IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2021] EWHC 1818 (Admin)

No. CO/1140/2021

Royal Courts of Justice

Wednesday, 31 March 2021

Before:

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE

B E T W E E N :

THE QUEEN ON THE APPLICATION OF
DAVID EVANS

Claimant

- and -

THE ELECTORAL COMMISSION

Defendant

MR F. CAMPBELL AND MR W. BORDELL appeared on behalf of the Claimant.

MR P. COPPEL QC AND MS O. DAVIES appeared on behalf of the Defendant.

J U D G M E N T

MRS JUSTICE ELLENBOGEN:

1 Given the nature and timing of the interim relief sought I make clear at the outset that the claimant's application is refused and I shall now give judgment explaining my reasons for that decision.

Introduction

2 This is an application for interim relief in connection with a claim for judicial review issued and served on 29 March 2021. The claimant is Mr David Evans, on behalf of the Labour Party. Mr Evans is the party's General Secretary. The defendant is the Electoral Commission. By its claim form, the claimant asserts that the defendant has made an unlawful decision not to determine an application for the addition of a registered description for the Labour Party, to be included in nomination papers and, subsequently, printed on ballot papers. That decision is pleaded to have been taken on 23 March 2021 and confirmed on 25 March 2021. The interim relief sought is an order requiring the defendant to determine the application for the addition of a registered description, in time for that description to be included in nomination papers. By a draft minute of order submitted after the hearing yesterday, the claimant seeks a decision by 11 o'clock this morning. The urgency is said to arise from the imminence of the Scottish Parliamentary elections, on 6 May 2021 (which the claimant will be contesting), the deadline for the delivery of nominations for which is 4:00 p.m. today. It is said that, in the absence of the order sought, the claimant will be at a disadvantage in those elections.

3 By order of Swift J, made on 29 March 2021, the defendant was to file and serve any submissions and/or evidence in response to the claimant's application for interim relief and a hearing was listed, which took place before me yesterday afternoon. The claimant was represented by Messrs Fraser Campbell and Will Bordell and the defendant by Mr Philip Coppel QC and Ms Olivia Davies. I am grateful to both parties for their focused written and oral submissions. I have had regard to everything written and said on behalf of each of them, as well as to the evidence set out in the witness statement and exhibit of, respectively, Mr Andrew Whyte, Acting Director of the claimant's Governance and Legal Unit, and Ms Louise Edwards, the defendant's Director of Regulation.

The principles to be applied

4 On an application for interim relief, the questions to be addressed are whether there is a serious issue to be tried and, if so, whether the balance of convenience favours the grant, or refusal, of the relief sought. The question is which of the options available to the court gives rise to a lesser risk of prejudice, should it turn out to be wrong. That entails weighing the prejudice which might arise in the event that interim relief is wrongly granted against that which might arise in the event that a decision to refuse relief turns out to be wrong. As the parties acknowledge, amongst the matters to which I must have regard when assessing the balance of convenience are any relevant public interests which either favour or point against the relief sought. In a public law case, the overarching approach requires the existence of a particularly compelling set of circumstances, if an application for interim relief is to succeed. That is particularly so where, as here, the interim relief sought will, if granted, effectively constitute final relief. In such cases, it is necessary to consider the merits of each party's substantive case with particular care, and I have done so.

The facts

5 I begin by summarising the material facts, which are not in dispute.

6 The defendant was established in 2001 by section 1 of the Political Parties, Elections and Referendums Act 2000 ("the Act"). It is independent of Government and political parties and is directly accountable to the UK Parliament through a Committee chaired by the Speaker of the House of Commons and to equivalent committees in the Scottish Parliament and Senedd. Amongst its duties and relevant for current purposes are those to: (1) register a description to be used on nomination papers or ballot papers (upon application by a registered party), unless one or more of the conditions in section 28A of the Act applies; and (2) again upon application by a registered party, to alter that party's entry in the register by adding, altering, substituting or removing the party's description, unless one or more of the conditions in section 30 of the Act applies. I shall turn to the requirements of those statutory provisions later in this judgment. The purpose of a registered political party's description is that the candidate for that party may use it on his or her nomination papers or ballot papers (per section 28A(1)). Where a candidate has included a registered description on his or her nomination form and has been authorised by the registered party to do so, that description will be printed on the ballot paper next to the candidate's name. The rejection of an application means that the relevant description cannot be used on nomination papers or ballot papers. Nonetheless, and as is common ground, it does not prevent a party from using those same words as a slogan in his party campaign outside the polling station (for example, in leaflets and posters).

7 The defendant publishes on its website numerous documents in which it explains the manner in which it will carry out its functions. On 9 October 2020, it published a note entitled *"Party registration applications ahead of the 2021 May Polls"*, requesting that a party wishing to add a description to the register, to be included on ballot papers for the elections taking place on 6 May 2021, should *"... please ensure that* [its] *application is with us by Sunday 31 January 2021. We cannot guarantee that we will make a decision in time on an application submitted after this date for use on ballot papers at elections."* The note went on to record, in table format, that existing registered parties wishing to make changes to their names, descriptions or emblems in time for the Scottish Parliamentary Elections had to do so by Wednesday 31 March 2021 (that is, today).

8 On 14 January 2021, Mr Richard Leonard resigned as leader of the Scottish Labour Party, triggering a leadership election. On 27 February 2021, Mr Anas Sarwar was elected as his successor.

