

C1/2006/0964

Neutral Citation Number: [2006] EWCA Civ 733

**IN THE SUPREME COURT OF JUDICATURE**

**IN THE COURT OF APPEAL (CIVIL DIVISION)**

**ON APPEAL FROM QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT**

MR JUSTICE KEITH

Royal Courts of Justice

Strand

London, WC2

Tuesday, 2<sup>nd</sup> May 2006

B E F O R E:

**SIR ANTHONY CLARKE**

**(The Master of the Rolls)**

**LORD JUSTICE RIX**

**LORD JUSTICE MAURICE KAY**

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**SULTANA BEGUM**

**MOHAMMED HASSAN**

**FAYAZ ALI**

CLAIMANTS/RESPONDENTS

- v -

**RETURNING OFFICER FOR**

**LONDON BOROUGH OF TOWER HAMLETS**

DEFENDANT/APPELLANT

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(DAR Transcript of

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Official Shorthand Writers to the Court)

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**MR T STRAKER QC and MR R PALMER** (instructed by LB Tower Hamlets Legal Services, London, E14 2BG) appeared on behalf of the Appellant

**MR H SOUTHEY** (instructed by Messrs Birnberg Peirce & Partners, London NW1 7HJ) appeared on behalf of the Respondents

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## J U D G M E N T

SIR ANTHONY CLARKE MR:

### Introduction

1.

Local elections are due to be held in many parts of the country the day after tomorrow on Thursday 4 May 2006. One such election was due to be held in the St Katherine and Wapping ward of the London Borough of Tower Hamlets ("the ward"). By an order made last Thursday, 27 April, Keith J countermanded the election or the poll and directed that a new election be called by the appellant returning officer ("the returning officer") under section 39(1) of the Representation of the People Act 1983 ("the Act").

2.

The judge also declared that:

"A new election be called by the Defendant under section 39(1) of the Act. The Claimants will be entitled to stand in that election provided that they deliver valid nomination papers before the closing date for nominations. Candidates validly nominated in the countermanded election will remain nominated pursuant to section 39(5)(b) of the Act".

3.

The judge granted permission to appeal and stayed the order until 4.30 pm on Friday last, if an Appellant's Notice was filed by the returning officer by 3.00 pm on Thursday. Such a notice was filed before that deadline.

### The statutory framework and the correct approach

4.

The Act (as amended) contains very detailed provisions governing the conduct of both parliamentary and local elections. Section 35(1) provides that local elections will ordinarily take place on the first Thursday in May each year. It is as a result of that provision that all (or almost all) the local elections are taking place on the same day, namely this Thursday.

5.

By section 36(1) and (2) the Act provides that elections of councillors shall be conducted in accordance with rules made by the Secretary of State and that those rules shall apply the parliamentary elections rules in Schedule 1 to the Act subject to such adaptations, alterations and exceptions as seem appropriate to the Secretary of State. The Secretary of State subsequently made the Local Elections (Principal Areas) Rules 1986 which by rule 5 provide that local elections shall be conducted in accordance with the rules set out in schedule 2 to those rules.

6.

The rules in schedule 2, as amended, ("the rules") provide, so far as relevant, as follows.

7.

Rule 1 provides for the proceedings at an election to be conducted in accordance with a precise timetable, beginning with publication of notice of the election not later than the 25<sup>th</sup> day before the day of the election. In this case the notice of the election was published on 24 March. By the operation of a similar formula in rule 1, the delivery of nomination papers was to be by noon on 3 April.

8.

Rules 3 and 4 provide for notice of election and nomination of candidates respectively. Rule 4 (a) provides:

“(1) A nomination paper may not include a description of a candidate which is likely to lead voters to associate the candidate with a registered political party unless the party is a qualified party in relation to the electoral area and the description is authorised by a certificate –

(a) issued by or on behalf of the registered nominating officer of the party, and

(b) received by the returning officer before the last time for the delivery of nomination papers”.

9.

