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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

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

and

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

COGHLIN J

[1] The applicant in these proceedings is Ms Michelle Gildernew MP who is the Sinn Fein Member of Parliament for the constituency of Fermanagh/South Tyrone, having been elected by the voters of that constituency at the General Election of 2001. Ms Gildernew has been a member of the Sinn Fein political party for 16 years and is currently one of 4 members of that party to have been elected as Members of Parliament at Westminster. The relief claimed by Ms Gildernew has been set out in the Order 53 statement and is as follows:

> "(i) A Declaration under section 4 of the Human Rights Act 1998, that section 12 of the Political Parties, Elections and Referendums Act 2000 is incompatible with Article 10(1) of the European Convention of Human Rights read in conjunction with Article 14.
>
> (ii) A Declaration under section 4 of the Human Rights Act 1998, that section 12 of the Political Parties, Elections and Referendums Act 2000 is incompatible with Article 3 of protocol 1 to the European Convention of Human Rights read in conjunction with Article 14."

Mr Seamus Treacy QC and Ms Karen Quinlivan, appeared on behalf of the applicant while Mr Declan Morgan QC and Mr Paul Maguire were instructed on behalf of the respondent, the Lord Chancellor's Department. I am grateful to both sets of counsel for their well prepared skeleton arguments as well as for their oral submissions which were both carefully reasoned and succinct.

The relevant statutory provisions

[2] The Political Parties, Elections and Referendums Act 2000 ("the Act of 2000") came into force on 30th November 2000 and section 12 includes the following provision:

> "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 to an election which is a relevant election for the purposes of Part 2, 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
>
> *(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 remainder of section 12 provides for recommendations to be made to the Secretary of State by the Electoral Commission for the terms of a scheme for the making of policy development grants, which would include specifying the parties eligible for such grants and the basis upon which any such grants are to be allocated between the eligible parties.

[3] On 7th February 2002, the Secretary of State for Local Government, Transport and Regions laid before Parliament the Elections (Policy Development Grants Scheme) Order 2002, to come into force on 5th March 2002. On 13th February 2002, the Electoral Commission published draft recommendations for the basis upon which the grants should be allocated between a number of political parties. The

parties identified in this document were Labour, Conservative, Liberal Democrats, Scottish National, Plaid Cymru, Ulster Unionist, SDLP and Democratic Unionist Parties. The Electoral Commission also published draft conditions relating to the basis upon which policy development grants might be obtained and included the following under the heading "Eligible Expenditure";

> **Eligible Expenditure**
>
> Parties must use the grants solely for necessary expenditure incurred by them in meeting the costs incurred through developing policies for inclusion in any manifesto on the basis of which candidates for the represented registered party or the party itself seek election at the following elections:
>
> - Elections to the Westminster, Scottish or European Parliament;
> - Elections to the Welsh or Northern Ireland Assemblies;
> - Local Government elections in England, Wales and Scotland;
> - Local elections in Northern Ireland."

[4] In accordance with the powers conferred upon him by section 12 of the Act of 2000, the Secretary of State made the Elections (Policy Development Grants Scheme) Order 2002 ("the Order of 2002") which came into force on 5th March 2002. Schedule 2 to this Order identified the parties who were eligible to benefit from the grants and these corresponded with the parties identified by the Electoral Commission in their publication of 13th February 2002. The Order also set out detailed formulae devised for the purpose of allocating the available funds between the eligible parties. As a result of the application of these formulae, it appears that, in Northern Ireland, the Social Democratic and Labour Party ("the SDLP"), the Ulster Unionist Party ("the UUP") and the Democratic Unionist Party ("the DUP") were each granted £133,921.

[5] The Oath as set out in section 1 of the Parliamentary Oaths Act 1866 ("the 1866 Act"), amended by sections 2, 8 and 10 of the Promissory Oaths Act 1868 is as follows:

> "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."

It is this Oath that is referred to at section 12(1)*(b)(i)* of the Act of 2000.

[6] Section 4 of the Human Rights Act 1998 ("HRA") provides as follows:

> "4. Declaration of Incompatibility
>
> (1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention Right.
>
> (2) If the court is satisfied that the provision is incompatible with a Convention Right, it may make a declaration of that incompatibility."

