

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 22/10/10

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

IN THE MATTER OF THE REPRESENTATION OF THE PEOPLE ACT
1983

-and-

IN THE MATTER OF THE PARLIAMENTARY ELECTION FOR
FERMANAGH AND SOUTH TYRONE HELD ON 6 MAY 2010

MORGAN LCJ (delivering the judgment of the court)

[1] This is a petition by Rodney Connor, an unsuccessful candidate in the Parliamentary election held for the constituency of Fermanagh and South Tyrone (the constituency) on 6 May 2010. The petitioner claims that on the holding of the election breaches of the statutory rules governing the conduct of elections were committed by the Deputy Returning Officer, the Returning Officer and their servants and agents. The petitioner further claims that in truth and in fact he had a majority of the lawful votes of the electors and ought to have been returned. He seeks a scrutiny of the votes recorded as having been cast, an order for a recount and a determination that the first named respondent Michelle Gildernew was not duly elected or returned and that he ought to have been returned. He further seeks any other appropriate relief.

Background

[2] In the election held on 6 May 2010 in the constituency a total number of 96 polling stations were allocated at which voters could vote in person. Each station was manned by a presiding officer and assistant and each was allocated an appropriate number of ballot papers for issue. Some stations were located on the same premises. A person wishing to vote presented their

identification to the presiding officer who called out their name. The assistant then marked the register so as to indicate that they had voted and entered the electoral register number of the voter beside the number of the ballot paper issued to them on a document called the Corresponding Number List. The presiding officer then issued the ballot paper to the voter.

[3] Once the last ballot paper had been issued shortly before 10pm the presiding officer placed the unused ballots into a transparent envelope which was sealed. The ballot box itself was also sealed. The presiding officer established from the Corresponding Number List how many ballot papers had been issued and entered that number on a sheet known as the ballot paper account. The ballot paper account was securely fixed to the ballot box and the Corresponding Number List and marked register were also securely attached for return to the count centre.

[4] The counting of votes for the constituency took place at Omagh leisure centre. It had been arranged that the staff would first proceed with the count in relation to West Tyrone. The declaration in that constituency was made sometime after midnight. The evidence suggests that the count in relation to the constituency started at about 12:45 a.m. on 7 May 2010.

The Verification Statement

[5] The beginning of the count process was the verification of the number of ballot papers in each ballot box. The instruction given to the supervisors and counting assistants was that the votes in the ballot box should be counted to see if they agreed with the ballot paper account. If they did not agree the votes were to be recounted until a recount agreed with some earlier count or the ballot paper account. In fact most boxes appear to have been counted rather more than this.

[6] The approach to verification in this election was different to that taken in previous elections. The effect of the instructions issued for the election in May 2010 was that the papers in the ballot boxes were mixed with papers from at least one other ballot box or postal votes before being allocated as votes for any candidate as soon as a figure had been reached for the number of ballots in each box as set out in the preceding paragraph. In previous elections before the votes from any ballot box were mixed for allocation it was established whether there was a discrepancy between the ballot box account and the number of ballot papers counted. If so there was an opportunity to investigate that discrepancy. That would have included access to the unused ballot papers and investigation of the number of ballot papers found in other boxes at the same location. Such an investigation would also have enabled the counting assistants to carefully examine whether any of the papers were not valid ballots.

[7] Mr Bain, the Chief Electoral Officer for Northern Ireland and returning officer for each of the 18 constituencies, explained that he had issued the relevant instruction on the basis of his examination of procedures utilised in other constituencies in Great Britain. He agreed that the effect of the instruction was to make it impossible to carry out a detailed scrutiny of those ballot boxes where the number of ballot papers did not agree with the ballot paper account. He indicated that he was minded to review this instruction for further elections so as to ensure that increased scrutiny of the ballots in a ballot box could be carried out where there was an unexplained discrepancy between the ballot paper account and the number of ballots in the box.

