a maximum possible objectivity whenever it's political programme. This extends not only to the process of giving advice to ministers but also to the implementation of government policy at all levels. Ministers must be able to reply on civil servants not being so politically committed that they cannot easily comply with these basic constitutional requirements. The minister should not be embarrassed by the political history or pedigree of a civil servant and equally should confidently be in a position to expect that the civil servant will carry out his or her duties with complete impartiality whether or not he or she agrees with government policy. The public should moreover be able to enjoy a similar expectation that the civil servant dealing with him or her will approach the matter in hand unaffected by that civil servant's own party political views. In short, 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.
>
> (5) To allow civil servants to be nominated for and seek election to the legislature would potentially compromise the values above referred to. Under the Departments (Northern Ireland) Order 1999 the functions of a department at all times should be exercised subject to the direction

> and control of the minister in charge of the department. The ministers are accountable to the Assembly for the discharge of the functions of their department. The Civil Service is the politically neutral component of the Executive and if Civil Servants were permitted to stand for public elections to a legislature within their constitutional context they would undermine not only the principle of political impartiality but also the relationship between the legislature and the Executive. Candidature for election to such legislatures cannot be viewed as other than providing the ultimate indication of political allegiance and such a candidature would publically undermine a civil servant's claim to impartiality in a way that would not be apparent in the contact of lesser forms of participation in public affairs.
>
> (6) The individual affected retains the right to stand for election but he or she must first terminate employment as a civil servant in order to do so.
>
> (7) The constitutional imperatives behind the present rules and disqualification are valid whether the context is that of the House of Commons, the Assembly or the European Parliament. The Assembly's position as the Northern Ireland legislature is analogist to the position of the House of Commons within the overall system of government for the United Kingdom. In fact if anything the need for objectivity, neutrality and impartiality on the part of civil servants is perhaps even greater in Northern Ireland given the size of the community they serve and the devolved system of government in Northern Ireland in which ministers of different political parties form the Executive Committee".

[17] The respondent relies on the above matters as constituting a legitimate aim and a pressing social need for restrictions. The general character of the restrictions is longstanding although the detailed approach has changed from time to time. The Armitage Committee carried out a review of the system and produced a Report in 1978 as the "Committee on Political Activities of Civil Servants". In relation to parliamentary candidature the Report noted the effect of the restrictions that were then in place in England under the Servants of the Crown (Parliamentary Candidature) Order 1960. All Civil Servants

were required to resign before announcing candidature for election to parliament. Civil Servants in the politically free category if not elected were entitled to re-instatement and if elected could under certain circumstances be re-instated in a Civil Service post on ceasing to be an MP. Staffs in the restricted or intermediate categories were required to resign their posts on being adopted as parliamentary candidates and there was no entitlement to re-instatement. At paragraph 81 the Report noted that "it would seem that an application for re-instatement by a member of the politically restricted category would be most unlikely to be successful, and the same might also apply to a member of the intermediate category". At paragraph 82 the Report records that the Civil Service Department opposed any relaxation of the Rules regarding parliamentary candidature on the basis that it would undermine not only the principle of political impartiality but also the traditional relationship between the legislature and the Executive. At paragraph 83 the Report noted that the Staff Side argued that the rules were unnecessarily restrictive and that parliamentary candidature should be regarded in the same light as other political activity. The Staff Side also proposed that staff adopted as parliamentary candidates should then be entitled to one month's special leave to fight the election campaign.

[18] The Committee expressed their conclusions on candidature and reinstatement at paragraph 84. On candidature it was stated that it would not be right for a Civil Servant, unless he were in the politically free group, to remain in post once it was publicly announced that he was a parliamentary candidate. On reinstatement the Report stated that they were not in favour of any change to the existing provisions regarding re-instatement. The view was that the special position of parliament in relation to the Civil Service made it difficult to reinstate, in his former post, a Civil Servant who had been a member of parliament or who failed to become elected, since both the individual and the Civil Service would be placed in an invidious position.
A footnote to the Report indicates that paragraph 84 represented the views of the majority of the Committee. Two members of the Committee recorded their dissent on candidature as it applied to the intermediate group. The minority would have prevented the restricted group from remaining in post once candidature was publicly announced; were not in favour of changing reinstatement; proposed a distinction between members of the intermediate category to recognise those who might be permitted candidature.

[19] It is apparent that there has been modification of the approach to re-instatement of those in the politically restricted group and the intermediate group. The Report at paragraph 81 stated the practice to have been that such persons were "most unlikely" to be re-instated. This appears to be reflected in the February 1986 version of paragraph 992 of the Code which stated that members of such groups will "not normally" be re-instated. However the present version of paragraph 992 of the Code states that applications for re-

instatement from members of such groups may be considered "when postings to non-sensitive areas of work are possible".

Restrictions on candidature in Canada.