9 On 4 March 2021, the claimant made an application, under section 30(1) of the Act, to add two new descriptions to the Register: *"Anas Sarwar — unite and rebuild Scotland"* and *"Anas Sarwar — Get Scotland Back Better"*.

10 On 10 March 2021, Mr Whyte emailed the defendant stating that he fully appreciated that the "soft deadline" for registration of new descriptions had been 31 January; that Mr Sarwar had been keen to make the application as soon as he had been elected, to use a description for the regional lists which reflected the change in party leadership; and that he hoped that the assessment should be relatively straightforward, given that there was no risk of confusion with other parties; the description could be clearly identified as being that of the Labour Party (as it referenced the party leader in Scotland and, if registered, would only be used in conjunction with the party name on the regional list ballot); and that he could not immediately see why any of the other statutory tests should apply.

11 By email dated 11 March 2021, the defendant stated that the claimant's application would be assessed against the requirements of the Act, but that it was very unlikely that the defendant

would be able to come to a decision in time: *"We are continuing to work through the high number of applications received before deadline, for which we guaranteed a decision would be reached prior to the close of nominations for May polls. Although we will endeavour to assess applications received after the 31 January deadline, you should be aware that we also received a number of applications submitted between 1 February and 4 March. If we are able to reach a decision on your application in time for the close of nominations, it will be very close to the close of nominations deadline itself. You may therefore wish to start preparing nomination papers for submission without use of the descriptions applied for on 4 March."*

12 On 12 March 2021, Ms Kate Watson of the claimant telephoned Mr Andy O'Neill of the defendant to discuss the application. She was informed that the proposed descriptions were unlikely to be approved, as they did not clearly identify the registered party. She was further informed that the claimant's application was behind what Mr O'Neill described as being a long queue.

13 On 18 March 2021, Ms Watson made a further telephone to Mr O'Neill, to suggest an alternatively worded description which included the word "Labour". Mr O'Neill indicated that the revised wording might be more acceptable, but stressed that it was not his decision to make and reiterated that the defendant was dealing with a large number of applications which had been made before the deadline for applications.

14 By email to the defendant dated 23 March 2021, the claimant sought to amend its application by replacing the originally proposed descriptions with the following: *"Anas Sarwar — Labour's National Recovery Plan"*. This was 11 days after the defendant had informed the claimant that its descriptions were unlikely to be approved in their then current form and 8 days before the close of nominations. The email was not signed by the responsible officers for the party, and, accordingly, as Mr Campbell acknowledged, did not meet the requirements of paragraph 9.1 of schedule 4 to the Act. In its reply of the same date the defendant stated, *"We can now confirm that, due to the short time-frame until the deadline for delivering nominations, we will not be able to grant your application in time for inclusion on the ballot papers at the elections taking place on 6 May 2021. This applies whether you amend the application or not. You may still contest these elections using the identity marks already registered to your party."*

15 On 24 March 2021:

a. at 08.54, David Evans wrote to Mr Bob Posner, Chief Executive of the defendant, seeking a meeting. He stated that the party's application had not been made sooner because the Scottish Labour Party's leadership election had not concluded until 27 February 2021 and that the leadership election constituted extenuating circumstances which the defendant was obliged to take into account. The description on the regional list ballot paper was an essential mechanism for communicating the party's message to voters — to deny the claimant the opportunity to register an appropriate description for the crucial Scottish Parliamentary elections would be profoundly unfair;

b. at 12.43, Mrs Edwards responded, at Mr Posner's request. She stated that, whilst it was a matter for the party, whether because it was common to other parties in Scotland or for some other reason, to include a reference to its leader in Scotland within the description the subject of its application, that choice was not obviously a relevant fact for the defendant to take into account in fulfilling its legal duties in a robust and impartial way. She continued, "“*We asked for applications well in advance of close of nominations to help all parties know when we needed them by to have time to complete assessments against the various tests. The related challenge here is the need for all applications to be published for a reasonable period of time for public comment. We would find ourselves in difficulties regarding*

procedural fairness should we disregard that step for you but not for anyone else… I do want to say that your party has, and has always had, the same opportunities under the law and our processes as any other party to apply for amendments to your registered details. There is no question of the commission denying any opportunity to your party that has been extended to others. That said, we are of course willing to talk further if you do think there are exceptional circumstances to consider your application urgently and without a reasonable period for public comment. I can be available for a phone call this afternoon…";

c. at 14:00, the parties had a telephone conference, during which the claimant reiterated its position that the defendant's approach placed the elections in jeopardy of not taking place on an equal footing;

d. at 16:25, Ms Edwards asked the claimant to arrange for its registered officers to authorise the amended application which the claimant had sought to make on 23 March 2021;

e. at 16:29, Mr Whyte asked Ms Edwards whether an email from him, with the registered officers on the copy line, would suffice for a valid authorisation, or whether each officer needed to send his individual authorisation.