[8] The next step in the verification process was the preparation of the verification statement. For this election Mr Bain issued instructions on 14 April 2010 that a two-part verification statement should be prepared. Part A recorded:-

- (i) the number of ordinary ballot papers issued according to the ballot paper account,
- (ii) the number of spoilt ballot papers according to the ballot paper account (this is where voters made a mistake and sought a replacement ballot from the presiding officer),
- (iii) the number of ballot papers to be counted as shown on the ballot paper account,
- (iv) the difference if any and
- (v) the number of ordinary ballot papers included in the count.

[9] That part of the statement was to be made available to agents who requested a verification statement and they were to be entitled to copy it. Part B contained:-

- (i) a record of the number of ordinary ballot papers provided to each box,
- (ii) the number of spoilt ordinary ballot papers as found by opening the envelope containing such papers for each box,
- (iii) the number of unused ordinary ballot papers returned and found in the envelope,
- (iv) the number of tendered ballot papers provided to each box,
- (v) the number of spoilt tender ballot papers found by opening the envelope, and
- (vi) the number of unused tender ballot papers found by opening the envelope.

[10] In the instructions issued to Deputy Returning Officers they were advised that in order to avoid alerting agents to the existence of Part B the letter A would be omitted from the version of the statement used at the count and provided to agents on request. We consider that such an instruction was

entirely inappropriate. The information contained in Part B was clearly material to the determination of whether there had been any irregularity in the number of ballot papers contained in some ballot boxes. The Parliamentary Election Rules (the Rules) are contained in Schedule 1 to the Representation of the People Act 1983 (the 1983 Act). Rule 45(5) deals specifically with this issue in the following terms:-

“(5) The returning officer shall verify each ballot paper account by comparing it with the number of ballot papers recorded by him, and the unused and spoiled ballot papers in his possession and the tendered votes list (opening and resealing the packets containing the unused and spoiled ballot papers and the tendered votes list) and shall draw up a statement as to the result of the verification, which any election agent may copy.”

It is clear, therefore, that the verification statement which should be made available to an election agent to copy should contain the result of the deliberations of the election officials arising from the examination of unused ballot papers as well as other documents. The instruction, therefore, was not in accordance with the requirements of the Rule.

[11] The evidence of Mr Fox, the Deputy Returning Officer, was that Part A verification statement was available around 3 a.m. He believes that it was available for agents from that time on. The representatives of the petitioner believe that they did not get access to the document until somewhere closer to 4 a.m. and therefore did not have an opportunity to consider its contents until later that morning. When they did so they established that there were 14 ballot boxes in which it appeared that more ballot papers were found in the ballot boxes than had been issued according to the ballot paper account. In total in those 14 boxes there appeared to be 36 votes in excess of the number of ballot papers issued by the presiding officers of those boxes. Mr Fox indicated that although it had been anticipated that Part B would be completed on the evening of the count the resources necessary for this operation were not available and this part of the verification statement was not in fact completed until 17 May 2010. It was not, therefore, available either to the election officials or the agents of the candidates at the time of the count.

Doubtful Votes

[12] As the counting assistants engage in the process of allocating the votes to each of the candidates they are required to identify any ballot papers in respect of which there is any issue which might raise the possibility that the ballot paper will be rejected. By virtue of Rule 47(1) of the Rules any ballot paper -

- (a) which does not bear the official mark, or
- (b) on which votes are given for more than one candidate, or
- (c) on which anything is written or marked by which the voter can be identified except the printed number and other unique identifying mark on the back, or
- (d) which is unmarked or void for uncertainty

shall be void and not counted. Where a counting assistant identifies a ballot paper which might fall into any of these categories the paper is referred for consideration as a doubtful vote.

[13] In previous elections the practice was that doubtful votes were considered by the Deputy Returning Officer at various stages during the count. When a number of such doubtful votes had built up the Deputy Returning Officer would alert the agents of the parties to the fact that he intended to make a determination in respect of the doubtful votes and representatives of each candidate would then present themselves at the place where the doubtful votes were being considered. This ensured that each candidate had an opportunity to make representations in relation to whether any such votes should be rejected. The process would be repeated every 20 to 30 minutes in the course of the count until all of the doubtful votes had been considered. Any candidate or agent who did not agree with any decision to reject a ballot paper as invalid had to tell the Deputy Returning Officer who then stamped the paper "rejection objected to".

