



OUTER HOUSE, COURT OF SESSION

[2018] CSOH 68

P507/18

OPINION OF LORD CLARK

In the Petition of

ASIM KHAN

Petitioner

against

SCOTTISH EXECUTIVE COMMITTEE OF THE SCOTTISH LABOUR PARTY

Respondent

**Petitioner:** Dunlop QC, Campbell; MBS Solicitors (for Miller, Beckett and Jackson)

**Respondents:** Brodie QC; Jones Whyte Law

19 June 2018

**Introduction**

[1] In this petition for judicial review, the petitioner is a member of the Scottish Labour Party (“the SLP”). He is one of four candidates who are eligible for selection as the SLP Westminster candidate for the constituency of Glasgow South West (“the constituency”). The first respondent is the Scottish Executive Committee (“the SEC”) of the SLP. The second respondent is the representative of the Selection Committee for the constituency. The petitioner seeks reduction of a decision made by the second respondent and a representative of the first respondent to set the “freeze date” for the constituency candidate selection process as being 21 March 2018.

[2] The freeze date is the date which is used to determine the eligibility of members of the SLP within the constituency to vote in the selection of the Westminster candidate for the constituency. Members of the SLP in the constituency require to have been members for six months prior to the freeze date in order to be eligible to vote. This creates a disincentive for supporters of a candidate to join the SLP shortly prior to any vote for the sole purpose of voting in the candidate selection process. The petitioner contended that the correct freeze date was 4 April 2018. It was explained that at least 84 members, but possibly more than 130 members, of the constituency were ineligible to vote in the selection process if the freeze date was 21 March 2018, but were eligible to vote if the freeze date was 4 April 2018.

[3] The petition called before me on 22 May 2018 on the matter of permission to proceed with the application for judicial review and on the petitioner's motion for interim interdict against the respondents from conducting the vote in the selection process with a freeze date earlier than 4 April 2018. The vote was due to take place on 30 May 2018. In the circumstances, I acceded to parties' request that I should hear the submissions on the motion for interim interdict and then give my decision on that matter and the question of permission to proceed. Following upon the hearing, I granted permission to proceed and granted the motion for interim interdict. I gave oral reasons for my decision, which I indicated would be expanded upon in this written opinion.

### **Submissions for the Petitioner**

[4] The submissions for the petitioner can be summarised as follows. The correct freeze date was 4 April 2018 and it was altered unlawfully. The numbers affected by the freeze date were significant, as the total number in the constituency electorate of SLP members was in the region of 600 people. The key issues were: (i) when did the first meeting of the

Selection Committee take place?; and (ii) what was the trigger for the establishment of the freeze date in terms of the relevant rules? The rules made provision for alteration of the freeze date in special circumstances, but this had never been presented by the respondents as the reason for the change in freeze date. Candidates were to be selected in accordance with the rules set by the SLP. Reference was made to the SLP's "Selection Procedures Summary Document for UK Parliamentary Constituency Candidates". Among other things, this referred to the shortlisting of constituency candidates being carried out by a Selection Committee, which required to be gender balanced. There required to be an SEC representative to supervise the process of selection. The Selection Committee is appointed by the Executive Committees of the Constituency Labour Parties ("CLPs") which form part of the constituency. The Selection Committee sets the timetable for the selection process, receives self-nomination CVs, and draws up a long list and short list of candidates. The Selection Committee appoints a Procedures Secretary to administer the procedure. The document sets out in a table the order of events. It states that the Selection Committee meets to agree the timetable and any other matters relating to the selection procedure. This is described as the formal start of the procedure and the freeze date for membership.

Paragraph 6D of the document states:

"The freeze date for determining eligible members shall normally be the date on which the Selection Committee meets to agree the timetable.

The SEC Representative or the SEC may require an alternative freeze date if there are special circumstances."

