Neutral Citation no. [2008] NICA 16 | *Ref:* **HIG7088**

Judgment: approved by the Court for handing down | *Delivered:* **21/2/08**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

JOHN McCONKEY and JERVIS MARKS

Claimants/Appellants;

and

SIMON COMMUNITY NORTHERN IRELAND

Respondents.

Before Higgins LJ and Girvan LJ and McLaughlin J

HIGGINS LJ

[1] This is a an appeal by way of case stated from a decision of the Fair Employment Tribunal (the Tribunal) holding that the respondent did not unlawfully discriminate against the appellants under the Fair Employment and Treatment (Northern Ireland) Order 1998(the 1998 Order). On 18 October 2000 the first appellant lodged a claim with the Tribunal against the respondent seeking compensation for alleged discrimination under the 1998 Order. On 30 August 2000 the second appellant lodged a similar claim with the Tribunal. As the claims gave rise to identical issues it was agreed between the parties and the Tribunal that the claims be heard together and that the issue of liability should be determined first. In each case the Tribunal was asked to determine whether the respondent discriminated against either appellant on grounds of the respondent's perception of their political beliefs. The hearing lasted twelve days and the Tribunal, to whose industry I pay tribute, delivered a forty seven page decision in which it found that the respondent did not unlawfully discriminate against either appellant. Following its decision the Tribunal received a requisition to state a case on twelve questions. The Tribunal considered there was considerable overlap and repetition in the questions put forward. Accordingly it agreed to state a case on two questions –

1. Whether the Tribunal, in deciding that the first and second appellants were not unlawfully discriminated against by the respondent contrary to the 1998 Order, failed to properly interpret and apply Article 2(4) of the 1998 Order and thereby erred in law?

2. Did the Tribunal err in law in interpreting Article 2(4) of the 1998 (sic), so as to defeat the claim of each appellant of unlawful discrimination by the respondent on the grounds of political opinion, where the political opinion, which was the ground for the decision to refuse employment to each appellant, no longer applied to each appellant at the time of the application by each appellant for employment.

[2] On 19 June 2000 the first appellant applied for the post of residential support worker in the Belfast area. On the application form he was asked the following question -

> "Have you ever been convicted of a criminal offence which could not be considered to be 'spent' under Rehabilitation of Offenders Order 1978 ?.
> Yes/No
> If Yes give details."

[3] The first appellant answered the question by putting a question mark but provided no details. At the same time he completed a form consenting to a pre-employment check (PECS). The form provided the reason for this, namely, to ensure employees are not appointed who might be a risk to children or adults with learning difficulties. This form was signed on 16 June 2000. The form asked also whether he had been convicted at any court for any offence. Again the second appellant put a question mark at the side of the form. In the body of the form he stated –

> "I do not have any criminal convictions because I have never been involved in any criminal activity. I have been convicted of alleged political activity by special courts 1975 – 1977 for being, it was alleged, a republican and for life during 1982 – 1996 for alleged political activity."

[4] He gave his current address as Lenadoon but also stated that 'from 1982 to 1996 he had been at Long Kesh POW Camp Lisburn'. The first appellant was short- listed and interviewed. On 4 August 2000 he was offered the post for a period of six months initially, but subject to the pre-employment check. On 6 August 2000 he confirmed in writing his acceptance of the post on terms set out in the letter.

[5] The pre-employment check revealed that the first appellant had been convicted of murder and possession of a firearm with intent to endanger life and of belonging to a proscribed organisation. He was released from custody on 28 March 1997 the Secretary of State being satisfied that the risk of repetition of the offence or another offence of violence was minimal.
On 4 September 2000 the respondent wrote

> "….. The checks highlighted the nature of the offence of which you have been convicted. As an organisation we are not willing to employ staff who may directly or indirectly place our resident group at risk…"

[6] The decision not to appoint the first appellant was taken by Miss A.

[7] The application by the first appellant to the Tribunal for compensation was lodged on 18 October 2000. This set out his complaint in these terms - 'Withdrawal of offer of employment Political discrimination'. In the description of his complaint he stated – 'discriminated against me taking into account irrelevant political convictions' and 'on grounds of perceived political opinion'.

In Replies to Particulars the respondent stated, inter alia, –

> "…. the respondent considers that its reliance on the applicant's convictions for offences of violence for political ends as a reason for not employing the applicant is therefore protected by the provisions of Article 2(4) against a finding of discrimination on the grounds of political opinion."

[8] The Tribunal came to the conclusion that it was "not merely the convictions themselves which were central to her (that is Miss A's) decision but also the additional element of paramilitary involvement in each conviction and the relevance of that additional element in coming to the decision that she did" (page 45 paragraph 7.20). In answer to a question she had stated that 'politics was an element of the decision' ".

[9] In evidence the first appellant said he did not support the use of violence as a means of achieving the political objective he supported, namely a 32 county republic. He stated that he supported the Peace Process and as a member of Sinn Fein he canvassed support for the Good Friday Agreement. At the time he applied for the post he did not support the use of violence for political ends and had never supported punishment beatings. This evidence was not challenged by the respondent.

[10] The Tribunal made certain findings from which discrimination could be found. In the course of this part of the decision the Tribunal found that Miss A withdrew the offer of employment not just because of the serious nature of the convictions but the paramilitary involvement in each conviction and that the involvement was from a republican perspective. In the Tribunal's opinion Miss A acknowledged that the first appellant as a republican paramilitary might facilitate punishment beatings to persons within the hostel and potentially influence residents coming to the hostel or in the hostel and that he would be known in the area and the residents would not feel safe. She did not deny there was a political element to her decision and that the offences of which he was convicted were offences using violence for political ends and recognised it was in the context of the affairs of Northern Ireland.

[11] The Tribunal found on the basis of the above that it could find the decision taken relating to the first appellant was made on the ground of his political opinion, namely that in light of the convictions and their paramilitary nature from a republican perspective he therefore approved or accepted the use of violence for political ends and such approval or acceptance was connected to the affairs of Northern Ireland. The Tribunal stated that

> "such a political opinion, regardless of the terms of Article 2(4) of the 1998 Order, was a political opinion, in the Tribunal's view, which fell within the terms of the dicta set out in the case of Gill v Northern Ireland Council for Ethnic Minorities 2002 NIJB 299."

[12] The Tribunal then declared itself satisfied that the reason for the decision to withdraw the offer of employment was the first appellant's political opinion. The Tribunal concluded that the first appellant could therefore establish that he had been less favourably treated on the grounds of his political opinion than any person who also had been convicted of similar offences but from which offences no such political opinion could have been derived. Such a hypothetical comparator would have been appointed to the relevant post. The Tribunal found that the first appellant could have been discriminated against on grounds of political opinion. The Tribunal then found that the respondent had failed to discharge the onus on it (to prove that in no sense was the treatment based on political opinion). It found that it had failed to do so because no proper explanation had been given for the failure to follow procedures including the requirement to have a discussion with the first appellant. Therefore the Tribunal found the first appellant had been unlawfully discriminated against on grounds of his political opinion, namely his approval or acceptance of the use of violence for political ends connected to the affairs of Northern Ireland.