Rules 5 and 7 provide, so far as relevant, as follows:

“5 – Subscription of nomination paper

(1) The nomination paper shall be subscribed by two electors as proposer and seconder, and by eight other electors as assenting to the nomination.

...

(3) The nomination paper shall give the electoral number of each person subscribing it.

7 – Decisions as to validity of nomination papers

(1) Where a nomination paper and the candidate’s consent to it are delivered in accordance with these rules, the candidate shall be deemed to stand nominated unless and until –

(a) the returning officer decides that the nomination paper is invalid; or

(b) proof is given to the returning officer’s satisfaction of the candidate’s death; or

(c) the candidate withdraws.

(2) The returning officer is entitled to hold a nomination paper invalid only on one of the following grounds –

(a) that the particulars of the candidate or the persons subscribing the paper are not as required by law; and

(b) that the paper is not subscribed as so required.

(3) Subject to paragraph (3A), as soon as practicable after each nomination paper has been delivered, the returning officer shall examine it and decide whether the candidate has been validly nominated.

(3A) If in the returning officer’s opinion a nomination paper breaks rule 4A(1), he shall give a decision to that effect as soon as practicable after the last time for the delivery of nomination papers.

(4) Where the returning officer decides that a nomination paper is invalid, he shall endorse and sign on the paper the fact and the reasons for his decision.

(5) The returning officer shall send notice of his decision that a nomination paper is valid or invalid to each candidate at his home address as given in his nomination paper.

(6) The returning officer's decision that a nomination paper is valid shall be final and shall not be questioned in any proceeding whatsoever.

(7) Subject to paragraph (6) above, nothing in this rule prevents the validity of a nomination being questioned on an election petition."

10.

The rules contain many other provisions to which, save for rule 49, it is not necessary to refer for present purposes. Rule 49 is headed Countermand or Abandonment of a Poll on Death of a Candidate, and provides by paragraphs 1 and 2 as follows:

(1) If at a contested election proof is given to the returning officer's satisfaction before the result of the election is declared that one of the persons named or to be named as candidate in the ballot papers has died, then the returning officer shall countermand notice of the poll or, if polling has begun, direct that the poll be abandoned, and the provisions of subsections (1) and (5) of section 39 of the Representation of the People Act 1983 apply in respect of any vacancy which remains unfilled; but neither the countermand of the poll at the principal area election nor the direction that that poll be abandoned shall affect the poll at any relevant election or referendum.

(2) Where the poll at the principal area election is abandoned by reason of a candidate's death, no further ballot papers shall be delivered in any polling station and, at the close of the poll at any relevant election or referendum the presiding officer shall take the like steps for the delivery to the returning officer of ballot boxes and of ballot papers and other documents as he would be required to do if the poll at the principal area election had not been abandoned."

11.

The Act contains a number of further provisions of some importance, to which I should refer. Section 39 provides so far as relevant:

"(1) If in England and Wales at [a local government election, other than an election for the return of the London members of the London Assembly,] -

(a)

the poll is countermanded or abandoned for any reason, or

(b)

no person is or remains, or an insufficient number of persons are or remain, validly nominated to fill the vacancy or vacancies in respect of which the election is held,

the returning officer ... shall order an election to fill any vacancy which remains unfilled to be held on a day appointed by him.

That day shall be within the period of [35 days] (computed according to section 40 below) beginning with the day fixed as the day of election for the first-mentioned election.

...

(2) If for any other reason an election to an office under the Local Government Act 1972 [or the 1999 Act] ... other than that of chairman of a parish or community council or parish meeting or parish or community councillor, is not held on the appointed day or within the appointed time, or fails either wholly or in part or becomes void, the High Court may order an election to be held on a day appointed by the court.

...

(5) Where an election is ordered to be held under this section –

(a) rules under section 36 above relating to the notice to be given of an election and the manner in which an election is to be conducted apply in relation to the election so ordered to be held as they applied or would have applied in relation to the election which has not been duly held or has failed or become void;

(b) no fresh nomination is necessary in the case of a candidate who remains validly nominated for that election.