[5] A meeting took place on 21 March 2018, but that was not a meeting of the Selection Committee. Even if it was, no timetable was agreed at that meeting and so it did not trigger the freeze date. In any event, the freeze date of 4 April 2018 which had been set could only be altered in special circumstances and it had never been suggested on the part of the

respondents that this was the basis for changing the freeze date. The SLP's document "Selection Procedures - Appointing the Selection Committee" explained that at the meeting of the CLP Executive Committees they had to decide the date of the first meeting of the Selection Committee. At the first meeting of the Selection Committee it had to elect a Procedures Secretary and agree a timetable for the Parliamentary candidate election. The document further stated that the date of the first Selection Committee meeting would be the freeze date for Parliamentary candidate selection. According to a further document, the Pollok CLP Standing Orders, formal notice of all meetings was to be sent, to those entitled to attend, seven days prior to the meeting. In the present case, a decision was made on 19 March 2018 for there to be a meeting of the Executive Committee of Pollok CLP two days later and all members of Pollok CLP were notified of the meeting by email. None of the members of Glasgow Southside CLP, which forms part of the constituency, were invited by email. Some were contacted on the 20 March, but only one person from Glasgow Southside CLP was able to attend the meeting on 21 March. The minutes of the meeting on 21 March were headed "Pollok CLP Executive Meeting". That meeting could not be said to be a properly convened meeting of the Executive Committees of Pollok CLP and Glasgow Southside CLP. Furthermore, it purported to select nine members of the Selection Committee, four female and five male. Thus, it was not a gender balanced Selection Committee. One of the nine people was not in fact in attendance on 21 March. At the meeting, it was expressly discussed and agreed that other persons required to be added to the Selection Committee, among other things to achieve gender balance. No representative of the SEC was present at the meeting on 21 March. It was understood by at least some attendees that the attendance of such a representative was necessary in order for the meeting to be a meeting of the Selection Committee. No Procedures Secretary was appointed at the

meeting on 21 March. No timetable was discussed, let alone agreed, at the meeting.

However, the meeting expressly agreed that the first meeting of the Selection Committee would be in April 2018.

[6] At the meeting on 4 April 2018, a gender balanced Selection Committee comprising twelve people was appointed. At this meeting, an individual (“ZH”) was appointed as the Procedures Secretary of the Selection Committee. He completed the SLP *pro forma* document which set out the key dates in the timetable. It stated that on 4 April 2018 the Selection Committee met to agree the timetable and any other matters relating to the selection procedure. Reference was made to the affidavit of ZH, as to what he and others understood regarding the meeting of 21 March and the meeting of 4 April and in particular that the latter, and not the former, was the first meeting of the Selection Committee.

[7] On 5 May 2018, the representative of the SEC sent an email to the petitioner informing him that following independent legal advice from a QC, the beginning of the selection process was 21 March. The petitioner sought an explanation of why this was the freeze date and, in a further email dated 10 May 2018, the representative explained that the decision made by the SEC as to the amended freeze date was “underpinned by the independent legal advice provided to the Labour Party.” The matters raised by the petitioner in querying the position had, it was said, all been considered by the QC. There was nothing further to add. There was no mention of special circumstances as having justified the alteration of the freeze date.

[8] The authorities made clear that the rules and regulations of an unincorporated association have contractual effect: *Crocket v Tantallon Golf Club* 2005 SLT 663; *Evangelou v McNicol* [2016] EWCA Civ 817; *Foster v McNicol* [2016] EWHC 1966 (QB). These rules and regulations were to be construed in the same manner as applies in respect of contracts in

