Neutral Citation No: [2024] NIKB 67	*Ref:*	**SCO12590**
	ICOS No:	**22/110916/01**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**03/09/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY RAYMOND McCORD FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE NORTHERN IRELAND ACT 1998

_____

Ronan Lavery KC and Conan Fegan (instructed by McIvor Farrell Solicitors Ltd) for the Applicant
Tony McGleenan KC and Philip McAteer (instructed by the Crown Solicitor's Office) for the Proposed Respondent

_____

SCOFFIELD J

Introduction

[1] By this application the applicant, Raymond McCord, who describes himself in his pleaded case as a "peace campaigner and nascent politician", seeks to challenge section 4(5) of the Northern Ireland Act 1998 (NIA) which sets out the mechanism for cross-community voting in the Northern Ireland Assembly. The applicant has described how he wishes to stand for election as an unaligned member of the legislative assembly (MLA) who would designate as 'Other' in the event of being elected (that is, neither designated as 'Nationalist' or 'Unionist'). The application is said to be brought on this basis and also on the basis that the applicant is a voter who votes for parties who designate as Other.

[2] The applicant's grounds of challenge are founded on the rights set out in article 3 of the First Protocol (A3P1) to the European Convention on Human Rights (ECHR), namely the right to stand for election and the right to vote, and on article 14 ECHR in conjunction with those rights. The basic thrust of his case is that the voting rights of MLAs who are neither designated as Unionist or Nationalist within our constitutional arrangements carry less weight in certain important areas of Assembly business than those of MLAs so designated; and that this is unjustified.

[3] Mr Lavery KC appeared for the applicant with Mr Fegan; and Mr McAteer (led by Mr McGleenan KC) appeared for the proposed respondent. I am grateful to all counsel for their helpful written and oral submissions.

Factual background

[4] The applicant's grounding affidavit sets out the basis upon which these proceedings are brought. He is both an Irish citizen and a British citizen and is in his mid-60s. The eldest of his three sons, Raymond McCord Junior, was murdered by loyalist paramilitaries on 9 November 1997. Following upon this tragic loss, the applicant has become a victims' campaigner and says that he has dedicated much of his life to campaigning on behalf of victims and seeking justice in relation to his son's murder. As noted above, in his Order 53 statement the applicant is described as a peace campaigner and "nascent politician." He is said to be "desirous of standing for election as a constitutionally unaligned member" of the Northern Ireland Assembly who, if elected, would designate as Other within the Assembly. The applicant has stood as a candidate in Assembly elections previously, in 2003 and again in 2007, in the North Belfast constituency where he is from. In the 2007 election, he received 1,323 votes but failed to gain an Assembly seat.

[5] When the proposed respondent made the case that the applicant remained entirely free to stand for election and had not been inhibited from doing so previously on the basis of the community designation system, the applicant filed a supplementary affidavit in which he said that he would not designate as Unionist or Nationalist and would therefore "instead *automatically* be designated" as Other. Mr McCord says that he would not want to be labelled as 'Other' "because of the negative and exclusionary connotations of that word". In this further affidavit, he avers that, although he would wish to stand for election to the Assembly, he will *not* do so until the designation system is changed. Nonetheless, he believes that the persons who *would* vote for him deserve to have their voices heard and to be in a position to affect law-making in the Assembly as equals to those who vote for Unionist or Nationalist MLAs. He also avers that *if* he were to run as a candidate, one of his main goals would be to remove sectarianism in Northern Ireland.

[6] The applicant has described a number of issues of concern to him in relation to recent and current political events. These include the extended period of political impasse at Stormont before the formation of the current Executive Committee; issues relating to the Northern Ireland Protocol (now Windsor Framework); and proposals in relation to dealing with the legacy of the Troubles. He says that he wishes to stand for election to address these issues. He also says that he is strongly opposed to "tribal politics" and "the politics of orange and green"; and hopes that his grandchildren grow up in a Northern Ireland which is more progressive and free from community division. He feels that the designation system within the Assembly entrenches division in Northern Ireland society and promotes tribal politics.

[7] The applicant contends that the imbalance resulting from the provisions he seeks to challenge "has become intolerable in a democratic society" in circumstances where, following the last election in May 2022, those designated as Other make up 20% of the total seats (18 seats) in the Assembly, compared to 41% Unionist make-up (37 seats) and 39% Nationalist make-up (35 seats). Mr McCord says that he is from a Unionist family and community but simply wants what is best for his grandchildren; and that he would consider voting for a united Ireland if he was persuaded his grandchildren would be better off in that constitutional arrangement.