16 On 25 March 2021:

a. at 06.45, Ms Edwards informed Mr Whyte that an email from him, copied to the other registered officers, would not suffice and that affirmative individual authorisations by email were required;

b. at 11:22, Mr Whyte sent the necessary authorisations to Ms Edwards, thereby validating the application. (That was over 7 weeks after 31 January 2021 and over 4 weeks after the claimant's Scottish leadership election.);

a. at 13:25, Ms Edwards informed the claimant that, "*Having considered the matter very carefully, unfortunately as the initial application was received on 4 March, followed by an authorised amendment on 25 March, we are left with insufficient time to fulfil our statutory duties as the registrar of parties and take a fair decision on this matter in advance of the close of nominations next week.… In order for us to meet our statutory obligations in respect of the registration of party descriptions, we follow an established process when taking decisions on applications. The details of this process can be found on our website. This includes undertaking a careful assessment against the statutory requirements, as well as seeking the views of our internal approvals board before taking a final decision. Prior to this, we also publish the details of applications on our website for public comment. This allows voters to provide views on the proposed identity marks in relation to the statutory tests, and so forms an important part of the process. Following this process ensures that the decisions we reach are robust and fair. It also means that voters can interact with the ballot paper without being confused or misled by what is on there, and no party is treated more or less favourably as part of it…. We do not think it is reasonable under the circumstances to accelerate the process. Doing so would compromise our decision-making process potentially to the detriment of voters in the upcoming election. It would also not be fair to other parties who have submitted applications that will also not receive a decision before the close of nominations for the May Polls this year… We had advised parties on 9 October 2020 via our website to submit applications by 31 January. This was to ensure parties had enough time to finalise the details of applications well in advance for the nominations deadline, and ensure that we could undertake a statutory decision-making role in a*

robust manner. Our guidance also makes clear that, once we have all the information we need to consider for an application, the process usually takes around six weeks. In some cases, it can take less or more time than that… You have raised concerns that your party is being put at an electoral disadvantage because of this matter, particularly noting the use of other parties' leaders names and policy positions, and also the voting system in Scotland. As stated yesterday, we appreciate these factors but do not agree that they raise extenuating circumstances to consider your party's application ahead of close of nominations, with the consequent deviations from our standard procedures. If parties want to use particular identity marks or ballot papers, then it is the party's responsibility alone to determine those details and submit an application in a timely manner. Our responsibility is to maintain the registers of political parties and consider those applications in line with the statutory requirements. We do this by applying the law consistently, impartially, and fairly for all applicants. Ensuring that parties have similar or identical registered descriptions that they can use at elections does not comprise one of our statutory functions, and it would not be proper for us to interfere in this way…"

17 On 26 March 2021 (a Friday), the defendant:

a. received a pre-action letter from the claimant, which stated that, unless the defendant confirmed its grant of the claimant's application by 5:00 p.m. that day, proceedings would be issued; and

b. published the claimant's application of 25 March 2021 online, for public comment.

18 On Monday 29 March 2021, as I have previously noted, the claimant issued and served its claim for judicial review, solicitors' correspondence having been exchanged over the intervening weekend.

The grounds of review

19 There are two grounds of review:

Breach of statutory duty

a. First, it is said that there has been a breach of statutory duty arising from an error of law. It is contended that, under section 30 of the Act, an application of the type in question *must* be granted unless the defendant forms the opinion that it (1) will cause the relevant political party to have too many descriptions registered (section 30(4A)(a)); or (2) is longer than the six words prescribed by statute (section 30(4A)(b)); or (3) is impermissible in one of the ways specified by section 28A(2) of the Act. (section 30(4A)(c)). Neither section 28A nor section 30 permits the defendant to impose an additional or procedural substantive pre-condition beyond those for which the Act provides. Refusing to grant an application on the ground that it had not been made prior to a self-imposed administrative cut-off date was an error of law and a breach of the statutory duty to grant applications which do not fall foul of the relevant provisions, as was the refusal to determine the application, absent an opportunity for public comment (which is neither required by statute nor clearly provided for within the defendant's own guidance; the latter stating that proposed descriptions will "normally" be published on the defendant's website, for no particular period. The defendant had already indicated that it considered that the description did not engage any of the statutory grounds for refusal and there was no basis on which to delay its decision until after close of nominations, knowing that the effect of doing so would be to deprive the claimant of its ability to have the description included on ballot papers for the

Scottish Parliamentary elections. Any specified pre-conditions which are not required by the Act ought to be disregarded. Furthermore, there is no room for implying a general power under which the defendant might delay or defer compliance with its statutory obligations. The defendant's reliance upon the need to apply its processes consistently to all applicants was misconceived: consistency, whilst desirable, was not an absolute rule in administrative law and, in any event, (2) there is no virtue in consistency where its effect is to subvert the defendant's express statutory obligations; and (3) the claimant's position falls to be distinguished from that of other applicants because its new Scottish leader was elected after the defendant's internal deadline for applications.

Unlawful fettering of discretion

b. Further or in the alternative, it is said that the defendant's inflexible application of its standard approvals process constitutes an unlawful fettering of the statutory discretion which Parliament has accorded to it under sections 28A and 30 of the Act because:

i. it is an unlawful fetter on a public body's discretion for it to treat policy guidance as binding, and internal policies must not preclude a proper exercise of the statutory discretion in each case;

ii. a policy should not be framed in absolute terms which have the effect of debarring from consideration a person who falls outside the terms of the policy rule, but within the statute itself; and

iii. there is no bar on public bodies adopting a policy or practice, as long as it does not preclude departure from that policy, or the taking into account of circumstances relevant to a particular case. If such an inflexible and invariable policy is adopted, both the policy and the decisions taken pursuant to it will be unlawful.

