

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

O'Muilleoir's and Toner's Applications [2009] NIQB 54

APPLICATIONS FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY

- 1. TIERNAN O'MUILLEOIR**
 - 2. ROBERT TONER**
-

WEATHERUP J

[1] These applications are for leave to apply for a judicial review of the decisions of the Chief Electoral Officer for Northern Ireland. The decision in respect of the first applicant was contained in a letter of 27 May 2009 by which there was a refusal by the Chief Electoral Officer of the application for a proxy vote in the European Parliamentary election on 4 June. The reason stated for refusal was that the national insurance number stated on the application form was not the same as that provided when the applicant became a registered voter. Mr White appeared for the first applicant and Mr Scoffield for the respondent.

[2] The application for a proxy vote is dated 8 May 2009 and includes the details of the applicant's name and address, date of birth and national insurance number. The applicant agrees that the application form contains the wrong national insurance number. The applicant's father filled in the details on the form and inadvertently inserted his daughter's national insurance number rather than his son's national insurance number. The application form also includes contact details for the applicant by phone and email and states that "We will only use this if we need to check anything". Then there are details of the proxy and the reasons for the application, namely that the applicant is a student of the University of Kent in England and will be at the university on 4 June and therefore unable to vote.

[3] The application was received by the Electoral Office on 12 May. The closing date for applications for this election was 14 May. The application was considered by an officer in the Electoral Office on 15 May, on which date it appears that a decision was made not to accept the application because of the error in the recording of the national insurance number on the application form. The decision was conveyed to the applicant by letter from the Electoral Office on 27 May.

[4] National insurance numbers are included in the particulars that are required for proxy voting applications further to the Electoral Fraud (Northern Ireland) Act 2002 by which amendments were made to the Representation of the People Act 1983. The European Parliamentary Elections Regulations (Northern Ireland) 2004 address the requirement to provide national insurance numbers. Regulation 9 provides, under the heading "Absent vote at a particular election and absent voters list", that where a person applies to the registration officer to vote by proxy, the registration officer shall grant the application if certain conditions are satisfied.

[5] The conditions are first of all that the applicant sets out the circumstances by which he cannot be expected to vote, secondly, that he is registered as a voter, thirdly, that his date of birth is provided, fourthly, that he signs the application, fifthly, that the application either states the applicant's national insurance number or states that he does not have one and the registration officer is satisfied as mentioned in paragraph 2 (Regulation 9(1)(e)), sixthly that the application meets the requirements of Schedule 2 of the Regulations.

[6] Paragraph 2 provides that in respect of the national insurance number the registration officer must be satisfied, if the application states the national insurance number, that the requirements of paragraph 3 are met. Paragraph 3 requires that the number stated in the application form is the same as that supplied as the applicant's national insurance number in respect of other provisions in the Regulations. The above outline is a rather complicated way of setting out that the registration officer must be satisfied that the application form contains the correct national insurance number.

[7] Schedule 2 of the Regulations contains some additional requirements that must also be satisfied. Under the heading "General requirements for applicants for an absent vote" applications must state the full name of the applicant, the address, the proxy's address and the grounds on which the voter claims to be entitled to an absent vote. Further the application must be in writing and be signed and dated by the applicant. In addition the application should include an application for the appointment of a proxy which meets the further requirements that are then set out. It is provided that an application shall be refused if it is received after the closing date.

[8] In addition to the Regulations there are Guidance Notes issued by the Electoral Office. A Guidance Note on proxy voting is attached to application forms or can be downloaded with the form. Of particular note are two of the seven paragraphs. Paragraph 2 states “Your completed form must reach the Registration Officer by 5.00 pm on 14 May. If it is received after that time your application will be rejected.” Paragraph 4 states “Given the short time available it may not be possible to return your application to you if you do not complete it correctly. Please check it carefully before submission”.

[9] It is common case that the applicant’s application form provided the wrong national insurance number and the reason has been given in the affidavit evidence to the effect that the applicant’s father had unfortunately mixed up the applicant’s number and the applicant’s sister’s number when he was completing the forms on their behalf.

[10] The applicant’s father spoke to the Electoral Office on 28 May and he explained the mistake to the officer and to a senior officer in the Electoral Office. No correction of the application form was permitted.