[14] Prior to the election in May 2010 the Electoral Office for Northern Ireland issued a Guide for Candidates (the Guide). The Guide dealt with the issue of doubtful ballot papers and explained the process that would be followed.

" Doubtful Ballot Papers

9.19 During the counting of votes the count staff will find some ballot papers that may not be valid.
Any ballot paper –

- which does not bear the official mark
- on which votes are given for more than one candidate
- on which anything by which the voter can be identified has been written
- which is unmarked or void for uncertainty

will be referred to the DRO.

9.20 An announcement will be made over the public address system telling candidates and agents that an adjudication on these doubtful ballot papers is about to be made. You can attend the adjudication or nominate one person to represent you. The adjudication will not be delayed if you are not present or represented. The DRO will inform those present of the decision on the validity of each ballot paper and of the reason for it. That decision is final and can be challenged only by way of an election petition. If you do not agree with any decision to reject a ballot paper as invalid you must tell the DRO who will stamp the paper 'rejection objected to'."

[15] It can be seen, therefore, that the process for the consideration of doubtful ballot papers was essentially to be the same as that which had taken place at other elections. Between the date of the issue of the Guide and the holding of the election the Chief Electoral Officer decided that the process for consideration of doubtful ballot papers should be changed so that doubtful ballot papers should be considered by a doubtful votes supervisor (the supervisor) on a continuous basis during the count. The Count Instructions issued to all of those who were working for the Electoral Office on the count included Annex D which set out the duties of the supervisor. That document recorded that "the deputy returning officer will have briefed candidates and agents that the adjudication will be a continuous process and that it is up to them to be present if they wish".

[16] The supervisor carried out her duties in relation to the count for West Tyrone. During the count for the constituency she remained in the same position close to a wall on which there was an A3 sheet with the words "Doubtful Votes" marked on it. In front of the table on which she was working there was also a similar sign although the evidence indicated that it was at such a low level than it might not have been easily seen. The deputy returning officer gave evidence that at the start of the count for the constituency he used the PA system to advise candidates and agents that doubtful votes would be considered on a continuous basis. The petitioner's representatives stated that the acoustics in the hall were such that the PA system was incapable of being understood and they were unaware of the fact that doubtful votes were being continuously determined. Those who gave evidence had not noticed the sign on the wall referring to doubtful votes although the supervisor's evidence that the petitioner himself had been present at the doubtful votes table during the count was not challenged. Rule 44(4) of the Rules deals with the facilities which must be provided to counting agents representing the candidates.

“(4) The returning officer shall give the counting agents all such reasonable facilities for overseeing the proceedings, and all such information with respect to them, as he can give them consistently with the orderly conduct of the proceedings and the discharge of his duties in connection with them.”

The Count

[17] The counting of votes for the constituency finished about 2.45 a.m. on 7 May 2010. The petitioner at that stage had 21,296 votes and the first respondent 21,288. The first respondent’s agent requested a recount and there was no controversy about that. The recount was carried out by examining the bundles of 50 votes for each candidate and in order to do so 21 tables were allocated to the petitioner and 21 tables to the first respondent with a number of tables allocated to the remaining candidates. The bundles were checked to make sure that there were 50 votes in each bundle. At the same time the counting assistants checked the line of crosses for each candidate. At the end of the first recount the petitioner had 21,295 votes and the first respondent 21,305 votes. A further recount was requested by the petitioner and the deputy returning officer agreed. The count was carried out in the same way as the first recount except that the 21 tables for each candidate were reversed. At the end of that recount the petitioner had 21,298 votes and the first respondent 21,300 votes. It was shortly after 4 a.m. by that stage. The petitioner's agent requested a further recount and the deputy returning officer acceded to that request but decided that it should take place later that morning at 11 a.m. The ballots were secured.

