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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY SINN FÉIN FOR JUDICIAL REVIEW

and

IN THE MATTER OF SECTION 12 OF THE POLITICAL PARTIES, ELECTIONS AND REFERENDUMS ACT 2000

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Before: Carswell LCJ, McCollum LJ and Campbell LJ

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CARSWELL LCJ

[1] This is an appeal from a decision of Coghlin J given on 10 April 2003, whereby he refused the application of Sinn Féin for a declaration that section 12 of the Political Parties, Elections and Referendums Act 2000 is incompatible with Article 10(1) of the European Convention on Human Rights, read in conjunction with Article 14, and with Article 3 of Protocol 1 to the Convention, read in conjunction with Article 14 of the Convention.

[2] The appellant Sinn Féin is a political party registered under the Political Parties, Elections and Referendums Act 2000 (the 2000 Act). Four members of that party were elected in the 2001 election as Members of the United Kingdom Parliament at Westminster, although none of these persons have taken their seats.

[3] In paragraphs 2 to 5 of her grounding affidavit Ms Michelle Gildernew, one of those four persons elected as Members of Parliament, gives the following reasons for the refusal of her colleagues and herself to take their seats:

> "2. Sinn Féin is an increasingly prominent political party within Ireland as a whole. In the six counties area, at the last election, our party secured 21.7% of the vote overall, which represents approximately

50.9% of the Nationalist vote. Besides the 4 MPs, we have 18 Members of the Legislative Assembly for Northern Ireland and 108 Councillors. In the 26 counties at the Irish Parliament in Dublin, we have 5 TDs. As such we have a large and broad electoral base and mandate.

3. Our party is an Irish Republican party, committed to the principle that the Irish people have the right to self-determination and therefore the party does not recognise the sovereignty of the British monarch over any part of Ireland. Our objective is to end British rule in Ireland and, to that end, we seek national self-determination, the unity and independence of Ireland as a sovereign state. Consequently, it has always been and remains party policy that Sinn Féin members elected to the parliament at Westminster refuse to swear or affirm any oath for allegiance to the British monarch.

4. I believe that the requirement to take the Oath or affirm allegiance to the Queen, before I am permitted to take my seat in Westminster, discriminates against my political beliefs and the beliefs of those who voted for me and my party colleagues and denies us our constitutional right to freedom of expression of our beliefs.

5. To take an Oath to serve the British sovereign runs directly contrary to the aims and political beliefs of our party. Moreover, the British Government is aware that members of our party, who have been elected as Members of Parliament, have consistently refused to take an Oath to serve the Queen."

During the hearing of this matter in the court below, however, the judge asked counsel for the appellant to obtain specific instructions from Sinn Féin whether their representatives would be prepared to take their seats in Parliament if the requirement to take the oath were removed. The response was in the negative.

[4] The provision whose validity is challenged in the appeal before us is section 12(1) of the 2000 Act, which provides:

"12-(1) For the purposes of this section –

> *(a)* 'A policy development grant' is a grant to a represented registered party to assist the party with the development of policies for inclusion in any manifesto on the basis of which –
>
> > *(1)* candidates authorised to stand by the party will seek to be elected at an election which is a relevant election for the purposes of Part II, or
> >
> > *(2)* the party itself will seek to be so elected (in the case of such an election for which the party itself maybe nominated); and
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> *(b)* a registered party is 'represented' if there are at least two Members of the House of Commons belonging to the party who –
>
> > *(1)* have made and subscribed the oath required by the Parliamentary Oaths Act 1866 (or the corresponding affirmation), and
> >
> > *(2)* are not disqualified from sitting or voting in that House."

The oath prescribed by the Parliamentary Oaths Act 1866, as amended, which all Members of Parliament have to take before they can take their seats in the House, reads:

> "I [name] do swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth II, her heirs and successors, according to law. So help me God."

