



Neutral Citation Number: [2023] EWHC 376 (KB)

Case No: M377/22

IN THE ELECTION COURT
HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

**IN THE MATTER OF THE REPRESENTATION OF THE PEOPLE ACT 1983
AND IN THE MATTER OF A LOCAL GOVERNMENT ELECTION FOR THE
ASTON WARD OF BIRMINGHAM CITY COUNCIL HELD ON THE 5TH OF MAY
2022.**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 February 2023

Before :

HIS HONOUR JUDGE FOSTER SITTING AS ELECTION COMMISSIONER

Between :

MUHAMMED AFZAL	<u>Petitioner</u>
- and -	
AYOUB KHAN	<u>Respondents</u>
MUMTAZ HUSSAIN	
DIRECTOR OF PUBLIC PROSECUTIONS	

Mr Mike O'Brien KC and Mr Harjot Singh Solicitor Advocate (instructed by **Twinwood Law Practice**) for the **Petitioner**

Mr Ragveer Chand (instructed by **Caroline Street Legal**) for the **First Respondent**

Mr Sham Uddin (instructed by **Red Lion Solicitors**) for the **Second Respondent**

Hearing dates: 8 February 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 24 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE FOSTER

His Honour Judge Richard Foster sitting as Election Commissioner:

1. On 8th February, 2023 I heard the Petitioner’s application for permission to withdraw the petition pursuant to section 147 of the Representation of the People Act 1983 (“RPA”) which provides:

“147 Withdrawal of petition.

(1) A petitioner shall not withdraw an election petition without the leave of the election court or High Court on special application, made in the prescribed manner and at the prescribed time and place.

(2) The application shall not be made until the prescribed notice of the intention to make it has been given in the constituency or local government area to which the petition relates.

(3) Where there are more petitioners than one, the application shall not be made except with the consent of all the petitioners.

(4) If a petition is withdrawn the petitioner shall be liable to pay the costs of the respondent.”

2. In view of the need for a prompt resolution of this application for case management reasons I gave my decision with brief reasons following the hearing of the application, but indicated that I would provide a written judgment. I granted permission. I now provide my written judgment.

The election

3. The Aston Ward is a two membered ward and so is represented on Birmingham City Council by two councillors. Prior to the election the Petitioner had been one of the two elected councillors. So far as is relevant to this Petition the result at the election on 5th May, 2022 was:

Ayoub Khan (Liberal Democrat) 3012 votes

Mumtaz Hussain (Liberal Democrat) 2542 votes

Muhammad Afzal (Labour) 2463 votes

Nagina Kauser (Labour) 2223 votes

So the First and Second Respondents were duly elected, the Petitioner coming third.

Procedural background

4. On 25th May, 2022 the Petitioner issued the petition seeking a determination that the First and Second Respondents (hereafter I will refer to them as “the Respondents”, the Director of Public Prosecutions having taken no active part in the proceedings) were not elected and that the election was void. This was upon the grounds that the Respondents had during the election campaign made false allegations that the

Petitioner was bribing voters with the provision of packs of dates. It is relevant to point out that the election took place during Ramadan and that the consumption of dates is a traditional way in which Muslims end their fast at sundown.

5. On 9th December, 2022 I gave directions which included the following:

“Petitioner to serve his evidence by 5th January, 2023

Respondents to serve their evidence by 27th January, 2023

Trial of Petition in Birmingham commencing 6th February, 2023 (time estimate 10 days)”

6. These directions were complied with, so the Petitioner did not receive the Respondents’ evidence until 27th January, 2023, ten days prior to the trial date.
7. In the light of the evidence served by the Respondents the Petitioner sought the permission of the court to withdraw the petition. That evidence included doorbell video footage of the Petitioner and his supporters giving packets of dates to electors with Labour Party stickers on them, and further evidence that this was a widespread practice throughout the ward during the election campaign. The trial date was therefore adjourned until 13th February, 2023 to allow this application to be heard on 8th February, 2023.
8. No point is taken regarding compliance with any procedural requirements and I am satisfied that they have been complied with.
9. Rule 12 of the Election Petition Rules 1960 stipulates various requirements upon an application for permission to withdraw a petition. These have been complied with, time having been abridged by me by order dated 2nd February, 2023 under my powers pursuant to Rule 3.1 (2) (a) of the Civil Procedure Rules. In any event there is now an unresolved conflict in these requirements since the repeal of sections 148-153 of RPA.