[13] On 4 May 2002 the second appellant applied for employment as night worker at a hostel in Newry. The application form asked the same question -

if he had ever been convicted of a criminal offence which cannot be considered spent under the Rehabilitation of Offenders Order. The second appellant put a tick under No. Under Additional Information he stated – " I was in prison from 27 April 1992 until October 1998 when I was released under the GFA". He signed the consent to pre-employment check form on 9 May 2002 and in the body of it stated – 'Crumlin Road Court August/September 1993 Conspiracy and possession with intent Sentenced to 15 years'.

[14] The second appellant was short listed and interviewed on 7 June 2002. During interview he stated that he would have no objection to calling the police to the hostel if required. In general discussion after the interview he indicated that he supported the Good Friday Agreement. After interview he was informed that a pre-employment check would be requested but no offer of employment was made at that stage. It was acknowledged that the manner in which he completed the PECS form was relevant to the decision not to appoint the second appellant.

[15] On 2 July 2002 the pre-employment check revealed that the second appellant had convictions for conspiracy to murder, conspiracy to cause an explosion likely to endanger life or property and possession of explosives with intent to endanger life as well as convictions for public order and road traffic offences. He was released from custody under the Northern Ireland Sentences Act 1998 on 13 October 1998 on the basis that he would not be a danger to the public.

[16] On 18 July 2002 the second appellant was informed by the respondent's Human Resources Manager that he was unable to offer him a position as night worker.

[17] In evidence the second appellant stated that he was a supporter of the Good Friday Agreement and the Peace Process and that at the time of the interview for the post he had indicated that he did not support the use of violence for political ends. This evidence was not challenged by the respondent.

In Replies to Particulars the respondent stated –

> "that the decision not to offer M employment was taken on the basis of the previous convictions including conspiracy to murder;
>
> the nature of the convictions and their recency coupled with the vulnerable nature of the resident group were taken into account and were the prime reasons for the decision."

[18] The Tribunal found that in reality the decision not to appoint the second appellant was made by Miss O who had consulted the Chairman of the Board and that she knew at all material times that the convictions were paramilitary convictions. The Tribunal was "satisfied that knowing the said convictions were of a paramilitary nature she also accepted that such convictions by their said nature were convictions of violence for political ends and there was therefore some element of political motivation for involvement in that type of offence." The Tribunal was also satisfied that she assumed the offences were from a Republican perspective. In the Tribunal's opinion such a perspective clearly had to involve a political element. The Tribunal noted that she "did not dispute that at the time of [the second appellant's] convictions that republicans regarded themselves as being in 'armed conflict'." She also accepted that she had taken the view that the second appellant would support Sinn Fein's opposition to the respondent's proposed development of a homeless service in the city of Newry. She concluded that he 'would have an adverse influence on the residents and would see violence was an appropriate way to resolve issues, with the potential for mismanagement and escalation of incidents and confrontation between residents within the hostel' though it was accepted that the second appellant would not seek to harm residents directly. Miss O acknowledged that a person who had committed such offences and who espoused the use of violence for political ends could change their view. She believed 'the second appellant had stepped over the line in terms of how a person related to the world and what was acceptable'.

[19] The Tribunal was satisfied that Miss O, in considering the suitability of the second appellant for the post, took into account not just the convictions themselves, but also the paramilitary nature of them and in view of this paramilitary activity she concluded that he was not suitable for the post given the necessity of ensuring a safe environment for vulnerable residents. She relied on the paramilitary nature of the convictions and in doing so accepted that such convictions were convictions for violence for political ends as some political motivation was involved in that type of offence. The Tribunal found that she assumed they were of a republican nature and like Miss A was recognising that the use of such violence for political ends was in the context of the affairs of Northern Ireland.

[20] The Tribunal found the decision not to employ the second appellant was made on grounds of his political opinion, namely in light of the said convictions and their paramilitary nature from a republican perspective he thereby approved or accepted the use of violence for political ends connected with the affairs of Northern Ireland. The Tribunal found that this 'was a political opinion which was a proscribed reason'. The Tribunal concluded the second appellant could establish he had been less favourably treated on grounds of his political opinion than any person who had also been convicted for similar offences but from which convictions no such political opinion

could have been derived. The Tribunal then considered whether the respondent had discharge the onus on it and concluded it had not (because of failure to follow procedures).

[21] I have set out the decision of the Tribunal in each case at some length to demonstrate the fact-finding route which the Tribunal took in arriving at its decision. For the purposes of the case stated this might be summarised as – the appellants committed criminal offences of a republican paramilitary nature involving violence which indicated that they approved or accepted the use of violence for political ends connected with the affairs of Northern Ireland and that this approval or acceptance was a political opinion.

[22] The Tribunal was therefore satisfied, subject to a consideration of the terms of Article 2(4,) that the respondent had discriminated against both appellants on grounds of their political opinion. In those circumstances the Tribunal held that it was necessary to consider whether, what it referred to as the exception created by the terms of Article 2(4), enabled the respondent successfully to defend each claim.

[23] The Tribunal was of the opinion that it was clear that the wording of Article 2(4) restricted the ambit of political opinion under the 1998 Order, which it noted was otherwise not defined. The Tribunal commented that where it applied it placed 'limits on the dicta relating to the meaning of political opinion' as set out in McKay v NIPSA 1994 NI 103 and Gill v Northern Ireland Council for Ethnic Minorities 2001 NIJB 299. It noted that a similar provision was to be found in Section 57(3) of the Fair Employment Act 1976 as amended. The Tribunal found

> "the provision was undoubtedly included ……. when it was originally enacted, to take account of the particular difficulties of the 'Troubles in Northern Ireland'; namely to enable an employer to avoid liability, which would otherwise apply but for this provision, in circumstances where such an employer has discriminated against a claimant on grounds of the claimant's political opinion, which 'consists of or includes approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland, including the use of violence for the purpose of putting the public or any section of the in fear' ".

[24] The Tribunal noted that both appellants stated in evidence in effect that they did not accept the use of violence for political ends connected with the affairs of Northern Ireland. This was not challenged by the respondent. If it was necessary to do so, the Tribunal would have accepted that neither held

such a political opinion when they made the applications for employment with the respondent.

[25] Having considered carefully the submissions of the parties the Tribunal stated its conclusions on this issue at paragraphs 12.9 and 12.10 of its decision. These paragraphs state –

> "12.9 Article 2(4) of the 1998 Order simply excludes in the 1998 Order (sic) any reference to a political opinion, as specifically set out therein. The words of Article 2(4) of the 1998 Order are, in the view of the Tribunal, clear and unambiguous and it is therefore necessary to give them their ordinary meaning. The Tribunal concluded, giving the words of the Article their ordinary meaning, that, if it was satisfied the political opinion, relied on by the respondent as the grounds for its decision, in relation to each claimant, included 'an opinion which consists of or includes approval or acceptance of the use of violence for political ends, connected with the affairs of Northern Ireland, including the use of violence for the purpose of putting the public or any section of the public in fear' then the provisions of Article 2(4) had to be strictly applied. Since, in relation to both claimants, the Tribunal was satisfied that the decision of the respondent was on the ground of such opinion, the Tribunal reluctantly came to the conclusion that the claims of each claimant, which would otherwise have been successful, must fail in view of the provisions of Article 2(4) of the 1998 Order.
>
> 12.10 The Tribunal considered very carefully the submissions of the parties on this issue. However the Tribunal did not consider it was entitled, given the clear and unambiguous words, to attempt to interpret the provision in a manner which fell outside that ordinary meaning. In taking this view, the Tribunal was fully aware that, on the evidence before it, that political opinion which was the ground for the decision to refuse employment to each claimant no longer applied to each claimant."