[18] Because of their concerns over the verification statement discussed above the petitioner’s representatives attended at the count centre shortly after 10 a.m. on 7 May 2010. By that stage Mr Bain had arrived and indicated that he would take charge of the recount. He had been advised that there was a rumour that copy ballot papers had been inserted in another constituency and he gave instructions that staff should be on the alert for any suspicious papers. He indicated that accuracy rather than speed was paramount. Where a counting agent raised an issue about a ballot paper it should be put aside for consideration as a doubtful vote. He instructed that the staff should check whether the votes were correctly allocated to the right candidate and whether there were 50 votes in each bundle.

[19] Prior to the recount commencing Mr Bain called all of the candidates and a number of their representatives together to explain how he would approach the recount. He explained that any ballot would be referred as a doubtful vote if requested by the candidate’s counting agents. In relation to the petitioner and the first named respondent 13 tables of votes were allocated to each. Each candidate had 18 people available for supervision. Mr Bain indicated that he was aware of the rumour about copy ballot papers.

[20] On behalf of the petitioner Mr Cooper raised four points. First he submitted that there should be a mingling of votes and fresh recount *ab initio*. Mr Bain rejected the suggestion because he considered that it would serve no useful purpose. The allocation and number of votes would be accurately checked by his methodology. If the votes were intermingled it was likely that more tables would be required and the ability of the agents to supervise would be diminished. The second point made by Mr Cooper was that there had been no announcement to the agents in respect of doubtful votes. Mr Bain indicated that his information was different but that the process that he intended to undergo whereby all doubtful votes would be considered by him in the presence of the candidates' agents on the recount would remedy any lack of opportunity.

[21] The third point raised by Mr Cooper concerned the 36 additional ballot papers which had been found in the 14 ballot boxes referred to in paragraph 11 above. It is apparent that Mr Bain did not appreciate that Mr Cooper was referring to the verification statement which had been made available to him and dismissed this objection as being of no relevance. In his evidence, however, Mr Bain indicated that it was common to find that where ballot boxes were located within the same building voters placed their votes in the wrong ballot box thereby causing a surplus in one box and a corresponding deficit in the other. A total of 24 of the 36 additional ballot papers were explained on the basis that there were exactly corresponding deficits in ballot boxes placed within the same location. The fourth issue raised by Mr Cooper concerned postal votes but it is not relevant for the purpose of this petition.

[22] When the recount started Mr Bain had the candidates and agents called together for re-adjudication of the rejected ballot papers. As a result of his consideration he reintroduced 11 votes of which two were for the petitioner and four for the first named respondent. In respect of these votes vigorous representations were made by Mr Cooper on behalf of the petitioner and Mr Fahy behalf of the first named respondent. Three of the votes admitted for the first named respondent were votes where there was a cross which did not cover the entire paper and the intersection of the two lines of the cross was in the part of the paper where the first named respondent's name appeared. The fourth vote was introduced because there was a mark which was described by Mr Cooper as like a snake in the box for the first named respondent. Mr Bain regarded it as a clear indication of voter intention. Although the petitioner was provided with the opportunity to inspect each of the votes none of these four votes was sought or located on his behalf.

[23] During the recount doubtful votes were considered on a continuous basis in the presence of the respective agents. Although these were carefully examined it appears that no material issues of controversy arose in relation to them between the agents and all in fact were admitted. Evidence was,

however, given by a counting agent on behalf of the petitioner that 2 votes had been referred for consideration as doubtful votes because the paper quality felt different. These were taken by the supervisor to the doubtful votes table for consideration. It appears that they were admitted. The evidence indicates that each doubtful vote was carefully examined and in particular that its bar code was carefully checked. The counting agent and the petitioner's wife, who was also his election agent, made representations in relation to these votes to the Returning Officer. He in turn provided them with the opportunity to examine the doubtful votes to locate any vote of different paper quality. The checked some ballots but decided not to continue. The petitioner had access to all of the votes cast but did not carry out a check to identify any vote of different paper quality.