general. The decision complained of was not reached in accordance with the rules. It involved the view being reached by the SEC that the meeting which was expressly agreed not to be the first meeting of the Selection Committee was actually its first meeting. On 21 March 2018, the Selection Committee was not yet constituted, its chair not having been appointed, those present did not meet the requirements of gender balance, no properly constituted meeting of the Executive Committees of the CLPs charged with selection of the Selection Committee had occurred, and the meeting did not do what the rules required a Selection Committee to do at its first meeting. It defied logic to say that the meeting on 21 March 2018 was a meeting of the Selection Committee. The meeting of the properly constituted Selection Committee on 4 April 2018 took the required steps, including fixing a timetable and appointing a Procedures Secretary. In relation to the reference in the respondents' Answers to the existence of special circumstances, the authorities made clear that it was not possible for a decision-maker to give new reasons for the decision: *R (on the application of Alletta Nash) v Chelsea College of Art and Design* 2001 EWHC Admin 538. The reliance on special circumstances constituted a new reason. Having never been mentioned as the basis for the decision, the petitioner had not come to court prepared to deal with this issue at the hearing.

[9] The petitioner had a strong *prima facie* case. Issues of balance of convenience were less important in a situation in which the actings complained of were plainly unlawful. If, however, the court was to consider the balance of convenience, it was clear that many of the supporters of the petitioner would cease to be eligible to vote in the selection process if interim interdict was not granted.

### **Submissions for the Respondents**

[10] The submissions for the respondents can be summarised as follows. It was accepted that the rules and guidance of the SLP, referred to on behalf of the petitioner, had contractual effect as between the members and the party itself, as represented by the SEC. However, the Selection Procedures Summary Document made it clear, in paragraph 6D, that part of the contractual framework was the giving of a discretion to the SEC Representative or the SEC to require an alternative freeze date where there were special circumstances. In the present case there were special circumstances. While it was accepted that the freeze date of 4 April 2018 had been fixed and had been altered to 21 March 2018, it was nonetheless the case, as a matter of fact and law, that the meeting of 21 March 2018 was the first meeting of the Selection Committee. Nothing in terms of specific acts was required for the purposes of defining a meeting as being a meeting of the Selection Committee. The fact that a timetable was set on 4 April and the fact that other steps were taken at that meeting were irrelevant.

[11] However, as the respondents relied upon the exercise of discretion in paragraph 6D for the purpose of altering the freeze date, it was not necessary to establish that the meeting of 21 March 2018 was, as a matter of fact and law, the first meeting of the Selection Committee. The exercise of that discretion was expressly permitted under the contractual rules and hence was *intra vires* and unchallengeable on the grounds of irrationality. The documents made clear that the SLP gave the SEC oversight of the selection process for selection of Westminster constituency candidates. This included, as the SLP 's Rules and Standing Orders document made clear, strategic direction.

[12] In respect of the freeze date of 4 April 2018, issues were raised by members as to whether in fact the correct freeze date was 21 March 2018, which some contended was the position. It had also been contended to the SEC that the Executive Committees of the CLPs

did appoint the Selection Committee on 21 March and that in accordance with the guidance the Selection Committee went on to meet on that day. In terms of paragraph 6D of the Selection Procedures Summary Document, it was clear that the word “normally” illustrated that the fixing of the timetable was not determinative of whether the Selection Committee had or had not met. Other aspects of the documentation also made that point clear. The scope of the power to alter the freeze date was broad. Reference was made to *Evangelou v McNicol*. Special circumstances required to exist, but here there were special circumstances. These were that queries had been raised as to the correct freeze date and that legal advice was sought and given and which stated that 21 March 2018 was the correct freeze date. In all of these circumstances the SEC exercised the discretion given to it in terms of the contractual rules and altered the freeze date to 21 March 2018. It was not essential as a matter of fact or law that there had been a first meeting of the Selection Committee on 21 March 2018. The court should be very careful to review the exercise of that discretion. Reference was made to *Brown v Executive Committee of the Edinburgh District Labour Party* 1995 SLT 985 and *Nattrass v UK Independence Party* [2013] EWHC 3017 (Ch). The power to alter the freeze date had been exercised in a rational manner. The petitioner had no *prima facie* case. In relation to the balance of convenience, the selection process was due to be completed on 30 May 2018. Any delay was detrimental to party members and selection candidates. If interim interdict was granted it was likely to be necessary that the whole process would require to start again. There would also be cost implications. Members who were ineligible to vote based on the freeze date of 21 March 2018 would require to be contacted and given the opportunity to vote. Issues would arise as to postal votes.