[26] The Tribunal went on to state that Article 2(4) 'excludes a specific political opinion were it is found to be the grounds of a relevant decision'. It noted that it does not state it can only be relied on in certain circumstances or in certain conditions. It does not say that it only applies where the respondent

had satisfied itself in some way that the opinion was held at the time the decision was made or if the use of the defence was necessary or could be justified in some way. The Tribunal concluded there was no proper basis upon which it could give Article 2(4) such an interpretation or insert such requirements or conditions. Consequently it found that the respondent did not unlawfully discriminate against either claimant contrary to the 1998 Order.

[27] Thus it was found that the respondent declined to employ the appellants because of their political opinions. Those opinions consisted of or included approval or acceptance of the use of violence for political ends. Such opinions fell within the terms of Article 2(4) and therefore the claims could not succeed.

[28] In the course of its decision the Tribunal made reference to the Northern Ireland Act 1998 and the Good Friday Agreement of the same year and the changed environment in Northern Ireland. The Tribunal postulated that there might be good reason to consider appropriate amendments to the Fair Employment legislation. Correctly the Tribunal concluded that it was not for the Tribunal to make or suggest any such amendments, the Tribunal's function being to consider complaints made to it based on the existing legislation. It is the function of Parliament (in whatever form) to consider whether circumstances are different and whether any change in legislation is warranted. It is no function of the Tribunal to debate or consider whether changes are required let alone what such changes might be.

[29] The applicants requested the Tribunal to state a case for the opinion of the Court of Appeal. In the case stated the Tribunal summarised its findings and referred to its decision which was exhibited. It was necessary during the hearing and thereafter to consider at length the decision which was exhibited. The purpose of a case stated is to set out the relevant facts as found by the Tribunal (or Court) and to do so as succinctly as the circumstances permit. Having done so, it is then the duty of the Tribunal to set out the questions of law referred to this court for decision. The decision of the Tribunal should not be exhibited as a substitute for clear findings of fact on which the question of law is based. That is not to say that the decision should not be attached but the relevant facts as found should be set out in the case stated as those are the facts on which the questions of law should be answered.

[30] I set out the relevant paragraphs of the case stated -

> "6.5 The decision by the respondent to withdraw offer to the first appellant was made on the grounds of his political opinion; namely that, in light of the said convictions and their paramilitary nature from a republican perspective, the first appellant therefore

approved or accepted the use of violence for political ends and such approval or acceptance was connected to the affairs of Northern Ireland.

6.6 The Tribunal therefore concluded, subject to consideration of the terms of Article 2(4) of the 1998 Order, the first appellant had been unlawfully discriminated against on the grounds of his political opinion.

7.4 The decision by the respondent not to offer the second appellant employment was made on the grounds of his political opinion; namely that, in light of the said convictions and their paramilitary nature from a republican perspective, the second appellant thereby approved or accepted the use of violence for political ends and such approval or acceptance was connected to the affairs of NI.

7.5 The Tribunal therefore concluded, subject to consideration of the terms of Article 2(4) of the 1998 Order, the second appellant had been unlawfully discriminated against by the respondent on the grounds of his political opinion.

8.1 The Tribunal also found that, if it had been necessary to do so of the purposes of the Tribunal's decision, it would have accepted that neither the first appellant nor the second appellant, at the time each made their application for employment accepted the use of violence for political ends connected with the affairs of Northern Ireland, including the use of violence of putting the public or any section of the public in fear; and that when each made the said application for employment to the respondent, neither in fact held such a political opinion, which fell within the terms of the Article 2(4) of the 1998 (sic).

9.2 The Tribunal was satisfied that the provisions of Article 2(4) of the 1998 Order restricted the ambit of political opinion under the 1998 Order, which is not otherwise defined: and that where it applied it placed limits on the dicta relating to political opinion, set out in cases of McKay v NIPSA and Gill v NICEM and referred to above in paragraph 5.2 of this cases stated. The Tribunal further noted that a similar provision

had been found in Section 57(3) of the Fair Employment Act 1976 (as amended by the Fair Employment (NI) Act 1999 and the Fair Employment (Amendment) (NI) Order 1991. The Tribunal was of the opinion that the provision had been included, when it was originally enacted, to take account of the particular difficulties of the 'troubles in Northern Ireland'; namely to enable employer to avoid liability, which would otherwise apply but for this provision, in circumstances where such an employer had discriminated against an employee on the grounds of the employee's political opinion, which 'consists of or includes approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland, including the use of violence for the purpose of putting the public or any section of the public in fear.

9.5 Having set out paragraphs 12.9 and 12.10 the Tribunal found that Article 2(4) of the 1998 Order excluded a specific political opinion, where it is found to be the grounds of a relevant decision. It did not state that it could only be relied upon in certain circumstances and/or in certain conditions; and the Tribunal therefore concluded that there was no proper basis upon (sic) it could give Article 2(4) such an interpretation and/or insert certain requirements/conditions in the face of the clear and unambiguous wording of the Article.

9.6 The Tribunal therefore concluded that the respondent did not unlawfully discriminate against each of the appellants contrary to the 1998 Order. The claims of each appellant were therefore dismissed."

[31] At paragraph 12.7 the Tribunal stated that if it had been necessary to do so it would have accepted that at the time when each appellant applied for employment with the respondent neither of them held a political opinion which consisted of or included approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland. Furthermore in each case the Tribunal was satisfied that if each claimant had paramilitary convictions from a loyalist perspective rather than a republican perspective the respondent would have taken a similar decision.

[32] It was submitted by Miss Quinlivan who appeared on behalf of both appellants that the issue raised was one of statutory interpretation, namely

the meaning to be attached to Article 2(4) of the 1998 Order. It was submitted that Article 2(4) should be read in conjunction with Articles 3 and 19. The Tribunal had applied the plain meaning rule and held that if it was satisfied that the employer relied on a political opinion that included the use of violence for political ends then Article 2(4) was engaged and was to be strictly applied. It was submitted that the use of the words 'consists or includes' demonstrate that Article 2(4) is framed in the present tense and excludes from the protection of the legislation those who, at the time the employer makes his decision, support the use of violence for political ends. Article 2(4) is not designed to exclude those who held such views in the past. The Tribunal accepted that at the time the appellants applied for employment they did not hold the views excluded by Article 2(4). In relying on convictions which occurred some years previously as an expression of their political opinions, the Tribunal had erred in its approach to Article 2(4) which applies to views currently held. As the appellant did not hold those views the Respondent could not rely on Article 2(4). Miss Quinlivan stated that it was incumbent on the employer to make a contemporaneous inquiry of a prospective employee in order to establish his present beliefs and in this instance the respondent had chosen not to do so. Furthermore the Tribunal made no effort to establish the political beliefs of the appellants at the relevant time and made its decision based on beliefs which they did not hold. If the wording of Article 2(4) was ambiguous or obscure then the court was entitled to consider material from its passage through Parliament. In this regard she referred to the origins of Article 2(4) in section 57(2) of the Fair Employment (Northern Ireland) Act 1976 and to transcripts of the proceedings in Committee and in Parliament which led to the inclusion of similar wording in the 1976 Act. In particular she referred to a statement of the Minister of State in presenting the Bill. It was submitted that the wording of Article 2(4) was intended to cater for people who have changed their views and eschewed violence. The interpretation adopted by the Tribunal was absurd when it was the intention of the government to persuade people away from the use of violence for political ends.

