HOUSE OF LORDS

McConkey

Vs.

The Simon Community (Northern Ireland)

(Lord Phillips of Worth Matravers, Lord Rodger of Earlsferry, Lord Carswell, Lord Brown of Eaton-under-Heywood, Lord Neuberger of Abbotsbury)

20.05.2009

JUDGMENT

LORD PHILLIPS OF WORTH MATRAVERS

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Rodger of Earlsferry and for the reasons that he gives I will dismiss these appeals.

LORD RODGER OF EARLSFERRY MY LORDS,

2. In about 1975 the first appellant, John McConkey, who was a member of a proscribed organisation, was also in possession of a firearm and ammunition, and committed murder. He was subsequently convicted of offences relating to these activities and sentenced to life imprisonment and other substantial terms of imprisonment, from which he was released on the order of the Secretary of State in about March 1997.

3. In about 1992 the second appellant, Jervis Marks, was in possession of explosives with intent to endanger life or property and was involved in a conspiracy to murder and a conspiracy to cause an explosion likely to endanger life or property. He was subsequently convicted of offences relating to these activities and sentenced to long terms of imprisonment, from which he was released on licence on the order of the Secretary of State in about October 1998.

4. In the case of both appellants it is agreed that their involvement in these activities was in support of the Republican cause. It is also agreed that, at all material times in 2000 and 2002 respectively, they no longer approved of, or accepted, the use of violence for political ends connected with the affairs of Northern Ireland.

5. Their previous involvement in violent crime in support of the Republican cause came to the attention of the Simon Community when it was proposing to offer them employment. As a result, the Community decided not to employ them. The appellants complained to the Fair Employment Tribunal that they had been discriminated against on the ground of their former political opinion approving of, or accepting, the use of violence for political ends connected with the affairs of Northern Ireland. Somewhat reluctantly, the Tribunal rejected their complaints. The appellants appealed by way of case stated, but the Court of Appeal dismissed their appeals.

6. All this is explained more fully in the speech of my noble and learned friend, Lord Carswell. For the reasons he gives, which are based on the material set out in the Tribunal's decision, I am satisfied that the Community did not refuse to employ the appellants because of their former political beliefs, but because of a concern that employing them might pose risks for the vulnerable people who are cared for by the Community. Leave to appeal was granted, however, in order to give the House the opportunity to consider the meaning and application of the provisions of the Fair Employment and Treatment (Northern Ireland) Order 1998 (SI 1998/3162 (NI 21)) ("the Order") relating to discrimination on the ground of political opinion. It is therefore right to deal with those issues, which were fully argued before the House.

7. Article 19(1)(a)(iii) of the Order makes it unlawful for an employer to discriminate against a person by refusing him employment for which he applies. By reason of articles 2(2) and 3(1), article 19(1)(a)(iii) applies where an employer discriminates by refusing a person employment on the ground of his political opinion. The expression "political opinion" is not defined, but article 2(4) provides:

"In this Order any reference to a person's political opinion does not include an opinion which consists of or includes approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland, including the use of violence for the purpose of putting the public or any section of the public in fear."

8. The first thing to notice is that the Order is concerned with discrimination against someone on the basis of the religious belief or political opinion which he holds. It is not concerned with discrimination on the ground of actions that the person may take in support of that religious belief or political opinion. So, for instance, if someone belonged to a religious sect which favoured wife beating, it would be unlawful for me to discriminate against him, simply because of his religious belief. But I would be quite entitled to refuse to employ him if he actually gave effect to his beliefs by helping a friend to beat his wife. Similarly, if someone supports a lawful extreme right-wing or left-wing party, it is unlawful for me to refuse to employ him simply because of his political opinion, but I can certainly refuse to employ him if he gives expression to that opinion by assaulting his opponents or destroying their property.

9. At para 41 of his judgment in the present cases, [2008] NICA 16, Higgins LJ elided the distinction between an opinion and actions based on that opinion when he discussed whether "the use of violence for political ends is a political opinion to which article 3 applies." The use of violence can never be an opinion, whether political or otherwise. His question would have to be whether "an opinion approving or accepting the use of violence for political ends is a 'political opinion' to which article 3 applies."

10. Those in authority in Northern Ireland today hope that people will feel able to put the Troubles behind them. The First Minister and Deputy First Minister therefore urge employers not to refuse to employ people simply because of their involvement in criminal activities of a political nature during that period. But, even today, the Ministers can only issue Guidance, exhorting employers to follow that line. The employers are under no legal obligation to do so. If they choose to ignore the Ministers' advice and prefer not to employ people with a history of violence, they are free to do so. There was not even any equivalent official advice in 2000 or 2002 when the Community decided not to employ the appellants. The Community would have been perfectly entitled to refuse to employ the first appellant simply because he had committed murder and the second appellant simply because he had conspired to endanger property or life. That was indeed common ground at the

hearing of the appeal.

11. Even to get a toe in the door of unlawful discrimination, therefore, the appellants have to put a very artificial construction on the Community's reaction to discovering their past history of violence: they have to say that they were refused employment, not because they had been guilty of crimes of violence, but because of a political opinion lying behind those crimes. What opinion? Since the Tribunal found as a fact that the Community would have treated Loyalists with the same criminal record in the same way, the appellants cannot say that they were discriminated against on the ground of their support for the Republican cause. Rather, they say that they were refused employment because of their former opinion, approving the use of violence to advance Republican political ends in Northern Ireland.

