IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION

No. QB-2019-001497

Royal Courts of Justice
Strand
London, WC2A 2LL

[2019] EWHC 1398 (QB)

Wednesday, 24 April 2019

Before:

MR JUSTICE WAKSMAN

B E T W E E N :

DINESH DHAMIJA — Claimant/Applicant

- v -

THE LIBERAL DEMOCRATS IN ENGLAND — Defendant/Respondent

MR I. MAYES QC and MR J. MILLER (instructed by Zaiwalla & Co) appeared on behalf of the Claimant/Applicant.

MR G. VASSALL-ADAMS QC (instructed by Goodman Derrick LLP) appeared on behalf of the Defendant/Respondent.

A P P R O V E D J U D G M E N T

MR JUSTICE WAKSMAN:

1. I have come to a clear view on this matter. Given the time pressures which not only I but the parties to this claim are under, I propose to deliver this oral judgment now.

2. Until recently it was not anticipated that the UK would be participating in the forthcoming elections for the European Parliament which take place on 23 May. But, as a result of the recent grant of an extension to the Exit Day until 31 October of this year, as matters stand at the moment, the UK will be participating in those elections and relevant political parties will be selecting and then fielding candidates. This has put the present defendant, the Liberal Democrats in England (along, no doubt, with other political parties) under considerable pressure to establish correct selection protocols and criteria in circumstances where until recently there was not thought to be any, or any pressing, need.

3. The claim before me is brought by Mr Dinesh Dhamija, a prominent member of the Liberal Democrats who, for reasons which I will explain, challenges the lawfulness of the recently-issued protocol governing the selection of candidates. Although several points have been made in the written submissions, there is, in my judgment, one key and fundamental point, as recognised by both counsel, and it is the approach to, and the interpretation of, section 104 of the Equality Act 2010. It is common ground that if the protocol in question (which the Defendant has withdrawn) was indeed unlawful within the meaning of section 104, as the Defendant considers, then this challenge must fail. If the protocol was in fact lawful, then there may be a subsidiary argument as to whether the defendant was in breach of contract or not in withdrawing it.

4. Let me turn immediately and in short order to the relevant protocol. Appendix A thereto says this at para.1:

> "The Equality Act 2010 permits a political party to take positive action through the use of selection arrangements to address the under-representation of certain groups. The committees within the party that are responsible for the governance of selections are encouraged to consider whether to adopt selection arrangements. For the purpose of the European Selection Rules, that body is the English candidate's committee. The following process should be followed when doing so."

5. Then para.2, which, in my view, is very important:

> "The committee should first consider the composition of the present Liberal Democrat group within the relevant body for which candidates for election are being selected. The committee should identify which, if any, groups are under-represented in the body concerned as compared to the general population by reference to the following protected characteristics: disability, race, ethnicity, sex, gender, gender reassignment, sexual orientation, age and religion or belief."

6. So as to avoid coming back to this paragraph, I observe that it is plain that the view expressed in that protocol was that the group of persons to be considered was whoever were the Liberal Democrat members within the relevant body at that time, and in this case it is common ground that the relevant body here is the European Parliament. The present tense is emphasised by the following words:

> "... for which candidates for election are being selected. The committee should identify which, if any, groups are under-represented in the body concerned."

7. Pausing there, this of course is not a statute, but it is material, in my view , to note that, at least in the eyes of the protocol, the relevant group of persons to be considered were the current incumbents in the present body prior to the election of new incumbents.

8. Paragraph 3 says:

> "The committee should decide whether or not it wishes to take positive action to address any under-representation.
>
> 4. The committee must ensure that any arrangements it wishes to make are reasonable means of achieving of that end."

9. It then turns to specifics. First of all, para.5:

> "The outcome of the final count will be adjusted to ensure gender balance in the top two positions on each list, and that at least two of the candidates in positions 3 to 8 are female. For the following lists this adjustment will be made to ensure a female candidate is in first place in the east, northeast, the southeast and the southwest of England [this protocol applying only to the English part of the Liberal Democrat party]. This will apply when sufficient female candidates apply for selection and meet the selection criteria, and the diversity monitoring form is to be filled in."