[33] It was submitted by Miss McGrenera QC, who with Miss Finnegan appeared on behalf of the respondent that the wording of the Order and Article 2(4) in particular were clear. It was the intention of Parliament to create an exception in respect of those who pursued violence. In those circumstances the respondent was entitled not to appoint either appellant in light of their convictions for serious criminal offences. The Tribunal held that it was the character of the criminal offences together with the paramilitary nature of them which the respondent had considered in making the decision not to employ them and not their political opinions. As the wording of the Order was clear there was no necessity to resort to Hansard and in any event the reported decisions recommended caution in referring to such sources for assistance on the interpretation of statutes. It was submitted by Miss McGrenera QC that it was significant that this Order was passed following

the coming into force of the Northern Ireland Act 1998 which was based on the Good Friday Agreement of the same year. No amendment was sought to alter the effect of either section 57(2) of the 1976 Act or the present Order.

[34] The Fair Employment and Treatment (Northern Ireland) Order 1998 repeals and re-enacts with amendments the Fair Employment (Northern Ireland) Act 1976 and the Fair Employment (Northern Ireland) Act 1989. The 1998 Order in re-enacting the Fair Employment (Northern Ireland) Act 1976 makes it unlawful for an employer to discriminate against any person who is seeking employment in Northern Ireland, on grounds of religious belief or political opinion, inter alia, by refusing to offer that person employment. Article 19 of the Order provides –

> "19. - (1) It is unlawful for an employer to discriminate against a person, in relation to employment in Northern Ireland,-
>
> (a) where that person is seeking employment-
>
> (i) in the arrangements the employer makes for the purpose of determining who should be offered employment; or
> (ii) in the terms on which he offers him employment; or
> (iii) by refusing or deliberately omitting to offer that person employment for which he applies; or
>
> (b) where that person is employed by him-
>
> (i) in the terms of employment which he affords him; or
> (ii) in the way he affords him access to benefits or by refusing or deliberately omitting to afford him access to them; or
> (iii) by dismissing him or by subjecting him to any other detriment."

[35] Discrimination is defined in Article 3 and means treating a person less favourably on grounds of religious belief or political opinion. It is in these terms -

> "3. - (1) In this Order "discrimination" means -
>
> (a) discrimination on the ground of religious belief or political opinion; or

(b) discrimination by way of victimisation;
and "discriminate" shall be construed accordingly.

(2) A person discriminates against another person on the ground of religious belief or political opinion in any circumstances relevant for the purposes of a provision of this Order, other than a provision to which paragraph (2A) applies, if-

(a) on either of those grounds he treats that other less favourably than he treats or would treat other persons; or

(b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same religious belief or political opinion as that other but-

(i) which is such that the proportion of persons of the same religious belief or of the same political opinion as that other who can comply with it is considerably smaller than the proportion of persons not of that religious belief or, as the case requires, not of that political opinion who can comply with it; and (ii) which he cannot show to be justifiable irrespective of the religious belief or political opinion of the person to whom it is applied; and (iii) which is to the detriment of that other because he cannot comply with it."

Article 2(3) provides –

(3) In this Order references to a person's religious belief or political opinion include references to-

(a) his supposed religious belief or political opinion; and

(b) the absence or supposed absence of any, or any particular, religious belief or political opinion."

Article 2(4) provides –

"2(4) In this Order any reference to a person's political opinion does not include an opinion which consists of or includes approval or acceptance of the

> use of violence for political ends connected with the affairs of Northern Ireland, including the use of violence for the purpose of putting the public or any section of the public in fear."

[36] Discrimination on political grounds albeit under the Fair Employment (Northern Ireland) Act 1976 was considered in McKay v NIPSA 1994 NI 103. In that case the appellant applied to the Tribunal alleging that he had been denied appointment to a post because of his left wing political opinions. The Fair Employment Tribunal declined jurisdiction on the basis that the phrase 'discrimination on the ground of religious belief or political opinion' in the definition of 'discrimination' in s 16 of the 1976 Act (Article 3 in the 1998 Order), rendered unlawful discrimination on the ground of political opinions which displayed some connection or correlation between religion and politics in Northern Ireland, and not on the ground of any political opinions. It was held that the tribunal had erred in concluding that the term 'political opinion' in the 1976 Act fell to be construed so as to require some connection or correlation between religion and politics in Northern Ireland. In the course of the judgments the court considered also submissions that the words 'political opinion' used in section 16 were either obscure or ambiguous. At page 113g Hutton LCJ said:

> "I now turn back to consider whether the term 'political opinion' is ambiguous or obscure, or whether to give the words their ordinary natural meaning would lead to absurdity in the context of the 1976 Act. In my opinion the term is not ambiguous or obscure, nor do I think that the ordinary natural meaning of the words leads to absurdity.
>
> I consider that the term 'political opinion' has a meaning which is recognised and used both in legal documents and in every day speech."

[37] It was submitted to the Court of Appeal that the words 'political opinion' were restricted to the Unionist/Nationalist divide in Northern Ireland. Hutton LCJ saw no valid reason to restrict the term in that way, commenting that citizens in Northern Ireland were entitled to hold political views on political matters relating to Conservatism and Socialism like any other citizen in the United Kingdom.

[38] In his judgment Kelly LJ considered the meaning of the words 'political opinion' and stated at page 117j:

> "There can be no difficulty as to the meaning of the word 'opinion' and none as to the word 'political'.

> When they come together in the phrase 'political opinion' it means, in broad terms, and without attempting any exhaustive definition, an opinion relating to the policy of government and matters touching the government of the state. The word 'political' is defined in the Shorter Oxford Dictionary as: 'Of, belonging or pertaining to the state, its government and policy; public, civil; of or pertaining to the science or art of government.' It seems to me clear that a person who holds an opinion on matters relating to any of the elements of this definition, holds a political opinion. I have said I have not attempted any exhaustive or precise definition of 'political opinion' and it would be unwise to do so. But it is well established that because a phrase or word cannot be exhaustively or precisely defined or because it may, on occasions, be difficult to apply it must follow that its meaning is obscure…..
>
> However, one does not have to go so far as to seek the idea or conception of 'political opinion'. It is, as I have stated, a phrase in everyday use and easily understood, and although it has not been defined in the Act, there is no provision in the Act to suggest it should be given a meaning other than its ordinary meaning. To hold, as the tribunal did, that it means an opinion which 'displays some connection or correlation between religion and politics in Northern Ireland', is to offend well established rules of statutory construction. It attributes an intention to the Act which it has not expressed."