12. At this point, I must examine article 2(4) and article 3(1) of the Order in a little more detail.

13. When article 3(1) refers to discrimination on the ground of religious belief or political opinion, it must cover both present and past religious belief or political opinion. I can no more refuse to employ you because you were formerly a member of a Protestant church than because you are now a member of the Roman Catholic Church. The same applies to political opinions. Again, that is accepted by both parties.

14. By virtue of article 2(4), the term "political opinion" in article 3(1) does not refer to an opinion consisting of, or including, approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland. As the appellants acknowledge, if they had still approved of the use of violence to advance Republican political ends in Northern Ireland when they applied for the jobs, their opinion to that effect would not have come within article 3(1). It would therefore not have been unlawful, under article 19(1)(a)(iii), for the Community to refuse to employ them because they held that opinion.

15. Counsel for the appellants contended, however, that article 2(4) is deliberately limited to opinions that people hold at the time when they, say, apply for, and are refused, employment. It does not apply to an opinion that a person formerly held, but has repudiated and abandoned before he makes his application. It followed that, since article 2(4) does not apply, the term "political opinion" in article 3(1) includes a previously held opinion approving of, or accepting, the use of violence for political ends connected with the affairs of Northern Ireland. It was accordingly unlawful, under article 19(1)(a)(iii), for the Community to refuse the appellants employment because they had at one time approved of, or accepted, the use of violence for political ends connected with the affairs of Northern Ireland.

16. Counsel for the Community made two points in reply.

17. First, article 2(4) applied to both present and past opinions. An opinion in favour of the use of violence, which someone had previously held but had now abandoned, was accordingly not a "political opinion" for the purposes of article 3(1). So it was not unlawful to discriminate against someone precisely because he had once held that opinion. Under some pressure from members of the appellate committee, Ms McGrenera QC accepted that the logic of her position was that it was lawful to discriminate against someone who had held that opinion but had abandoned it long ago - perhaps twenty years before.

18. The second contention, though never well focused, underlay a point which surfaced at various

points in the discussion before the Committee. The issue was whether the type of opinion identified in article 2(4) could ever count as a "political opinion" for the purposes of article 3(1), even if article 2(4) did not apply. Ms McGrenera said it could not. In other words, even if the appellants were right, and article 2(4) did not apply to an opinion which the person no longer held, an opinion of that kind did not count as a "political opinion" for the purposes of article 3(1) and so it would not be unlawful to discriminate against a person because he held that opinion.

19. Lord Carswell accepts this second argument. I would not be disposed to do so, at least in the way that Ms McGrenera put it. Girvan LJ was surely right when he said, in *Ryder v Northern Ireland Policing Board* [2008] NIJB 252, 260a-b, that, "depending on the facts, an opinion on methods of achieving certain results may qualify as being truly a political opinion." For present purposes, one can test the point by taking the converse of the opinion described in article 2(4): an opinion which consists of, or includes, disapproval or rejection of the use of violence for political ends connected with the affairs of Northern Ireland. This would be an opinion behind which people could unite and form a party to contest elections. It would therefore be a "political opinion" according to the meaning of that term "which is recognised and used both in legal documents and in every day speech": *McKay v Northern Ireland Public Service Alliance* [1994] NI 103, 113g, per Sir Brian Hutton LCJ. In the context of the Order, I see no reason to give the term anything other than its ordinary meaning.

20. If that is so, then it seems plausible to suggest that, in the context of the Order, but for article 2(4), the opposing opinion described in article 2(4) would also constitute a political opinion. While no single party could unite all those who held that opinion, the opinion certainly could, and indeed did, form part of the creed of various political parties or organisations. Some of those organisations may have been proscribed. But, so far as we were told, it has never been unlawful for a person simply to hold that opinion. Indeed, a considerable number of people on either side of the political divide actually espoused some version of it. The purpose of article 2(4) was, however, to make sure that other people could conduct their employment and other affairs without being forced to associate with those who held that obnoxious opinion.

21. Of course, article 2(4) forms a crucial element of the context in which the term "political opinion" is to be construed in the Order. One can comfortably conclude that the phrase would be apt to embrace that kind of opinion precisely because article 2(4) deals with what would otherwise be the unacceptable consequence of that view. The position would be very different if article 2(4) were not included. This can be seen from *Re Lavery's Application* [1994] NI 209. The Secretary of State had refused to pay the cost of installing special security measures in the plaintiff's home because he was a member of a party that supported terrorist violence. The plaintiff complained of discrimination on the ground of his "political opinion" under section 19 of the Northern Ireland Constitution Act 1973. The statute contained no equivalent of article 2(4) of the 1998 Order. Not surprisingly, Kerr J was convinced that, if - as a generality - "political opinion" could include the belief that it was legitimate to use or support the use of violence to achieve political ends, that interpretation of the phrase would not have accorded with the intention of Parliament in enacting section 19. Here, by contrast, there is no difficulty in taking the view that, because of, and but for, the inclusion of article 2(4), the opinion which it describes would constitute a "political opinion".

22. Looked at more narrowly, Ms McGrenera's argument is indeed unpersuasive because it would render article 2(4) redundant. Of course, a court is sometimes forced to conclude that provisions in a statute are redundant, but the basic rule is that statutes are best construed as a whole and by giving due effect to all their provisions. Looking at the provisions of articles 2 and 3 together, I think that

the natural reading is that article 2(4) was included in order to exclude from the scope of the term "political opinion" something that would otherwise have fallen within it - or, at the very least, might reasonably be thought to do so. If admissible, the Parliamentary debates, which I refer to later, would confirm that conclusion.