[24] The third recount produced a figure of 21,300 votes cast for the petitioner and 21,304 votes cast for the first named respondent. When one takes into account the two rejected votes introduced for the petitioner and the four rejected votes introduced for the first respondent this outcome is identical to that reached on the second recount. The petitioner requested a further recount but the Returning Officer refused this request pursuant to Rule 46(1) of the Rules on the basis that the request was unreasonable. Three consecutive counts had put the first respondent ahead and the latest count had in substance been identical to the previous count. The outcome was duly declared by the deputy returning officer.

The Issues

[25] There were essentially 5 issues canvassed on behalf of the petitioner. The first related to the 36 extra votes referred to at paragraph 11 above. This issue was connected to the complaint about the absence of the verification statement as required by the Rules and the inability of the returning officer to investigate any box once it had been mixed with other votes. The second complaint concerned the fact that the petitioner's representatives had no opportunity to check the doubtful votes during the count or on the first or second recount. Thirdly there were 4 votes which had previously been rejected during the count which were admitted by the returning officer on the third recount for the first respondent. The petitioner submitted that these should not have been admitted because the returning officer had no power to do so once they had been rejected in the count and secondly because in any event they did not indicate a preference for the first respondent. The fourth issue concerned the admission of 2 votes in respect of which there was an issue about the paper quality and the fifth issue concerned the decision of the returning officer not to hold a recount.

The 36 extra votes

[26] As set out in paragraph 11 above it appeared from the verification process that in 14 ballot boxes there were a total of 36 votes in excess of the number which should be present according to the ballot paper account in those boxes. Of course there were other ballot boxes in which the number of votes was found to be less than the ballot paper account and overall there were 4 less votes counted than were issued suggesting that at least 4 voters did not place their ballots in any ballot box. In respect of 24 of these 36 votes there was a corresponding deficit in a ballot box located at the same venue. The evidence indicates that where more than one ballot box is located at a venue it is common for a ballot to be placed in the wrong box. Such votes are, of course, valid. We are satisfied, therefore, that this represents a satisfactory explanation for the discrepancies in those cases.

[27] The verification statement for Polling Station 59 provided to the parties on the morning of 7 May 2010 suggested that there was a significant discrepancy resulting in 8 more votes in that box than should have been there according to the ballot paper account. Evidence was given by the presiding officer of that box who indicated that she had been meticulous in conducting the election according to the instructions given to her. She offered the opinion that the explanation for this discrepancy was that additional counterfeit votes had been inserted unlawfully into the box. She stated that she had seen a man within the grounds of the polling station apparently handing out imitation ballot papers marked in favour of the first respondent and that she had taken a number of these from voters who displayed them as they came to obtain their ballot paper.

[28] We are completely satisfied that this opinion is entirely without foundation. As previously explained the ballot paper account was calculated by noting the number of ballots issued according to the Corresponding Number List. The presiding officer's assistant was required to enter the electoral number of each person to whom a ballot had been issued on the list by hand. The total number on the list then gave the number of ballots issued according to the ballot paper account.

[29] As previously explained, however, each ballot paper was issued sequentially and since the unused ballots were securely preserved it was, therefore, possible to establish how many ballot papers had in fact been issued by the presiding officer. This disclosed that 8 more ballots had been issued than had been recorded in the Corresponding Number List. It is absolutely clear that these ballots could only have been issued to persons entitled to vote. In addition to this the register which the assistant to the presiding officer is required to mark against the name and number of each voter established that 8 more persons had been marked as having voted than appeared on the Corresponding Number List.

[30] This evidence clearly demonstrates, therefore, that at some stage the assistant to the presiding officer failed to record the electoral numbers of 8 voters in the Corresponding Number List. If those numbers had been recorded there would have been no discrepancy in this box and the total number of apparently extra votes in the 14 ballot boxes would have reduced to 28 of which 24 are accounted for at paragraph 26 above. In her evidence the presiding officer did not accept that such a mistake could have been made by the assistant. We are satisfied that she is wrong. We should record, however, that the presiding officer was relieved from time to time for meal breaks, including one period of 45 minutes for lunch. There is no evidence before us to demonstrate when this error was made and it may well have occurred during a period when she was not present. We do not, therefore, make any finding of fault against the presiding officer who gave evidence before us.