[39] The phrase was considered again by the Court of Appeal in Gill v Northern Ireland Council for Ethnic Minorities 2001 NIJB 299. Carswell LCJ, who was the third member of the court in McKay, gave the only judgment. The Tribunal had found that the appellant (NICEM) discriminated against the respondent on the grounds of his political opinion in failing to appoint him to the post of co-ordinator in February 1996. The respondent alleged that the reason he was unsuccessful in securing the post of co-ordinator with the appellant was his association with, and advancement of, an 'anti-racist approach' to the solution of the racial problems of ethnic minorities in Northern Ireland, when the approach favoured by the appellant, and by the successful candidate, was a culturally sensitive one. The tribunal was of the opinion that the respondent's views on anti-racism constituted a political opinion and cited the passage from Kelly LJ's judgment in McKay v Northern Ireland Public Service Alliance, quoted above. In considering this issue

Carswell LCJ quoted with approval the reasoning of Kelly LJ and commented at page 311:

> "The context of those remarks was an issue whether the "Broad Left" opinions held by the appellant constituted political opinions for the purposes of the fair employment legislation, or whether, as the tribunal had held, such political opinions must display some connection or correlation between religion and politics in Northern Ireland. This court held that the meaning of the term was not restricted in the manner accepted by the tribunal and that it was not confined to Unionist-Nationalist politics. In Re Treacy's Application [2000] NI 330 Kerr J had occasion to consider the meaning of the phrase "political opinion" in a different context, and although he expressed the need for caution in dealing with the concept in a discrimination case he did not essay a comprehensive definition of the words. The extradition cases based on the interpretation of the phrase "offence of a political character", such as Shtraks v Government of Israel [1964] AC 556 and R v Governor of Pentonville Prison, ex parte Cheng [1973] AC 931, are also of limited assistance, since they concern somewhat different issues. We are of the view that the remarks of Kelly LJ in McKay v NIPSA and the dictionary definition quoted by him give us the most useful guidance for present purposes. It seems to us that the type of political opinion envisaged by the fair employment legislation is that which relates to one of the opposing ways of conducting the government of the state, which may be that of Northern Ireland but is not confined to that political entity. The object of the legislation is to prevent discrimination against a person which may stem from the association of that person with a political party, philosophy or ideology and which may predispose the discriminator against him. For this reason we consider that the type of political opinion in question must be one relating to the conduct of the government of the state or matters of public policy. The opinion or opinions held by the respondent which he claimed brought about discrimination against him appear, if we understand the description given by the tribunal, to be concerned with advocating more aggressive means of achieving

> the objects of NICEM than the "culturally sensitive" methods espoused by Mr Yu and apparently favoured by the panel. We can only go on that description, but from it we conclude that the difference between the "anti-racist" and "culturally sensitive" approaches is one of methods, the one being more aggressive and confrontational than the other, but both being means of advancing the interests of people from ethnic minorities. It might be possible to describe such a difference as constituting a divergence of political opinion, but we do not think that it is the type of political opinion intended by Parliament in enacting the fair employment legislation."

[40] In the case of the first appellant the Tribunal found that the decision of the respondent to withdraw the offer of employment was made on the grounds of his political opinions. In the case of the second appellant the Tribunal found that the decision of the respondent not to offer employment was made on the grounds of his political opinion. In each case the Tribunal found the political opinion was expressed as the approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland. This finding was based on the criminal convictions of each appellant and the paramilitary nature of those convictions, as the Tribunal stated, from a republican perspective. The Tribunal found that the approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland was a political opinion which fell within the dicta of Gill v Northern Ireland Council for Ethnic Minorities, supra, and that such was a political opinion for the purposes of Articles 2(4), 3 and 19 of the 1998 Order (see paragraph 10.8 of the Decision). The Tribunal held that the terms of Article 2(4) excluded this 'political opinion' from the operation of the 1998 Order and therefore the appellant's claims failed.

[41] Central to the findings of the Tribunal was the assertion that the approval or acceptance of violence for political ends connected with the affairs of Northern Ireland was a political opinion within Article 3 of the 1998 Order. Article 3 makes it unlawful to treat another less favourably on the ground of political opinion. Political opinion in Article 3 is not defined by any reference to political ends connected with the affairs of Northern Ireland. The Tribunal found that the use of violence was a political opinion which fell within the dicta of Gill v Northern Ireland Council for Ethnic Minorities, supra. There is no reference in the judgment in Gill, the relevant passages of which I have quoted above, to the use of violence for political ends. Nor is there any support in that judgment for the proposition that the use of violence for political ends is a political opinion to which Article 3 applies. The judgment defines political opinion in Article 3 as relating to the opposing

ways of conducting the government of the state (which may be that of Northern Ireland but is not confined to that political entity). As Kelly LJ observed in McKay there can be no difficulty with the two words 'political' and' opinion'. When they come together they relate to policy of government or matters touching the government of the state. They do not refer to the use of violence for political ends. Therefore the Tribunal erred in concluding that the use of violence for political ends was a political opinion within the terms of Article 3.

[42] As a consequence of this finding by the Tribunal it went on to consider Article 2(4) and concluded that this created an exception to the political opinion contemplated by Article 3. As Article 3 does not encompass the use of violence for political ends there was no need to consider Article 2(4). The Tribunal found Article 2(4) to create an exception to Article 3. Rather than creating an exception, Article 2(4) states what the words 'political opinion' in Article 3 (and elsewhere within the 1998 Order) do not include, namely an opinion which consists of or includes approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland. The use of the word 'opinion' in Article 2(4) in relation to the approval or acceptance of the use of violence for political ends must be read in conjunction with the earlier phrase ' a person's political opinion'. It seems clear from this that Parliament did not regard an opinion that approved or accepted the use of violence for political ends (or for the purpose of putting the public in fear) as a political opinion for the purposes of Article 3. The meaning to be attached to Articles 3 and 2(4) are clear and no reference to the debates in Parliament is necessary to interpret the Order. In any event the passages to which counsel referred do not assist in the interpretation of the words of either Article in the 1998 Order. It is pertinent to note that the Northern Ireland Act 1998 was passed on 19 November 1998. Various sections including Section 98 came into force on that date. Section 98 provides that "political opinion" and "religion belief" shall be construed in accordance with Section 57(2) and (3) of the Fair Employment (Northern Ireland) Act 1976. Schedule 3 to the Fair Employment and Treatment (Northern Ireland) Order 1998 substituted Article 2(3) and (4) of the 1998 Order for the references to Sections 57(2) and (3) in the 1976 Act with effect from 1 March 1999 (see Fair Employment and Treatment (1998 Order) (Commencement No. 1) Order (Northern Ireland) 1999).

[43] The applications of the appellants to the Fair Employment Tribunal alleged discrimination on the grounds of political opinion based on the appellants' convictions for serious criminal offences. The Tribunal found that the convictions of the appellants provided the basis for a finding that such convictions gave rise to the approval or acceptance of the use of violence for political ends. The Tribunal therefore concluded in each case that the respondent treated the appellants less favourably on grounds of political opinions which supported the use of violence for political ends, but that the

appellants were excluded from making a claim due to the wording of Article 2(4). In Igen v Wong 2005 IRCA 258 guidance was offered on the proper approach to cases in which unlawful discrimination is alleged. It is for the complainant to prove on the balance of probabilities facts from which the Tribunal could conclude , in the absence of an adequate explanation, that the respondent had committed an act of discrimination which is unlawful by reason of the appropriate legislation. If the claimant does not prove such facts the claim will fail. When the claimant does prove facts from which it could be drawn that the respondent has treated the complainant less favourably on a prohibited ground then the burden of proof moves to the respondent to prove on the balance of probabilities that he did not commit the act or treat the claimant less favourably on a prohibited ground. Following that approach in each case the Tribunal found the facts on which it could find that the decisions not to employ the claimants were made on the grounds of their political opinions (see paras 10.8 and 11.6 respectively). The Tribunal then considered the respondents evidence or explanation and concluded in each case that was not satisfied that the respondent had discharged the burden upon it and subject to the issue relating to Article 2(4) held that the claimants had been unlawfully discriminated against on the grounds of their political opinion. The facts from which it is held that the first step in this process was satisfied were that the claimants approved or accepted the use of violence for political ends connected with the affairs of Northern Ireland and that such was a political opinion which fell within the terms of Article 3 of the 1998 Order. As the approval or acceptance of violence for political ends is not a political opinion within the terms of Article 3 it was not open to the Tribunal to find that the respondent could have discriminated against the claimants and therefore it was not necessary to consider the second step in the process there being no factual matter within Article 3 proved for the respondent to rebut. Equally the issue relating to the use of the present tense in Article 2(4) does not therefore arise.

