

Judicial Communications Office

29 March 2019

COURT DISMISSES APPEAL BY JOLENE BUNTING

Summary of Judgment

Mr Justice Maguire, sitting today in the High Court in Belfast, dismissed an appeal by Jolene Bunting against a decision to suspend her from Belfast City Council pending the outcome of an investigation into complaints which had been made against her.

Jolene Bunting (“the applicant”) was elected to Belfast City Council (“the Council”) in 2014. A number of complaints were made to the Local Government Commissioner for Standards by members of the Council, the Chief Executive Officer of the Council and members of the public about the following matters:

- Comments she made on a video published on 13 December 2017 when she was pictured outside the Belfast Islamic Centre. The applicant and Ms Jayda Fransen, Deputy Leader of the far right political group, Britain First, both spoke of their opposition to the growth of Islam in Belfast;
- The applicant’s use of the Council Chamber on 9 January 2018 when she appeared to facilitate the filming of Ms Fransen sitting in the Lord Mayor’s chair and wearing the ceremonial robes provided for councillors;
- Comments made by the applicant during Council meetings on 3 January and 9 April 2018;
- The applicant’s participation in a rally organised in conjunction with Britain First on 6 August 2017 and subsequent interviews in the News Letter and on Facebook;
- A social media post on 3 May 2018 which depicted a cartoon character dressed in an Irish Tricolour and wearing a hat bearing the phrase “Please be patient I have Famine”.

On 15 September 2018, the Acting Local Government Commissioner for Standards (“the Acting Commissioner”) concluded in his interim report that there was *prima facie* evidence that she had breached the Northern Ireland Local Government Code of Conduct for Councillors (“the Code”). In the Commissioner’s view the alleged breach of the Code justified the step of suspending the applicant from the Council for four months pending the outcome of an on-going investigation into complaints which had been made against her. The Commissioner’s report considered whether the applicant had breached specific rules of the Code and addressed the question of the imposition of interim sanctions pending the publication of the full report.

The Acting Commissioner concluded that it was in the public interest to suspend the application immediately given the serious nature of the allegations and that the applicant had demonstrated hostility towards specific groups, the unprecedented number of complaints, the repetitive and escalated nature of the conduct and the impact that the alleged breaches have had on certain groups within the community. The Commissioner also concluded that there could be further disruption to the functioning of the Council and a loss of public confidence in the Council if the applicant continued in her role as a Councillor whilst the investigations are ongoing. He also believed it was highly probable that the Councillor would engage in further activity which could be the source of additional similar complaints and that this would impact on the effective and efficient completion of

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the investigation. The Commissioner recommended suspension for four months. The applicant sought leave to appeal against that decision.

Statutory Framework

Section 60(9) of the Local Government Act (Northern Ireland) 2014 (“the 2014 Act”) provides for an appeal to the High Court against an interim decision to suspend a councillor or the length of the suspension. Mr Justice Maguire, delivering the judgment of the High Court (“the Court”) said that two matters arise in respect of this appeal: whether it is necessary for the Court to have regard to whether the tests set out in section 60(1)¹ are met in order to determine whether a suspension should be imposed and/or its length and whether an appeal under section 60(9) is sufficiently wide as to embrace issues about whether there has been any breach of Article 10 of the European Convention on Human Rights (“ECHR”).

The Court said that section 60(1) appears to be a gateway provision and is the means of access to any possible interim suspension. It said it would be unattractive to seek to divorce any suspension from a discussion of the gateway provisions which allow for it. Secondly the Court said it was difficult to see how it could ignore Article 10 as it is obliged, as a public authority, to comply with the Human Rights Act 1998. The Court said it was therefore willing to consider the Article 10 issues which arise within the overall context of this appeal.

Article 10 of the ECHR

Article 10 provides that everyone has the right to freedom of expressions but the exercise of those freedoms may be subject to such restrictions or penalties as are prescribed by law and are necessary in a democratic society for the protection of reputation or rights of others.

At paragraphs [41] - [44] the Court set out case law by which it is recognised that what is said by elected politicians is subject to “enhanced protection” under Article 10. This is because freedom of expression is especially important for an elected representative of the people. The Court referred to examples where it has been established that “political speech” is to be widely defined embracing communications on matters of public interest generally and that freedom of expression for politicians includes the right to say things that “right thinking people” consider dangerous or irresponsible or which shock or disturb.

The Court’s Assessment

The Court initially assessed the applicant’s case by utilising the tests set out at section 60(1) of the 2014 Act and left to one side the issues of ECHR compliance.