[11] The respondent’s position is that the correct form must be lodged in the Electoral Office by the closing date, in this case 14 May, containing the relevant particulars set out in the Regulations. The respondent accepts that its officials may contact an applicant by phone or by email on the content of the form. It is clear that they may do so because it is stated on the face of the form that they may do so. Further the respondent contends that amendments will be accepted on the basis that an application form with correct particulars has been signed by the applicant and lodged before the closing date. The Office does not accept verbal amendments given by telephone call. Officials in the Office will not make amendments to the application forms because of the requirement in the Regulations that the form as completed be signed by the applicant.

[12] The respondent received the applicant’s form two days before the closing date. At that time officials had some 1,000 applications to process. The respondent invites the Court to conclude that the scheme of the Regulations does not involve changes to the form being permitted after the closing date for applications. On the other hand the applicant’s approach is that the Electoral Office must have a discretion to accept amendments to the form after the closing date, that the Office signals that it will accept such amendments by the words of the application form that they may need the applicant’s contact details in order to check matters and that the Guidance Notes would suggest that the form could be amended, provided that it had been first received before the closing date.

[13] It is a requirement of the Regulations that the national insurance number that is provided on the application form should correspond with the number that has been notified to the Electoral Office at registration. The registration officer must be so satisfied. The registration officer will grant the application, conditional upon being satisfied of the specified matters that include the correct national insurance number. The application must be in writing and be signed and dated by the applicant. The application must be submitted to the Electoral Office by a particular closing date and will be rejected if received after that date. Subject to what might be said about Regulation 19 and Mr White's argument about legitimate expectation it seems to me to be necessarily implicit in the structure of the Regulations that an application form that complies with the conditions set out in the Regulations must be submitted to the Electoral Office by the closing date and that an application form that does not comply with the Regulation can not be accepted.

[14] The additional Regulation to which I should then refer is Regulation 19 which is described by the applicant as a slip rule. Regulation 19 which is headed "Effect of misdescription" states that -

"No misnomer or inaccurate description of any person or place named (a) in the register of electors or (b) in any list, record, proxy paper, nomination paper, ballot paper, notice or other document required for the purposes of this Part of these Regulations, affects the full operation of the document with respect to that person or place in any case where the description of the person or place is such as to be commonly understood."

[15] First of all the misdescription must be either a 'misnomer', which I interpret as a misnaming, or an inaccurate description, of any person or place. Secondly, this misdescription must be found in the documents listed. Thirdly, the misdescription will be of no effect where the description of the person or place "is such as to be commonly understood".

[16] The second matter concerns the nature of the relevant documents where the misdescription occurs. I conclude that the relevant documents are probably intended to be limited to documents issued by the Electoral Office. The specific terms of paragraphs (a) and (b), which list the documents, refer to Electoral Office documents and those words are followed by the general words "or other document" which are probably equally confined to Electoral Office documents.

[17] However if Regulation 19 has a wider meaning and is capable of including an application form for a proxy vote, the first matter referred to above is the issue as to whether there is a misnomer or inaccurate description of a person or place named in the document. Again it is doubtful if that could be said to apply to the present case because this is not a misdescription of a

person or place. This is an error in relation to a national insurance number. Descriptions of an applicant or a place, such as the address, might be within Regulation 19. I conclude that, if Regulation 19 does apply to an application form, it does not extend to the mistake that occurred in this case.

[18] However even if Regulation 19 may apply to a mistaken national insurance number the third matter referred to above is that the misdescription will be of no effect where the description of the person is such as to be commonly understood. This aspect appears to provide that if there is a misdescription of a person, such as the misspelling of the name, it will be disregarded if the mistaken name would be commonly understood to apply to the particular person. That approach does not translate that into this type of error involving the national insurance number. This could not be said to be a situation where there was a misdescription of a person such as would be commonly understood to apply to the applicant.

[19] In any event I am satisfied that it cannot be the intention that Regulation 19 displaces the requirements of Regulation 9 where it states that certain particulars be provided. If Regulation 19 were intended to or had the effect of displacing Regulation 9 then Regulation 9 would be largely to no effect. It could be set aside by reliance on Regulation 19.

[20] The applicant claims a legitimate expectation of acceptance of the amendment of the application after the closing date arising from the terms of the application form and the Guidance Notes. However the Guidance Notes make clear that there was a strict closing date of 14 May and applications received after that time would be rejected. Further the Guidance Notes place the onus on the applicant to complete the form correctly or at least within such time for it to be possible for the form to be corrected. Rather than creating any expectation that the form might be corrected after the closing date, the terms of the Guidance Notes seem to me to make clear the very opposite, namely that corrections must be completed before the closing date. Some schemes provide for a discretion to accept late applications. This scheme does not state that there is any discretion to accept late applications. Rather the Guidance Notes make clear that any correction has to be made within time and thus no correction may be made out of time. Nor does the entry on the application form providing for possible contact with an applicant after submission of the application form suggest that corrections to the form will be permitted after the closing date. The application should be submitted within sufficient time to permit corrections to be introduced before the closing date.