[44] I have already referred to the questions posed for this Court and it seems more appropriate to recast the questions in light of what is now before the Court. The real issue to which the application to the Fair Employment Tribunal for compensation gave rise in effect was whether an opinion which consisted of or included the approval or acceptance of the use of violence for political ends came within the terms of Article 3 of the 1998 Order. Therefore I have redrafted the question for this court as follows:

> "On the facts proved or admitted was the tribunal correct in law in deciding that the acceptance or approval of violence for political ends in connection with the affairs of Northern Ireland is a political opinion within the meaning of Article 3 of the Fair Employment and Treatment (Northern Ireland) Order 1998."

I would answer that question 'No'. That is sufficient to dispose of this appeal and the application for compensation to the Fair Employment Tribunal. This appeal is dismissed.

GIRVAN LJ

Introduction

[45] This appeal comes before the court by way of a case stated by a Fair Employment Tribunal ("the Tribunal"). The appeal raises a question relating to the proper interpretation of Articles 3 and 2(4) of the Fair Employment and Treatment (Northern Ireland) Order 1998 ("the Order"). It is common to two applications before the Tribunal in which the appellants claimed that they had been the victims of discrimination on the ground of political opinion and which were heard together.

[46] The first appellant John McConkey made a claim to the Tribunal on 18 October 2000 in which he claimed that the respondent, the Simon Community (Northern Ireland), unlawfully discriminated against him on the ground of political opinion contrary to the Order in relation to his failure to be appointed to the post of residential support worker at a hostel run by the respondent at 414 Falls Road, Belfast. The second claimant made a claim to the Tribunal on 30 August 2002 in which he claimed that the respondent had discriminated against him on the ground of political opinion in relation to his failure to be appointed to the post of night worker at the respondent's hostel in Newry. The conclusion ultimately reached by the Tribunal in each case was that the respondent did not unlawfully discriminate against the appellants on the ground of political opinion.

[47] In order to understand the nature of the legal issues raised in the appeal it is necessary to set out the relevant statutory provisions and then move to the details of the factual background to each claim. As could be expected there are differences in the facts and precise circumstances of each application.

Relevant statutory provisions

[48] Under Article 19 of the Order contained in Part III it is provided:

> "(1) It is unlawful for an employer to discriminate against a person, in relation to employment in Northern Ireland, -
>
> (a) where that person is seeking employment –

(i) in the arrangements the employer makes for the purpose of determining who should be offered employment; or

(ii) in the terms in which he offers employment; or

(iii) by refusing or deliberately omitting to offer that person employment for which he applies."

So far as material to these proceedings, Article 3 defines discrimination as "discrimination on the ground of political opinion." By virtue of Article 3(2) a person discriminates against another person on the ground of political opinion in any circumstances relevant for the purposes of the Order if, on that ground, he treats that other less favourably then he treats or would treat other persons. Comparison of the cases of persons of different political opinion under paragraph (2) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

Article 2(3) and (4) provide : –

"(3) In this Order references to a person's political opinion include references to –

(a) his supposed . . . political opinion; and

(b) in the absence or supposed absence of any or any particular political opinion.

(4) In this Order any reference to a person's political opinion does not include an opinion which insists of or includes approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland, including the use of violence for the purpose of putting the public or any section of the public in fear."

The first appellant's claim

[49] In June 2000 in his application for the post of residential support worker the first appellant was asked in the application form whether he had ever been convicted of a criminal offence which could not be considered as "spent" under the Rehabilitation of Offenders (Northern Ireland) Order. He answered that question with a question mark. He did not provide any details. The form stated that it would be the respondent's responsibility to carry out a pre-

employment check with the Department of Health & Social Services (this check being commonly been known as a "PECS check"). An applicant for the job had to fill in a consent for such a check. He did so on 16 June 2000. In the body of the form he stated:-

> "I do not have any criminal convictions because I have never been involved in any criminal activity. I have been convicted of alleged political activity by special courts in 1975 to 1977 for being, it was alleged, a Republican and for life during 1989 to 1996 for alleged Republican activity."

He said that from 1982 to 1996 he had been at "Long Kesh POW camp," Lisburn, Co Antrim.

[50] The first appellant was short listed and after interview was sent a letter dated 4 August 2005. In it the respondent's Manager of Human Resources offered him the post for a period of six months and pointed out that employment was subject to receipt of satisfactory pre-employment references and checks and a successful completion of a six week probationary period. On 6 August the claimant confirmed his acceptance of the post on the terms and conditions outlined in the letter of offer.

[51] When the PECS check was returned by the relevant authorities on 24 August it stated that he had previous convictions for offences in or about 1975. These were for offences of murder, possession of firearms and ammunition with intent and belonging to a proscribed organisation for which he received lengthy periods of imprisonment. He had been released on licence in March 1997.

[52] Following receipt of that information the first appellant was informed by letter dated 4 September 2000 that the checks highlighted the nature of the offences of which he had been convicted. The letter stated that as an organisation the respondent "was not willing to employ staff who directly or indirectly place our resident group at risk." The offer of employment was withdrawn.

[53] Although the letter of 4 September 2000 was written by the Manager of Human Resources the Tribunal found as a fact that the decision to withdraw the offer of employment was made by Ms A.

[54] It is possible to distil from the decision a number of factual conclusions reached by the Tribunal leading to the ultimate conclusion set out in paragraph 6.15 of the case stated that the respondent withdrew the offer of employment on the ground of the political opinion. Paragraph 6.15 of the case stated:

> "The decision by the respondent to withdraw the offer of employment to the first appellant was made on the grounds of his political opinion, namely that in the light of such convictions and their paramilitary nature from a Republican perspective the first appellant therefore approved and accepted the use of violence for political ends and such approval or acceptance was connected with the affairs of Northern Ireland."

[55] The Tribunal's conclusions on the evidence relating to Ms A's decision may be summed up as follows:-

(a) In making the decision to withdraw the offer of employment Ms A considered the application form, the PECS check form and the details of the convictions specified in the PECS check.

(b) Central to Ms A's decision was the element of paramilitary involvement in each of the convictions. She was of the opinion that each of the convictions had a paramilitary involvement which was from a Republican rather than a Loyalist perspective.

(c) Ms A would have reached the same conclusion if the PECS for had revealed a similar set of convictions with paramilitary involvement from a Loyalist perspective.