(6) An order made –

(a) under this section may include such modifications of the provisions of –

(i) this Part of this Act (and the rules under section 36), and

(ii) the Local Government Act 1972 [or the 1999 Act] ...

as appear to the High Court, or, as the case may be, the district council [or Welsh county or county borough council], necessary or expedient for carrying the order into effect;

(b) by a ... council under subsection (4) above with respect to an election of parish or community councillors may modify the provisions of –

(i) this Act (and the rules with respect to such elections under section 36); and

(ii) any other enactment relating to such elections.”

The expression “countermanded” is not defined in the Act. However, paragraph 60 of Schedule 1, which contains the rules referable to parliamentary elections, is in the same or substantially the same terms as rule 49 of the rules which I have already quoted.

12.

It appears to me that, on the true construction of both rule 49 and paragraph 60 of Schedule 1 and section 39(1) of the Act, it is for the returning officer and not for the court to countermand a poll when appropriate. It appears from rule 49 and paragraph 60 that the returning officer will do so in the case of the death of a candidate, and it is something of a puzzle why section 31(1) uses the words “for any reason”. It is not however necessary to solve that puzzle in order to determine the issues in this appeal.

13.

It is important to note that the Act nowhere confers on the High Court jurisdiction to intervene or to make orders in the course of an election. There are, by contrast, many provisions which govern proceedings after the election. They include provisions which focus upon cases where it is said that the returning officer is in breach of duty. Of these, perhaps the most important for present purposes is section 48 which provides as follows:

“48. Validity of Local Elections, and Legal Costs

(1) No local government election shall be declared invalid by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the election or

otherwise of rules under section 36 or section 42 above if it appears to the tribunal having cognizance of the question that –

- (a) the election was so conducted as to be substantially in accordance with the law as to elections; and
- (b) the act or omission did not affect its result.

(2) A local government election, unless questioned by an election petition within the period fixed by law for those proceedings, shall be deemed to have been to all intents a good and valid election.

(3) The council which is required to pay the expenses properly incurred by a returning officer in relation to any local government election may treat those expenses as including all costs properly incurred by the returning officer in connection with or in contemplation of any legal proceedings arising out of the election (including any criminal proceedings against the returning officer), whether or not the proceedings are in fact instituted.”

14.

Section 48 is important because the respondents’ case is that the returning officer was in breach of rule 7(3) in that she failed to examine the respondents’ nomination papers as soon as practicable after they were delivered and/or because she failed to act fairly in accordance with the respondents’ legitimate expectations. I will return to those allegations below.

15.

At present it is important to note that section 48 provides that, at any rate after an election, the only way in which the validity of an election can be challenged is by an election petition before the election court. On the hearing of such a petition it will be for the claimant petitioner to establish the breach of official duty alleged, but if that is established it will be for the respondent to show that both “(a) the election was so conducted as to be substantially in accordance with the law as to elections; and (b) the act or omission did not affect its result”. Section 48 does not confer any power on the High Court.

16.

I should note in this connection a series of sections of the Act which relate to petitions. Section 127 provides:

“An election under the local government Act may be questioned on the ground that the person whose election is questioned –

- (a)  
was at the time of the election disqualified, or
- (b)  
was not duly elected,

or on the ground that the election was avoided by corrupt or illegal practices or on the grounds provided by section 164 or section 165 below, and shall not be questioned on any of those grounds except by an election petition.”

I need not refer to sections 164 and 165, which are concerned with avoidance of an election for general corruption and avoidance of an election for employing a corrupt agent respectively.

17.

It is not, I think, in dispute that sections 48 and 127 have to be read together. Sections 128 to 131 make detailed provisions for the hearing of petitions. Section 128(4) provides for the petition to be

published in a relevant area. Section 130(6) provides for the trial of a petition in general to be held in the local area, and section 139 provides for the trial to be in open court. Express provisions are contained in section 140 for the calling of witnesses. The whole process is thus very different from judicial review.