23. Mr Macdonald QC was therefore probably right to say that, if article 2(4) does not apply to past opinions, it would be unlawful to discriminate against someone by refusing to employ him, on the ground that he had formerly held the opinion described in article 2(4). At the same time, it would seem strange if an essential part of the scheme of the Order, which vitally affects the interpretation of "political opinion" wherever it appears, were meant to be turned on and off in this way. The crucial issue is, accordingly, whether article 2(4) does indeed apply to an opinion that someone had held previously, but had abandoned by the time he applied for a job. I am satisfied that it does.

24. The appellants' first argument for confining article 2(4) to present opinions was so weak as scarcely to bear repetition. Mr Macdonald focused on the use of the present tense in article 2(4) - the idea being that this indicated that it applied only to an opinion that the person held at the relevant time. But article 2(4) is simply one element in article 2, which is headed "General interpretation". Every single definition or gloss in article 2 is framed in the present tense - but they would all apply to the term in question, whatever its relevant time frame in the Order.

25. For instance, as pointed out already, article 3(2) must apply to discrimination on the ground of past, as well as present, religious belief. No one could possibly suggest, however, that article 2(3), clarifying the scope of the term "religious belief" and written in the present tense, is confined to a person's presently held religious belief, so as to require "religious belief" in article 3(2) to be interpreted differently, depending on whether the discrimination was on the ground of past or present religious belief. The same goes for what article 2(3) says about political opinion.

26. Equally clearly, it would be very strange to confine article 2(4) to a person's presently held "political opinion", so requiring "political opinion" in article 3(2) to be interpreted differently, depending on whether the discrimination were on the ground of past or present political opinion. More concretely, it might seem strange for Parliament to regard an opinion as unacceptable if held now, but to be tolerated if held in the past but now abandoned.

27. Mr Macdonald seemed to accept that his argument was difficult to sustain on the text of the Order. So he confronted the issue head-on by reference to what he claimed was the policy of the legislation. His essential contention was that interpreting article 2(4) as applying to past political opinion would produce an unacceptable result, which Parliament could never have intended. He sought to bolster this argument by reference to passages in the Hansard report of the committee and report stages when the Fair Employment (Northern Ireland) Bill was going through the House of Commons, prior to becoming the Fair Employment (Northern Ireland) Act 1976 ("the 1976 Act"). The present dispute centres, of course, on the 1998 Order, which repealed the 1976 Act. But the language of articles 2(4) and 3 of the Order is, in its material respects, similar to the language of sections 57(2) and 16 of the Act. So Mr Macdonald argued that what was said in the debates leading to the introduction of an amendment which inserted section 57(2) could be prayed in aid of the construction of article 2(4) of the Order.

28. On policy, Mr Macdonald repeatedly submitted that the legislature could never have intended to allow people, say, to refuse to employ someone, or to refuse to serve someone in a restaurant, just because he had, many years before, voiced his support for the use of violence for political ends

connected with the affairs of Northern Ireland. If the legislation were to permit this, it would be a “bigots’ charter".

29. Sitting in London, at some distance from Northern Ireland, your Lordships might be tempted by such a submission, chiming - as it might seem - with the often-expressed desire for a new start for Northern Ireland after the Good Friday Agreement. But, as just explained, the origin of the words under consideration lies in an Act passed in 1976, at a time when violent incidents were at their height and long before anyone could see a way out of the conflict. The idea of forgiving and forgetting what people had formerly said and thought might well have appeared less compelling in those days. Indeed, but for his need to rely on passages from Hansard relating to the 1976 Act, Mr Macdonald might have been expected to emphasise the fresh enactment of the words in 1998, rather than their origin in the dark days of 1976.

30. Mr Macdonald’s description of the respondent’s interpretation of article 2(4) as a bigots’ charter completely - and insensitively - misses the point. It may well be that many, or indeed most, Northern Irish people would now feel able to overlook an expression of support for the use of violence, voiced long ago, in very different times, and long since repented of. But there are, unfortunately, many people on both sides of the sectarian divide whose lives have been blighted by the death of relatives or friends, killed in a politically motivated atrocity. Others have to live out their lives under the permanent burden of injuries sustained in such an atrocity. Some of these people may, indeed, feel able to forgive both the perpetrators and those who approved of what they did. But we admire such feelings, precisely because they cannot be commanded. Other people who have been similarly affected may, quite understandably, be unable to see matters in that way. This does not make them bigots; they are just people who have been deeply and immediately affected by the violence and who do not yet feel able to “move on” - to use the unattractive modern jargon.

31. The real question therefore is whether the 1998 Order makes it unlawful for people who feel like that to refuse to employ, or to serve, someone who once approved of the use of violence for political ends in Northern Ireland, but now no longer does so. In my view, there is nothing surprising, far less absurd or outrageous, in holding that the 1998 Order allows such people to say: “No, I'm sorry, because of all I have suffered, I won't employ you; I won't serve you.” To hold otherwise would be to force these vulnerable individuals to associate with people who approved of the use of the very kind of violence that has blighted their lives.

32. The parallel with Jewish refugees who lost relatives in the Holocaust is striking. In the 1960s, it would surely have been unthinkable for Parliament to legislate, say, to force such a Jewish restaurateur to serve a German professor who had spoken in support of Hitler’s anti-semitic policies during the Nazi régime, but had long since seen the error of his ways. Even today, I doubt if it would be done.

33. At the very least, if the intention of the legislature had been to force everyone, however deeply affected, to ignore previous expressions of approval of the use of violence, I would expect to find it stated in plain words on the face of the Order for all to see, not left to be unearthed in the lucubrations of lawyers.