[5] In exercise of the powers contained in section 12 the Elections (Policy Development Grants Scheme) Order 2002 was made, under which policy development grants (PDGs) were made to the Labour, Conservative, Liberal Democrat, Scottish National, Plaid Cymru, Ulster Unionist, SDLP and Democratic Unionist Parties. No grant was made to Sinn Féin, because although it had more than two Members of the House of Commons none of them had made and subscribed the Parliamentary Oath. It was specifically prescribed that the grants were to be used solely by the parties for necessary expenditure incurred by them in meeting the costs incurred through developing policies for inclusion in any relevant electoral manifesto.

[6] The genesis of PDGs was a proposal made in the Fifth Report of the Committee on Standards in Public Life, chaired by Lord Neill of Bladen QC. Having discussed the arguments for and against state aid for political parties, the report came down against recommending substantially increased state funding. It discussed the provision of "Short money", named after its proposer the Rt Hon Edward Short MP (later Lord Glenamara), which is provided to parties in opposition to enable them more effectively to perform their Parliamentary duties, and also "Cranborne money", named after Lord Cranborne, which finances opposition parties in the House of Lords. The report identified a lacuna in the provision of such state aid as is furnished, which it discussed in paragraphs 7.25 to 7.27:

> "7.25 All that said, there is, however, a problem. It is evident that the political parties, hard pressed to meet the mounting costs of election campaigns and also the mounting costs of their day-to-day activities, are driven to concentrate their resources on campaigning and routine administration at the expense of long-term policy development. Perhaps surprisingly, this applies almost as much to the governing part as to the opposition. Ministers become preoccupied with current crises and the sheer volume of government business. They, and the party to which they belong, find it hard to 'think long'. The opposition parties, for their part, are also in continuous danger of being deflected from one of their principal tasks, which is to prepare for government in policy terms. The political parties themselves should be one of the major sources of ideas in British politics. They are not always so at present.
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> 7.26 For that reason – although we are not in favour of public subvention of the parties' general activities – we propose that a modest Policy Development Fund should be established to enable the parties represented in the House of Commons to fulfil better what is, after all, one of their most vital functions. The fund could be administered by an *ad hoc* body agreed upon among the parties. Failing that, it could be administered by our proposed Election Commission (though that would not be our preferred option, since the fund would not be intended for electoral purposes).
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> 7.27 Bearing in mind that in 1997 the three main parties appear to have spent less than £1.5 million on

> research, we propose that the annual amount provided for the Policy Development Fund should be in the order of £2 million, which could in future be up-rated in line with inflation. The political parties would be required not only to account in the normal way for their expenditures from the fund but to certify that the money had not been spent on such objects as routine party administration, electioneering and opinion polling."

The Government accepted the recommendation of the Neill Committee, as it set out in paragraphs 6.16 and 6.17 of the White Paper published on 29 July 1999 and entitled "The Funding of Political Parties in the United Kingdom." The proposals of the Neill Committee were enacted into law by the 2000 Act. It may be noted that the amounts of PDGs were deliberately kept fairly modest by comparison with the major expenditure of the political parties, which together expended a total sum of £54 million on the 1997 election.

[7] In relation to the exclusion of Sinn Féin from receipt of PDGs Ms Gildernew averred in paragraphs 6 and 7 of her affidavit:

> "6. Section 12 of the Political Parties, Elections and Referendums Act 2000 defines the parties who will be eligible for funding and that the qualifying representation within the House of Commons is to have 2 members elected to the House of Commons who 'have made and subscribed the oath required by the Parliamentary Oaths Act 1866'. The Government, in introducing this legislation, was aware that Sinn Féin would quality for funding by virtue of the number of their members, but who would be disqualified if taking the Oath to the Queen was a condition of eligibility.
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> 7. Moreover, the Government was aware that in those circumstances Sinn Féin would be the only party, who, although eligible as a result of the number of their MPs, would be disqualified from any policy grant funding if taking an Oath to the Queen was an additional requirement. The Government was also aware that Sinn Féin would be uniquely disadvantaged in those circumstances. In those circumstances I believe that this requirement to take an Oath to the Queen was specifically designed to exclude Sinn Féin from eligibility for a policy

development grant, and as such is discriminatory and unlawful."