[31] It is also clear that a relevant error occurred in the calculation of the ballot paper account for box 66. The Corresponding Number List which was completed by the presiding officer's assistant indicated that the next unused ballot was 50001. Accordingly in calculating the ballot paper account the Presiding Officer concluded that 500 ballots had been issued. In fact ballot number 50001 had been issued to an elector and the assistant should have recorded number 50002 as the next unused ballot. The ballot paper account would then have resulted in a calculation of 501 ballots having been issued. A count of the unused ballots confirmed that 501 ballots had indeed been issued and it is clear, therefore, that the ballot paper account should have been 501 rather than 500. If the correct figure had been included the number of apparently extra votes would have reduced from the 28 identified in the last paragraph to 27, of which 24 were accounted for as set out above.

[32] There remain 3 boxes where an excess of 1 vote has been identified and no clear explanation has been produced. There may have been some clerical or numerical error. It was suggested to us that a postal vote may have been surreptitiously inserted within an issued ballot rather than being returned to the deputy returning officer with the appropriate documentation. It is possible that a ballot paper issued in another station may have been inserted in one of these boxes although the mechanism by which this might have occurred is far from obvious. It is possible that an unauthorised piece of paper was inserted although such a document would have been subject to rejection at the count. In the absence of any convincing explanation we are unable to come to a conclusion which explains the discrepancy between the ballot paper account and the counted number of ballots in those 3 boxes.

The doubtful and rejected votes

[33] We can deal with the next three issues which concern doubtful and rejected votes together. There were 2 preliminary applications by the petitioner in relation to these challenges. In his petition the petitioner had

asserted that the deputy returning officer and the returning officer had caused or permitted the inclusion of invalid votes. A notice for particulars raised by the second named respondent asked for particulars of those votes. The petitioner referred to the list of votes served in accordance with Rule 9(1) of the Election Petition Rules 1964 (the 1964 Rules). Paragraphs 2 and 3 of this document contended that one group of 4 votes and one group of 2 votes should not have been admitted as the marks on the voting papers indicated rejection of the first respondent rather than a vote in her favour. The votes in question were not otherwise specified.

[34] The petitioner sought leave on the first day of the hearing of the petition to amend the replies to particulars to include a contention that the returning officer was not entitled to readjudicate the validity of votes which had been rejected by the supervisor. Mr Maguire QC for the second and third named respondent, whose submissions the first respondent adopted, submitted that this amounted to an amendment to the petition. He recognised that this was a legal issue with which he could deal and in the circumstances we agreed to the amendment as no prejudice was in fact caused to any party.

[35] The petitioner also applied on the morning of the hearing to amend the list of votes served pursuant to Rule 9(1) of the 1964 Rules by adding a reference to an allegation that a counting assistant had referred for consideration as a doubtful vote a ballot paper which appeared to be of different paper quality. The respondents objected to the introduction of any evidence in relation to particular votes because of the terms of Rule 9(4) of the 1964 Rules which provides:

“Except by leave of the court-

(a) no evidence shall be given by a party against the admission or rejection of any vote, or as to any ground of contention, which is not specified in a list filed by him pursuant to paragraph (1) of this rule...”

The respondents contended that although the petitioner had available the means of identifying the particular votes art issue he had not done so and was prevented by the Rule from now doing so.

[36] Despite some misgivings we decided that we should permit the introduction of the evidence which the petitioner sought to adduce. We are inclined to accept the submission of the respondents that the votes had not been specified in the list served under Rule 9(1) but it seemed to us that the respondents could fairly deal with the issues and that if there was substance in the points that required further consideration this could be considered at a later stage.