[7] The following Articles of the European Convention on Human Rights and Fundamental Freedoms ("the Convention") are relied upon by the applicant:

> Article 10, Freedom of Expression
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent the State from acquiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are proscribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
>
> Article 14, Prohibition of Discrimination
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds 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.
>
> Protocol 1, Article 3, Right to Free Elections
>
> 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.

The background to the passage of section 12 of the Act of 2000

[8] This has been dealt with in some detail in the affidavit sworn on 3rd October 2002 by Ms Stella Pauline Mary Prosser, Head of Electoral Modernisation, Referendums and Political Parties Branch of the Lord Chancellor's Department. It seems that the initial proposal for the provision of Policy Development Grants ("PDG") arose from the concerns of the Neill Committee on Standards in Public Life which were expressed in the Committee's 5th Report entitled "Public Funding of Political Parties". Under the heading "Policy Development", the Committee stated, at paragraph 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 cost 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 party as to the opposition. Ministers become pre-occupied 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 principle tasks, which is to prepare for government and 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."

[9] In order to remedy this situation the Neill Committee proposed that a modest policy development fund should be established to enable the parties represented in the House of Commons to fulfil better their most vital functions.

[10] The Government's response to the Neill Committee proposal was contained in a White Paper published on 29th July 1999 entitled, "The Funding of Political Parties in the United Kingdom". The White Paper supported the Neill Committee proposal for the establishment of a Policy Development Fund and drew attention to clause 10 of the accompanying draft Bill which made provision for Policy Development Grants indicating that such grants would be paid to those political parties with at least two sitting Members of the House of Commons and that the grants would be administered by the Electoral Commission. In the course of her affidavit, Ms Prosser explained that the condition restricting the payment of PDGs to those parties with two sitting Members in the House of Commons, was adopted

by the Government in order to comply with the recommendation of the Neill Committee that such funding should be available for parties which would otherwise be prevented from developing long-term policies because of their commitment to the "day-to-day hurly-burly of the political agenda at Westminster". Ms Prosser exhibited an extract from the issue of Hansard for 14th February 2000, recording the debate which took place in relation to the proposed condition for the payment of PDGs.

Sinn Fein

[11] Sinn Fein is an Irish Republican party which is committed to the principle that Irish people have the right to self-determination and the party does not recognise the Sovereignty of the British monarch over any part of Ireland. The primary political objective of Sinn Fein is to bring British rule in Ireland to an end by achieving the unity and independence of Ireland as a Sovereign State. Ms Gildernew has explained in her affidavit that, as a consequence of this political objective, it has always been Sinn Fein party policy that members elected to the Parliament at Westminster would refuse to swear any oath or make any affirmation of allegiance to the British Monarch. Representatives of Sinn Fein who have been elected to serve as Members of Parliament at Westminster, have consistently refused to take any such oath or make any such affirmation. At paragraph 7 of her affidavit, Ms Gildernew stated:

> "Moreover, the Government was aware that in those circumstances Sinn Fein 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 Fein 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 Fein from eligibility for a Policy Development Grant, and as such is discriminatory and unlawful."

[12] Currently, four representatives of Sinn Fein have been elected to serve as Member of Parliament at Westminster, although none of these individuals have taken their seats. At the last election, Sinn Fein secured 21.7% of the overall vote in Northern Ireland and, apart from the four Westminster MPs, there were 18 Sinn Fein members of the Legislative Assembly for Northern Ireland and 108 local councillors. The party is also represented at the Irish Parliament by five TDs.

The submissions

[13] On behalf of the applicant, Mr Treacy QC advanced three submissions which I propose to deal with in turn.

Breach of Article 10

[14] Article 10 of the European Convention on Human Rights ("the Convention"), as far as it is relevant has been set out earlier in this judgment.

[15] Mr Treacy QC referred the court to Bowman v United Kingdom [1998] 26 EHRR 1 in which the Strasbourg Court, in the course of the judgment, stated at paragraph 3*(d)*:

> "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."