[8] In its statement grounding the application for judicial review the appellant claimed that the provisions of section 12 of the 2000 Act constituted a breach of Article 10 of the Convention read in conjunction with Article 14 and a breach of Article 3 of the First Protocol read in conjunction with Article 14 of the Convention. The grounds on which relief was sought, as set out in the statement, focused on discrimination, but it appears from the terms of Coghlin J's judgment that counsel for the appellant argued before him that section 12 was incompatible with Article 10 and with Article 3 of the First Protocol standing alone, as well as in conjunction with Article 14, and Mr Treacy QC for the appellant did present this argument before us without objection from the respondent. We shall therefore consider each Article separately before deciding whether there was any breach of either taken in conjunction with Article 14.

[9] Article 10(1) of the Convention, so far as material, reads:

> "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

Mr Treacy argued that the condition for receipt of a PDG of taking the Parliamentary oath prevented Sinn Féin *pro tanto* from giving the most effective expression to the political views which it espouses and so inhibited the free circulation of information and ideas essential for proper working of a democratic polity. He relied on the statement of the ECtHR in paragraph 42 of its judgment in *Bowman v United Kingdom* (1998) 26 EHRR 1:

> "Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system. The two rights are inter-related and operate to reinforce each other: for example, as the Court has observed in the past, freedom of expression is one of the 'conditions' necessary to 'ensure that free expression of the opinion of the people in the choice of the legislature'. For this reason it is particularly important in the period preceding an election, that opinion and information of all kinds are permitted to circulate freely."

[10] In *Bowman v UK* the applicant, the executive director of the Society for the Protection of Unborn Children, was prosecuted for an electoral offence, in that SPUC had published and circulated 1.5 million leaflets outlining the position on the issue of abortion adopted by candidates in Halifax in the 1992 Parliamentary election The permitted limit of expenditure on the part of unauthorised persons on publications relating to an election campaign was £5.00. The ECtHR held that this limitation constituted a restriction on freedom of expression and hence that there was a breach of Article 10 of the Convention. It was not a proportionate means of pursuing the legitimate aim of securing the "free expression of the people in the choice of the legislature", which might have provided justification for some restrictions on electoral expenditure.

[11] Mr Treacy also referred to the decision of the Supreme Court of Zimbabwe in *United Parties v Minister of Justice, Legal and Parliamentary Affairs* (1997) 3 BHRC 16. In that case the applicant challenged the constitutionality of legislation making provision for the state funding of political parties, the conditions for which were so set that the only party which could conceivably qualify for funding was ZANU(PF). The court held that this provision was inconsistent with section 20(1) of the Constitution, which provided that –

> "no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to impart ideas and information without interference …"

Setting the qualification in such a way made it impossible for any other party to obtain State funding, without which in poorer societies smaller parties would find it impossible to mount an effective political campaign. This in the view of the court (page 28 of the report) caused a reduction of the effective freedom of expression of political parties, by restricting the number of issues debated, the depth of their exploration and the size of the audience reached. In short, it had a marked and adverse effect upon political advocacy.