34. If at any time the policy of the Order is thought outmoded or its advantages are thought to be outweighed by its potential for abuse by bigots, the legislature can change it. In the meantime, approaching article 2(4) in this way, I do not find it ambiguous, irrational or absurd. I therefore see no justification for looking at the Hansard debates. Nevertheless, Mr Macdonald took the House to

some of the debates and was persuaded to clarify the position by providing the additional information which was necessary to understand what was being said.

35. What Hansard showed was that, as originally drafted, the Fair Employment Bill contained no provision dealing with those who approved of the use of violence to achieve political ends in Northern Ireland. At the committee stage, several MPs were, understandably, anxious to ensure that the ban on discrimination on the ground of political opinion would not benefit these people. In response to their arguments, the government minister, Mr Orme, undertook to consider the matter and to bring forward an amendment in due course. The amendment was introduced at report stage and became section 57(2). So much is clear.

36. In the course of the debate in committee, a number of references were made to people who had once used violence, but had then changed their mind. The minister said that the government did not want to see those people discriminated against because they might have been involved in the past in any form of violence. Now, it is absolutely clear - and a matter of agreement - that the legislation which the minister was discussing did not deal with that situation and that it remains perfectly lawful to discriminate against people who actually used violence. So there is every reason to doubt whether the minister was a reliable interpreter of the legislation.

37. Mr Fitt MP gave the specific example of a woman who was known for speaking out in favour of the use of violence. Would she, for the rest of her life, be prevented from seeking the protection of the Bill? The minister replied that anybody who actively encouraged violence but did not himself or herself participate in it “would not be covered by this Bill". It is hard even to imagine what the minister meant, or thought he meant, by that answer. But he did go on to say that he was trying to distinguish between those who had rejected violence and wanted to live peaceably and those who continued to advocate or take part in violence. He then added “It is not an easy question and, as we see it, the terminology of the Bill meets my hon Friend’s point, and it will be for the agency - not some other organisation - to decide ultimately on this matter": Hansard (HC Debates) 6 April 1976, col 523. As a subsequent reply shows, the minister meant that the Fair Employment Agency would have to decide whether someone had really changed his mind (col 524).

38. These answers do suggest that the minister thought that the Bill as then drafted would have the effect that someone who really changed his mind would not be forever tainted by his previous support for the use of violence. But he did not explain how this meaning was to be derived from the wording of the Bill as it was then drafted. At report stage, a different minister spoke for the government when introducing the amendment which became section 57(2). He merely said that the government had had to find a form of words to meet the commitment given by Mr Orme at committee stage. As the form of section 57(2) suggests, that commitment related to MPs’ concern to permit people to discriminate against those holding a political opinion in favour of the use of violence. The minister said nothing about those who had changed their minds or how their situation was dealt with by the legislation in its new form.

39. While, therefore, the report of the proceedings in Parliament shows that the point about those who changed their minds was raised in debate and that Mr Orme seems to have thought that a previous opinion would not count against someone, the discussion is, frankly, confused. It gives no indication whatever of how such a meaning was to be derived from the legislative text. Therefore, even if I were persuaded that this was a case where reference could properly be made to Hansard, I would not regard anything said by the ministers concerned as providing a reliable gloss on section 57(2) of the 1976 Act or article 2(4) of the 1998 Order.

40. For these reasons, even if the Simon Community did indeed dismiss the appellants because of their former approval of the use of violence for political ends connected with the affairs of Northern Ireland, it was lawful for the Community to do so. I would accordingly dismiss the appeals.

LORD CARSWELL

My Lords,

41. The respondent in this appeal, the Simon Community Northern Ireland, is a charitable body dealing with homeless people in Northern Ireland. Its work includes running a number of hostels providing temporary accommodation and support services for homeless people, some under 18 years. Many of them are vulnerable persons, some having had to leave home because of threats from paramilitary organisations or others.

42. The appellants John McConkey and Jervis Marks each applied for posts in the respondent's hostels, Mr McConkey as a residential support worker in the hostel at Falls Road, Belfast and Mr Marks as a night worker in the hostel in Newry. Each was rejected on account of his paramilitary convictions for serious offences and brought a complaint before the Fair Employment Tribunal that he had been the subject of discrimination on grounds of his political opinion. The Tribunal heard the claims together and dismissed each, on grounds to which I shall refer, and the Court of Appeal (Higgins and Girvan LJJ and McLaughlin J) dismissed the appellants' appeals.

43. The Fair Employment and Treatment (Northern Ireland) Order 1998 replaced with amendments the Fair Employment (Northern Ireland) Acts 1976 and 1989. Section 19 of the 1998 Order makes it unlawful for an employer to discriminate against a person, in relation to employment in Northern Ireland, by, inter alia, refusing to offer him employment for which he applies. Article 3 defines discrimination in the following terms:

> "In this Order 'discrimination' means -
>
> (a) discrimination on the ground of religious belief or political opinion; or
>
> (b) discrimination by way of victimisation;
>
> and 'discriminate' shall be construed accordingly."

The inclusion of political opinion stems from the recommendation in the van Straubenzee report which preceded the 1976 Act: Report and Recommendations of the Working Party on Discrimination in the Private Sector of Employment 1973. The working party which produced the report agreed that it should be a ground for actionable complaint of discrimination along with religious belief, on account of the "close connection" between the two in Northern Ireland, in order to ensure, as the report said, "that any measures adopted to deal with religious discrimination do not leave loopholes for its practice in another guise" (para 6).