10. The effect of this is that where candidates put themselves forward for the purpose of a ballot of members to arrive at a list of candidates which will then be fielded at the forthcoming election, the candidates will be graded in terms of their success by reference to the number of votes from members that they have achieved. So position number one will go to the candidate who has secured the most votes under the voting system applied to the members and so on. The effect of para.5 for the areas concerned would be that if there is no female candidate in first place, then a female candidate otherwise in the list will be moved to first place, i.e. ahead of the others, and that is a scheme which has been referred to colloquially before me as "zipping". It is, in one sense, the most intrusive of protective measures or measures designed to ensure proper representation of protected groups. That is because this goes beyond, for example, encouraging applications from those in protected groups, or mentoring them, or giving particular training opportunities or other opportunities for participation in the party or its activities. This goes to re-arranging the order of priority of those who have been the subject of a vote by members for the purpose of becoming candidates, in this case for the European elections.

11. In this particular case, I should add that the protocol had been put in place obviously before the voting for the prospective candidates had started. Paragraph 6 is the one with which I am directly concerned, and it says:

> "The outcome of the final count will be adjusted to ensure that at least two of the top six candidates on each list are from BAME background [black, Asian or minority ethnic]. For Yorkshire and the Humber, one of those two must be in first or second place. For London, one of those two must be in first place."

Again that applies when sufficient BAME candidates apply for selection.

12. In the present case, Mr Dhamija ended up being second on the priority list. On the basis of this policy, since the person who is number one is not from a BAME background, he would be moved up to replace her as number one. The advantage of being number one is particularly

important here because the general view is that unless you are number one, the chances of you ultimately obtaining a seat in the European Parliament are low. That is fully reflected by the fact that there is only one MEP representing the Liberal Democrats in the European Parliament at the moment, and she is a woman.

13. So those are the two sections. Paragraph 7 then says:

> "The outcome of the final count will be adjusted to ensure that at least one of the top five candidates on each list is from an LGBT+ background.
>
> 8. In southeast and east of England, the outcome of the final count will be adjusted to ensure that at least one of the top four candidates on each list is from a disabled background."

14. Shortly after that policy was announced, the party began to receive a number of complaints about it, and they are documented in the exhibit to Sir Nick Harvey's witness statement in opposition to the present application. These were made by people of various and diverse backgrounds, but one of them, at p.17, sums up what the problem was perceived to be by zipping someone from one particular protected group. It says:

> "In the context of the selection of a slate of candidates who will be elected to public office in the order that they finish in internal party ballots, we do not support action that seeks to discriminate in favour of individuals who have one protected characteristic against those who have another."

15. There are a number of emails expressing the same sentiment, and it is not necessary for me to go through them.

16. Suffice to say that, on the evidence I have seen, those in charge of the Liberal Democrats perceived that there was a real problem emerging and that something needed to be done about it. What they did about it was to seek counsel's advice. That advice is not the subject of this challenge, because it is for this Court to decide the lawfulness or otherwise of para.6 of the protocol, but it is an important feature of the chronology. The advice, which was written by Mr Vassall-Adams (who appears before me today on behalf of the Liberal Democrats), analysed the workings of the section. As I shall be doing that myself shortly, I do not need to state his advice in detail. Suffice it to say that the approach he took was to say that when considering particular measures which might otherwise be discriminatory in order to improve or remedy under-representation, the matter which had to be considered was the nature and extent of the representation currently in the elected body. Therefore he took the view that what I have referred to as a comparator, simply as a useful turn of phrase, in this particular case was, and is, the single woman MEP representing the Liberal Democrats in the European Parliament.

17. So far as para.5 is concerned, he said that that paragraph was unlawful because it could not be said to be remedying any under-representation of women, when the current representation was constituted by a single woman, and one can follow the logic of that.