[37] We have set out at paragraphs 12 to 16 above what information was provided to candidates in the Guide prior to the election and how the process in relation to the counting of doubtful votes was changed between the issue of the Guide and the holding of the election. There was evidence that the PA system was not audible to some of those present at the count on the night of the election because of the acoustics in the room. We are satisfied that those who represented the interests of the petitioner in relation to doubtful votes did not hear the advice which Mr Fox, the deputy returning officer, gave through the PA system that doubtful votes would be considered on an ongoing basis during the count although it is not clear whether that was because of any defect in the PA system or because those representatives were not in the hall at the time. The notices referred to at paragraph 16 were undoubtedly in place and although they did not alert the counting agents to the fact that a change in the arrangements for doubtful votes had been made since the issue of the Guide the evidence indicates that the petitioner himself was present at some stage at the doubtful votes table.

[38] We have set out at paragraph 16 the terms of Rule 44(4) which imposes an obligation on the returning officer to give counting agents all such reasonable facilities for overseeing proceedings and all such information in respect of them as he can give consistently with the orderly conduct of the proceedings and the discharge of his duties in connection with them. In respect of the count it is arguable that the counting agents were not given such facilities in relation to the consideration of doubtful votes. We accept, however, that the deputy returning officer made an announcement on the PA system that the doubtful votes would be considered on a continuous basis and that notices were placed on the doubtful votes table and on the wall adjacent to the doubtful votes table.

[39] As appears from paragraphs 22 and 23 above the doubtful and rejected votes were, however, reconsidered by the Returning Officer in the presence of the counting agents for the parties during the third recount. If it was lawful for him to do so it is submitted on his behalf that any failure to follow the requirements of the Rules did not affect the result. The petitioner submits, however, that once a decision has been made that a ballot should be rejected the Returning Officer has no power to revisit that decision in the course of a recount.

[40] Rejected ballot papers are provided for in Rule 47 of the Rules.

“47(1) Any ballot paper –

- (a) which does not bear the official mark, or
- (b) on which votes are given for more than one candidate, or

- (c) on which anything is written or marked by which the voter can be identified except the printed number and other unique identifying mark on the back, or
 - (d) which is unmarked or void for uncertainty,
- shall, subject to the provisions of the next following paragraph, be void and not counted.
- (2) A ballot paper on which the vote is marked –
 - (a) elsewhere than in the proper place, or
 - (b) otherwise than by means of a cross, or
 - (c) by more than one mark,
 shall not for such reason be deemed to be void if an intention that the vote shall be for one or other of the candidates clearly appears, and the way the paper is marked does not itself identify the voter and it is not shown that he can be identified by it.
 - (3) The returning officer shall endorse the word ‘rejected’ on any ballot paper which under this rule is not to be counted, and shall add to the endorsement the words “rejection objected to” if an objection is made by a counting agent to his decision.
 - (4) The returning officer shall draw up a statement showing the number of ballot papers rejected under the several heads of –
 - (a) want of official mark;
 - (b) voting for more than one candidate;
 - (c) writing or mark by which voter could be identified;
 - (d) unmarked or void for uncertainty.”

Rule 48 provides that the decision of the returning officer on any question arising in respect of a ballot paper shall be final, but shall be subject to review on an election petition. The petitioner contends that once a decision has been made to reject a ballot on the count it cannot, therefore, be revisited on a recount since a final decision has already been made which can only be challenged by election petition.

[41] We do not consider that the reference to finality in Rule 48 is of benefit to the petitioner. Such clauses are designed to ensure at most that the merits of the decision making are to be assessed only by the decision maker. Such decisions can, of course, be challenged as to their legality (see Ridge v

Baldwin [1964] AC 40). The real issue in this case is to what extent the statutory scheme enabled the returning officer to reconsider which papers should be rejected.

[42] In order to answer that question it is necessary to examine the obligation which the 1983 Act and the Rules impose on the returning officer. The returning officer's core duty is contained in s 27(1) which provides that it is for the returning officer as such to execute the writ for a parliamentary election. This covers the period from the issue of the writ to the declaration and return of the writ with the name of the successful candidate certified (see the discussion in Halsbury's Laws of England Vol 15(4) at paragraph 355 and Parker's Law and Conduct of Elections at paragraph 4.23). By virtue of s 23(1) of the 1983 Act the proceedings at an election are to be conducted in accordance with the Rules and by s 23(2) it is the returning officer's general duty to do all such acts and things as may be necessary for effectually conducting the election in the manner provided by the Rules.