## Decision and reasons

[14] Parties were in agreement that the provisions in the SLP documents referred to had contractual effect. Paragraph 6D of the SLP's Selection Procedures Summary Document for UK Parliamentary Constituency Candidates states:

"The freeze date for determining eligible members shall normally be the date on which the Selection Committee meets to agree the timetable.

The SEC Representative or the SEC may require an alternative freeze date if there are special circumstances."

Giving these words their natural and ordinary meaning, there is a normal freeze date, which can be altered. The normal freeze date (the date when the Selection Committee met to agree the timetable) can be altered to an alternative date if there are special circumstances. It seems to me that the concept of the freeze date coinciding with the setting of the timetable makes sound common sense; it is the start of the selection process and the various stages in the timetable need to be identified at that point. I do not regard there as being any dissonance between that position and what is set out in the SLP's document Selection Procedures - Appointing the Selection Committee, which also refers to the first meeting of the Selection Committee and states that:

"During this meeting the Selection Committee need to:

- Elect a Procedures Secretary from among the Selection Committee.
- Agree a timetable for the Parliamentary Candidate selection.

The date of this first Selection Committee meeting will be the freeze date..."

The terms of this second document are therefore consistent with those of the first, the Selection Procedures Summary Document. In any event, this second document is for the purposes of guidance to CLPs and it seems to me to be therefore of lesser status for present purposes than the first document. Should there exist, against my view expressed above, any

dissonance between the two documents, I conclude that the primary document is the first. The date when the Selection Committee met to agree the timetable was 4 April 2018. This was taken by the Selection Committee to be the freeze date and reported as such to the SEC.

[15] The respondents rely upon that freeze date having been altered because of special circumstances. The documentary productions and, more importantly, the Answers to the petition (in particular Answer 16) explain that the SEC had obtained a formal request for a ruling as to whether the freeze date was 21 March or 4 April 2018. The SEC sought and obtained an opinion from senior counsel as to the interpretation of the relevant rules and guidance and their application to the circumstances. The opinion was to the effect that on the facts a meeting of the Selection Committee was properly convened on 21 March 2018 and that meeting had appointed a Procedures Secretary, ZH. On behalf of the SEC, it was stated to the petitioner, apparently based upon the opinion, that properly construed the relevant rules and guidance provided that the freeze date is the date of the first meeting of the selection committee, irrespective of whether a timetable for the process was agreed at that meeting.

[16] In my view, the basis upon which the decision to fix 21 March 2018 as the freeze date proceeded was wrong in fact and in law. I make clear that I am not criticising the terms of the legal advice; it has not been produced to the court, nor has the material upon which it was based. In relation to matters of fact, it is disputed that ZH was appointed as Procedures Secretary on 21 March 2018, but the legal advice apparently proceeded upon the basis that he was so appointed. The minutes of the meeting make no reference to a Procedures Secretary having been appointed. In his affidavit, ZH states that the meeting on 21 March deliberately did not appoint a Procedures Secretary and that he was appointed to that position at the meeting on 4 April. Accordingly, in view of this dispute, the reliance placed

on the fact of a Procedures Secretary having been appointed on 21 March was unfounded. Moreover, it is also clear from the minutes of the meeting of 21 March 2018 that the persons present expressly agreed to fix the date of the first meeting of the Selection Committee to be on 4 April 2018. There was no explanation given as to how this decision at the 21 March meeting could fit with that meeting being the first meeting of the Selection Committee, as the legal advice apparently concluded. I accept of course that the subjective views of those (or at least what appears to be a majority of those) present at the meeting on 21 March as to the nature and status of that meeting, as explained in the affidavit of ZH, are not directly relevant, but I merely observe that their understanding and actions do fit with the view that this was not the first meeting of the Selection Committee.