The Parties’ submissions

10. The Petitioner’s position is straightforward. He accepts the evidence served by the Respondents and would in any event no longer seek to adduce any evidence at the hearing of the petition. Mr O’Brien, KC on his behalf submits that it would now be “impracticable” (to use his word) to continue with the petition and that having satisfied the court that there has been no improper collusion there is no good reason why the court should not grant the permission sought. His client accepts, as he must, his liability to pay costs, although he will have arguments regarding the basis for assessing such costs. He submits, the purpose of the requirement for permission to withdraw is to guard against improper collusion and the affidavits served deal with this. In any event his client is a 78 year old man who has no intention of ever standing for any elected office again. He withdraws all allegations made in the petition and accepts the relevant parts of the evidence served by the Respondents.
11. The First Respondent consents to the application, but urges upon me in my judgment to set out in the clearest terms the reason for the withdrawal, namely the acceptance by the Petitioner of the overwhelming evidence of illegal election practices. A clear

indication in those terms would satisfy the public interest, short of a formal finding as such.

12. The Second Respondent opposes the application. Mr Uddin of counsel on her behalf argues that the public interest demands a full and thorough investigation by me, utilising my inquisitorial role. Furthermore my inquiry should not be restricted to just the conduct of the Petitioner but should extend to others whose misconduct is indicated by the evidence. I should serve upon them the appropriate notice of my intention to inquire into any corrupt or illegal practices by them so to give them the opportunity to be heard and have representation. In so far as those individuals are also witnesses they have also been untruthful in their witness statements. If this requires a re-listing of the trial this is what must happen. To proceed in any other way would “sweep under the carpet” (to adopt his submission) the clearest evidence of serious election malpractice.

The law

13. In the old case of County of Durham (Northern Division): Glaholm and Store V Elliot (1874) Grove J stated:

“The withdrawing of an election petition must be by leave of the judge and if the judge saw that the withdrawal was the result of any compromise, of any giving and taking so as to prevent evidence being brought forward, which ought to be brought forward, not in the interest of either of the parties, but in the interest of the constituency, and of purity of election, the judge ought not to allow a petition to be withdrawn; he ought as far as he would have power to do so, insist upon the petition being proceeded with”.

14. Notwithstanding the above dicta, the judge allowed the petition to be withdrawn because of the procedural difficulties for it to continue by virtue of the adversarial process in which a judge could not partake. However that concern is overcome by section 140 of RPA which makes it clear that the nature of an Election Court is now inquisitorial:

“140 Witnesses.

(1) Witnesses shall be summoned and sworn in the same manner as nearly as circumstances admit as in an action tried in the High Court

(2) On the trial a member of the election court may, by order signed by him, require any person who appears to him to have been concerned in the election to attend as a witness, and any person refusing to obey the order shall be guilty of contempt of court.

(3) The election court may examine any person so required to attend or who is in court although he is not called and examined by any party to the petition.

(4) A witness may, after his examination by the court, be cross-examined by or on behalf of the petitioner and respondent, or either of them”

15. This case only confirms what is obvious from the statutory framework that an Election Petition is not a purely private law action but rather an inquiry into the

conduct of an election in the public interest. This was again confirmed in the more recent case of *Greene V. Forbes* [2020] EWHC 676 (QB) where Robin Knowles J (sitting in the Divisional Court) said at paragraph 55:

“The wider questions are moreover of general public importance. Take a case where cogent evidence had been heard of corrupt practices at the point when Parliament was dissolved and the respondent wished that evidence to be taken no further (and so to escape the provisions on the consequences of a finding by the Election Court of corrupt or illegal practice). Or take a case where a respondent was close to the point of being fully vindicated in respect of allegations of corrupt practices and the petitioner wished to avoid that outcome. It is important that the question whether and how a petition could proceed is left for determination on facts such as those.”

16. In the circumstances of that case the court went on to grant permission to withdraw the petition, put this way at paragraph 62:

“In the present case the papers show that withdrawal is the proper course. The allegations in the Petition are not maintained. Some at least should not have been made. The application to withdraw is not opposed.”