[8] The applicant's representatives wrote to the leader of the Alliance Party, Ms Naomi Long MLA, on the basis that her party was the largest party which designates as Other in the Assembly, seeking support for the applicant's contentions in these proceedings. This correspondence has been placed before the court. Ms Long responded indicating broad agreement with the applicant's central contention regarding the designation scheme, namely that (in her words) "it places not only non-aligned MLAs but also their constituents in a disadvantageous position, particularly with regards to key issues in the Assembly" which required cross-community support, where "the votes of non-aligned MLAs count for less than other MLAs." She shared with the applicant the Alliance Party's proposed reforms to the designation system, and other related changes, in that party's paper published in June 2022 entitled "Sharing Power to Build a Shared Future", a copy of which has also been made available to the court by the applicant.

Summary of the parties' positions

[9] The applicant contends that only those who designate as Nationalist or Unionist can "exercise full voting rights" in respect of issues which require cross-community support in the Assembly, with the votes of those designated as Other being "excluded." He avers that, if elected, his vote would not count in "17 important areas" where cross-community support is required. He argues that the effect of the impugned provision is that, when cross-community support is required, the votes of those designated as Other count only towards the composition of the majority or weighted majority thresholds but do not count towards the additional intra-nationalist and intra-unionist thresholds which are also required to be met. He therefore argues that they are a "lower class of legislator."

[10] The applicant seeks declarations pursuant to section 4(2) of the Human Rights Act 1998 (HRA) that section 4(5) NIA is incompatible with his rights to stand for election or vote in an election under A3P1 and/or incompatible with his article 14 rights in conjunction with his A3P1 rights. The application for judicial review has been brought against the Secretary of State for Northern Ireland (SSNI). It is unclear whether the SSNI is really the correct respondent in a challenge of this nature but, in any event, he is the Minister within the United Kingdom Government with responsibility for the constitutional arrangements in Northern Ireland and has opposed the applicant's application for leave to apply for judicial review.

[11] The SSNI contends that the application is premature, since the applicant has not in fact been elected and, in any event, there is no election pending at which the applicant is standing for election. He may in fact not stand at the next Assembly election when it is held. Relatedly, the proposed respondent contends that the applicant lacks standing since he does not have sufficient interest to litigate this matter. That is particularly so, the SSNI submits, because, properly analysed, the subject of the proceedings is not relevant to an election but, rather, the working of the Assembly thereafter.

[12] On the substance of the application, the proposed respondent contends that A3P1 does not create any obligation to introduce a specific electoral system, provided there are free elections at reasonable intervals. Such elections are held in Northern Ireland and the applicant (or anyone else who would wish to designate as Other if elected) is free to stand for election, should he so wish. There is no evidence that the designation system has a chilling effect either on candidates standing or on how electors vote, particularly in a Single Transferable Vote (STV) system designed to give effective representation to minorities and in which electors can vote for several candidates. The SSNI further notes that the current system gives legislative effect to agreed provisions of the Belfast Agreement and submits that any change to that system is for determination through the political process. As to the article 14 challenge, the proposed respondent submits that this does not require separate consideration and that, in any event, any differential treatment is justified. On these bases, the proposed respondent invited the court to refuse leave to apply for judicial review.

Relevant statutory provisions

[13] Section 4(5) NIA is, in fact, merely an interpretation provision which defines a number of key terms used elsewhere within the Act. In particular, it defines what is meant by "cross-community support" in the following manner:

> "In this Act—
>
> …
>
> "cross-community support", in relation to a vote on any matter, means—
>
> (a) the support of a majority of the members voting, a majority of the designated Nationalists voting and a majority of the designated Unionists voting; or
>
> (b) the support of 60 per cent of the members voting, 40 per cent of the designated Nationalists voting and 40 per cent of the designated Unionists voting;

> "designated Nationalist" means a member designated as a Nationalist in accordance with standing orders of the Assembly and "designated Unionist" shall be construed accordingly."

[14] There are a number of matters which, pursuant to the NIA, require cross-community support. These include, non-exhaustively, the approval of the budget and the passing of financial Acts (see sections 64(2) and 63(3)); approval of a draft Ministerial Code (see section 28A(4) and (8)); votes of no confidence in ministers or junior ministers (see section 30(8)); election of the Presiding Officers and deputies (see section 39(7)); making, amending or repealing Standing Orders (see section 41(2)); a vote on a matter following the passing of a petition of concern (see section 42(1)); and the continuation of the Northern Ireland Protocol to the UK-EU Withdrawal Agreement (see para 3(2)(b), Schedule 6A). An alternative way of analysing the applicant's challenge is that it is really a challenge to each of those provisions requiring certain matters to achieve cross-community support.