[20] The applicant takes his approach from *Frazer v Attorney General of Nova Scotia* [1986] 30 DLR (4th) 340. 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. It was found that the provisions of the Civil Service Act infringed the applicant's right to candidature under Section 3 of the Charter. Accordingly it was necessary for the Court to determine whether the infringement was justified under Section 1 of the Charter by being subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The applicant's contention was that at the time of taking the decision to seek political office the civil servant should have the right to leave of absence without pay, and if unsuccessful in a bid for office should have the option of returning to former duties. It was not submitted that a civil servant should continue on as a civil servant during the time as a candidate for political office (p.351). It was accepted that there was a legitimate aim in restricting the political activities of civil servants because in the absence of such limits there would probably have been an erosion of public confidence in its factual and perceived impartiality in carrying out the politics of the government as required (p.357).

[21] On the issue of proportionality the Supreme Court of Canada outlined three important components to the proportionality test in *R v Oakes* [1986] 1 SCR 103. First of all the measure must be rationally connected to the objective, secondly the means adopted must impair as little as possible the rights and freedoms in question and thirdly there must be proportionality between the effects of the measures and the objective. The Court in *Frazer* applied that approach and was satisfied that the restrictions were rationally connected to the objective. The Court made comparisons with the systems in place in other Canadian provinces and other countries including Great Britain. Grant J referred to the Armitage Committee Report and the three categories of civil servants. He noted the recommendation for extended use of block remission to as many staff as possible within the intermediate category. He made no reference to the exclusion of parliamentary candidature from the extended use of block remission in the intermediate category. In *Frazer* most of the applicants fell into the politically free category and a few into the intermediate category. The Court found that the restrictions on candidature did not satisfy the second and third tests of proportionality, namely the means adopted did not impair as little as possible the rights and freedoms in question and there was a lack of proportionality between the objective and

the effects of the restrictions. It was found that the objective could be achieved by utilising lesser means, namely leave of absence rather than dismissal (p.370).

Proportionality in the domestic courts.

[22] Article 10 was considered by the House of Lords in *R v Shaylor* [2002] 1 AER 477. Lord Hope referred to a general international understanding as to the matters which should be considered where a question is raised as to whether an interference with a fundamental right is proportionate and stated (at para. 61) -

> "These matters were identified in the Privy Council case of *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 by Lord Clyde. He adopted the three stage test which is to be found in the analysis of Gubbay CJ in *Nyamirai v National Social Security Authority* [1996] 1 LRC 64, where he drew on jurisprudence from South Africa and Canada: see also *R (Daly) v Secretary of State for the Home Department* [2001] 2 WLR 1622, 1634H-1635A, per Lord Steyn; *R (Pretty) v Director of Public Prosecutions* [2001] 3 WLR 1598, 1637A-C. The first is whether the objective which is sought to be achieved - the pressing social need - is sufficiently important to justify limiting the fundamental right. The second is whether the means chosen to limit that right are rational, fair and not arbitrary. The third is whether the means used impair the right as minimally as is reasonably possible. As these propositions indicate, it is not enough to assert that the decision that was taken was a reasonable one. A close and penetrating examination of the factual justification for the restriction is needed if the fundamental rights enshrined in the Convention are to remain practical and effective for everyone who wishes to exercise them."

[23] The House of Lords and the ECHR have expressed a three stage test involving legitimate aim, rational means and minimal interference. The final stage was expressed by the Supreme Court of Canada in *R v Oakes* as involving separate consideration of minimal means and proportionate effect. The jurisprudence referred to by Lord Clyde in *de Freitas* was drawn from Zimbabwe and South Africa, which in turn had drawn from Canada. It was recognised that in some instances proportionality was expressed as a four stage test involving legitimate aim, rational means, minimal means and proportionate effect, and in some instances the last two aspects were dealt with together. As Lord Hope stated in *R v Shaylor* (at para. 69), "the nature of the restrictions must be sensitive to the facts of each case if they are to satisfy

the second and third requirements of proportionality". I interpret this approach as including a concern for the effect of the measures on the individual. The three stage test of proportionality includes consideration of the proportionate effect of the measures adopted.

[24] I am satisfied that the objective which is sought to be achieved, the pressing social need, is sufficiently important to justify restrictions on the right to candidature. The objective is to maintain the principle of political impartiality and also the traditional relationship between the legislature and the Executive, as set out in the respondent's affidavit. I am satisfied that the means chosen to limit that right are rational, fair and not arbitrary. The restrictions on candidature have been carefully considered and are a relevant response to the pressing social need. The distinction between industrial and non office grades and those in the intermediate group is not an arbitrary distinction but represents a description of those whose employment is of a nature that engages the concerns that are being addressed by the restrictions.