[16] Mr Treacy QC also referred the court to the decision in United Parties v Minister of Justice, Legal and Parliamentary Affairs & Others [1997] 3BHRC 16 and Association X, Y and Z v Federal Republic of Germany (Application No. 6850/74).

[17] There can be no doubt about the importance of the right enshrined in Article 10 for a democratic society, and in Castells v Spain [1992] 14 EHRR 445 the Strasbourg Court observed, at paragraph 42:

> "The Court recalls that the freedom of expression, enshrined in paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."

[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 Fein 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 Fein 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 Fein 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.

Breach of Article 3 of Protocol 1

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

> "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."

In Mathieu - Mohin and Clerfayt v Belgium [1987] 10 EHRR 1 the European Court of Human Rights confirmed that, despite the use of the phrase "the High Contracting Parties", Article 3 of Protocol 1 did give rise to individual rights but that these rights are not absolute and there was room for implied limitations. The court recognised that the Contracting States have a wide margin of appreciation, given that their legislation on these matters varies from place to place and from time to time and stated, at paragraph 54:

> "Electoral systems seek to fulfil objectives which are sometimes scarcely compatible with each other; on the one hand to reflect fairly faithfully the opinions of the people, and on the other, to channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will. In these circumstances, the phrase 'conditions which will ensure the free expression of the opinion of the people in the choice of the legislature', implies essentially – apart from freedom of expression (already protected under Article 10 of the Convention) –

> the principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election."

[20] The need to ensure equality of opportunity in relation to state subsidy of political parties, has been expressly recognised by the Parliamentary Assembly of the Council of Europe. In recommendation R.1516 (2001) Financing of Political Parties, the Assembly stated that:

> "Political parties should receive financial contributions from the State budget in order to prevent dependence on private donors and to guarantee equality of chances between political parties. State financial contributions should, on the one hand, be calculated in ratio to the political support which the parties enjoy, evaluated on objective criteria, such as the number of votes cast or the number of Parliamentary seats won, and on the other hand enable new parties to enter the political arena and to compete under fair conditions with the more well-established parties."

[21] Again, no evidence was placed before the court that the inability of Sinn Fein 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.

[22] On the other hand, Mr Morgan QC, on behalf of the respondent, accepted that the impugned legislation engaged the applicant's rights under Article 3 of Protocol 1 in conjunction with Article 14. In my view he was right to do so.

Article 14

[23] Article 14 of the Convention imposes a prohibition against discrimination and provides that:

> "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."

As the learned authors of "Human Rights Law and Practice" (Lester and Pannick Butterworths 1999) point out, at page 226, para 4.14.4:

> "The application of the Article does not, however, pre-suppose a breach of any of the substantive provisions of

> the Convention: such an interpretation would leave no practical function for Article 14. A measure which in itself conforms with the substantive Article of the Convention may violate Article 14 because it is discriminatory in nature."

Thus, even if no breach of either Article 10 or Article 3 of Protocol 1 has been established by the applicant, in consequence of the agreement between the parties that the facts of the case fall within the "ambit" of Article 3 of Protocol 1, it is necessary to consider the application of Article 14 in conjunction with Article 3 of Protocol 1. Article 5 of Protocol 1 specifically provides that:

> "As between the High Contracting Parties, the provisions of Article 1, 2, 3 and 4 of this Protocol shall be regarded as additional Articles to the Convention and all the provisions of the Convention shall apply accordingly."

[24] In Larkos v Cyprus [1999] 30 EHRR 597 the Strasbourg Court explained the rights protected by Article 14 in the following terms at paragraph 29:

> "29. As to the scope of the guarantee provided under Article 14, the court recalls that according to its established case law, a difference in treatment is discriminatory if 'it has no objective and reasonable justification', that is if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship or proportionality between the means employed and aims sought to be realised'. Moreover, the contracting states enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference treatment (see eg Gaygusuz v Austria [1996] 23 EHRr 364 at 381 (para 42))".

Provided a difference of treatment upon one of the prohibited grounds is established, it is not necessary for the applicant to prove that any particular injury has resulted from that difference in treatment, if the different treatment cannot subsequently be found to be justified and while the burden is on the applicant to establish a relevant difference in treatment, if that is achieved, the burden then shifts to the public authority to justify the difference (Darby v Sweden [1990] 13 EHRR 774).