[15] Further detail about the practical operation of the cross-community voting system and the related system for designation of MLAs is set out in the Assembly's Standing Orders. In particular, Order 3A makes provision to the following effect. After signing the Roll of Membership at the first meeting of an Assembly, an MLA may enter in the Roll his or her political designation, which may be either 'Nationalist', 'Unionist' or 'Other.' An MLA who does not specify a political designation may be designated Other for the purposes of the Standing Orders and the NIA: see Order 3A, para 9. An MLA may change their political designation but only in certain circumstances, namely where (i) having been a member of a political party, they become a member of a different political party or cease to be a member of any political party; or (ii) not having been a member of a political party, they become a member of a political party. This provision is obviously designed to prevent MLAs gaming the system by changing designation regularly or on an issue-by-issue basis. A number of further provisions of the Standing Orders, in particular those relating to votes, identify certain matters which require cross-community support in accordance with the provisions of the NIA. These include votes, resolutions or Acts which appropriate a sum out of the Consolidated Fund or increase a sum to be appropriated and/or which impose or increase a tax (see Standing Order 26, para 1).

Relevant excerpts from the Belfast (Good Friday) Agreement

[16] As the proposed respondent noted, these provisions reflect an agreed position set out in the Belfast (Good Friday) Agreement. For instance, paragraph 4 of Strand One of the Agreement notes that the Assembly "operating where appropriate on a cross-community basis" will be the prime source of authority in respect of all devolved responsibilities. More specifically, paragraph 5 of that Strand, dealing with "Safeguards", provides as follows:

"There will be safeguards to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected, including:

…

(d) arrangements to ensure key decisions are taken on a cross-community basis;

(i) **either** parallel consent, i.e. a majority of those members present and voting, including a majority of the unionist and nationalist designations present and voting;

(ii) **or** a weighted majority (60%) of members present and voting, including at least 40% of each of the nationalist and unionist designations present and voting.

Key decisions requiring cross-community support will be designated in advance, including election of the Chair of the Assembly, the First Minister and Deputy First Minister, standing orders and budget allocations. In other cases such decisions could be triggered by a petition of concern brought by a significant minority of Assembly members (30/108)."

[17] Paragraph 6 of Strand One then goes on to provide that:

"At their first meeting, members of the Assembly will register a designation of identity - nationalist, unionist or other - for the purposes of measuring cross-community support in Assembly votes under the relevant provisions above."

Standing

[18] The proposed respondent relies upon the fact that, pursuant to section 18(4) of the Judicature (Northern Ireland) Act 1978, the court shall not grant any relief on an application for judicial review unless it considers that the applicant has a sufficient interest in the matter to which the application relates. In turn, RCJ Order 53, rule 3(5) provides that the court shall not, having regard to section 18(4) of the Judicature Act, grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates. The case made by the SSNI

has squarely put in issue the applicant's *locus standi* to pursue this application. The SSNI further relies upon the judgment of the Divisional Court in *R (Good Law Project) v The Prime Minister and Others* [2022] EWHC 298 (Admin), particularly at paras [21]-[28], as representing a check on the liberalisation in practice theretofore of the test for standing in judicial review.

[19] The *Good Law Project* decision has been discussed in a number of recent decisions in this jurisdiction. As ever, the challenge is to strike a proper balance between permitting ready access to the supervisory jurisdiction of the High Court, especially in matters engaging significant public interest, and, on the other hand, ensuring that such matters are brought before the courts only by those with an appropriate stake in the outcome. The rules as to standing are themselves a reflection of the public interest, operating (alongside other principles relevant to the discretionary nature of judicial review) to ensure that valuable court time is not wasted by applications which are unlikely to result in any concrete benefit to the litigants; and that important issues of public interest are argued by those well-placed to do so, rather than mere busybodies, publicity-seekers or agitators. That appears to me to be why the decision in the *Good Law Project* case sought to draw the focus back to the important questions of whether the challenger is directly affected by the decision at issue; whether they have a particular expertise in the subject matter; whether they are properly to be viewed as representative of the public or some section of it; and whether there were better placed challengers. Non-governmental organisations with specialist knowledge and expertise will often have sufficient interest to challenge a matter of public interest within their field of expertise; the purely self-appointed "concerned citizen" less so. However, context is everything and the sufficiency of interest required may also vary with the nature and importance of the issue raised.