Irrespective of whether sound reasons lie behind the defendant's usual process for considering applications of the nature under consideration, there is no justification for its rigid application in circumstances in which it is not appropriate, particularly where the defendant has acknowledged that the limited statutory grounds for refusal are not engaged.

<u>The grounds of resistance</u>

20 The defendant contends that the claimant's application for judicial review is "thoroughly misconceived":

a. There has been no "decision", as described in section 3 of its claim form. The claimant's contention is a construct, because the only alternative would be to challenge the defendant public authority on the basis that it had not made a decision within a matter of days of its receipt of a valid application, submitted by a body which had delayed making it, knowing of a time imperative.

b. There had been no refusal to grant the application; merely a recognition that the decision-making process for the purposes of section 30 of the Act could not be completed before 31 March 2021. Neither could such recognition properly be construed as a policy of refusing to grant applications on the grounds that they had not been made by a self-imposed cut-off date. As the defendant's website made clear, 31 January 2021 was not such a date, because it was still possible that applications received after that date would be determined before close of nominations, as, indeed, some had been. However, that could not be guaranteed. Here, the claimant had submitted a valid application 4 weeks after electing its new Scottish

leader, leaving the defendant with just 5 days before the close of nominations. There was a need to prioritise giving due consideration to the factors set out in section 30 of the Act, over rushing to deal with applications as quickly as possible. The process was not a tick-box exercise and had been introduced following an independent review by Elizabeth Butler, in 2014, after the defendant had approved the registered description "*Remember Lee Rigby*", to the considerable distress of Mr Rigby's family. Although the claimant's proposed description was not offensive, the reference to the name of a more recent political figure (Mr Sarwar) could mislead a voter, if used in an electoral area where that figure was not a candidate. It was to be remembered that a description could be used on a ballot paper without an emblem. The defendant was obliged to consider the experience of any sort of voter — including one who had limited education and knowledge of political parties — when casing a vote. The defendant had not informed the claimant that it considered the proposed description to engage none of the statutory grounds for refusal. It had indicated that, unlike the originally proposed descriptions, the amended description clearly referred to a particular registered party. That was a consideration under the defendant's guidance, but was not one of the considerations required by section 30 of the Act. The matter was not straightforward and the claimant's proposed description would need to be compared against all 867 descriptions on the register to ensure that there were no similarly worded descriptions which could cause confusion amongst the electorate. In considering whether voters were likely to be confused or misled, it could not be unlawful to seek views from the electors themselves, which was a vital and necessary part of the defendant's ability to decide whether section 28A(2)(b) or (e)(i) was fulfilled. In any event, such power could be found in paragraph 2 of schedule 1 to the Act, by which the defendant "*may do anything...which is calculated to facilitate, or is incidental or conducive to, the carrying out of any of* [its] *functions"*.

c. The need for balance in the way in which the defendant carries out its functions was embedded in the Act; see, for example, the provisions which ensure that the defendant's composition and the information and representations which it receives are representative of the political landscape (sections 3A and 4). That need necessarily informs the processes by which the defendant carries out its functions. The claimant's suggestion that the defendant replace its current practice of dealing with applications in the order in which they are received with one which takes account of subjective factors, such as the date of a party's leadership election, in deciding which application should take priority, would be entirely ad hoc and would lead to precisely the situation of which the claimant unjustifiably complains, whereby other parties are not in a *"comparable position"* with one another. It would be smaller parties which would suffer in that event.

d. Even if an application to amend the claim form were to be made, seeking to challenge the time being taken to decide the claimant's application, the claim would fail because a valid application had not been received until 25 March 2021, and, then, only at the defendant's prompting; determination of an application is not a mechanical exercise; there is nothing unlawful in the process adopted by the defendant, which is thorough, even-handed and expeditious; all of the evidence before the court is that the defendant has moved with as much speed as possible; and the substantive and operative course of the defendant's inability to complete the process before close of nominations is the claimant's serial delays in submission of required details.

e. The defendant had not fettered its discretion and had already decided 11 of the applications to amend the register which had been submitted after 31 January 2021 (albeit earlier than the claimant's application), within 2 weeks of that date. The defendant was continuing to work through the remaining applications, of which the claimant's was one of the latest, on a first come, first served basis. This was not a case in which the defendant's advice to parties amounted to a decision or determination, or in which the Defendant had applied an

inflexible policy; it was a statement of the length of time usually taken to carry out the requisite steps, in order that applicants would not be disappointed. The defendant's statement that some applications could be completed quickly indicated that the time taken is, properly, fact-sensitive. Had the claimant not wasted a month between Mr Sarwar's election and the making of a valid application, its application could well have been granted. The claimant had been informed, on 12 March 2021, that its proposed description was unlikely to be approved, because it did not clearly identify a registered party. It had then taken a further 11 days to attempt to make another application, containing revised wording, on 23 March 2021. Even then, that application had not been validly submitted for a further 2 days. By that point, less than a week had remained before close of nominations, with 17 applications ahead of the claimant's in the queue.

The parties' submissions

21 I summarise only those submissions which add to, or are at variance with, the matters set out in the relevant pleading.