On the evidence the Tribunal was satisfied that at the time he applied for the post he did not support the use of violence for political ends and that he never supported the use of punishment beatings.

The second applicant's claim

[56] In his application in May 2002 for the post of night worker with the respondent at its hostel in Newry the second appellant was asked whether he had ever been convicted of a criminal offence which could not be considered spent under the Rehabilitation of Offenders (Northern Ireland) Order 1978. He answered "No" though elsewhere in the form he stated that he was in prison from 27 April 1992 until October 1998 when he was released under the Good Friday Agreement. As in the case of the first appellant he was informed that a PECS check would be carried out. He signed the consent form pointing out that he was sentenced for 15 years for conspiracy and possession with intent.

[57] The second appellant was short listed and attended an interview on 7 June 2002 he was chosen by the Panel as the successful candidate. By letter of 7 June 2002 he was informed by the respondent that references and a PECS check would be requested. He was not offered employment at that stage.

[58] When the PECS check was returned in July 2002 it stated that he had convictions for offences in or about 1992 for conspiracy to murder, conspiracy to cause explosions likely to endanger life and property and possession of explosives with intend to endanger life or property. He had been released on licence on 13 October 1998 pursuant to Section 3 of the Northern Ireland Sentences Act 1998.

[59] Following receipt of the PECS check the respondent's Manager of Human Resources wrote to inform the second appellant to inform him that following receipt of the references and the PECS check the respondent was unable to offer him the post. The references were, however, not relevant to the decision which followed the PECS check.

[60] The Tribunal found on the facts that the decision not to offer the post to the second appellant was a decision effectively taken solely by Ms O, the chief executive, who received the necessary authority from the chairman of the board of directors to deal with the matter in the way in which she ultimately did. Ms O had not been involved in the decision to withdraw the offer of employment to the first appellant as she had been on leave at the time though she had been informed on her return and retrospectively approved the decision.

[61] From the written decision of the Tribunal it is possible to distil a number of factual conclusions leading to the ultimate conclusions set out in paragraph 7.4 of the case stated that "the decision by the respondent not to offer the second appellant employment was made on the grounds of his political opinion namely that, in the light of the convictions and their paramilitary nature from a Republican perspective, the second appellant thereby approved or accepted the use of violence for political ends and such approval or acceptance was connected to the affairs of Northern Ireland." The Tribunal's conclusions on the evidence relating to the decision in respect of the second appellant can be summed up as follows:-

(a) Central to Ms O's thinking in making the decision not to offer the post to the second appellant was the paramilitary nature of the convictions. That paramilitary nature flowed from the facts that they were by their nature convictions of violence for political ends, there being an element of political motivation for involvement in those offences.

(b) She considered in his view of his paramilitary connection he would have an adverse influence on the residents and would see violence as an appropriate way to resolve issues with the potential for mismanagement and escalation of incidents and confrontation between residents of the hostel although she did not think that the second appellant would himself seek directly to harm residents.

(c) A similar decision would have been taken if the second appellant had been convicted of paramilitary offences from a Loyalist perspective.

The Tribunal's decision

[62] The Tribunal decided that to establish a claim of unlawful discrimination under the order it was necessary for the appellants to establish that they had been less favourably treated that a hypothetical comparator. It determined that the Tribunal *could* have found that the appellant's had been less favourably treated on the grounds of their political opinion than a person who had been convicted of similar offences but from which offence no political opinion could be derived. Applying its understanding of Igen v. Wong [2005] IRLR 258 the Tribunal concluded that since a Tribunal *could* find that there had been less favourable treatment it should move to consider the question whether the respondent had discharged the burden of showing that it had not discriminated. The Tribunal was not satisfied that the respondent had discharged the necessary burden and, subject to Article 2(4) of the Order, the respondent had unlawfully discriminated against the appellants on the grounds of political opinion.

[63] The Tribunal then proceeded to consider the effect of Article 2(4) of the Order. It recorded the evidence of the appellant that at the time each made their application for employment with the respondent neither "accepted" the use of violence for political ends connected with the affairs of Northern Ireland and recorded that their evidence on that point was not challenged. The Tribunal ruled that if it had been necessary to do so it would in the circumstances on the evidence have accepted at the time when each made his application for employment with the respondent neither appellant in fact had such a political opinion which fell within the terms of Article 2(4) of the Order. At paragraph 12(9) of its decision the Tribunal concluded:-

> "Article 2(4) of the 1998 Order simply excludes in the 1998 Order any reference to a political opinion as specifically set out therein. The words of Article 2(4) of the 1998 Order are, in the view of the Tribunal, clear and unambiguous and it is therefore necessary to give the words their ordinary meaning. The Tribunal concluded, giving the words of the Article their ordinary meaning, that, if it was satisfied the political opinion relied on by the respondent as the grounds for its decision in relation to each claimant included "an opinion which consists of or includes approval or acceptance of the use of violence for political ends, connected with the affairs of Northern Ireland, including use of violence for the purpose of

> putting the public or any section of the public in fear" then the provisions of Article 2(4) of the 1998 Order had to be strictly applied. Since, in relation to both claimants, the Tribunal was satisfied that the decision of the respondent was on the grounds of such an opinion, the Tribunal reluctantly came to the conclusion that the claims of each claimant, which would otherwise have been successful, must fail in view of the provisions of Article 2(4) of the 1998 Order."

Party's contentions

[64] Miss Quinlivan's central argument on behalf of the appellants was that on a proper construction of Article 2(4) of the Order its effect was to exclude from protection against discrimination persons who at the time that the employer was making his decision supported the use of violence for political ends. She argued that it could not have been intended to apply to persons who may have supported the use of violence in the past but who have renounced their views at the time of the recruitment process. To so construe the legislation would, she argued, produce an undesirable or absurd result on the facts. The language of Article 2(4) is expressed in the present tense pointing to a currently held opinion. Counsel sought to rely on extracts from Hansard to support her argument. She called in aid a statement of the Minister at the time of the passage of the Fair Employment (Northern Ireland) Act 1976 through Parliament, the thrust of that statement being that the government did not want to see discrimination against people who previously held views in support of violence political ends but who no longer held those views. Miss Quinlivan contended that a purposive interpretation should be given to the legislation. The aim of the legislation was to eliminate discrimination on both religious and political grounds and any exceptions should be interpreted so as not to leave loopholes for its practice in another guise. Given the Tribunal's findings the appellants were not persons who at the relevant time supported the use of violence for political ends.

[65] Miss Quinlivan relied, in particular, on what the Minister stated in Parliamentary Standing Committee H on 6 April 1976 the Minister saying-

> "I think I made it clear and unambiguous as possible what we mean by people who commit acts of violence or what we think about people who commit or advocate violence and who will have no protection under the terms of the Bill. To put this into a form of words within the Bill creates a great difficulty, and we believe it is clear that to discriminate against someone who commits acts violence is not the same as to

> discriminate against political opinion. To gloss the Bill unnecessarily is a mistake and can only cause misunderstanding. There will at times be difficulties when we are dealing with people in Northern Ireland. We may come across cases where people have taken part in violence in the past and have now rejected violence for the future. There could be people, of both communities coming out of prison, released detainees who quite openly have said and are saying that they reject violence in any future political attempt to change the society in Northern Ireland. We do not want to see those people discriminated against because they may have been involved in the past in any form of violence. What we want to do . . . is to encourage people to turn their backs upon violence as a means of pursuing political aims. People who pursue political aims through violence are completely rejected by the government and will continue to be rejected. I think I have gone as far as is possible to make that clear, and I am sure that the Agency will operate on that basis . . ."