[12] The judge held on this part of the case in paragraph 18 of his judgment:

> "[18] However, in Bowman the court found that section 72 of the 1983 Act operated, for all practical purposes, as a "total barrier" to the ability of the applicant to publish information with a view to influencing the voters of Halifax in favour of an ant-abortion candidate. It was not satisfied that, in practice, she had access to any other effective channels of communication. In the United Parties case, the Supreme Court in Zimbabwe found that the threshold for funding set by the government,

> rendered it "virtually impossible" for other political parties to gain any real margin of success. By contrast, the applicant in this case has not produced or drawn attention to any respect in which members of Sinn Féin have been restricted in their ability to hold or express opinions or to receive or impart information or ideas. There is no suggestion that Sinn Féin is so lacking in financial resources that the failure to provide the party with finance by way of PDG has prevented such activity. Mr Treacy QC submitted that the court should infer such interference or restriction simply as a result of the failure of Sinn Féin to receive a payment by way of PDG, but it seems to me that it is a matter for the applicant to establish that there has been a breach of its Article 10 rights. Accordingly, I hold that no breach of Article 10 has been established."

[13] Mr Treacy submitted that in so holding the judge had applied by way of test the criterion whether the restriction on funding operates as a total barrier to the ability of the appellant party to hold or express opinions or to receive or impart information. We do not understand the judge to have applied such a test. He observed that the restriction in *Bowman's* case operated as a total barrier to SPUC's ability to disseminate information and that the limits on qualification for funding in the *United Parties* case had rendered it "virtually impossible" for any party but ZANU(PF) to obtain it. He then went on to hold that Sinn Féin had not proved *any* restriction on its members' ability to hold or express opinions or to receive or impart information. He did not attempt to spell out what level of restriction would constitute a breach of Article 10, but he was not in our view purporting to hold that a total barrier had to be established. In any event, it was not necessary for him to define the appropriate level of restriction: if, as he held, no restriction had been established, the appellant would be bound to fail whatever the proper criterion might be. We consider that the judge's reasons for so holding are soundly based. The basic object of the provision of PDGs was to give resources for undertaking policy formulation to parties whose Members of Parliament were too taken up with the daily work of Parliament to be able to afford the time required for that. If the Sinn Féin MPs do not take their seats (and would not, even if the oath were modified) their time is not taken up by Parliamentary activities to an extent which necessitates the provision of resources through the payment of PDGs. We accordingly agree with the judge's conclusion that there was no breach of Article 10(1) of the Convention.

[14] Article 3 of Protocol 1 to the Convention provides:

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

We find it extremely difficult to fit the complaint of the appellant in the present case into the framework of Article 3. As the ECtHR stated in *Mathieu-Mohin and Clerfayt v Belgium* (1987) 10 EHRR 1 at paragraph 54, it is directed to ensuring equality of treatment of citizens in the exercise of their right to vote and their right to stand for election. It was beyond question that the United Kingdom elections are free and are held by secret ballot and at reasonable intervals. The appellant's case focused on the question of conditions, it being submitted that the effect of the restriction on qualification for payment of PDGs inhibited the freedom of the electors to express their opinion by depriving them of the material which could be placed before them by well-directed policy research. We feel a good deal of doubt whether a restriction of the type in question in this appeal, if it were proved to have a deleterious effect on a particular political party, could be said to inhibit the free *expression* of the opinion of the people. They continue to be free to express their opinion, and the most the appellant can claim is that the restriction might be have, in the words of the court in the *United Parties* case, an adverse effect upon political advocacy. The matter is, however, concluded by the finding of the judge in paragraph 21 of his judgment:

> "[21] Again, no evidence was placed before the court that the inability of Sinn Féin to obtain a PDG had inhibited the party in developing policies for inclusion in its electoral manifesto, or has significantly interfered with its ability to do so."

We therefore agree with his conclusion that no breach of Article 3 of the First Protocol has been established.

[15] We turn then to consider the case made under Article 14 of the Convention, which provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 14 is not a generalised prohibition of discrimination, but its operation is limited to that which may take place in the securing of Convention rights.