For the claimant

22 Mr Campbell first submitted that the essence of the claim was that the defendant had refused to take a decision in advance of close of nominations. In reply, he asserted that there had been a reviewable decision by the defendant that the standard process would be followed, including public consultation, in the knowledge that that would preclude an in-time decision.

23 The purpose of registration of a description was to enable it to be put on the ballot papers. It was accepted that there had been no properly constituted application made until 25 March, and it was in relation to that application that the defendant's decision was challenged. The claimant's earlier engagement with the defendant explained the delay which was now criticised by the defendant and indicated that the claimant had acted with due expedition since Mr Sarwar's election.

24 The defendant's insistence on going through its standard process, including public consultation, constituted an unjustifiable pre-condition to complying with its statutory duty for three reasons:

a. First, following that process would cause the claimant substantial prejudice; its leader's name would not appear on the ballot paper, whereas the Scottish National Party's leader's name would do so. The fact that the proposed description can be deployed in other materials is the source of part of the prejudice created — electors will not be able to identify the connection between the two.

b. Secondly, the process will frustrate the purpose of the Act, which is to require approval and registration of those descriptions which are compliant with the statutory criteria; and

c. Thirdly, there can be no justification for such prejudice, because public consultation is neither required by statute, nor otherwise reasonably required.

25 Mr Campbell submitted that there were two matters which the claimant's challenge did not entail — a contention that public consultation is, in general terms, unlawful; and the claimant's seeking of special treatment, as a major political party. Any party which submits a similar application before close of nominations ought to be treated in the same way. The defendant's evidence was not that it would be impossible, or impracticable, for it to deal with all applications made prior to 31 January 2021, other than if public consultation were required. The standard six-week assessment period might be all very well under normal circumstances,

but needed to be justified where it caused prejudice, as it did here. If external factors precluded a faster assessment, that was one thing, but a mere preference for a particular process would not suffice. Public consultation was not mandated by the statute; a relevant, if not conclusive, factor. Even the defendant's internal guidance did not require that it take place, or specify a particular consultation period. At least two working days, plus a weekend had already passed since the consultation had been opened. The Butler report had not recommended public consultation of any form regarding such decisions. The only consultation recommended had been regarding the criteria in deciding upon applications. In all those circumstances, there was no requirement for the standard 10-day period of (or any) consultation, whether generally or in this case. The defendant was perfectly capable of determining for itself whether a proposed description could confuse or mislead; it did not need to "crowd source" its regulatory decision-making.

26 Mr Campbell submitted that there had been no more than a bare assertion that the claimant's application was complex. Furthermore, Mr Sarwar was by no means a recent political figure; he had been Deputy Leader in 2011 and come second in the 2017 leadership election. He was one of the highest profile Scottish politicians in a decade. Furthermore, in Scottish Parliamentary elections, the regional ballot papers contain the party name, in bold capital letters, followed by a description. There could be no scope for confusion or concern regarding that. The defendant could take its own expert view and did not require public consultation. What was to be gained from the latter, on the particular question of confusion and was the unsophisticated voter likely to respond to consultation, he asked. There had to be a good reason to justify the prejudice caused.

27 The defendant's desire for even-handedness afforded no answer to the claimant's application, submitted Mr Campbell. To the extent that other applicants were in the same position, would they had the same arguments to make. Depending upon the number and timing of applications made, a first come, first served approach was not inherently problematic. There was nothing objectionable to the standard process, provided that it did not cause the unjustifiable missing of a deadline which frustrated the purpose of the Act. If it were the case that the claimant could be criticised for doing things too late and creating a situation whereby it was not reasonably possible for the defendant to come to a reasonable view, that would be fatal to the claimant's case. The question was one of degree. In this case, what was lacking was a statement that the defendant could not process all applications, if it "rolled its sleeves up". The real difficulty lay in its insistence on public consultation and in its multi-layers of reporting as part of the assessment process. The height of Ms Edwards' evidence was that the defendant could not follow its "Rolls Royce" process, but there was no evidence to the effect that it could not reach a valid decision under the Act, promptly, in relation to both the claimant and to any other applicant who had submitted an application after 31 January 2021.

28 There could be many reasons why others whose applications could not be processed by 31 March 2021 would not wish to challenge the defendant's approach, including an absence of prejudice. The claimant felt strongly about the need for its Scottish leader's name to appear in its description, in a similar way to that of its main political opponent. There was a danger that, in seeking to ensure that everyone was treated equally, everyone would be treated unlawfully; if the claimant could reasonably be spared prejudice, that ought to be done. The fact that other parties might wish that they had adopted a similar course was no answer. Should the defendant be worried about complaints, a court order would afford the best possible defence.

29 Mr Campbell submitted that it was not open to the defendant to rely upon a backlog in dealing with applications which was of its own making in adopting an unnecessarily elaborate internal process. Upon receipt of each application, it ought to have been asking itself what it could reasonably do to achieve a decision in order to fulfil its statutory function and duty.

30 As to the balance of convenience, there was no evidence of the materiality or relative importance of the pending applications by other parties, whereas such evidence was available in relation to the claimant. The court had been made aware that a major party, second in the polls in Scotland, was facing serious prejudice. There was a public importance in a fair election process. The defendant's contention (see below) that latecomers would be rewarded by an abbreviated process was speculative and there was no evidence that the rejection of any application which had been rejected had resulted from public concentration. It was perfectly possible for a valid, rigorous decision now to be made which would not require consultation. The defendant had advanced no sound argument for an overriding necessity for consultation and no valid concern over dispensing with it in all the circumstances.