18.

I should also note section 63 which provides by subsections (1) and (2):

“(1) If a person to whom this section applies is, without reasonable cause, guilty of any act or omission in breach of his official duty, he shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(2) No person to whom this section applies shall be liable for breach of his official duty to any penalty at common law and no action for damages shall lie in respect of the breach by such a person of his official duty.”

By section 63(3)(b), section 63 applies to a returning officer. It can thus be seen that the Act provides detailed provisions governing breaches of procedure on the part of returning officers. They are exposed to potential criminal sanctions, but cannot be sued for damages. The election may be declared invalid or void by an election court in the event of a breach of duty on the part of the returning officer.

19.

As already indicated, the Act makes no provision for the High Court to make orders for judicial review in the course of an election. Mr Straker does not however submit that the High Court has no jurisdiction to grant relief. He recognises that the High Court has, or may have, jurisdiction under section 31 of the Supreme Court Act 1981, for example to grant a mandatory, prohibiting or quashing order under section 31(1)(a) or a declaration or injunction under section 31(1)(b). As I see it, the judge was invoking the power to grant a mandatory injunction when he ordered the returning officer to countermand the poll.

20.

Mr Straker submits that such an order should, as he put it, hardly ever be made. I agree. That was the approach of Scott Baker J in R (De Beer) v The Returning Officer for the London Borough of Harrow [2002] EWHC 670 (Admin), where he said at paragraphs 37 and 38, in the context of a submission, that the court would have jurisdiction to interfere with a decision by a returning officer that a nomination paper was invalid:

“37. It has not been argued before me that the court cannot interfere by way of judicial review, although it is fair to say that neither party was aware of any case where there has been a successful application for judicial review against a returning officer.

“38. In my judgment, although judicial review does lie, this is an area in which the courts should be extremely slow to interfere with the decision of a returning officer. No doubt where a returning officer has plainly acted unlawfully relief will lie. But ordinarily returning officers should be left to conduct the election process as provided by Parliament.”

21.

I agree with Scott Baker J that the court should be extremely slow to intervene. It should only do so in a most exceptional case. Parliament has conferred duties (but not discretions) on returning officers and has made express provisions as to how any decision of a returning officer might be challenged,

namely by petition before an election court after the election. Save in a wholly exceptional case the court should in my opinion allow the statutory machinery to work as set out in the Act and the rules.

22.

It is not easy to think of circumstances in which it might be appropriate for the court to intervene. Two were suggested in argument. The first was a case where the returning officer declared invalid a nomination paper but plainly misread the election number in circumstances in which it was clear that the number on the paper was correct. That is a very different case from this because there no error would have been made by or on behalf of the nominees. The second, which was suggested by Mr Southey, was where the election process was so flawed that the election court would be bound to declare the election invalid, in accordance with section 48. As to that, it might be possible to conceive of such a case, but to my mind wholly exceptional circumstances would be required.

#### The facts

23.

The respondents are three Respect Party candidates who were nominated for election in the ward. Mr Sean Doherty is described as the Nominating Officer for Respect in Tower Hamlets. The judge treated him as the respondents' agent. It is common ground that the deadline for the delivery of the nomination papers was noon on 3 April. It is also common ground (at any rate now) that the nomination papers referable to the respondents were invalid because they gave the wrong electoral numbers for one or more subscribers. It appears that the numbers were taken from an earlier register which had become invalid and replaced by the up-to-date register on 1 March.

24.

The judge had before him a statement both from Mr Doherty and from the deputy returning officer, Pat Parker. He also had the respondents' grounds supported by a statement of truth. In paragraph 3 of her statement the deputy returning officer said this:

"On 7 March, I had a meeting with Mr Doherty and the other agents. I gave them a copy of the Electoral Commission Guidance on nominations and the new Register of Electors which had been produced on 1 March 2006. I emphasised that the new register must be used for the electoral numbers and not the old one. I said I would assist in advance with checking the details of forms to ensure they were correct. I did however emphasise that if all the candidates left it to the last minute I would not be able to check all forms prior to the 12 noon deadline on 3 April".