[18] The thrust of the proposed respondent's objection is that, properly analysed, the intended challenge in this case is not a matter relevant to an election (whether one is standing or voting in that election) but, rather, is a matter relevant to the working of the Assembly thereafter. The logic of the SSNI's argument is that it is likely only to be elected MLAs who have standing to bring a challenge of the character the applicant seeks to mount.

[19] For his part, the applicant has made clear that he mounts his case on two alternate bases. The first is as a putative MLA, that is to say someone who hopes to stand for election and hopes to be elected to the Northern Ireland Assembly. He avers that he is a person who actively participates in public life and wishes to run for election to the Assembly for a third time. The second basis is simply as a voter who (at least presently) votes for parties whose MLAs designate as Other. On that basis, the applicant considers his vote "carries much less weight than a comparator elector" who votes for candidates who designate as either Unionist or Nationalist.

[20] In his submissions the applicant acknowledged that, as someone who had expressed an intention to run for election rather than as an elected MLA, the issue of

standing required to be addressed. He relied upon the decision of the Grand Chamber of the European Court of Human Rights (ECtHR) in *Sejdić v Bosnia and Herzegovina* (2009) 28 BHRR 201, at paras 28-29, in support of his contention that he had the necessary standing to bring this application in order to vindicate his Convention rights. In that case, the ECtHR confirmed that article 34 of the Convention does not permit the bringing of an *actio popularis* on the part of individuals or organisations who have not been directly affected by a provision of national law which they wish to challenge. However, the court went on to note that it is open to applicants to contend that the law violates their rights, in the absence of an individual measure of implementation, "if they belong to a class of people who risk being directly affected by the legislation or if they are required either to modify their conduct or risk being prosecuted."

[21] In the *Sejdić* case, the applicants' active participation in public life meant that it would be entirely coherent that they would in fact consider running for election to the relevant legislature. However, they were prevented from doing so. I accept Mr McAteer's submission that this authority is of limited (if any) relevance to the substantive argument in the present case. That is because, in the *Sejdić* case, unlike the present, prospective candidates were actually *precluded* from standing for election. They could also therefore not challenge the relevant provisions of national law once they had been elected. Their victim status for the purpose of a Convention challenge could *only* be established by virtue of showing that they would, or might well, stand for election if the impugned rules permitted them to do so.

[22] The respondent focused on the suggestion that one could also qualify as a victim under the approach outlined in the *Sejdić* case if one was "required" to modify one's conduct (or risk being prosecuted) and contended that, in the present case, the applicant did not meet this threshold either. This engages the debate about what the applicant might or might not do when the next Assembly election is called. As noted above, in his initial evidence he indicated that he wished to run for election again and was intending to do so. In a supplementary affidavit he indicated that he would not do so unless the designation regime was removed or modified (so indicating that he had modified his conduct because of the provisions he wishes to challenge). In his skeleton argument it was contended that he "*may* not stand for election if the designation regime remains as is" [my emphasis].

[23] As a result, the court was left in some doubt as to the applicant's intentions and, regrettably, was faced with a lack of clarity in the applicant's evidence overall about these. At best, this evidence was equivocal. At worst, it was contradictory and vulnerable to the accusation that the applicant was changing his tune in order to meet the proposed respondent's objection in relation to standing. However, I am prepared to give the applicant the benefit of the doubt in relation to the question of standing insofar as he relies upon his status as a potential Assembly candidate. He has stood for election twice before in the past and received a modest, although not insignificant, measure of electoral support in his home constituency. He has been active in public life since that time and, I accept, does not wish to be labelled either

as a Nationalist or Unionist in that context. If elected, he would have to consider whether (and, if so, how) to politically self-designate under the Assembly's Standing Orders. The designation issue may well influence his decision as to whether or not to stand for election again; and, if he did so, his intentions in relation to political designation may be the subject of valid enquiry during the course of the election campaign.

[24] But for the applicant's previous attempts to be elected to the Assembly, and therefore the credible suggestion that he might well stand again, I would not have considered him to have had a sufficient interest in the subject matter of these proceedings to bring them. Such an approach would have amounted, in my view, to conferring a right of *actio popularis* in relation to this issue, which would entitle any voter to raise the same issue in a manner which would not represent the necessary sufficiency of interest. I have considered the powerful point made by the proposed respondent that there are other potential, better-placed challengers, an obvious example being an MLA who has been elected and has either self-designated or been designated by default as Other. I do not consider that objection sufficient to deprive the applicant of standing on this occasion.