For the defendant

31 Mr Coppel submitted that Mr Campbell now described the decision under challenge as being a refusal to determine the claimant's application before the deadline for nominations. That was a consequence, not a decision. The real attack was upon the defendant's decision-making process, on the basis that it would not yield a decision before 31 March 2021. That was much more difficult to sustain on public law grounds. Embedded within Mr Campbell's express submission was the contention not only that the defendant was able and at liberty to decide an application made as recently as 25 March, but that there was a wilfulness not to do so by 31 March, and of a sort which rendered it unlawful. The contention was that all that the defendant actually had to undertake was a tick-box exercise and that the process described by Ms Edwards was unnecessary. A lawful decision which caused prejudice did not thereby become unlawful.

32 Mr Campbell's contention that the defendant's approach frustrated the statutory purpose of the Act, because the proposed description could not be used on ballot papers, was similarly lacking in force; that was simply a consequence of non-approval and, in any event, was not the cause of the issue, which was the claimant's own delay.

33 The contention that frustration of the statutory purpose could not be justified approached matters from the perspective of the registered party and was problematic for that reason. The defendant had to approach matters from the wider perspective of the elector, too, in order to ensure that the electoral process was fair and supervised in an even-handed way. All registered parties must consider that they are being treated equally by the defendant in its administration of the electoral regime. The claimant had not suggested that the process was unlawful per se; rather that, whilst lawful, the defendant should not adhere to it in this case. Ms Edwards has explained why the process takes the time which it does. There was no slack in that timetable. The claimant's position would require the defendant to abandon one or more steps in its process. Alternatively, the claimant was seeking to be moved to the front of the queue, to the disadvantage of those thereby being pushed back and favouring a party which has the means to make an application over one which does not.

34 The task for the defendant, under sections 28A and 30 of the Act, includes ensuring that a description will not mislead or confuse. It was lawful to go about that process in the way which informed it as to the likelihood of such events. Public opinion provided an important check on that, because those who work within the electoral system might be thought to have greater sophistication and insight than those who do not. There was no statutory proscription on consultation and the absence of a requirement that it take place reflected no more than a recognition that the defendant need not be instructed as to how to go about carrying out its functions.

35 Whilst, as a matter of principle, the defendant would accept that there could be circumstances in which a lawful process might need to be abbreviated owing to circumstances, one would expect those circumstances to be external to the applicant, such as the sudden death of a leader whose name had been used in a description. This is not such a case. Even if the leadership election might be thought to constitute an external circumstance of the requisite nature, at that point it was known to the claimant that 4 weeks had elapsed since 31 January 2021, such that it was imperative that it move quickly. Yet, it had waited 5 days to propose a description which had not referred to the registered party, and, when informed, on 12 March, that the proposed descriptions were unlikely to be approved in the absence of a party name, had allowed a further 11 days to lapse before submitting a valid amended application. That delay had had two significant effects, submitted Mr Coppel:

a. The situation which the claimant now complained, and the associated need for expedition, was not a product of external circumstances, or unlawful decision-making by the defendant; rather it was one of the defendant's own making; further,

b. It was material to whether the court should entertain the claimant's claim, or grant relief. Ms Edwards' evidence, which could not be gainsaid, was to be borne in mind:

> *"54. The Commission received 59 registration applications in the month of January 2021. This was the highest number of applications in one month for the Commission. All applications received by 31 January have been determined by the Commission. The last of those applications was determined on 5 March 2021. As at 26 March 2021, we have received another 40 registration applications after the 31 January date, of which the Labour Party is one of the later applications, We have considered these applications on a first-come-first served basis, except where they were part of the earlier descriptions review (paragraph 52 above). We have determined another 11 applications received after 31 January date and are continuing to assess the others."*

That evidence demonstrated that the claimant's contention that the defendant refused to consider applications received after 31 January 2021 was simply wrong and, secondly, that allowing its very late application to be determined without reference to lawful procedure would serve to bump the claimant up the queue. That would be unfair and was unattractive, having regard to the importance of the defendant being conspicuously fair, a concept baked into its composition and required independence and impartiality. For one large political party to be given preferential treatment would be unfair. Even if all outstanding applications could be determined by the morning of 31 March, that would be to the prejudice of those who had been obliged to go through a more rigorous application process and would favour those who had put in applications very late and, for that reason, would be subject only to an abbreviated process. Some members of that latter group might have had an application rejected following public consultation which would not have been rejected in its absence. There had been no suggestion that the defendant had been dilatory. The requirements of fairness towards the electorate and other registered parties were at a premium in the legislation; they were not luxuries. The application for interim relief ought to be refused.

Discussion and conclusion

36 I start by considering the merits.

37 Part II of the Act gives the defendant various powers connected with the registration of political parties. Section 28A provides, so far as material:

"(1) A party's application under section 28 [for the initial registration of a party] may include a request for the registration of up to 12 descriptions to be used on nomination papers or ballot papers.