18. So far as para.6 is concerned, he took a somewhat more nuanced view but he said this in para.31:

> "I am also doubtful about the validity of paragraphs 6 to 8 as they seem to me to be essentially arbitrary. The position is less clear in respect of paragraphs 6 to 8, but my view on balance is that with only one MEP as a comparator, this is an insufficient basis for positive action and there is a significant risk that such action would be disproportionate, for example, by reason of promoting one protected characteristic at the expense of another. This judgment is ultimately a matter for those who know in practice who the potential candidates are and what the impact of any given policy will be in practice."

19. As a consequence of receiving that advice, Martin Beardwell, who is the chair of the English Appeals Panel for the Liberal Democrat party in England, decided that paras.5 to 8 should be removed in their entirety. He was aware of complaints that had been made, in particular from three LGBT Plus candidates, and was aware of what the EHRC guidance had said, which I shall come to in a moment. This decision to remove those paragraphs was taken before the ballots had been counted. Its actual implementation came after they had been counted, but those concerned, including counsel giving the advice, did not know what the results of the ballots being counted were, it was simply the fact that they had been counted.

20. In the event, as I indicated, Ms Irina von Wiese was number one in the list of priorities, and Mr Dhamija was number two. It was shortly after that had been announced that the implementation of the decision to remove these paragraphs had been communicated to everyone. One can understand entirely the concern which Mr Dhamija felt about this, having stood to be selected as a candidate and doing so in the knowledge of what he thought were the relevant protocol provisions at the time. His challenge is, therefore, that the removal of para.6 was itself a breach of the contract with him that is constituted when anyone becomes a member of an unincorporated association such as the Liberal Democrats. However, as I have said, if in fact para.6, as implemented, was itself unlawful, he accepts that that is the end of his challenge, because he could hardly be coming to this court to ask for mandatory or injunctive relief to enforce a contractual provision which the court has already deemed to be unlawful.

21. That then takes me without further ado to the relevant statutory provisions themselves. Section 101 of the Act is worth noting, because what that says is that in relation to an association, which here includes the Defendant:

> "An association (A) must not discriminate against a member (B) - ...
> (d) by subjecting B to any detriment."

22. What that means is that in particular a detriment by reason of being in a particular protected group, or not being so, would itself constitute discrimination. That is unless section 104 applies. Section 104(1) says that it applies to a registered political party. Section 104(2) says:

> "A person does not contravene this Part only by acting in accordance with selection arrangements."

23. So then "selection arrangements" are defined in sub-para.(3):

> "Selection arrangements are arrangements -
> (a) which the party makes for regulating the selection of its candidates in a relevant election,
> (b) the purpose of which is to reduce inequality in the party's representation in the body concerned, and
> (c) which, subject to subsection (7), [which is not relevant here] are a proportionate means of achieving that purpose."

24. Subsection (4) then defines what is meant by "inequality in a party's representation", and it says that it is:

> "The reference ... to inequality between -
> (a) the number of the party's candidates elected to be members of the body who share a protected characteristic, and
> (b) the number of the party's candidates so elected who do not share that characteristic."

25. There is a difference of view between the parties as to what in particular section 104(4) means. In my judgment it is clear. It is to look at the inequality between the number of the party's candidates elected, meaning (a) those who have been elected to be members of a body who share a protected characteristic, and (b) those so elected, again who have also been elected but who do not share that characteristic. The only sensible way to read that provision is to say that the group of persons to be considered are those who are the current incumbents in the elected body concerned. That, in some ways, makes complete sense because if the underlying purpose of such measures, which can be justified so as to avoid being discriminatory, is to redress the question of imbalance or under-representation, then the obvious place to start is what the current state of representation is, not what it might have been 25 years ago or what it might be in 10 years' time. That is not to say that such features are not important, but it is some explanation as to why, on the face of it, section 104 is focused in the way that it is, and that it should not be a surprising interpretation. On the face of the words, I have to say I find it difficult to see how there can be any other interpretation.

26. The consequence of that for this challenge, however, is this. The "group" to be considered here consists of one person, and that is the present incumbent in the European Parliament, she who is representing the Liberal Democrats presently. I take the view that there are certain other documents which reinforce the interpretation I have just expressed. Thus, in the explanatory notes to the Equality Act itself, para.335 says:

> "This section allows registered political parties to make arrangements in relation to the selection of election candidates to address the under-representation of people with particular protected characteristics in elected bodies."