The **first test** under section 60(1) was to consider whether there has been assembled *prima facie* evidence that the applicant has failed to comply with the Code. It noted that councillors should act in a way that is conducive to promoting good relations. They should not conduct themselves in a

¹ Section 60(1) provides that where the *prima facie* evidence is such that it appears to the Commissioner (a) that the person who is the subject of an interim report has failed to comply with the code of conduct; (b) that the nature of that failure is such as to be likely to lead to disqualification; and (c) that it is in the public interest to suspend or partially suspend that person immediately, the Commissioner may give notice to the clerk of the council concerned that that person is suspended or partially suspended from being a councillor for such period and in such way as may be specified in the notice.

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manner which could reasonably be regarded as bringing their position as a councillor, or their council, into disrepute; they should maintain and strengthen public trust and confidence in the integrity of the council; they should be aware of the council's responsibilities under equality legislation; they should show respect and consideration to others; they should not harass any person; they should not attempt to use their position as a councillor improperly and they should not use the resources of their council improperly for political or private purposes.

The Court noted that the Acting Commissioner had found a *prima facie* breach in the following areas:

- The *meme* was sectarian or racist in nature;
- The applicant's associations with Britain First and her apparent support for the views of Ms Fransen raised questions about her conduct as a councillor;
- The events involving the videoing of an interview with Ms Fransen when she was wearing a councillor's gown and seated in the Lord Mayor's seat could be viewed *prima facie* as conduct that would breach the Code.

The Court was of the opinion that the complaints upon which the Acting Commissioner was adjudicating disclose *prima facie* evidence of potential breaches of the Code and that it could see no basis upon which it should not accept the correctness of the conclusion on the first test.

The **second test** is concerned with whether there is *prima facie* evidence that the nature of any breach of the Code is such as to be likely to lead to disqualification. The Court commented that suspension should only be used in a case where the nature of the failure supported by the *prima facie* evidence is such that it would be likely to attract the severest sanction if the failure to comply with the Code was demonstrated at the end of the process. It said it was clear that the Commissioner regarded this case as satisfying the likely disqualification test and considered whether he was wrong to reach this conclusion.

The Court noted that the Acting Commissioner was influenced by factors including the seriousness of the potential breaches; the allegation that the applicant misused council resources; the pre-planning which appeared to have preceded the failures giving rise to the breaches of the Code; the concern that the applicant had brought the Council into disrepute; the fear that similar breaches may occur in the future; and the applicant's apparent failure to heed advice offered to her by the Chief Executive Officer. The Court said it did not view the Acting Commissioner's conclusion as wrong.

The **third test** requires a view to be taken as to whether it is in the public interest to suspend or partially suspend a person immediately in an interim adjudication situation. The Court said it was clear that the Acting Commissioner took into account the impact on the applicant and weighed that against the gravity of the allegations and complaints in this case, which he saw as leading to a loss of confidence in the council and the erosion of the maintenance of public confidence more generally. In the Acting Commissioner's view, these latter factors outweighed any personal or financial impact on the applicant. The Court said it was satisfied that the Acting Commissioner was not wrong to take this view

The Court acknowledged that even in cases where the three tests when applied all point in the direction of imposing a suspension or partial suspension, there still remains an area of discretion available to the Acting Commissioner. The Court, however, said that on the facts of this case it was unable to identify any sound reason why a suspension should not be imposed.

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Article 10 ECHR Compliance

The Court said the Article 10 issues arise because the alleged breaches of the Code raise issues of political expression on the part of an elected councillor and may result in a sanction which involves the suspension from elected office pending the final determination of the complaints. In the context of Article 10, the court should proceed on the basis that it ought to consider each complaint separately with a view to determining whether there has been any breach of it. The Court said it should therefore consider the following issues:

- Does the applicant's alleged behaviour attract "enhanced protection" in terms of freedom of speech?
- If it does, is there a *prima facie* breach of Article 10?
- If there is, can the interference be justified?
- Is the sanction of suspension a proportionate response at this stage?