[20] There is nothing in the application form or in the Guidance Notes or in the Regulations to suggest that the form may be amended after the closing date for applications. There is nothing in Regulation 19, or in the claim to a legitimate expectation of amendment after the closing date, to alter the

provisional view stated above that it is necessarily implicit in the scheme of the Regulations that the application form must comply with the requirements in the Regulations and be lodged by the closing date. In the present case the correct application form was not received within the time limit of 14 May. Accordingly the Electoral Office was correct to reject the application.

[21] A further ground relied on by the applicant concerns discrimination. Reliance is placed on a comment by an official who suggested to the applicant's father that his background in Sinn Fein had been a consideration taken into account in the rejection of the application. However it has been established that decisions on the amendment of applications do not involve a discretionary rejection by the official. The approach applied by the Electoral Office to all applications is that after the closing date those that are found not to be correct will not be accepted. There will be rejection of all application forms for proxy votes that are incorrect after the closing date. The background of the particular applicant is irrelevant to that outcome. No different approach has been applied to this applicant because of his political views. The same rule is applied to all applicants. The foundation for discriminatory action, less favourable treatment, has not been established.

[22] An additional ground relied on by the applicant concerns the right to vote under Article 3 of the First Protocol of the European Convention. The applicant has a right to vote and he has a right to vote in person and he may continue to exercise that right to vote in the forthcoming election. The applicant has personal difficulties in this instance and there is a proxy vote system that is available to him. That system is subject to a statutory regime and that requires an application in a particular manner by a particular date and subject to particular conditions. The statutory regime as such is not under challenge. The applicant has not complied with the statutory scheme. Had he done so and been judged eligible for a proxy vote then he would have been entitled to a proxy vote. He has not been deprived of his right to vote save by his own misfortune in failing to complete the application form correctly.

[23] For all the above reasons I have not been satisfied that the first applicant has an arguable case on any of the grounds and accordingly I refuse the first applicant leave to apply for judicial review.

[24] The circumstances of the second applicant are slightly different. Ms Doherty appeared for the second applicant and Mr Scoffield for the respondent. The second applicant applied for a proxy vote before the closing date on 14 May and his application was rejected by a letter from the Electoral Office on 26 May. It appears that he had filled in the application form with the name Robert Toner. However he had registered to vote in 2006 in the name of Robert Henry Toner. Schedule 2 of the Regulations provides for

additional requirements in relation to absent votes and one of those requirements is that the application must state the full name of the applicant.

[25] The applicant relies on Regulation 19. As stated above, Regulation 19 is probably intended to apply to Electoral Office documents for the reasons that are given above. However if Regulation 19 does apply to these application forms it relates to a misnomer or inaccurate description of any person or place name. The misdescription condition is satisfied in the present case because there is misnaming of the person, unlike the position with a mistaken national insurance number.

[26] The further requirement of Regulation 19 is that the misdescription will not affect the full operation of the document "... in any case where the description of the person or place is such as to be commonly understood." In the present case those who know the applicant could be expected to understand the description of the person to be a description of the applicant. If Regulation 19 applies to application forms it is capable of applying to the circumstances of this particular case.

[27] However there remains the broader question as to whether Regulation 19 can have been intended to displace the other requirements in Regulation 9 or in this case Schedule 2. As the Regulations require that specified particulars must be given, that would be largely of no effect if an applicant could turn to Regulation 19 to seek a waiver of the requirements. This only reinforces the view expressed earlier that Regulation 19 is probably intended to apply to the forms that are produced by the Electoral Office, so that if there is misdescription of a voter that should not prejudice the voter, provided the form could be commonly understood to apply to that voter. Thus the voter will not be affected if for example there is a misprint as to the identity of the voter in the Electoral Office forms. That is what Regulation 19 is intended to cover and therefore it fits into the scheme of the Regulations and does not displace the requirements of Regulation 9 or Schedule 2.

[28] The second applicants form did not contain his full name in accordance with the Regulations and the form was not corrected by the applicant before the expiry of the closing date for applications on 14 May. There is not an arguable case on any of the second applicant's grounds and the application for leave to apply for judicial review is refused.