27. The under-representation in elected bodies again can only be read in the present tense.

28. In terms of the examples, it is said that:

> "A political party can have a woman-only short-list of potential candidates to represent a particular constituency in Parliament, provided women remain under-represented in the party's Members of Parliament."

29. "Remain under-represented" is to the same effect. Equally, in the next example:

> "A political party cannot shortlist only black or Asian candidates for a local government by-election. However, if Asians are under-represented amongst a party's elected councillors on a particular Council, the party could choose to reserve a specific number of seats for Asian candidates on a by-election shortlist."

30. Again, one points to the reference "are under-represented".

31. Guidance in relevant respects has also been produced by the Equality and Human Rights Commission in its paper on the Act itself and a guide for political parties. It says this under part 1:

> "Parties can only take positive action in their selection processes when people who share one of the protected characteristics listed above are under-represented in the party's representatives elected to the following bodies ..."

Again, note the expression "are under-represented".

32. Finally, there is the guidance in the document, "Services, Public Functions and Associations: Statutory Code of Practice", by reference to the Equality Act. At 12.52 there is a section which concerns positive action by associations. Under section 104(4) itself it says:

> "Inequality in a party's representation on an elected body means inequality between the number of a party's candidates elected as members of that body who share a protected characteristic compared to [those who do not.]"

33. Then in 12.59, and importantly:

> "It is unlikely to be proportionate for a political party to adopt selection arrangements that focus exclusively on improving the representation of one particular group sharing a protected characteristic which would reduce further the selection prospects for people in other under-represented groups."

34. Then an example of that is given:

> "A political party identifies that in an area with a large Asian community it has too few councillors who are from an Asian background. It also has disproportionately low numbers of councillors who are women. It decides to adopt proportionate selection arrangements to increase the number of councillors with these characteristics."

35. That example makes no sense unless the focus of the consideration is the current incumbents on the postulated local Council given by way of example.

36. On that basis, the interpretation of section 104(4) seems clear to me. Mr Mayes QC in his helpful submissions says that one reason why this cannot be right is that if a new political party should start up which, by definition, has no representatives in the relevant elected body, then if it itself put forward measures for selection of candidates which, for example, included the zipping of a member of one particular protected group, then that would be unlawful, and that cannot possibly be right. I disagree. It does not seem to me to follow at all that if there is an entirely new political group, presumably with its own measures in place to encourage diversity of applications to be candidates, and so on, that it is entitled to be protected by section 104. That group, as it stands, has no present under-representation problem. If it does in the future, then section 104 may justify measures to remedy that problem. But that would be something in the future.

37. In his skeleton argument at paras.41 and 42 Mr Mayes also says that one can interpret the section in a different way, which is by reference to effectively re-defining section 104(4) and inserting it into section 104(3). But the interesting thing about this is that it still contains the words "elected to be members" and "so elected". The point remains the same and the problem with the analysis remains the same. I disagree with the contention set out at para.43 that the words "elected to be members", and "so elected" are forward looking to the situation after the relevant election has been completed. Apart from anything else, if that approach was correct, then, however laudable and desirable the aims of the relevant political party may be, it becomes a very difficult and uncertain matter to know whether section 104 would apply or not; this is because one immediately loses the focus of the single group which, in my judgment, is meant to be the target of consideration – namely that group of people in the elected party then, which it is said are under-represented. The boundaries could go historically and into the future and, since it would no longer focus on that elected body, it is unclear whether that means, for example, that consideration should be given to the question of representation in other elected bodies. Those sorts of possibilities have only to be stated in order to underline the unreality, as I see it, of that interpretation.

38. Therefore I conclude that the focus of any consideration for the purpose of section 104(3) and (4) has to be in this particular case the single woman member of the European Parliament who represents the Liberal Democrats. Precisely because she is a woman, one can understand very clearly that para.5 could not possibly be justified because the one thing that could not be said was that women were under-represented so far as the Liberal Democrats were concerned in the European Parliament.