[25] In the recently reported decision of Wandsworth LBC v Michalak [2002] 4 All ER 1136 Brooke LJ in the course of giving judgment in the Court of Appeal stated, at page 1144, that it would usually be convenient for a court considering an Article 14 issue to approach its task in a structured way by asking itself four questions:

(1) Do the facts fall within the ambit of one or more of the substantive Convention provisions?

(2) 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?

(3) Were the chosen comparators in an analogous situation to the complainant's situation?

(4) 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 learned Lord Justice suggested that, should the answer to any of the four questions be No, the claim would be likely to fail and it would, in general, be unnecessary to proceed to the next question. This approach has been subsequently cited with approval by Lord Woolf CJ in A, X and Y and others v Secretary of State for Home Department [2002] UK HRR 1141 at 1163.

Conclusions

[26] Both the Neill Report and the subsequent White Paper explained in detail the aim sought to be achieved by PDGs which was the provision of limited financial assistance in connection with the development of long-term policies for those parties whose resources were expended upon the day-to-day demands of political life at Westminster – the "day-to-day, hurly-burly of the political agenda" referred to in the course of the Hansard Debate. In my opinion this was a legitimate aim which was both reasonable and objectively justified, given the fact that there are over 100 registered political parties in the UK and the potential drain upon public finances.

[27] Therefore, it seems to me that the key issue in this case is whether the condition imposed by section 12(1) of the Political Parties, Elections and Referendums Act 2000, that to qualify for PDG a "represented" party must have at least 2 members of the House of Commons who have made and subscribed to the relevant oath is a proportionate means of achieving that legitimate end.

[28] Mr Morgan QC, on behalf of the respondent, emphasised that this was a piece of primary legislation passed by a democratic legislature and that the impugned condition had been the subject of a specific amendment debate in the House of Commons. In such circumstances, Mr Morgan QC submitted that the Strasbourg Court would have been willing to accord a wide "margin of appreciation" to Parliament and, in a domestic context, he drew the attention of the court to the decision of the Privy Council in Brown v Stott (Procurator Fiscal, Dunfermline) & Another [2001] 2 All ER 97 in which, in the course of giving judgment, Lord Bingham said at page 114:

> "Judicial recognition and assertion of the human rights defined in the Convention is not a substitute for the processes of democratic Government but a complement to them. While a national court does not accord the margin of appreciation recognised by the European Court as a supra-national Court, it will give weight to the decisions of a representative legislature and a democratic Government within the discretionary area of judgment accorded to those bodies (see Lester & Pannick Human Rights Law and Practice (1999) pp 73-76 (paras 3.20 – 3.26)."

[29] While there has been considerable academic and judicial discussion about the need for courts to observe a "discretionary area of judgment" or, to use the words of Lord Hope in R v DPP ex parte Kebilene [2000] 2AC 326 at 3.80 an area "within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose actual decision is said to be incompatible with the Convention", both before and since the coming into force of the HRA it seems to me that considerable caution should be observed by the court when considering the stage at which and the extent to which resort should be had to such a concept in relation to the domestic application of Convention rights.

[30] One of the reasons frequently advanced for the need to observe a significant degree of "judicial deference" is the risk that the court may be tempted to substitute its own decision for that of the democratically elected legislature. However, in my opinion, an equal if not greater risk, is that an excessive degree of deference paid simply to the identity of the decision-maker may inhibit the court in the performance of its primary function under the HRA in determining whether an act of a public authority is lawful. In Brown v Stott (op cit) Lord Steyn observed, at page 118:

> "And it is a basic premise of the Convention system that only an entirely neutral, impartial and independent judiciary can carry out the primary task of securing and enforcing Convention rights."

The independence of the courts is a fundamental component in the maintenance of the rule of law and it is to those independent courts that Parliament, in passing the HRA, has chosen to entrust the task of deciding whether a breach of any Convention right has been established. In relation to primary legislation, the constitutional balance has been specifically safeguarded by section 4 of the HRA which limits the court to making a declaration of incompatibility. In cases other than those which involve primary legislation, Parliament remains free to pass legislation nullifying or altering the effect of judicial decisions with which it does not agree.