[25] The issue is whether the response to the need impairs the right as minimally as is reasonably possible. The contest in the present case occupies narrow ground. In effect the resignation of all Civil Servants is required during candidature. While a Civil Servant in the politically free group is not obliged to resign on adoption as a prospective candidate he or she is disqualified from election to the Northern Ireland Assembly. To prevent the election being held to be void he or she should resign before consenting to nomination. If unsuccessful the Civil Servant in the politically free group will be re-instated in his previous capacity. This is the position for which the applicant contends in respect of non-politically sensitive posts in the intermediate category. On the other hand the system that applies to those in the non-politically sensitive area of the intermediate group involves a discretion as to re-instatement when postings to non-sensitive areas of work are possible. The difference lies in a right to re-instatement to those in, or certified to be in, industrial grades and non-office grades, and in relation to all other civil servants a discretion as to re-instatement in non-politically sensitive posts.

[26] The respondent contends that there is, and should be, a discretion as to re-instatement in order that consideration might be given to the impact of the Civil Servants actual candidature on the need for political impartiality and the maintenance of the traditional relationship between the legislature and the Executive. The basis of the justification for particular measures in relation to candidature also provides the basis for giving consideration to the impact of the particular candidature before making a determination as to reinstatement. I am satisfied that the approach to candidature warrants consideration of the impact of a particular candidature before reaching a decision on reinstatement. In those circumstances the measures impair the right as minimally as reasonably possible. I am also satisfied that the

measures have proportionate effect. There is a fact sensitive approach to reinstatement based on the particular circumstances of each case. Accordingly I am satisfied that the restrictions are proportionate and there is no breach of Article 10.

Article 11 of the European Convention

[27] Article 11 provides for freedom of assembly and association as follows:-

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

[28] Under Article 11 the right to freedom of peaceful assembly and to freedom of association with others includes the freedom to hold opinions and receive and impart information and ideas. For the reasons set out in the discussion of Article 10(2) above I am satisfied that such interference as arises in relation to the right to freedom of peaceful assembly and to freedom of association with others is justified under Article 11(2).

Article 3 of the First Protocol of the European Convention

[29] Article 3 of the First Protocol provides for the right to free elections as follows:-

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

[30] Article 3 of the First Protocol implies the right to stand for election. However this arises from the requirement that the State undertakes to hold free elections under conditions that will ensure the free expression of the opinion of the people in the choice of the "legislature". In *Ahmed v United Kingdom* the ECHR did not take a stand on whether local authority elections or elections to the European Parliament are covered by Article 3 of the First Protocol. In *Booth-Clibborn v United Kingdom* [5 July 1985] the European Commission on Human Rights found that Metropolitan County Councils in England could not be considered as legislative bodies for the purpose of Article 3 of the First Protocol. The Commission referred to decision number 5155/71 of 12 July 1976 where the Commission found that local authorities in Northern Ireland were not part of the legislature. The Commission's conclusion in *Booth-Clibborn* at p.248 was stated as follow –

> "Having regard to the powers exercised by the Metropolitan County Councils, their relationship to the United Kingdom Parliament, its previous case law, and the other facts of the case, the Commission is of the opinion that, despite the significant scope of their functions, the Metropolitan County Counties cannot properly be said to form part of the 'legislature' of the United Kingdom. They do not possess an inherent primary rule making power and those powers which have been delegated to them are qualified by the Parliament of the United Kingdom and exercise subject to that parliament's ultimate control."

[31] The respondent contends that the Northern Ireland Assembly is not a "legislature" for the purposes of Article 3 of the First Protocol. The Northern Ireland Assembly is a legislative body although it produces what is described as "secondary legislation". Its relationship to the United Kingdom Parliament involves transferred powers to the Assembly, although the United Kingdom Parliament remains sovereign. Within the scope of those transferred powers I am satisfied that the Northern Ireland Assembly is a legislative assembly that is part of the "legislature" of the United Kingdom. Accordingly Article 3 of the First Protocol accords the applicant an implied right to stand for election to the Northern Ireland Assembly. However that right is also subject to implied limitation, as stated in *Ahmed v United Kingdom* (paragraph 75). The restrictions on candidature for the Northern Ireland Assembly pursue the same legitimate aims as outlined above in respect of Articles 10 and 11. I have reached the same conclusion that the ECHR reached in relation to local government officers in *Ahmed v United Kingdom,* namely the restrictions do not limit the very essence of the right to stand for election as the applicant is at liberty to resign from his post and to seek re-instatement.

[32] Accordingly I find that Article 3 of the Civil Service (Parliamentary and Assembly Candidature) Order (Northern Ireland) 1990 is not incompatible with a Convention right.

[33] Finally, the applicant contends that the provisions of the Code in relation to reinstatement are arbitrary and irrational. For the reasons set out above that were found to amount to justification of the restrictions I am satisfied that the measures applied to those in the intermediate group of Civil Servants such as the applicant can not be said to be arbitrary or irrational. The application for Judicial Review is dismissed.