[25] I have also considered the further powerful point that this application may be premature in light of the fact that there is presently no Assembly election campaign ongoing, nor is there any in prospect any time soon. To await such a development would perhaps have the benefit of bringing additional clarity to the applicant's position. However, to dismiss the application in the exercise of the court's discretion on that basis would simply be to invite a further such application to be made by the applicant (or someone else) at a time when there was considerably more time pressure on the application (and any appeal) being determined. I do not propose to do so. I therefore turn to the merits of the proposed application.

Article 3 of the First Protocol ECHR

[26] A3P1 provides as follows:

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

[27] A3P1 is generally recognised as containing two related but distinct rights: the right to stand for election and the right to vote in elections. The applicant contends that each of these aspects of his rights are violated by the cross-community voting system. The case-law of the ECtHR indicates that the rights contained within A3P1 do not extend to local elections, whether municipal or regional; but I proceed on the basis that the law-making functions of the Northern Ireland Assembly are such that it is plainly a legislature the elections to which engage A3P1 in principle.

[28] An important decision in relation to this Convention article is that of the Grand Chamber in *Hirst v UK (No 2)* [2005] ECHR 681, particularly at paras 56 to 62. In the context of the present case, paras 60-62 are worth setting out in full:

> "60. Nonetheless, the rights bestowed by Article 3 of Protocol No. 1 are not absolute. There is room for implied limitations and Contracting States must be allowed a margin of appreciation in this sphere.
>
> 61. There has been much discussion of the breadth of this margin in the present case. The Court reaffirms that the margin in this area is wide (see *Mathieu-Mohin and Clerfayt*, cited above, p. 23, §52, and, more recently, *Matthews v. the United Kingdom* [GC], no. 24833/94, §63, ECHR 1999-I; see also *Labita v. Italy* [GC], no. 26772/95, §201, ECHR 2000-IV, and *Podkolzina v. Latvia*, no. 46726/99, §33, ECHR 2002-II). There are numerous ways of organising and running electoral systems and a wealth of differences, inter alia, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision.
>
> 62. It is, however, for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see *Mathieu-Mohin and Clerfayt*, p. 23, §52). In particular, any conditions imposed must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage. For example, the imposition of a minimum age may be envisaged with a view to ensuring the maturity of those participating in the electoral process or, in some circumstances, eligibility may be geared to criteria, such as residence, to identify those with sufficiently continuous or close links to, or a stake in, the country concerned (see *Hilbe v. Liechtenstein (dec.)*, no. 31981/96, ECHR 1999-VI, and *Melnychenko v. Ukraine*, no. 17707/02, §56, ECHR 2004-X). Any departure from the principle of universal

> suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 of Protocol No. 1 (see, mutatis mutandis, *Aziz v. Cyprus*, no. 69949/01, §28, ECHR 2004-V).

[29] The applicant contends that, in instances where cross-community voting is required, the votes of designated Nationalist and Unionist MLAs are counted twice: first, in relation to the overall threshold required (whether a simple majority or a weighted 60% majority) and, second, in relation to the community designation thresholds (whether requiring a majority of Unionists and Nationalists or, as the case may be, at least 40% of designated Unionists and Nationalists present and voting). On this basis, he contends that the votes of MLAs designated as Other, which count only in relation to the overall threshold required, carry considerably less weight. This analysis is supported by an interesting and reflective article entitled 'How Unfair is Cross Community Consent? Voting Power in the Northern Ireland Assembly', published in June 2010 by Alex Schwartz: *Northern Ireland Legal Quarterly,* Vol 61(4), 349-362, at 351. In addition, the applicant relies upon a paper published by the Northern Ireland Assembly Research and Information Service, which expressed the view that in cross-community votes the "designated unionists and nationalists are more likely than the votes of others to have a determinative effect on the outcome": see McCaffrey and Moore, 'Opposition, community designation and D'Hondt' in the Assembly Executive Review Committee report, 'Review of Petitions of Concern' (25 March 2014) (NIA 166/11-15), p 185. In short, Unionist and Nationalist MLAs as designations have an effective veto which is not enjoyed by those who designate as other.

[30] In the *Sejdić* case mentioned above, the applicants complained that, despite possessing appropriate experience, they were prevented by the constitution of Bosnia and Herzegovina from being candidates for the presidency and the House of Peoples of the Parliamentary Assembly. This was solely on the ground of their ethnic origins, since these positions were reserved for members of the so-called 'constituent' peoples (Bosniacs, Serbs and Croats) as part of the Dayton peace settlement. The court agreed, by a majority, that the applicants' ineligibility to stand for these positions because they were Jewish and Roma constituted unjustified discrimination contrary to article 14 ECHR in conjunction with A3P1.