It is therefore necessary first to identify the Convention rights or rights which may be concerned. It is well established that a breach of Article 14 may be established if there has been discrimination in the provision of rights secured by the Convention, even if there has been no breach of the substantive Articles. The criterion adopted in the Strasbourg jurisprudence is that for Article 14 to come into play the facts of the case must "fall within the ambit" of one or more Articles of the Convention (which includes the Articles of the First Protocol): see *Rasmussen v Denmark* (1985) 7 EHRR 371 at paragraph 29 of the judgment). The term has never been at all precisely defined, and we find it very difficult to determine what it is intended to cover. It has been stated in other decisions of the ECtHR that the test will be satisfied if the "subject-matter of the disadvantage complained of constitutes one of the modalities of the exercise of a right guaranteed" or the measures complained of are "linked to the exercise of a right guaranteed": see Lester & Pannick, *Human Rights Law and Practice,* paragraph 4.14.6. We cannot ourselves say that we have found these paraphrases enlightening. The word "nexus" has been propounded as a more appropriate test, but it is hardly more precise. Another suggestion has been made that there must be something akin to a breach of the primary prohibition contained in the first part of many substantive Articles, which is then saved from being an infringement of the Convention right by the operation of the qualification added by the later part of the Article.

[16] There might well be some argument, accordingly, whether the present case falls within the ambit of either Article 10 or of Article 3 of the First Protocol. We do not propose to enter into further discussion of the issue, however, since the respondent's counsel was prepared to concede that it came within the ambit of Article 3, and for present purposes we are willing to assume that it is within the ambit of one or other provision of the Convention. We shall therefore approach the issue on this basis and seek to determine whether there has been a breach of the requirements of Article 14. It was suggested by the appellant's counsel that the judge failed to consider Article 14 in conjunction with Article 10. He certainly did at paragraph 23 of his judgment expressly commence consideration of Article 3 of the First Protocol in conjunction with Article 14, and it is implicit from his subsequent reasoning that he was also considering Article 10. That reasoning is equally applicable to either Article 10 or Article 3 and equally conclusive of the issue in respect of either provision.

[17] It is necessary in order to establish discrimination in any field to identify comparators, that is to say, the persons or bodies by comparison with whom the complainant claims to have been treated less favourably: cf, for example, the sex discrimination and fair employment legislation. In *Wandsworth London Borough Council v Michalak* [2002] 4 All ER 1136 at paragraph 20 of his judgment Brooke LJ set out a method of approaching the issue:

> "**[20]** It appears to me that it will usually be convenient for a court, when invited to consider an art 14 issue, to approach its task in a structured way. For this purpose I adopt the structure suggested by Stephen Grosz, Jack Beatson QC and the late Peter Duffy QC in their book *Human Rights: The 1998 Act and the European Convention* (2000). If a court follows this model it should ask itself the four questions I set out below. If the answer to any of the four questions is No, then the claim is likely to fail, and it is in general unnecessary to proceed to the next question. These questions are: (i) Do the facts fall within the ambit of one or more of the substantive convention provisions (for the relevant convention rights, see s 1(1) of the 1998 Act)? (ii) If so, was there different treatment as respects that right between the complainant on the one hand and other persons put forward for comparison ('the chosen comparators') on the other? (iii) Were the chosen comparators in an analogous situation to the complainant's situation? (iv) If so, did the difference in treatment have an objective and reasonable justification: in other words, did it pursue a legitimate aim and did the differential treatment bear a reasonable relationship of proportionality to the aim sought to be achieved? The third test addresses the question whether the chosen comparators were in a sufficiently analogous situation to the complainant's situation for the different treatment to be relevant to the question whether the complainant's enjoyment of his convention right has been free from art 14 discrimination."

We respectfully agree with and adopt Brooke LJ's four questions, pointing out only that it is only in respect of the first three questions that the answer No will cause the claim to fail; if the court proceeds to question (iv) it is the answer Yes which will be fatal to the claim. Brooke LJ also emphasised that the questions formed only a framework and that there was a potential overlap between them, so that there may be a need for caution in treating the four questions as a series of hurdles to be surmounted in turn. In particular, as Mance LJ observed in *Nasser v United Bank of Kuwait* [2002] 1 All ER 401 at paragraph 56 of his judgment, the two issues represented by Brooke LJ's questions (iii) and (iv) tend to merge into each other.