17. Finally, *Khan v. The Election Commissioner* [2005] EWHC 2365 Admin. which is no more than a reminder of the requirement to give non-parties the opportunity to be heard and represented before making adverse findings against them. This is in any event clear from section 160 (1) of RPA which provides:

“160 Persons reported personally guilty of corrupt or illegal practices.

(1) The report of the election court under section 144 or section 145 above shall state the names of all persons (if any) who have been proved at the trial to have been guilty of any corrupt or illegal practice, but in the case of someone—

(a) who is not a party to the petition, or

(b) who is not a candidate on behalf of whom the seat or office is claimed by the petition, the election court shall first cause notice to be given to him, and if he appears in pursuance of the notice shall give him an opportunity of being heard by himself and of calling evidence in his defence to show why he should not be so reported.”

18. None of these cases are binding on me, but do provide some assistance in an area where there is a paucity of case law.

19. Also relevant to my consideration of this application is the consequences of a finding of corrupt or illegal practices. This is contained in section 160 (4) and (5) of RPA as follows:

“Subject to the provisions of subsection (4A) and section 174 below, a candidate or other person reported by an election court personally guilty of a corrupt or illegal practice—

(a) shall during the relevant period specified in subsection (5) below be incapable

of—

(i) being registered as an elector or voting at any parliamentary election in the United Kingdom or at any local government election in Great Britain,

(ii) being elected to the House of Commons, or

(iii) holding any elective office; and

(b) if already elected to a seat in the House of Commons, or holding any such office, shall vacate the seat or office as from the date of the report.

(4A) The incapacity imposed by subsection (4)(a)(i) above applies only to a candidate or other person reported personally guilty of a corrupt practice under section 60, 62A or 62B above or of an illegal practice under section 61 above.

(5) For the purposes of subsection (4) above the relevant period is the period beginning with the date of the report and ending—

(a) in the case of a person reported personally guilty of a corrupt practice, five years after that date, or

(b) in the case of a person reported personally guilty of an illegal practice, three years after that date.”

Discussion

20. This application gives rise to a number of competing considerations. It is however clear that an Election Petition although begun by a private individual is not just a private law action. The Election Court has a duty where appropriate exercising its inquisitorial role to investigate any allegations of corrupt or illegal practice the consequences that flow from a finding of such practices. I reject the Petitioner’s submission that the only purpose of the requirement for the court’s permission to withdraw a petition is to ensure there has been no improper collusion between the parties.
21. Nevertheless the court must also be mindful of the court’s resources in accordance with the overriding objectives of the Civil Procedure Rules.
22. If I acceded to the Second Respondent’s submissions this would inevitably mean the trial of the petition now fixed for 13th February, 2023 would have to be adjourned for some time so as to allow non-parties the opportunity to seek legal advice and representation. It would also substantially increase the scope and length of any trial, and the consequent costs. Such costs would be incurred not only by the Petitioner but also by the First Respondent who consents to the Petitioner’s application.
23. The Director of Public Prosecutions is a party to these proceedings, and although he has taken no part in them he has been served with all relevant material at each stage and I am able to arrange for this judgment to be referred to him which I shall do. He is under a statutory duty by virtue of section 181 (1) of RPA “to make such inquiries and institute such prosecutions as the circumstances of the case appear to him to require”.

Additionally, it is open to any party to refer the matter to West Midlands Police directly who will not hitherto have seen the Respondents' evidence. In this regard specific criminal offences are created by sections 113 and 114 of RPA similar to the findings of corrupt or illegal practice which an Election Court could make, with similar consequences as regards disqualification from standing for election contained at section 173. By virtue of section 176 of RPA proceedings must be commenced within 12 months of the election, so before 5th May, 2023.

24. It seems clear from the statutory framework that Parliament envisaged that in appropriate cases a criminal prosecution would be an alternative to an Election Court making findings.
25. Any misconduct in these proceedings could be the subject of Contempt of Court proceedings pursuant to Rule 23.14 and Part 81 of the Civil Procedure Rules.
26. The Petitioner is 78 years of age and I am told through Mr O'Brien KC that he has no intention of standing for elected office again. In any event no mainstream political party would support his candidature given the circumstances of this case. For the purposes of considering the issues arising on this application I am satisfied that the Petitioner will not be standing in any future election. I make my decision upon this basis.