(2) Where a request is made by a party under this section in relation to a description, the Commission shall register the description as a description of the party unless it is of more than six words in length or in their opinion it –

(a) would be the same as the name of a party or the registered description of a party which (in either case) is already registered in the register in which that party is applying to be registered,

(b) would be likely to result in electors confusing that party with another party which is already registered in respect of the relevant part of the United Kingdom,

(c) is obscene or offensive,

(d) is of such a character that its publication would be likely to amount to the commission of an offence,

(e) would be likely, were it to appear on a ballot paper issued at an election –

(i) to result in an elector being misled as to the effect of his vote, or

(ii) to contradict, or hinder an elector's understanding of, any directions for his guidance in voting given on the ballot paper or elsewhere,

(f) includes any script other than Roman script, or

(g) includes a word or expression prohibited by order made by the Secretary of State ..."

38 Section 30 of the Act governs applications for alterations to be made to the register. It provides, materially:

"(1) A party may apply to the Commission to have its entry in the register altered by ...

(bb) the addition, alteration, substitution or removal of a description...

(2) Subject to subsections (3) to (6A), the Commission shall grant an application under this section.

...

(4A) The Commission shall refuse an application to add a description if –

(a) the party already has 12 descriptions (or such other maximum number of descriptions as is substituted by order under section 28A(6)),

(b) the length of the description exceeds six words, or

(c) in the Commission's opinion, any of paragraphs (a) to (g) of section 28A(2) apply to the description ...

(8) Where the Commission refuse an application by a party under this section, they shall notify the party of their reasons for refusing the application ..."

39 Ms Edwards' evidence as to the process followed by the defendant is set out at paragraphs 45 and 46 of her witness statement:

> *"45. The Commission follows an established process for the making of decisions on applications under sections 28A and 30 of [the Act]. Outside busy election periods, this process normally takes approximately 6 weeks.*
>
> *46. This process involves the following steps:*
>
> *a. checking that all the required documentation has on the face of it been provided, the application has been authorised by the party's officers and the fee has been paid, which usually takes place within five working days of receipt dependent on workload;*
>
> *b. publishing the details of the applications on its website for public comment, usually on a Thursday, giving voters the time and opportunity to provide their views on, in the case of an application under section 30, applied-for descriptions. We usually allow around 10 days for public comment;*
>
> *c. assessment of the application by the Commission's registration team, which forms part of the Regulation Directorate for which I am the director, which then makes a recommendation as to whether the application meets the legal tests. The time needed for this depends on the individual circumstances of each application;*
>
> *d. a "minded to" decision by the Regulation Director on the application (for parties that intend to contest elections in Scotland only, the Head of the Electoral Commission in Scotland takes this and the final decision referenced below) with the aim that this is done within two working days;*
>
> *e. submission of the application, assessment and minded to decision to the Commission's internal Approval Board (a group of senior officers from across the Commission) which considers the application in accordance with an internal guidance document entitled "Briefing Paper – The party registration approval board", a true copy of which I produce as EXHIBIT LE 3. The aim is for the Board to make recommendations within five working days;*
>
> *f. review of the Approval Board's comments and final decision by the Regulation Director, again with the aim that this is taken within two working days;*
>
> *g. notification of the decision to the applicants, usually the day after the decision; and*
>
> *h. If the application is approved, the making of the necessary changes to the relevant register."*

40 In relation to both grounds of its claim form, in my judgment a key difficulty which the claimant faces is illustrated by its three attempts to characterise the decision under challenge:

a. the pleaded case — the defendant has made an unlawful decision not to determine the application for the addition of a registered description for the Labour Party, to be included in nomination papers and subsequently printed on ballot papers;

b. the case asserted in Mr Campbell's opening submissions to me yesterday — the defendant has refused to take a decision in advance of close of nominations; and

c. the case asserted in reply to Mr Coppel's submissions — the decision by the defendant that the standard process would be followed, including public consultation, in the knowledge that that would preclude an in-time decision.

41 It is clear, from the evidence of Ms Edwards, that there has been no decision not to determine the claimant's application of 25 March 2021, or to refuse to take a decision in advance of the close of nominations. The defendant's decision has been to adhere to its standard process in relation to all applications made. Even leaving aside the fact that that is not the decision pleaded, the first question is whether, in connection with that decision, there is a strongly arguable case in relation to one or both of the grounds of review. I have come to the conclusion that there is not, for the reasons which follow.

42 It is acknowledged by the claimant that the application to which its claim relates was not validly made until 25 March 2021, being only 5 days from the deadline for close of nominations.

43 The requirement, under section 30(2) of the Act, that the defendant grant an application under section 30 is expressly subject to its obligation to refuse it, in the event that any of the circumstances set out (for current purposes) in section 30(4A) applies. Section 30(4A)(c) necessarily requires the defendant to form an opinion as to whether any of paragraphs (a) to (g) of section 28A(2) applies to the proposed description. Furthermore, as Mr Coppel observed, paragraph 2 of schedule I to the Act provides that the defendant *"may do anything (except borrow money) which is calculated to facilitate, or is incidental or conducive to, the carrying out of any of their functions".* In establishing a process by which it is able to form the requisite opinion, the defendant is not imposing a procedural or substantive pre-condition, or seeking to delay the making of a decision; it is seeking to comply with its statutory obligations. Mr Coppel is right to stress the need for balance, fairness and impartiality which is inherent in the defendant's composition and role and which must also be seen to be the case. In my judgment, the contrary argument has no strength to it.