[17] Furthermore, turning to the legal position, it is not correct, in light of the meaning of the words in paragraph 6D, to say, as the legal advice is reported to have conveyed, that the relevant rules and guidance provide that the freeze date is the date of the first meeting of the Selection Committee, irrespective of whether a timetable for the process is agreed at that meeting. What the key document provides is that the normal freeze date – which is the date when the timetable is fixed – can be altered in special circumstances. In any event, as I have said, no explanation was given as to how the first meeting of the Selection Committee could in fact have been on 21 March when that meeting expressly fixed the first meeting to be in April.

[18] The decision to alter the freeze date therefore proceeded on an erroneous factual basis (that on 21 March 2018 ZH had been appointed Procedures Secretary and that the meeting on that date was the first meeting of the Selection Committee) and on an erroneous legal basis (that the meeting of the Selection Committee did not require to agree a timetable in order for the date of that meeting to be the freeze date).

[19] I accept that the case law provides some support for the proposition that the court should be slow to interfere in matters of selection in a political party: *Brown v Executive Committee of the Edinburgh District Labour Party*; *Nattrass v UK Independence Party*. I also recognise that the rules of the SLP create a discretion on the part of the SEC Representative or the SEC to alter the freeze date in special circumstances. But where that exercise of discretion proceeds on an erroneous factual and legal basis, as I have held that it does in this case, it has taken into account irrelevant considerations and can properly be described as in defiance of logic. I conclude that the decision to alter the freeze date was therefore irrational. On that basis, interference in the selection process in the present case is wholly justified.

[20] Separately, I do not consider that the actual reason for the decision now relied upon by the respondents (the existence of special circumstances giving rise to an alteration of the freeze date) was given to the petitioner following upon the decision. He received an email dated 5 May 2018 from the SEC Representative which stated *inter alia* that:

“I also want to inform you that following independent legal advice from a QC, the beginning of the selection process is 21<sup>st</sup> March 2018”.

When he queried this, he received a further email dated 10 May 2018 from the SEC Representative which stated:

“With regard to the individual points you raised in relation to the amended freeze date, the decision made by the Scottish Executive Committee is underpinned by the independent legal advice provided to the Labour Party. These matters were all considered by the QC in their [*sic*] deliberation.”

A fair reading of these emails strongly suggests that the SEC had proceeded on the basis that as a matter of fact and law the correct freeze date was 21 March 2018, rather than that they exercised their discretion to alter the freeze date based upon special circumstances. No reference was made, in the emails or any of the information given to the petitioner, to the

existence of special circumstances or to the exercise of the discretion to alter the freeze date in terms of paragraph 6D of the Selection Procedures Summary Document. In short, the reason now advanced for the decision was simply not given at the time. It was therefore unsurprising that senior counsel for the petitioner had not come to court prepared to deal with any such reason. The reliance by the respondents upon what is effectively this new reason for the decision is of itself a cogent basis for challenging the decision.

[21] I therefore conclude that the petitioner has a strong *prima facie* case for reduction of the decision.

[22] In considering the question of the balance of convenience, I recognise that potential delays in carrying out the selection process may now occur and indeed that the process may require to start again, with cost implications. However, these issues were really identified as just potential problems. Moreover, the issues simply follow from the making of what I have concluded was the erroneous decision on behalf of the SEC and they are not the fault of the petitioner. If interim interdict is not granted, the petitioner loses the prospect of support from the various party members eligible to vote if the freeze date is 4 April 2018 but ineligible to vote if it is 21 March 2018. I therefore consider that the balance of convenience favours the grant of interim interdict.

[23] For these reasons, I held that the petition should be permitted to proceed and that the petitioner's motion for interim interdict against the respondents from holding the vote with a freeze date earlier than 4 April 2018 should be granted.