Decision

27. The Petitioner has withdrawn all the allegations contained in the petition and does not seek to challenge the Respondents' evidence. I am satisfied that the reason why the Petitioner now seeks to withdraw the petition is because there is conclusive evidence that indeed he and his supporters did supply electors with packets of dates containing Labour Party stickers on a widespread basis during the election campaign. Section 151 (2) of RPA provided that a report to the High Court must "state the circumstances attending the withdrawal". That provision has been repealed, but in the place of a report to the High Court I state in clearest term in this judgment that I am satisfied that the reason for the Petitioner seeking permission to withdraw the petition is the overwhelming evidence served on behalf of the Respondents of illegal election practices in which he participated.
28. The effect of this judgment will be that the Respondents will have been vindicated. Furthermore, given the circumstances of the Petitioner as set out in paragraph 26 no practical purpose would be served by a formal finding by an Election Court of corrupt or illegal practices following a full trial of the petition. The acceptance of such practices by the Petitioner and the reasons for the withdrawal of the petition as set out in this judgment serves the public interest. Additionally, I will be arranging for a copy of this judgment to be sent to the Director of Public Prosecutions reminding him of his statutory duty imposed by section 181 (1) of RPA.
29. If the Second Respondent (or indeed any other party) wish to pursue the allegations further then they can do so along the lines discussed at paragraphs 23 and 25 above. This would prevent the First Respondent needing to continue with the petition in circumstances where he consents to its withdrawal. The exercise of the duties of the Director of Public Prosecutions and the Crown Prosecution Service to make charging decisions and if need be for criminal proceedings to follow would be a far more

appropriate way to consider the conduct of the Petitioner and any non-parties rather than the costs and delays which would arise for all concerned if this petition were to continue. I am satisfied that notwithstanding the statutory limitation period there is still time for due process to take its course, especially bearing in mind the evidence which the Respondents are able to provide.

30. Accordingly, as indicated shortly after the hearing of this application, I grant permission for the petition to be withdrawn.

Costs

31. The Petitioner concedes that he is responsible for the Respondents' costs. This must in any event follow by virtue of section 147 (4) of RPA. The Respondents claim costs on the indemnity rather than the standard basis.
32. I heard argument on this issue following the announcement of my decision. The Petitioner argues that I must look at the conduct of the Respondents on two aspects. First, their failure to disclose the evidence upon which they rely until the deadline in accordance with the court's directions. Secondly, he criticises some of the items claimed as revealed by the costs schedules served in advance of the hearing of this application.
33. At the hearing I ordered indemnity costs up to and including 6th January 2023, and standard basis costs thereafter. I confirm that order in this judgment. For the avoidance of doubt that order is in favour of all three Respondents.
34. The Petitioner had the audacity to issue these proceedings in the knowledge that the allegations quite properly made by the Respondents in the course of the election campaign were truthful. He persisted with the Petition and served evidence from himself and others which was and he must have known to be false. Such conduct should properly be met with indemnity costs.
35. The Respondents cannot be criticised for their forensic strategy in not serving their evidence until the Petitioner had served his – indeed a tactic vindicated by the outcome of the petition. Nevertheless they could have served at least part of the crucial evidence or given an indication of its existence shortly after receiving the Petitioner's evidence in an endeavour to avoid the escalation of costs which inevitably occurs in the run up to a trial. It is for this reason that I award only standard basis costs after 6th January 2023.
36. The criticism of some of the claims for costs is a matter for a Costs Judge in due course. I order a detailed assessment of the costs. In the meantime, on a broad brush approach, I award the First and Second Respondents interim costs of £10,000 each to be paid within 28 days. The £2500 in court as security can be paid out in the sum of £1250 each to the First and Second Respondents respectively in part payment of the interim costs order.

Permission to appeal

37. The Second Respondent asked for permission to appeal, which I refused.

Post hearing note

38. Since the hearing of this application research has revealed that sections 148 to 153 of RPA have been repealed by Paragraph 5 to Schedule 17 of the Political Parties, Elections and Referendums Act 2000. Surprisingly, this repeal is not reflected in the Act as reproduced in legislation.gov.uk. This does not affect the substance of my judgment or decision, although submissions were made to me at the hearing of the application upon the basis that sections 148 to 153 were still in force.