[31] The Strasbourg court has emphasised the requirement of effectiveness in respect of the right to vote and stand for election. In *Ždanoka v Latvia* (Application No 58278/00), the Grand Chamber said that:

> "[The Court] has to satisfy itself that conditions imposed on the rights to vote or to stand for election do not curtail the exercise of those rights to such an extent as to impair

> their very essence and deprive them of their effectiveness; that they are imposed in pursuit of legitimate aim; and that the means employed are not disproportionate (see *Mathieu-Mohin and Clerfayt*, cited above, §52). In particular, any such conditions must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people for universal suffrage (see *Hirst*, cited above, §62)."

[32] The difficulty for the applicant in the present case is that there are no conditions whatever imposed upon his right to stand for election by the impugned provisions. He is entirely at liberty to put himself forward as a candidate. If he was to be elected, he would then have to decide whether or not to self-designate as Unionist, Nationalist or Other. His concern not to be categorised either as a Unionist or Nationalist is catered for by the third option. Even then, he could choose not to self-designate at all. The Standing Orders then provide that he "may" be designated as Other in that circumstance. The Standing Orders are silent on the question as to whether there is an obligation upon the Speaker to so designate an MLA who does not self-designate (although, even if there is no such obligation and an MLA could remain completely undesignated, that MLA's vote in the Assembly would not count towards the two relevant community thresholds required in a cross-community vote). However, this case is not equivalent to those where a candidate is excluded or even those where a mandatory oath is required of a public representative before they take up their seat. The applicant is not required to do anything.

[33] The central point, however, is that there is no condition imposed upon the applicant's right to stand for election. Even if the designation system could be said in some way to represent an impediment to the applicant standing for election, which the court does not accept, it would in any event not curtail the exercise of the applicant's right to such an extent as to impair its very essence. As McCloskey LJ observed in the *Allister* case (*Allister and Peeples v The Prime Minister and Others* [2022] NICA 15, at para [486]), that test is the ultimate touchstone of compatibility of A3P1 rights.

[34] As to the right to vote, the applicant contends that the will of the people to elect an MLA who will designate as Other is not given effect in the Assembly through its voting mechanisms because such an MLA is precluded from full participation in order to affect the outcome of votes on certain major issues. He says that the vote of someone electing an 'Other' MLA is of less value than that of a voter who votes for Unionist or Nationalist candidates. He relies upon the case of *Riza & Others v Bulgaria* (Application Nos 48555/10 and 48377/10) – a case concerning a decision to annul the election results in a number of polling stations set up outside the country in the 2009 Bulgarian general elections – for the proposition that the vote

of each elector must have the possibility of affecting composition of the legislature, otherwise the right to vote would be devoid of substance.

[35] Again, the simple difficulty for the applicant is that the vote of each elector *does* have the possibility of affecting the composition of the legislature. This case is not comparable to that of *Aziz v Cyprus* (2005) 41 EHRR 11, where the applicant was refused registration on the electoral roll in order to vote by reason of his national origin; nor to that of *Riza & Others* where votes were not counted. There is no exclusion from voting in the present case. Rather, voters are entitled to vote for, and (from the statistics placed before the court) increasingly appear to have been voting for, candidates who designate as Other upon election. (The SSNI relied upon the fact that, in the most recent election, MLAs designating as Other represent 20% of the Assembly, an increase in seven seats since the previous election, compared with a decrease in seats for those designating as Unionist or Nationalist). Such voters are able to see their vote "influencing the make-up of the legislature" (cf. the judgment of the ECtHR in *Riza*, at para 148). Across the vast majority of the Assembly's business there is no distinction whatever between votes of those MLAs and those who have selected a particular community designation.

[36] The proposed respondent made the extremely powerful point in his opposition to the grant of leave that A3P1 does not create any obligation to introduce a specific system and provides only for free elections which ensure the free expression of the opinion of the people in the choice of the legislature: see para 61 of *Hirst v UK (No 2)* (*supra*) (approved by the Court of Appeal in the *Allister* case (*supra*), at para [260]). Self-evidently, there are many ways in which electoral systems can be set up and run; and, indeed, there is a wide variety of diversity in this regard across the member states of the Council of Europe.