[31] A further concern about affording a wide degree of discretion simply because of the identity of the decision-maker, is that such an approach has the potential to inhibit the degree of rigour to which the court will subject any justification for the decision which may be required under the HRA. The HRA is a constitutional statute which guarantees certain fundamental human rights and which specifically charges the courts with the responsibility of ensuring that proportionality is observed in respect of any proposed justification for breach. This applies particularly to those Convention rights that are expressly or impliedly regarded as "qualified". Unlike a number of other Convention rights, Article 14 does not contain a clause which expressly set out grounds of justification, but as I have already noted above, the Strasbourg jurisprudence provides that there must be a relationship of proportionality between any interference with the rights guaranteed under the Article and the aim pursued (Belgium Linguistic case (No.2) [1968] 1 EHRR 252: Darby v Sweden [1990] 13 EHRR 774).

[32] Some difference of opinion may be discerned among the textbook writers as to the onus in respect of establishing justification under Article 14. In "The Law of Human Rights" (Oxford 2000), Messrs Clayton and Tomlinson refer to the Belgium Linguistic Test identifying the two essential elements as a rational aim behind the differentiation and proportionality between the interference and the aim pursued and then express the view, at page 1,242, 17.102:

> "The aim must be established by the State, but the onus is on the applicant to disprove proportionality."

On the other hand in his work "European Human Rights Law" (Legal Action Group 1999) Mr Kier Starmer, at page 687, para 9.10, expresses the view that:

> "The burden is on the applicant to establish a difference in treatment; it then shifts to the State Authority in question to justify that difference."

In a section headed "Objective and Reasonable Justification for Differential Treatment" Lester and Pannick in "Human Rights Law and Practice" (Butterworth 1999) state, at para, 4.14.15, page 230;

> "A difference in treatment will held to be discriminatory (contrary to Article 14) if it has 'no objective and reasonable justification'. In order to prove such justification, the respondent Government must show that the difference in treatment pursues a 'legitimate aim', and that there is a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised."

At paragraph 4.14.17, the learned authors of this work point out that a claim of justification by a State may well fail if it is based upon generalisations without

objective evidence in support. In the circumstances, it seems to me that, where a prima facie breach of a Convention right, in this case discrimination contrary to Article 14, has been established it is a matter for the State in question to provide the appropriate justification of the means by which it seeks to obtain its chosen end.

[33] In examining the question as to whether the State has established a reasonable relationship of proportionality between the legitimate aim and the means to be employed for the purpose of achieving that aim, it seems to me that the following factors fall to be considered:

(i) Are the means suitable? – Are the means rationally connected with the legitimate aim in that they are not arbitrary, unfair or based on irrational considerations.

(ii) Are the means chosen necessary to accomplish the legitimate aim or is there a less restrictive alternative?

(iii) Has the State advanced "relevant and sufficient" reasons in support of the particular means chosen?

(iv) Do the means chosen impose an excessive degree of disadvantage upon the individual concerned?

[34] Depending upon the circumstances of the case, if appropriate, the decision-maker may be entitled to some degree of deference in relation to the issue of justification. For example, the court may wish to take into consideration the fact that the means have been chosen by a democratic legislature, although it is important to remember that the original authors of the Convention were conscious that minorities might need protection, not only against tyrants or military dictators, but also against over-weening majorities. Again, when considering whether a less restrictive means might have been employed, a court may wish to take into account the fact that the relevant subject matter gives rise to particular moral difficulties or is socially or economically complex and the legislature is seeking to balance potentially conflicting rights and interests. In such a case it might be easier to defer to a Parliamentary choice which has been reached after a detailed and careful consideration of all of the relevant circumstances.