44 Mr Campbell founds his contentions to the contrary on 3 bases:

a. the allegedly substantial prejudice to the claimant in not having its Scottish leader's name on the ballot paper, in circumstances in which its primary opponent will have such an opportunity. As Mr Coppel submitted, that may be a consequence of the application of the defendant's process but, if so, it does not render that process unlawful. Furthermore, there is a tension between Mr Campbell's submission regarding Mr Sarwar's renown in Scotland and his assertion that, notwithstanding the claimant's unfettered ability to use the proposed description in its campaign materials, the connection between such materials and Mr Sarwar, or between Mr Sarwar and the Party, might not be made by voters at the ballot box;

b. its frustration of the purpose of the Act. I have already observed that a fair process serves, rather than undermines, the purpose of section 30;

c. the absence of justification for the alleged prejudice. It is far from clear that such prejudice has been demonstrated, but, if it has, I am satisfied that the claimant's contention that consultation is an unnecessary part of a fair process is unlikely to succeed. In any event, consultation is only one of the elements of the defendant's process which would need to have been completed within a 5-day period, and, on the claimant's case, potentially in relation to all applicants whose applications were submitted after 31 January 2021. It is self-evident that abridging the process adopted to such an extent will impede the quality of decision-making and will mean that applications which have been submitted late, or very late, will be subjected to lesser scrutiny than were those submitted in good time. That is not only unfair to applicants in that latter group but contrary to the interests of the electorate. I regard the submission that the defendant's approach risks treating every applicant affected unlawfully as fanciful.

45 As appears from Mr Campbell's submissions, it is not contended that the defendant lacks the power to determine the appropriate process or that its process as explained by Ms Edwards is inherently unlawful. His contention, put at its simplest, is that, in the particular circumstances of this case, the defendant ought to have departed from its standard lawful process and that it is unlawful for it not to have done so. However, once it is accepted, as it must be, that the exercise required by statute is not one of rubber-stamping applications, a desire for expedition in order to meet a deadline cannot override the need for appropriate scrutiny. Nor can a decision to apply a process in a manner which is fair and equitable to all those affected by it be said, with any force, to be unlawful. There is an obvious benefit to incorporating public consultation, with a view to informing the defendant as to the matters with which sections 28A(2)(b) and (e)(i), in particular, are concerned. The claimant's argument that there is patently no necessity to do so is not compelling, neither is its alternative argument, to the effect that sufficient time for consultation has already been allowed. In any event, consultation is not the only stage of the process which requires to be completed; as the defendant points out, checks need to be made against all 867 descriptions on the Register.

46 Furthermore, the extenuating circumstances on which reliance is placed by the claimant are not, substantially, the product of the leadership election and it does not sit well in the mouth of an applicant which has itself taken a month from that date to make a valid application to contend that, having done so, 5 days prior to close of nominations, it not only behoves the defendant to "roll its sleeves up" and truncate its assessment process, but that to do otherwise would be unlawful.

47 As to ground 2, the defendant has not fettered its discretion, as is clear from the 11 applications which post-dated 31 January 2021 and which, nevertheless, have been decided before 31 March. Nothing in the available evidence is supportive of rigidity or inflexibility in approach. Mr Coppel is right to assert that the defendant has, responsibly and transparently, warned would-be applicants of the risks of making a submission later than 31 January 2021, given the time typically taken for its assessment process to run its course. That is not synonymous with inflexible application of a policy, even arguably.

48 It follows from the above conclusions that the first limb of the test which I must apply on the claimant's application for interim relief is not satisfied, such that the question of the balance of convenience does not arise for consideration. Nevertheless, I make clear that, had I considered there to be suitable force in the claimant's contentions, I would have concluded that the balance of convenience tended against the grant of the relief sought. In brief, that is because:

a. the relief sought is that a decision to be taken by the defendant, by 11 o'clock this morning, to enable all necessary steps to be taken in advance of the close of nominations later today, should that decision be positive. I have already set out my conclusions as to the prejudice which the requisite truncation of the assessment process would cause, both to other applicants and to the electorate.

b. set against that is the potential prejudice to the claimant which would be caused by the refusal of interim relief. As I noted earlier in this judgment, I am not satisfied that significant prejudice has been demonstrated, on the available evidence. Mr Whyte has stated his belief that the defendant's *"..continuing refusal to grant the Application will place the Scottish Labour Party at an unfair electoral disadvantage in the 2021 Election"*. However, he has also given the following evidence:

> *"8. ...In his acceptance speech on the day of his election as leader, Mr Sarwar outlined the two campaign themes of an end to division and a focus on recovery from the Covid pandemic (see text of acceptance speech on LabourList website at pages 45-47). These*

two themes have remained at the forefront of the Scottish Labour Party's campaign in the 2021 Election."

That messaging, together with Mr Sarwar's high profile in Scotland, and the claimant's ability to use the text of its proposed description in all campaign materials, speeches et cetera, in my judgment means that any prejudice to the claimant is substantially less significant than has been asserted and is significantly outweighed by the prejudice which would be caused to other applicants, the electorate and the defendant's independence from political pressure, were the relief sought to be granted.

49 I refuse the claimant's application for interim relief.

50 Mr Campbell accepts that the defendant should have its costs of the application and makes no submissions as to the sum claimed. I am satisfied that it is appropriate summarily to assess the defendants' costs in the sum of £9,222, inclusive of VAT, and I make that order.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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