44. Discrimination is defined in familiar terms by article 3(2)(a) as occurring if a person treats another person "less favourably than he treats or would treat other persons". Article 3(2)(b) contains a definition of indirect discrimination, which is not relevant to the present case. The provision round which most of the argument centred is contained in article 2(4):

"In this Order any reference to a person's political opinion does not include an opinion which

consists of or includes approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland, including the use of violence for the purpose of putting the public or any section of the public in fear."

The wording of the last phrase is a direct echo of the definition of terrorism contained in a series of enactments relating to emergency provisions in Northern Ireland.

45. The first appellant applied for employment in the Belfast hostel on 19 June 2000. One of the questions on the application form asked if he had ever been convicted of a criminal offence. He put a question mark in the space for his answer, but gave no further details. He completed a form consenting to a pre-employment check, which was required by the respondent in order to ensure that persons were not appointed to posts where they might constitute a risk to vulnerable residents. On that form the first appellant stated:

"I do not have any criminal convictions because I have never been involved in any criminal activity. I have been convicted of alleged political activity by special courts 1975-1977 for being, it was alleged, a republican and for life during 1982-1996 for alleged republican activity".

He also stated that his address from 1982 to 1996 was "Long Kesh POW Camp, Lisburn", a description applied by republican prisoners to HM Prison, Maze. The pre-employment check result, received by the respondent on or about 24 August 2000, showed that the conduct so described by the first appellant was in fact a conviction in 1986 for murder, possession of a firearm with intent and belonging to a proscribed organisation. It also stated that he had been released on licence in 1997, when the Secretary of State would have had to be satisfied that he presented a minimal risk of reoffending.

46. Before the pre-employment check was sought and obtained the respondent's officers had shortlisted and interviewed the first appellant and offered him a post, subject to receipt of satisfactory pre-employment references and checks. Following receipt of the pre-employment check the respondent's Human Resources Manager wrote to him on 4 September 2000, withdrawing the conditional offer and stating that the respondent was not willing to employ staff "who may directly or indirectly place our resident group at risk".

47. The first appellant brought an application for compensation to the Tribunal on 17 October 2000. He stated in the complaint form that the respondent discriminated against him "taking into account irrelevant political convictions" and "on grounds of perceived political opinions." In its notice of appearance the respondent denied that it had discriminated against the first appellant on grounds of political opinion or perceived political opinion. It stated that it was concerned that in light of his convictions there might be a risk to residents. It relied in the alternative on article 2(4) of the 1998 Order.

48. The second appellant applied on 4 May 2002 for employment as a night worker at the respondent's hostel in Newry. In reply to the question in the application form about convictions he stated that he was in prison from 27 April 1992 until October 1998, when he was released "under the GFA". In the consent form for the pre-employment check he stated "Crumlin Road Court August/September 1993 Conspiracy and possession with intent Sentenced to 15 years". The pre-employment check dated 2 July 2002 revealed that he had convictions for conspiracy to murder, conspiracy to cause an explosion likely to endanger life or property and possession of explosives with intent to endanger life, in addition to lesser offences. He was released from custody on 13

October 1998 under the terms of the Northern Ireland (Sentences) Act 1998. By section 3 of that Act, before a prisoner was eligible for release several conditions had to be satisfied, including that he was not a supporter of a terrorist organisation, was not likely to become a supporter or to engage in terrorism and that he would not be a danger to the public.

49. The second appellant had been shortlisted and was interviewed on 7 June 2002, though he was not offered a post. On 18 July 2002 he was informed by the respondent's Human Resources Manager that he was unable to offer him a post.

50. The second appellant brought an application for compensation to the Tribunal on 28 August 2002. He stated in the complaint form that the respondent had discriminated against him unfairly and had drawn conclusions concerning his political opinions. The respondent entered a notice of appearance in similar terms to that in the case of the first appellant, denying discrimination on the grounds of the second appellant's political opinion or perceived political opinion and averring that it decided not to offer him employment "taking into account the needs of the residents". In the notice the respondent stated that it would not be unusual from time to time for a hostel to accommodate a resident or residents who had had to leave home because of action or threats from paramilitary organisations or others, for example because of alleged anti-social activities, and that its over-riding concern was the care and safety of the residents. In its reply to a notice for particulars the respondent stated that the prime reasons for not offering the post were the nature and recency of the second appellant's convictions, coupled with the vulnerable nature of the residents of Simon hostels. It relied in the alternative on article 2(4) of the 1998 Order.

51. The Tribunal set out in paragraphs 6.5 and 6.6 of the case which it stated for the opinion of the Court of Appeal the following finding in relation to the first appellant's case:

"6.5 The decision by the respondent to withdraw the offer of employment to the first appellant was made on the grounds of his political opinion; namely that, in light of the said convictions and their paramilitary nature from a republican perspective, the first appellant therefore approved or accepted the use of violence for political ends and such approval or acceptance was connected to the affairs of Northern Ireland.

6.6 The Tribunal therefore concluded, subject to consideration of the terms of Article 2(4) of the 1998 Order, the first appellant had been unlawfully discriminated against on the grounds of his political opinion."