[66] Miss McGrenera who appeared with Miss Finnegan on behalf of the respondent argued that the Tribunal did not conclude that the appellants did not support the use of violence for political ends but rather that at the time of the application for employment the appellant did not accept the use of violence for political ends. This was a narrower finding. The plain meaning rule of construction led to the result reached by the Tribunal. The legislation in Article 2(4) provided an exception from the protection of the legislation in respect of persons whose political opinion included support of the use of violence for political ends in Northern Ireland. There was no reference to the employment of persons with convictions for politically motivated offences in the Hansard report when the draft Order was laid. There had been no repeal of the equivalent of Article 2(4) despite amendments to the 1998 Order by the Fair Employment and Tribunal Order (Amendment) Regulations (Northern Ireland) 2003. Faced with a person with convictions for politically motivated offences there was no way it could be know whether the person had in fact renounced the support for the use of violence for political ends. Miss McGrenera further argued that there was no ambiguity in the provision and it was not permissible to seek to create an ambiguity by relying on a ministerial statement in parliament. In any event the ministerial statement did not support the appellant's contentions. She argued that the preconditions for the admission of Parliamentary material laid down in Pepper v. Hart [1993] AC 593 were not fulfilled.

Conclusions

[67] Following the reasoning process set out in the Guidelines in Igen v. Wong [2005] IRLR 258 the Tribunal posed the question whether the Tribunal *could*, in the absence of an adequate explanation, conclude that the respondent had committed an act of discrimination. It concluded that the Tribunal could so conclude and then proceeded to consider whether the respondents had discharged the burden of proof relying on it to show that there was an adequate explanation to show that there had not, in fact, been unlawful discrimination. However, that chain of reasoning was not apt to deal with the legal issues raised in the present cases. If the respondent's interpretation of Article 2(4) was correct then the Tribunal could never have found unlawful discrimination and there would have been no question of the respondents having to discharge any burden of proof. The case turned on the proper meaning of Article 2(4) and its impact on the question whether there had been discrimination on the ground of political opinion as defined in Article 3.

[68] On its findings of fact the Tribunal concluded that the first appellant's job offer was withdrawn and the second appellant failed to be offered a job because the respondent concluded that they were unsuitable for the relevant posts because they had been convicted of paramilitary offences. It is clear that the approach adopted by the respondent showed that it was treating persons with paramilitary convictions differently from persons with non-paramilitary convictions. The conclusion that the relevant comparables were persons with non-paramilitary convictions (rather than persons with no conviction) was, accordingly, correct as far as the question was relevant. It is also evident that the persons with paramilitary convictions were being treated less favourably because of the paramilitary nature of their convictions.

[69] The findings of fact by the Tribunal established that the differential treatment flowed, not from the fact that the appellants were Republicans as opposed to non-Republicans, but from the fact that the offences were paramilitary. Although the Tribunal does not define what is meant by paramilitary or, more accurately, does not define or seek to define what the decision-makers within the respondent meant by the term the exclusion of Republicanism or Loyalism as being of the essence of the paramilitary objection points to the conclusion that the decision makers decided as they did because the appellants had committed offences in the furtherance of political or quasi political ends and had committed them when they were in the state of mind that regarded the actions in question as morally legitimate. There was implicit in the Tribunal's conclusions a finding that the appellants, at the time the offences were committed, held the opinion that violence was morally and politically justified.

[70] It was because the appellants had committed the offences in the circumstances they did (which included that state of mind) the respondent

treated them differently from persons with non-paramilitary convictions. Such differential treatment was a form of discrimination (in the wider meaning of that term) but it would not be unlawful discrimination unless the respondent did what it did because it was holding against the appellant a political opinion which fell within the protection of the anti-discrimination legislation.

[71] In Pepper v. Hart [1993] AC 593 the House of Lords relaxed the rule against references to Parliamentary material as an aid to statutory construction. This relaxation was, however, limited and subject to strict safeguards. Lords Browne Wilkinson and Bridge stated:-

> "In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief in that or the legislative intention lying behind the ambiguous or obscure words. In the case the statements made in Parliament, as at present advised, I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria." (per Lord Browne Wilkinson at 634.)

> "It should, in my opinion, only be in the rare cases where the very issue of interpretation which the courts are called on to resolve has been addressed in Parliamentary debate and where the promoter of the legislation has made a clear statement directed to that very issue, that reference to Hansard should be permitted. Indeed, it is only in such cases that reference to Hansard is likely to be of any assistance to the courts. Provided the relaxation of the previous exclusionary rule is so limited, I find it difficult to suppose that the additional cost of litigation or any other grounds of objection can justify the court continuing to wear blinkers which in such case as this conceal a vital clue to the intended meaning of the enactment." (per Lord Bridge at 617).

[72] The wording of Article 2(4) read with Article 3 is not ambiguous or obscure nor does the literal meaning lead to an absurdity. The Parliamentary material relied on by the appellant does not clearly point to the legislative

intention for which the appellants contend. The wording of Article 2(4) represented a political compromise to meet the concerns of members who wanted a stronger statutory provision against those involved in any support or advocacy of the use of violence. What the Minister said was said in the context of recognising the difficulty of putting government policy into a form of words. The statement of the Minister did not spell out clearly or unambiguously what was to be expected of people rejecting violence before they could bring themselves within the ambit of the statutory protections against unlawful discrimination on the ground of political opinion. He did not deal with the cases of persons who continue to hold equivocal opinions on the use of violence (continuing, for example, to approve of the use of violence in the past or in different political circumstances but renouncing it for the present or for the future). Nor did the Minister clearly indicate what he meant by "open rejection" of violence. Accordingly, the Pepper v Hart preconditions are not satisfied. The proper interpretation of Article 2(4) leads to the conclusion that the respondent's decisions were based on an opinion that fell within the express wording of Article 2(4) and that that opinion did not qualify as a political opinion for the purposes of the Order.

[73] The fallacy in the appellant's argument lies in the fact that to succeed in their discrimination claims the appellants had to establish that their past support for political violence, which was not a legitimate political opinion at the time the offences were committed, in some way becomes a legitimate political opinion in retrospect when they change their view on the question of supporting political violence now or for the future. Such an argument runs contrary to the policy of Article 2(4) which is to treat the opinion as a form of illegitimate opinion that does not fall within the definition of political opinion for the purpose of the statute. It is questionable whether such an opinion even apart from a provision such as Article 2(4) could ever have qualified as the political opinion in view of the interpretation of that term in McKay v. Northern Ireland Public Service Alliance [1994] NI 107 and in Gill v. Northern Ireland Council for Ethnic Minorities [2001] NIJB 299.

The questions posed by the Tribunal

[74] I agree with the reformulation by Higgins LJ of the questions posed by the Tribunal and I also would answer that reformulated question No and dismiss the appeal.

McLAUGHLIN J

[75] I have had the opportunity of reading in draft the judgements of Higgins and Girvan L.JJ. I agree that the question posed for the consideration of this court should be reformulated as drafted by Higgins L.J. and concur that it should be answered in the negative. I have nothing further to add."