[43] We have already set out the terms of Rule 47 which prescribe the circumstances in which a ballot paper is to be void and not counted. Since the obligation on the returning officer to act in accordance with the Rules continues until the declaration it must follow that where the returning officer is satisfied that a ballot paper should not be excluded at any stage prior to the declaration he has a duty to ensure that such a vote is counted. That also accords with the obligation imposed on the returning officer under Rule 47(4) to draw up a statement showing the number of ballots papers rejected under the several heads. If the returning officer had concluded that a ballot previously rejected was in fact valid it is difficult to see how he could account for it under any of those heads. Such an interpretation also ensures that one avoids the absurd outcome that a plainly valid vote which had been wrongly rejected could only be introduced to the count or recount after an election petition. We are satisfied, therefore, that the returning officer was entitled to reconsider which papers should be rejected.

[44] We have previously indicated that it was arguable that there was a breach of the requirements of Rule 44(4) during the count. Section 23(3) of the 1983 Act provides a saving in the following terms.

“(3) No parliamentary election shall be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the parliamentary elections rules 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.”

Having regard to the authorities it is common case that the election was conducted so as to be substantially in accordance with the law as to elections. In light of the extensive opportunities to examine doubtful votes and to make representations at the third recount we can be confident that any omission to provide scrutiny facilities on the count did not affect the result. Accordingly the election cannot be declared invalid by reason of any such breach even if we had been satisfied that such a breach was established.

[45] We can deal with the other 2 issues arising in this area rather more quickly. As a result of the reconsideration of rejected votes 11 extra votes for were introduced, 2 for the petitioner, 4 for the first respondent and 5 for another candidate. The petitioner objected to the introduction of the 4 votes for the first respondent. These were votes which the returning officer found fell within Rule 47(2) where the intention to vote for a particular candidate clearly appeared. Mr Cooper for the petitioner made substantial representations about these votes. He described one vote as having a mark like a snake. The petitioner obtained an order for discovery which would have enabled the petitioner to identify these votes and have them examined by the court. No attempt was made to identify them and in those circumstances we have no reason to doubt that the conclusions reached by the returning officer were in accordance with the Rules.

[46] In the list of votes challenged which was served in accordance with the Rules the petitioner contended that 2 votes should be excluded on the basis that there were large crosses through the name of the first named respondent which could just as easily have indicated rejection of her. This challenge was abandoned at the hearing and replaced by the claim that 2 votes should have been excluded on the basis that the paper quality suggested that they were counterfeit as set out at paragraph 23 above. All such ballot papers were carefully scrutinised on behalf of each candidate and no such defect was identified. The petitioner had the opportunity on discovery to check the ballots but did not do so. We find no basis upon which to reject any votes for this reason.

The failure to recount

[47] The last issue concerns the refusal of the returning officer to conduct a further recount at the end of the third recount. Rule 46 enables a candidate to require a returning officer to have the votes recounted but the returning officer may refuse to do so if in his opinion the request is unreasonable. When one takes into account the votes reintroduced after the reconsideration of

rejected votes the outcome on the third recount was identical to that on the second recount. In those circumstances we are satisfied that the returning officer was entitled to conclude that there was no useful purpose to be served by a further recount and that it was unreasonable to require it.

Conclusion

[48] We have concluded that the breach of the Rules which we have found did not affect the result of the election. We note that there remain 3 extra votes for which we have not been able to account but even if those votes were introduced in breach of the Rules and if they had all been counted in favour of the first respondent their exclusion would still have given the first respondent a majority of 1 vote and the result would not have been affected. We therefore determine that Michelle Gildernew was duly elected as Member of Parliament for the constituency of Fermanagh and South Tyrone and shall certify our determination to the Speaker of the House of Commons accordingly.