In paragraph 7.4 it recorded its finding in respect of the second appellant, in almost identical terms. The phrase "from a republican perspective" appears to mean no more than that each appellant was concerned with a republican rather than a loyalist paramilitary group. The Tribunal did not make a finding on the question of to which particular paramilitary group either appellant belonged, or whether such group was regarded as connected to any specific political party or movement. It concluded as a consequence of these findings, that, subject to consideration of the terms of article 2(4), each appellant had been unlawfully discriminated against on the grounds of his political opinion. It also found in paragraph 8.1 as follows:

"The Tribunal also found that, if it had been necessary to do so for the purposes of the Tribunal's decision, it would have accepted that neither the first appellant nor the second appellant, at the time each made their application for employment to the respondent, accepted the use of violence for political ends connected with the affairs of Northern Ireland, including the use of violence for

putting the public or any section of the public in fear; and that when each made the said application for employment to the respondent, neither in fact held such a political opinion, which fell within the terms of Article 2(4) of the 1998 [Order]."

It concluded, however, that article 2(4) of the 1998 Order barred each appellant's claim, since it applied on its terms to political opinions held in the past as well as those presently held.

52. The Tribunal's written decision issued on 29 December 2006 contained its reasons and the evidence upon which it relied at much greater length, and it is necessary to refer to the terms of the decision in order to ascertain the findings of primary facts of the Tribunal and the basis for its expressed findings. The decision is extremely diffuse and somewhat repetitive and contains a considerable amount of irrelevant discussion, but it is possible to piece out from it some primary findings.

53. The Tribunal found (paras 7.11 and 7.18) that the decision to withdraw the offer made to the first appellant was made by Miss A, a senior officer with the respondent's organisation. It recorded in para 7.20 the reasons which she said made the respondent unwilling to employ staff who might directly or indirectly place the resident group at risk:

"These matters were, firstly, that the respondent had had prior difficulties with paramilitaries attempting to gain access to projects and residents and secondly concern about the [influence] the first claimant might have over vulnerable people, namely the residents of the said hostel."

In para 7.20 it set out a series of questions and answers from Miss A's cross-examination, in the course of which she reiterated her concern:

"The basis of the decision was the serious nature of his convictions and the paramilitary nature of his convictions and how that could potentially influence residents who were coming to Simon community or residents already staying within Simon community and there was a risk that he would be known in the area, and therefore residents or potential residents would not feel safe."

She asserted several times that her decision would have been the same whether the applicant for the post was a loyalist or a republican.

54. The Tribunal expressed in para 10.2 its conclusion in relation to the decision made by Miss A:

" … the Tribunal is satisfied that it was not just the serious nature of the convictions, which was the basis for her decision, but it involved something more. It was not the convictions themselves, but the additional element of paramilitary involvement in each said conviction and further that such a paramilitary involvement was from a republican perspective."

55. In para 8.14 the Tribunal declared itself satisfied that the decision not to offer employment to the second appellant was taken by Miss O, also a senior officer in the respondent's organisation. After a long discussion of the procedure, which seems to have had little bearing on the content of Miss O's actual decision, the Tribunal recorded in para 8.20:

"Ms O, in view of the second claimant's paramilitary convictions, concluded that the second claimant would have an adverse influence on the residents, and he would see violence was an appropriate way to resolve issues, with the potential for mismanagement and escalation of incidents and confrontation between residents within the hostel. She accepted that she had not concerns that

the second claimant would himself seek directly to harm residents."

It had previously stated in para 8.18 that it was satisfied that she "was not concerning herself whether these were convictions from a Loyalist or a Republican perspective as her decision, whatever the perspective, would have been the same." This brought the Tribunal to its conclusion in para 8.23:

"The Tribunal was satisfied, on the basis of Ms O's evidence that, in considering the second claimant's suitability for the post, in view of the vulnerability of the residents, she took into account not just the convictions themselves but, also, in particular, the paramilitary nature of those convictions; and in view of this paramilitary activity she concluded that he was not suitable for the post, given the necessity for her to ensure a safe environment for vulnerable residents."

It repeated in para 9.1 its conclusion in both cases that if each claimant had had paramilitary convictions "from a loyalist perspective rather than a republican perspective", the respondent would in each case have taken a similar decision.

56. In the Court of Appeal Higgins LJ, applying the statements made in the earlier decisions of *McKay v Northern Ireland Public Service Alliance* [1994] NI 103 and *Gill v Northern Ireland Council for Ehtnic Minorities* [2001] NIJB 299, held that the support of the use of violence for political ends was not itself a political opinion. He did not decide the issue whether article 2(4) of the 1998 Order applied to political opinions held in the past or only to those held at the time of the refusal of employment, since it did not arise in view of his conclusion about support of the use of violence. Girvan LJ expressed the view that it was questionable whether support for the use of violence for political ends qualified as a political opinion, but his main conclusion was that article 2(4) applied to opinions held by a person in the past, even if they were not presently held by him. McLaughlin J, while agreeing in the disposition of the appeal, did not state his views on either of these two issues.

57. The findings of the Tribunal confirm what was abundantly clear from the evidence, that the appellants were refused employment because the respondent's officers were concerned lest their presence in the hostels would give rise to a risk to the residents which could not be accepted. That risk was to their safety, stemming from the appellants' violent past, the contacts which they had had with terrorist organisations and the influence which they might have had over people in the hostels. The genuineness of the concern entertained by the respondent's personnel has not been questioned and the evidence fully supports it.

58. That might have been regarded as a conclusive finding in the respondent's favour, since its concern was over the possible consequences to the residents of the appellants' presence in the hostels and had nothing to do with their political beliefs. The Tribunal nevertheless held that because the appellants had committed violent crimes in the course of their support of a terrorist organisation or organisations, that "additional element of paramilitary involvement" imported a political component, reasoning from that finding that the respondent had refused them employment on the ground of political opinion. I am far from convinced that the paramilitary involvement did import any political factor or component, but the case was argued on the premise that it did, and I shall deal with the issues argued on that basis. In opposition to the Tribunal's conclusion on this part of the case the respondent's counsel advanced two propositions, first, that support for violence is not itself a political opinion, and, secondly, that support, past or present, for terrorist violence is excepted by article 2(4) of the 1998 Order.