25.

It is not in dispute that paragraph 3 of that statement fairly states the position. The respondents' grounds themselves refer to such a discussion, though in general terms. The Electoral Guidance referred to by the deputy returning officer is, in so far as relevant, in these terms:

"Paragraph 2.8 ... It is advisable to submit nomination papers as early as possible so that there is time to submit a fresh one if the first is invalid. Nominations remain confidential until they are declared so no advantage can be gained from submitting late nominations".

26.

It is, I think, of some importance to note that the deputy returning officer emphasised that the new register must be used for the electoral numbers and not the old. In these circumstances it is surprising, to put it no higher, that the electoral numbers used in respect of some supporting electors on the respondents' forms derived from the old register and not from the new. I will turn below to the



question whether on that evidence the deputy returning officer made the kind of clear and unequivocal statement or representation which might support a case of legitimate expectation. Mr Straker invites us to notice that this statement was made to "Mr Doherty and the other agents" on 7 March, which was some seventeen days before the publication of the Notice of Election on 24 March. It follows that there might well have been nominees and agents who were not present. On the other hand, the deputy returning officer makes it clear in her statement that as a matter of practice she offered what she described as an "informal voluntary process to assist the candidates". The forms were inputted manually into a computer which identified any errors on the form. The nominee or agent was then called to confirm the errors and the original forms were returned for correction.

27.

It should be noted that there were a large number of nominations. The deputy returning officer says that the total was 238 nominations for 17 wards, of which 128 were received between 9.00 am on 31 March and the deadline at noon on 3 April. There is an issue of fact as to when the respondents' nomination forms were submitted. Mr Doherty says that the week of 26 March was very busy and that he was dealing with the forms of 51 candidates. He says that at 10.00 am on 29 March he took the bulk of the 51 sets of nomination forms to the Town Hall, as previously arranged with the deputy returning officer. He says that among the 51 sets were those for the ward in question. He says that he has witnesses in the form of the candidates for the ward who met him in the foyer with their nominations. It is however right to say that the respondents have not themselves made statements in these proceedings.

28.

The deputy returning officer, by contrast, says that Mr Doherty came on 29 March as arranged but that he delivered 39 forms. She photocopied each of the forms and checked them, marking them where appropriate. 21 of the forms were wrongly completed for a number of different reasons. She telephoned Mr Doherty later on 29 March and explained the problems to him. She says that, although she cannot be certain, she does not believe that the respondents' forms were delivered on 29 March, because all the forms received were photocopied and marked up, so that if the respondents' defective forms had been included she would have marked them up and noted the defects then. Mr Doherty agrees that the deputy returning officer rang him on 29 March, he says twice. It is common ground that the respondents' forms were not mentioned on the telephone on 29 March or indeed at any time before the deadline. It is common ground that Mr Doherty again went to see the deputy returning officer on the next day, 30 March, as arranged. It is also common ground that the deputy returning officer pointed out further errors. She thinks that the respondents' forms must have been among the forms handed to her on 30 March. The only difference between the parties on the evidence is that Mr Doherty says that the respondents' forms were delivered on 29 March, whereas the deputy returning officer thinks that it was on the 30 March. On 31 March Mr Doherty visited the deputy returning officer with corrected forms. That evening the deputy returning officer again rang Mr Doherty. She said that all the forms of which she was aware were in order, except one which related to the Limehouse Ward. Finally on Monday, 3 April at 8.45 am Mr Doherty submitted two fresh nomination papers and the corrected Limehouse form. The deputy returning officer told him that all the papers she had received were correct subject to the returning officer's formal acceptance. The deadline then passed without any reference to the respondents' papers.

29.