The notion of enhanced protection is linked to the question of whether or not the behaviour at issue can be said to consist of political expression. The authorities make clear that political expression is to be viewed as a broad concept which extends generally to matters of public concern and the court should be slow to interpret narrowly or in an unduly restrictive way. The Court considered each of the complaints. It said it was satisfied that the bulk of the behaviour had sufficient connection with the applicant's role as a councillor and her contribution to issues of public debate to come within the category of enhanced protection. The Court noted, however, that the major exception to this related to the *meme* which it said was not easy to view as a coherent contribution to national or local public debate. It said the reference to the Famine appears to be directed to past history rather than any form of contemporaneous comment, though the Court acknowledge that the overall effect was nonetheless misguided and offensive. It commented that on proper analysis, the *meme* could be viewed as "simply abusive and reflective of a warped outlook and mind-set" and not disclosing any true contribution to political discourse. The Court considered that the *meme* therefore fell outside the enhanced protection associated with Article 10 and that accordingly a suspension in connection with it did not breach Article 10.

The Court concluded that the subject matter of the bulk of the complaints were within the sphere of enhanced protection and there was therefore an irresistible argument that the suspension was *prima facie* an interference with the terms of Article 10 as it had immediate political consequences for the ability of the applicant to serve her constituents and for the electors who elected her. The next issue for the Court was whether the restriction responds to a pressing social need and is proportionate to the legitimate aim being pursued. To assess this the Court carried out an audit of the complaints and considered relevant case law from the ECtHR. It said it was ultimately a matter of judgment on the part of the Court as to whether the facts of individual complaints pass over the line between protected political expression and expression which properly may be controlled by measures laid down by the State (such as the Code) and which include provision for interim sanctions.

The Court said it was satisfied that this line has been passed in respect of the following complaints:

- The applicant's role in co-organising a rally in Belfast on 6 August 2017 in conjunction with Britain First (in respect of which Ms Fransen is facing criminal charges) and her comments in this context. The Court's view was that this speech, with which the applicant has publicly associated herself, went well beyond the appropriate bounds of protected speech and involved language which was offensive to those who profess the Islamic faith. It considered

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that an interim sanction based on the applicant's public alignment with what had been said would be likely to be necessary in a democratic society and proportionate, as a protection against the same occurring in future, as a clear signal of public disapproval of a councillor who seeks to act in this way in future.

- The video in which the applicant can be seen with Ms Fransen speaking outside the Belfast Islamic Centre on 13 December 2017 which the Court said was designed to "instil public revulsion against those of Islamic faith". The Court said the comments were "designed to instil public revulsion of those of Islamic faith" and "exceeded the bounds of protected speech".

The Court was unpersuaded that the seriousness of the myriad of other complaints merited a conclusion such as to cause the applicant to lose the protection she enjoys in respect of political speech but said this should not be seen in any way that it was approving of the behaviour or sentiments expressed. These complaints included the inappropriate use of Council facilities:

"While others may be revolted by what the applicant has said and done in respect of these incidents, the Court reminds itself of the width of the ability of an elected councillor to engage in behaviour which shocks or annoys or appears dangerous or irresponsible. The issue is to be determined by the consistency of official action with her right to freedom of expression and not by the standard of whether the applicant's behaviour would diminish public confidence in her behaviour as a councillor or would be damaging to the ethics regime represented by the Code. It follows from the above that the Court finds itself in disagreement with the broader ways in which the Acting Commissioner's report had dealt with the matter of the applicant's Convention rights."

The Court then considered whether the interim sanction in this case was disproportionate. It said that given its findings, an interim sanction in the form of a suspension could properly be put in place as it had found that the seriousness of the applicant's behaviour may merit such a reaction. It said that interim measures should be about ensuring public confidence in the operation of the complaints system and preventing, prospectively, abuse of the system from recurring. The Court added that interim measures should only be resorted to when necessary and not as a knee jerk reaction or in every case. Likewise the term of any suspension should be tailored to meet the needs of the individual case.

The Court said it was clear that the Acting Commissioner was anxious to balance the factors for and against a period of suspension, a balance which he ultimately considered favoured the suspension which was imposed. It said, however, that it had broached the matter with a somewhat different focus in view of its conclusions as to the human rights dimension. It found, however, that a suspension on an interim basis in this case was merited:

"The matters of which there existed *prima facie* proof, and which survive an Article 10 analysis, were and are serious matters, which raise grave issues about the extent to which confidence in local government institutions in Northern Ireland may, if appropriate steps are not taken, be compromised. They also raise issues about putting in place a suitable regime for preventing behaviour of a similar nature happening again. The Court sees no reason in this case why a suitable period of suspension should not be put in place and it will endorse the view that there should be such a period. The Court believes that such a period should be one of four months in this case taking into account the full range of relevant factors. In particular, this period,

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properly in the court's view and should be seen as reflecting the seriousness of the matter at issue and the need to provide a level of deterrence pending the outcome of the full investigation".

Conclusion

The Court dismissed the appeal.

ENDS

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