[35] The material placed before the court by Mr Morgan QC, on behalf of the respondent in support of justification, consisted of the extract from the Neill Report, the subsequent White Paper, the extract from the Hansard Debate, the decision in McGuinness v United Kingdom (Application No. 39511/98) and the affidavit sworn by Ms Prosser. After carefully considering this material and taking into account the submissions of counsel, it seems to me that the following are factors of importance:

(a) The legitimate aim sought to be achieved by section 12 of the Political Parties, Elections and Referendums Act 2000, is the allocation of proportional funds to assist with the development of long-term political policies by those political parties with at least two members elected as representatives to the

House of Commons and restricted in their ability to develop such policies because of the demands made upon their time and resources by their activities at Westminster. The four elected representatives of Sinn Fein do not take their seats in the House of Commons or participate in the daily debate and business there but they do attend the Palace of Westminster and avail themselves of the facilities afforded to MPs including office accommodation, staff allowances, research facilities, travel allowances, broadcasting services and the facility of making informal contact and communication with other MPs in the interests of their constituents. No attempt whatever has been made by the respondent to ascertain whether involvement to this extent in the "day-to-day, hurly-burly of the political agenda" may restrict the party's ability to develop policies.

(b) Instead of attempting to measure in some way the actual degree of commitment to and involvement in political activity at Westminster by the parties represented there, the respondent has chosen to apply the criterion of taking the Oath required by the Parliamentary Oaths Act 1866, presumably, because failure to take the Oath ultimately prevents a Member from taking his or her seat. However, a party might well have two or more members who are prepared to swear the Oath but who spend relatively little time in the "hurly-burly" of daily political life in the House of Commons. No evidence was placed before the court to establish that such an exercise was impossible or impracticable and no discussion or consideration of this issue is contained in the Hansard excerpt or the affidavit of the respondent the sponsor of the legislation. Neither document contains any explanation as to how the Oath came to be chosen as the relevant criterion.

(c) In short, in relation to Section 12, there was no equivalent of the extensive parliamentary scrutiny which was referred to by Lord Woolf CJ in R(S) v Chief Constable of South Yorkshire Police [2002] 1 WLR 3223 at 3236.

(d) It seems clear from the excerpt from Hansard, that the decision of Parliament to impose the requirement to take the Oath was taken in the knowledge that Sinn Fein was the only party whose members would not comply with such a requirement as a matter of principle while it appears that at least some Members of the House of Commons, with republican, as distinct from Irish republican, beliefs, resent the requirement to take the Oath but are prepared to "tell a lie" to Parliament and take an Oath that they regard as "meaningless".

(e) Parliament itself appears to have recently reconsidered the significance of the Oath. On 14th May 1997, the Speaker of the House of Commons extended the requirement of taking the Oath to the services and facilities of the House, thereby excluding the Sinn Fein Members. However this decision has subsequently been reversed.

(*f*) The Neill Committee neither required nor suggested that PDGs should be restricted to those parties whose elected members were required to take the Oath.

(*g*) Apart from the fact that its outcome has subsequently been voluntarily reversed by Parliament itself, there seems to me to be many distinctions between this case and the case of McGuinness v UK. For example, McGuinness concerned the personal use of the services and facilities by the Sinn Fein representatives as opposed to the availability of funds to the political party for long-term policy development, McGuinness was concerned with Article 10 rather than Article 3 of the First Protocol and Article 14, in McGuinness the domestic court had found that the impugned action had been taken by the Speaker in exercise of his power to regulate the internal arrangements of the House of Commons, whereas this case concerns a piece of primary legislation, and, while the case was decided subsequent to the signing of the document in April 1998, there does not appear to have been any reference in McGuinness to the legitimacy accorded to the differing political aspirations in Northern Ireland by the signatories to the Belfast Agreement.

None of the above factors has persuaded me that this is a decision to which the court should extend any significant degree of deference in the circumstances.

[36] There is one further matter that it is important to mention before expressing my final conclusion, and that is the refusal by the Sinn Fein representatives to take up their seats at Westminster, quite apart from their rejection of the Oath of Allegiance. During the course of the proceedings I asked Mr Treacy QC to obtain specific instructions from Sinn Fein as to whether their representatives would be prepared to take up the seats at Westminster in the event of the removal of the requirement to take the Oath. The response was in the negative. I have no doubt that in the McGuinness case this attitude played a significant role in the decision of Strasbourg Court, which must have found such an apparent rejection of the opportunity to participate in a democratic institution difficult to comprehend, particularly in the context of the political ideals and values so resolutely indorsed by the original authors of the Convention.