[37] In the *Allister* case, McCloskey LJ (at para [455]) referred to "the threshold of complete deprivation of one of the rights protected in order to establish a violation of A3P1…" The applicant's suggestion that the voting mechanisms within the Assembly for matters requiring cross-community support are such as to render his right to vote "ineffective" is untenable. Voters are entitled to, and do, vote for candidates who will designate as Other. As noted above, across most of the Assembly's legislative competences, their vote is indistinguishable from those with community designations. There are a number of areas where this will not be so, as a result of the agreement reached during the negotiations which led to the Belfast Agreement (endorsed by, amongst others, a number of parties whose representatives would go on to designate as Other). Even then, the votes of Other MLAs are important in counting towards the overall threshold required for the measure to pass. Such MLAs are entitled to contribute fully both to the Assembly debates and scrutiny processes in the normal way; and the greater the number of Other MLAs elected, the fewer Nationalist and Unionist MLAs need to be persuaded to successfully vote through a measure requiring cross-community support. Albeit this is not presently the case, if sufficient Other MLAs were elected, by force of numbers

they could achieve an effective veto over legislation requiring cross-community support.

[38] It is also relevant to note that Parliament retains the sovereign authority to legislate for Northern Ireland even in relation to matters which do or might (through the petition of concern mechanism) require cross-community voting: see section 5(6) NIA. Recent history has shown that Parliament is willing to exercise that power in certain circumstances where there is deadlock in the Assembly. There is, of course, nothing similar to the designation system of which the applicant complains when it comes to elections to the Westminster Parliament.

[39] I accept the proposed respondent's argument that to adopt the approach advocated by the applicant would be to step well beyond the boundaries of the Strasbourg jurisprudence in relation to A3P1, contrary to the *Ullah* principle (as summarised, for instance, in recent times by Lord Reed in *R (AB) v Secretary of State for Justice* [2021] UKSC 28; [2022] AC 487, at paras [54]-[60]).

[40] In view of the above, I consider the applicant's case that the relevant provisions are in violation of A3P1 rights to be unarguable.

Article 14 ECHR

[41] In light of the discussion above, I do not consider that the alleged discrimination against the applicant falls within the ambit, properly understood, of A3P1. As McCloskey LJ noted in his concurring judgment in the *Allister* case, "the application of the ambit test will normally require the court to consider the proximity of the subject matter of the complaint to the core of what the relevant Convention right protects" (see para [494]). If I am wrong in that, I additionally consider that the applicant's case based on article 14 is also unarguable since any justification for the differential treatment is within the state's margin of appreciation.

[42] The applicant contends that there is a clear difference of treatment between him and his selected comparator (a Nationalist or Unionist candidate or elected MLA). He further contends that the difference of treatment is on the basis of ethnicity or nationality; and that those who designate otherwise than Other are given a special, higher status by reason of their ethnicity. This is a suspect ground upon which to discriminate in respect of which the court's standard of review should be intense, he submits. In the alternative, the applicant contends that the difference of treatment is on the basis of political opinion. He contends that even if there is a legitimate aim, the differential treatment is unjustified because it could be achieved with a less intrusive measure (for example, by a 'difference blind' weighted majority of 60% or 65%, which would allow for cross-community support but without recourse to a system of designation).

[43] I reject the applicant's suggestion that the designation system operates in the grounds of ethnicity. The Unionist and Nationalist designations are made on the

basis of political views relating to the constitutional status of Northern Ireland. It is overly crude and unrealistic to suggest that this is a pure proxy for ethnicity. There are those who identify as Irish or come from that ethnic background who may nonetheless be unionist in outlook. Similarly, there are those who identify as British or come from that ethnic background who may nonetheless support a united Ireland (for example, on the basis suggested by the applicant in his own evidence). There are those who identify as Northern Irish, whose views on the constitutional issue may vary. There are those of mixed ethnicity, of various permutations, and those who live and vote in Northern Ireland who have an ethnicity entirely unrelated to the historic majority and minority communities on the island or in this jurisdiction. All of these may fall on one or other side of the constitutional debate or neither. Their views may also change from time to time. In the applicant's case in particular, I do not consider that he can claim to have been discriminated against on the basis of his ethnicity (which, on his own evidence, is mixed Irish/British).

[44] In truth, the cross-community voting system is one designed to balance out, or share power between, the two groups with fixed views on the issue of Northern Ireland's constitutional future. The protected status, if any, is clearly based on political opinion. The applicant nonetheless suggests that this is an area where the court should exercise a high intensity review. I reject that submission for two reasons. First, the context of election to the devolved Assembly – unlike, for instance, employment or the provision of goods and services – is not one where political opinion ought to be irrelevant. On the contrary, this is an intensely political context where the political views of the candidate for election (including on constitutional issues) will be both well-known and to the fore. Indeed, candidates invite the electorate to cast their vote on the basis of their political opinions and aspirations. Second, the particular context in Northern Ireland in which the impugned system was adopted was one of moving to stable political arrangements in a consociational legislature as a means of ending a period of violent political conflict. The Grand Chamber in the *Sedjić* case unsurprisingly accepted that the restoration of peace was a legitimate aim in this context (see para 45 of the judgment).