[18] Mr Treacy submitted that the pool of comparators should be all political parties throughout the United Kingdom who, regardless of their political

outlook, command sufficient political support to elect two Members of Parliament to the House of Commons. Mr Morgan QC for the respondent countered by contending that since the object was to give this means of financial support to parties whose MPs' time was taken up with the activities involved in Parliamentary attendance, the comparators propounded by the appellant did not constitute the right group with which to make a comparison and that the appropriate pool of comparators consisted of parties with at least two elected MPs who take up their seats and participate in those activities. The judge at paragraph 40 of his judgment accepted the respondent's argument, stating:

> "These are the core activities of a democratic institution by means of which elected representatives directly participate in the democratic process and effectively represent the interests of their constituents. As I have already recorded in this judgment, Sinn Féin make use of certain facilities at Westminster but then so do those parties who take their seats and no evidence was submitted on behalf of the applicant to establish that her party was equally restricted by the daily demands of parliamentary life and, therefore, a valid comparator. The onus is upon the applicant to show that she falls within the relevant pool and this she has failed to achieve."

[19] We agree with the conclusion reached by the judge on this issue and consider that Brooke LJ's question (iii) should be answered No, which is fatal to the appellant's claim. We would also put our own conclusion in the alternative, that if question (iii) should be answered Yes, question (ii) (which might be logically posed after question (iii)) should receive a negative answer. If the appellant's counsel is right in his definition of the comparator group, then on a proper analysis we consider that Sinn Féin has not been treated differently from the other members of the group. It would have qualified for payment of a PDG if its MPs had taken their seats, the same condition which applied to the other members of the group, therefore there was not in our view a difference in treatment which amounts to discrimination.

[20] This conclusion is sufficient to dispose of the appeal, but since Brooke LJ's question (iv) was fully argued before us and the judge dealt with it in some detail in his judgment, we shall express our opinion briefly on it. The judge held in paragraph 32 of his judgment, in our view correctly, that it is for the respondent state authority to establish objective and reasonable justification for the discrimination, if this case is being made. At paragraph 31 he expressed some unease with the concept termed by Lord Hope of Craighead in *R v DPP, ex parte Kebilene* [2000] 2 AC 326 at 381 as deferring to the considered opinion of the legislature. When the concept is expressed in

the terms used by Lord Bingham of Cornhill in *Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2 All ER 97 at 114, giving weight to the decisions of a democratic legislature, it assumes its proper proportions and does not carry a connotation of the judiciary abandoning its independence of decision.

[21] In paragraphs 33 to 35 the judge set out a number of reasons why he did not consider that the respondent had sufficiently established a reasonable relationship of proportionality. We do not find it possible to agree with the conclusion to which he came following that examination. It seems to us essential to keep firmly in mind that the object of the provision of PDGs was to make available financial resources for policy making to parties whose MPs are too heavily occupied in the activities of daily political life in the House of Commons to be able to devote the time and energy required to this important part of political work. It was therefore provided in section 12 of the 2000 Act that in order for a party to qualify for PDGs its MPs must have taken the Parliamentary oath, the necessary preliminary to taking their seats. Requiring them in effect to have taken their seats is in our view the only workable criterion to apply in order to achieve the object of the legislation. This seems to us to be sufficient proof of the proportionality of the provision. We are not attracted to the judge's suggestion in paragraph 35(*b*) of his judgment that distinctions might be drawn between a party whose Members of Parliament busy themselves actively in the daily life of the House of Commons and one whose Members spend relatively little time there, for it appears to us to be unworkable and invidious. We therefore are of the opinion that the aim of the legislature in enacting section 12 of the 2000 Act was legitimate and that the method employed of achieving it was proportionate.

[22] For the reasons which we have given we accordingly dismiss the appeal.