59. "Political opinion" is not defined either in the 1998 Order or its predecessor legislation. It was settled in *McKay v Northern Ireland Public Service Alliance* [1994] NI 103 that it was not confined to political opinions having some connection or correlation between religion and politics in Northern Ireland, but had its ordinary accepted meaning. Kelly LJ said at page 117 that that meant in broad terms (which was not intended to be an exhaustive or precise definition) "an opinion relating to the policy of government and matters touching the government of the state." Giving the judgment of the Court of Appeal in *Gill v Northern Ireland Council for Ethnic Minorities* [2001] NIJB 299 I expressed the view that that statement gave the most useful guidance for the purposes of that case. I went on (at pages 311-312):

"It seems to us that the type of political opinion envisaged by the fair employment legislation is that which relates to one of the opposing ways of conducting the government of the state, which may be that of Northern Ireland but is not confined to that political entity. The object of the legislation is to prevent discrimination against a person which may stem from the association of that person with a political party, philosophy or ideology and which may predispose the discriminator against him. For this reason we consider that the type of political opinion in question must be one relating to the conduct of the government of the state or matters of public policy."

I am content now to affirm that view.

60. In *Gill v NICEM* the court distinguished the means of achieving a political end from the political opinion itself, and held that the former was not a political opinion. It concluded that

"the difference between the 'anti-racist' and 'culturally sensitive' approaches is one of methods, the one being more aggressive and confrontational than the other, but both being means of advancing the interests of people from ethnic minorities. It might be possible to describe such a difference as constituting a divergence of political opinion, but we do not think that it is the type of political opinion intended by Parliament in enacting the fair employment legislation."

In the present case Higgins LJ held (paras 41-42) that an opinion that approved or accepted the use of violence for political ends (or for the purpose of putting the public in fear) was not a political opinion for the purposes of article 3 of the 1998 Order. Girvan LJ did not express a concluded opinion on that point, though he regarded it as questionable whether such an opinion could ever have qualified as a political opinion (para 73).

61. The Court of Appeal returned to the issue in *Ryder v Northern Ireland Policing Board* [2007] NICA 43, [2008] NIJB 252. The respondent in that appeal, a well known Northern Ireland journalist, had brought an application to the Fair Employment Tribunal claiming that he had been discriminated against in the refusal by the Policing Board to appoint him to the post of communications director on account of his political opinions. Those opinions, as set out in the report, related to the conduct of policing rather than party politics or the conduct of government in general. The Court of Appeal in the end declined to decide the matter, which they considered should not have come before them as a preliminary point. In the course of their judgments, however, they expressed the view that the court in *Gill v NICEM* had not sought to lay down a universally applicable rule that a view as to the methods by which a particular cause should be advanced could never qualify as a political opinion for the purposes of the legislation (Kerr LCJ at para 15, Girvan LJ at paras 25-26).

62. In the context of different legislation Kerr J, as he was then, had held in *Re Lavery's*

Application [1994] NI 209 that support for violence should be regarded as a method of achieving a political aim and not included in the expression “political belief". This decision was not referred to in the judgments in *Gill* or *Ryder,* and may not have been cited to the court in either case, but it deserves more attention than it has received. The context was section 19 of the Northern Ireland Constitution Act 1973, which made it unlawful for a Minister of the Crown to discriminate in the discharge of functions relating to Northern Ireland against any person on the ground of religious belief or political opinion. Mr Lavery was a member of Sinn Fein, and the judge held that the Secretary of State was entitled to reach the conclusion that Sinn Fein at that time supported the use of violence for political ends. He stated that he was not satisfied that that could qualify as a political opinion, but reached the clear conclusion that section 19 was not intended to cover it, which would lead to a “manifestly absurd situation". He said at pages 220-221:

“It might be said that support for the use of violence to achieve a political objective is not a political opinion in the sense in which that expression is conventionally used but rather the means by which the vindication of one’s political opinion or the realisation of one’s political aims may be sought. Even if it can qualify for description as a political opinion, however, I am entirely satisfied that s.19 was not intended to and does not protect such an opinion. It was submitted that the ambit of s.19 did indeed extend to cover the view or belief that violence should be used to achieve a political goal but it requires little reflection to conclude that such an interpretation of the provision would lead to a manifestly absurd situation. Any advocate of violence, provided he was able to clothe his advocacy in the cloak of a political view, would be immune from less favourable treatment than that accorded to those who abhor and condemn the use of violence for political ends. Someone who openly encourages others to use arms to overthrow the state could claim entitlement to equality of treatment with law-abiding members of the community and would be able to prevent ministers from taking decisions which treated him less favourably. I cannot believe that such a situation was contemplated - much less intended - by Parliament in enacting s.19.

I am not satisfied that, in its plain and natural meaning, the expression ‘political opinion’ includes the belief that it is legitimate to use or to support the use of violence to achieve political ends. If it does, however, I am convinced that such an interpretation would not accord with the intention of Parliament which is the ultimate and defining test in statutory interpretation.”