39. However, there is also a fundamental difficulty, in my judgment, with para.6, and it is simply this. It is reflected in para.12.9 of the EHRC guidance. What para.6 has done is to give the advantage of zipping to a member of one protected group - in this case, BAME - which would obviously have the effect of disadvantaging a member of another protected group precisely because they have not been zipped. In other words, one is advantaging one protected group at the expense of another. In those circumstances, I cannot see how that can be regarded as a proportionate response.

40. Mr Mayes makes the argument that it could be proportionate although, on the face of it, it will obviously affect and disadvantage members of other protected groups, for example, LGBT+, because they do not have the advantage of going into the number one place. Because one can take into account the nature and extent of the proportion of the population made up by protected groups in the region concerned, one could conclude that there was a greater need to assist one protected group rather than another. There is nothing wrong, in general terms, in looking at matters in that way, of course; however, I am considering whether that would be a proportionate approach in terms of the workings of the Act. In some ways the proof of the pudding is in the eating, because once the protocol was introduced, there were a number of complaints precisely along those lines, including from those who were in the LGBT+ group. Mr Harvey gives evidence to the effect that in fact it was thought that there was one individual who is LGBT+ who was likely to do very well in the ballot and might have come out top. As it happens, he did not, but the example is still important because what is being said here is that if that person from that protected group had come top, he would then be displaced and disadvantaged by, in this case, Mr Dhamija, who is a member of another protected group. Mr Mayes says that this might be somewhat more nuanced and less of a problem because of course an individual can belong to more than one protected group. I follow that, but I do not think that it makes any difference on the question of proportionality. It is important, in my judgment, that 12.59 is precisely directed to this problem:

> "It is unlikely to be proportionate for a political party to adopt selection arrangements that focus exclusively on improving the representation of one particular group sharing a protected characteristic which would reduce further the selection prospects for people in other under-represented groups."

41. The example that I quoted in the following paragraph is an example where there was a need to remedy a problem with a group which could be described as being unrepresented from the point of one particular group. But 12.59 makes the point that needs to be made in this case. It is also important to note that para.2 of the protocol itself follows the interpretation of the Act that I have expressed by reference to what the present situation is.

42. As I have indicated earlier on, it seems to me that the Liberal Democrat party was finding itself in a difficult position, and it cannot possibly be faulted for taking the advice that it did in the light of the concerns that had been expressed. I do not consider - not that it is directly relevant - that they were acting in any way which was improper or unreasonable or anything like that. One understands the wider concerns, because, after all, the protocol had been put in place out of a desire in overall terms to tackle a problem of under-representation, and yet one

of its provisions is now falling foul of the law. But that, I am afraid, is the focus of the situation which arises and with which I have to deal.

43. So I conclude that in this case the effect of para.6 is to give a priority to one protected group but at the expense of others. And it can be tested very easily. Given that the only comparator is a woman, and a white woman, then it follows, or it might follow, that there are a number of protected groups who could be said to be under-represented. One of them is BAME. If the woman is not within the protected group LGBT+, then that group is also not represented. As a matter of logic, the same would be true of men. But if one then says effectively that every protected group is under-represented provided that they are not a woman, then one immediately sees the difficulties about finding a measure which would improve that under-representation without reference, effectively, to all those potentially excluded. This simply becomes unworkable and it is another reason why, in my judgment, the interpretation which I place on the section must be the right one. It is also another reason why, looking at section 104, as I must, para.6 is contrary to section 104(2)(c), because I do not consider that it is a proportionate means of achieving that purpose. If the result of this is that in this particular case, where there is only one sitting MEP, the amount that can be done in terms of lawful preferential measures is limited, then that, I am afraid, is a function both of the smallness of the group in the elected body and the clear words of the statute.

44. That is then beginning and the end of this application. Paragraph 6 is unlawful for the reasons I have given. It follows, as has been conceded, that in this event the application must fail. I will now hear counsel on consequential matters.

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** This transcript has been approved by the Judge**