[37] Neither in the original skeleton argument nor in the course of argument did the respondent make any submission that this refusal by Sinn Fein representatives to take up their seats at Westminster, quite apart from their objection to the Oath, was a factor which might prevent the comparator political parties from being in an analogous situation to Sinn Fein.

[38] Accordingly, after the conclusion of the hearing I offered an opportunity to both the applicant and the respondent to make further written submissions on this point and both chose to do so. In a submission dated 27th February 2003 Mr Morgan QC and Mr Maguire argued that the true prohibition upon the applicant's entitlement to participate in PDGs was the voluntary decision by Sinn Fein not to

participate in the activities in the chamber in Westminster and that, consequently, Sinn Fein was not a member of the appropriate pool and could not claim to be the victim of discrimination contrary to Article 14. Mr Treacy QC and Ms Quinlivan submitted a written response on 19th March 2003 which accepted that, regardless of the wording of the oath, the Sinn Fein MPs would not take up their seats, but maintained that the rationale behind this refusal flowed inexorably from their political outlook and the fact that they are an Irish Republican party.

[39] It is not altogether easy to understand the basis upon which the applicants seek to argue in their recent written submission that the refusal to take seats in Westminster … "falls within the same framework as a refusal to take an Oath and is an expression of their political beliefs and opinions." The refusal to take up seats at Westminster did not form any part of the applicant's Order 53 statement, affidavit or skeleton argument nor was it raised in oral submissions until the matter was specifically drawn to the attention of the applicant's counsel. Even after counsel confirmed that Sinn Fein would not take up their seats in the chamber, quite apart from the requirement to take the Oath, no further submission was advanced during the original hearing to the effect that such a refusal was "an expression of their political beliefs and opinions". It is not difficult to appreciate why an oath or affirmation of allegiance to the Queen might be inconsistent with the beliefs of a person holding republican views but, provided that no such oath was imposed, it is perhaps difficult to see why a candidate who held such views should not take up a seat within a democratic parliament and effectively represent the interests of the constituents, both republican and non republican. Further it is not altogether clear why in the absence of the oath of allegiance, the political opinions of those who support the Sinn Fein party should prohibit their elected representatives from actively pursuing the implementation of their republican ideals by the most obvious and direct democratic means, namely, participation in open debate and voting within the chamber at Westminster, particularly in circumstances in which their representatives do make extensive and no doubt productive use of the facilities at Westminster to which I have referred earlier in this judgment. Be that as it may, whatever the precise basis of such a policy may be, it is clearly one to which the applicant and her party are perfectly entitled to subscribe.

[40] In the written submission of 19 March 2003 the applicant contends that the appropriate pool of comparators is "all political parties, throughout the United Kingdom who, regardless of their political outlook, command sufficient political support to elect two MPs to the House of Commons." I reject this submission. As I have indicated in this judgment I have reached the view that accepting that funding is not available upon an unrestricted basis, the decision to provide PDGs for those parties which were limited in the development of their policies by the necessity for their members to participate in the daily activities in the chamber was both legitimate and reasonable. In such circumstances, I am satisfied that the appropriate pool of comparators consists of those parties with at least two elected members who take up their seats and take part in such activities. 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 Fein 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. In my view, in the circumstances of this particular case, it makes no difference that such failure is a consequence of political policy.

[41] For the reasons which I set out above I have reached the conclusion that Sinn Fein do not come within the relevant pool of comparators and, consequently, are not in an analogous situation to those parties to whom PDGs have been awarded. Therefore I would answer question 3 posed by Brooke LJ in the Michalak case in the negative. If I am wrong about this conclusion, again for the reasons set out above, I would have been prepared to hold that the respondent has failed to discharge the burden of establishing a reasonable relationship of proportionality between the legitimate aim and the means, namely, the Oath and, in such circumstances, I would have been prepared to make a declaration of incompatibility.

[42] Accordingly, the application will be dismissed.