63. I would not dissent from the views expressed in *Ryder* and supported by my noble and learned friend Lord Rodger of Earlsferry that a view as to the method by which a particular cause should be advanced may possibly in some cases and contexts itself constitute a political opinion. I would, however, hold that in the present context the approval or acceptance of violence for political ends does not rank as a political opinion. The political opinions concerned are republicanism and unionism, opposing aspirations of political identity. The division between their respective adherents reflects to a large extent the religious divide, the reason why the van Straubenzee Report recommended the inclusion of political opinion in the fair employment legislation. The overwhelming majority of the supporters of each are responsible and law-abiding citizens who seek to achieve their ends by constitutional and democratic means. Whatever may have been the position at the time when *Re Lavery’s Application* was decided, Sinn Fein now professes its object as being to promote Irish unity by solely political means. Paramilitary organisations resorted to violence as a means of achieving or supporting the political end of Irish unity or resisting it. I would not regard this as a political opinion in itself, for it is not an inherent and inseparable part of any political party’s beliefs or aims or those of any political movement. I do not consider that it follows from the provision in article 2(4) that Parliament necessarily classed it as a political opinion. The subsection was added to the Bill in 1976, long before the decision in *Gill* pointed up the distinction between a

political opinion and a means of achieving a political end. It seems to me that the provision was added, possibly *ex abundanti cautela*, in order to ensure that, however it might be framed, the approval or acceptance of violence for political ends was not to rank as a political opinion for the purposes of the 1976 Act, whence it made its way into the 1998 Order. It does not follow that it would have so ranked if article 2(4) had not been included, and I do not think that it would.

64. If this conclusion is correct, it is sufficient to dispose of the appeal. Whether article 2(4) on its correct construction is confined to presently held opinions would be a matter of no consequence, for if approval or acceptance of the use of violence for political ends does not rank as a political opinion for the purposes of the 1998 Order, it is not relevant when the appellants so approved or accepted it or whether they have or have not ceased to do so. Much of the argument was, however, devoted to the construction of article 2(4) and in my opinion the appeal is concluded by the view which your Lordships have taken on it. I had intended to set out my views fully on this part of the appeal, but having had the advantage of reading in draft the opinion prepared by Lord Rodger I do not find it necessary to do so. I agree entirely with the reasons which he has set out in paras 24 *et seq* and his conclusion. I do not consider that it is appropriate to resort to the debates in Parliament, since the conditions for doing so have not been satisfied. I agree with Lord Rodger that in any event, if one were to do so, there is no useful guidance to be obtained from the statements of Ministers about the construction envisaged by Parliament of article 2(4). I would add only that the function of a court is to interpret what Parliament has actually said in the legislative provisions as eventually enacted, not what it might have liked to say or what members thought it was saying.

65. I would therefore dismiss the appeals.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

66. I have had the advantage of reading in draft the opinions of all the other members of the Committee and, in common with each of your Lordships, would dismiss these appeals. Like Lord Neuberger, I too prefer Lord Rodger's view to that of Lord Carswell on the only issue dividing them, the ambit of the expression "political opinion." I also share Lord Neuberger's regret at the astonishing length of time taken by the Tribunal both in hearing and in deciding these applications. On the initial questions at issue there is nothing I could usefully add to what Lord Rodger and Lord Carswell have already said.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

67. I have had the benefit of seeing in draft the speeches of my noble and learned friends, Lord Rodger of Earlsferry and Lord Carswell. I agree with them that these appeals should be dismissed.

68. So far as the reasons for that conclusion are concerned, it appears to me that, save for one significant exception, the analyses of Lord Rodger and Lord Carswell are effectively the same. The difference between them concerns the issue discussed by Lord Rodger at paras 19 to 22 and by Lord Carswell at paras 59 to 63, namely whether an opinion which favours the use of violence is a "political opinion" within the meaning of the Fair Employment and Treatment (NI) Order 1998.

69. On that issue, I agree with Lord Rodger. First, as a matter of ordinary language, such an opinion

is a “political opinion", and, in the absence of good reason to the contrary, one should give an expression in a statute or statutory instrument its ordinary meaning. Secondly, if such an opinion were not a “political opinion” for the purposes of the 1998 Order, then at least part of article 2(4) of that order (in particular the phrase “consists of or”) would be redundant. Thirdly, as a matter of policy, if there is a choice between a narrower and a wider meaning, it appears to me that the expression should be given the latter meaning given the purpose of the 1998 Order.

70. That issue is not directly relevant to the resolution of this appeal. As to that, the stark and simple point is that the Community refused to employ the two appellants not because of their former political beliefs, but because of the concern that each of them would pose a threat to the vulnerable people cared for by the Community. Accordingly, while the former view of each of the appellants relating to the use of violence was a “political opinion", and a past opinion is within the scope of the 1998 Order, that does not avail the appellants in this case.

71. I cannot refrain from remarking on two unfortunate features of the procedural history of these two applications before the Fair Employment Tribunal. First, there is the delay between application and determination, and, secondly, there is the amount of time taken up by the hearing. The two applications to the Tribunal were brought in October 2000 and August 2002, but it was not until October 2005 that the hearing started. The hearing lasted twelve days spread over six months ending in April 2006. It then took more than a further eight months before the decision was published at the end of December 2006, more than four years after one of the applications had been made, and more than six years after the other. The substantial delay in disposing of these applications, and the inevitable costs and the amount of Tribunal time involved in a twelve-day hearing, appear to me to be unacceptable, particularly when one bears in mind the simple point at issue. There may be an explanation for these features in these two cases, and it is only fair to record that these concerns were not mentioned at the hearing of the appeal. However, if they are typical of the progress of applications to this Tribunal, something is going very wrong.

72. Having said that, I would dismiss these appeals for the reasons given by Lord Rodger and (subject to the qualification already mentioned) by Lord Carswell

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