[45] The applicant accepts that the establishment and operation of a political system which enjoys stability and sufficient support to bring the Troubles to an end represents the pursuit of a legitimate aim. However, he complains that the same end could be achieved by means of a less intrusive measure. He suggests that there are several potential ways in which the system could be changed which would still protect the principle of cross-community support but do so in a way which is less intrusive in respect of the rights of others. In making this point, the applicant refers to a number of articles and papers which examine the issue. He has mentioned a difference-blind weighted majority of 60 or 65% as one option; or some other qualified majority requirement, with a sufficiently high threshold which would still ensure that no decision could be taken against significant opposition of one of the two traditional communities. He also relies upon the advice to the Assembly from

the Northern Ireland Human Rights Commission (NIHRC) on the Assembly and Executive Reform (Assembly Opposition) Bill to this effect.

[46] However, as one of the articles upon which the applicant relies points out, "… however the threshold is set, there are inevitable and problematic trade-offs involved", leading the authors to "caution strongly against any precipitate change to the rules relating to key decisions": see McCrudden, McGarry, O'Leary and Schwartz, 'Why Northern Ireland's Institutions Need Stability' (Cambridge University Press, 2014), at pp 19-20. Interestingly, the NIHRC also advised the Assembly that, whilst the cross-community voting mechanism may be open to legal challenge under A3P1, the Commission considered that "the mechanism is compliant with the black-letter of the law" in light of the broad latitude available to states to establish constitutional rules on the status of members of Parliament. It nonetheless invited the relevant Assembly Committee to scrutinise the operation and proportionality of the mechanism and questioned whether it met "the spirit of the Convention" in present day conditions.

[47] The applicant further relies upon the ECtHR decision in *Zornić v Bosnia-Herzegovina* (Application No 3681/06) in which the court expressed the view that, 18 years after the conflict in that region, the time had come to adopt a political system capable of affording all citizens of that country the right to stand for election to the House of Peoples and the presidency without any distinction in respect of ethnic origin. The applicant argues that, equally, over 25 years after the Belfast Agreement, he believes it is time for Northern Ireland to move on so that the sizeable and growing 'Other' grouping is afforded equal status in the Assembly.

[48] It is not the role of the court, however, to seek to redesign the legislative arrangements passed by Parliament and adopted by the Assembly, after agreement in the course of the Belfast Agreement and endorsement by referendum. The system adopted falls squarely within the broad margin of appreciation which, in my judgement, should properly be afforded to the state to seek to secure stable government in the unique circumstances of Northern Ireland. The breadth of the margin of appreciation in this area was emphasised by the Court of Appeal in the *Allister* case at paras [261]-[262] of the majority judgment; and in the concurring judgment of McCloskey LJ at paras [451]-[453] and [457].

[49] The court also notes that the Assembly itself has mechanisms for reviewing the propriety of the cross-community voting arrangements. In particular, the Assembly and Executive Review Committee – whose work was referred to in the course of the arguments in this case – is a standing committee of the Assembly with a remit of keeping under review matters relating to the functioning of the Assembly. In June 2013 it reported on the community designation provisions, amongst other matters, finding that there was no consensus on replacing the arrangements, for example, with a 65% weighted majority. The facility for ongoing review of this issue, consistent with the content of paragraph 36 of Strand One of the Belfast Agreement (which provides for a review of arrangements set out in Strand One,

including the Assembly's procedures, with a view to agreeing adjustments necessary in the interests of efficiency and fairness), is another factor relevant to the establishing justification for the operation of the provisions.

Conclusion

[50] There are plainly valid points to be made about the continuing operation of the community designation system. The value, efficacy and fairness of the system is properly a matter for political debate. The increase in recent elections in the number of those voting for parties who designate as Other and the resultant increase in the number of MLAs so designated may prove a catalyst for further such debate. But this is not a matter where there is a realistic prospect of the court, observing its proper constitutional role, holding that the constitutional arrangements which have been adopted in this regard are unlawful, at least at this stage and on the basis of Convention arguments which have been raised in these proceedings.

[51] By reason of the foregoing, although I reject the respondent's submission that the applicant lacks standing, I nonetheless dismiss the application on the basis that the applicant has not raised an arguable case with a realistic prospect of success.