It appears that the reason that the respondents' papers did not come to light before the deadline was that they were misfiled with documents relating to other candidates. As I said earlier, the normal

procedure, which cannot have been carried out in this case, was on receipt to input nomination papers into a dedicated computer programme. After the deadline a computer reconciliation was carried out and checked against the ring binder files in which originals of the nominations were kept. It was only then that the deputy returning officer discovered that the respondents' nominations had not been previously checked and were invalid. The forms were then declared invalid by the deputy returning officer on behalf of the returning officer and Mr Doherty was informed on the afternoon of 3 April.

### The judgment

30.

It was common ground before the judge that the respondents' papers were invalid. Moreover it was not suggested before him, and is not suggested now, that the returning officer could have validated the invalid papers after the deadline. One of the striking features of the system is that the Act and the rules do not confer any discretion on the returning officer to correct errors. It follows that, but for the order of the judge, the respondents would not have been able to stand in the local elections on Thursday. If the respondents cannot stand this will have an unfortunate effect upon the Respect Party because only three candidates can be elected in each ward, so that a party is unlikely to field more than three candidates. In these circumstances the only Respect Party candidates in the ward were the three respondents.

31.

The respondents succeeded before the judge on the basis that they had a legitimate expectation that the deputy returning officer would examine papers which were not submitted at the last minute and that notification of any errors would be given in sufficient time for any errors to be corrected before the deadline. The judge's conclusions are set out in paragraphs 22, 23 and 24 of his judgment as follows:

"22. Generally speaking, public bodies should be kept to their promises. A public body should not be permitted to resile from a legitimate expectation which it has created in the minds of those members of the public to whom the undertaking which gave rise to the expectation was addressed, or who were affected by the practice which confirmed that expectation, and from which it would be an abuse of the process to resile. Of course, the returning officer was not intending to resile from her undertaking or to adopt a different practice from the one she thought she was pursuing. It was only as a result of an error that the claimants' nomination papers were not examined until after the passing of the deadline, and it was that which had made it impossible for Mrs Parker to notify Mr Doherty of the errors in the claimant's nomination papers so that they could be corrected in time. I have not overlooked that the claimants were themselves in error in the first place in not using the correct register of electors, but the fact remains that they had every reason to believe that if they delivered their nomination papers in good time, which on any view of the facts they did, any errors they made would be pointed out to them in time for them to be rectified. The returning officer's failure to do that amounted to unfair treatment of the claimants.

23. The non-examination of their nomination papers until after the passing of the deadline resulted in unfairness of another kind. They were being treated differently from all the other candidates who had submitted papers in good time before the deadline. Those candidates had had their nomination papers examined as soon as practicable after their delivery, and if their nominations were invalid, no doubt they were told that. The most relevant candidates were the other candidates for election in the St Katherine and Wapping ward, and the returning officer has not filed any evidence to the effect that

none of those candidates had delivered nomination papers which were invalid, but had corrected them in time as a result of being told what the defects in them were. All in all, I have concluded that the treatment of the claimants was sufficiently unfair as to amount to an abuse by the returning officer of her powers.

24. I have not overlooked the point made by Mr Timothy Straker QC for the returning officer that there is little scope for the operation of the doctrine of legitimate expectation in a field so highly regulated as local elections in which the returning officer has little room for manoeuvre. There is some force in that point, but it can, I think, be overstated. I come later to what, if anything, the returning officer could have done after the deadline had passed and representations had been made to Mrs Parker about the unfairness of the claimants' treatment. But the fact that the returning officer's course of action before the deadline was severely circumscribed by the Rules did not prevent her from pursuing the informal but laudable practice of notifying candidates' agents as soon as possible of problems with nomination papers. Having decided to help candidates in that way, there was no reason why the doctrine of legitimate expectation should not apply to that practice, and afford relief to those candidates who are treated unfairly in the process. In any event, it is not as if the court would be trespassing into an area of policy or decision making which Parliament has entrusted to returning officers. The courts would be interfering only to prevent unfairness arising from an administrative error in managing that process."

32.

I note in passing that we were told that there were no independents standing in the ward and that the parties were represented as follows: two Conservatives, two Greens, three Labour and two Liberal Democrats. We were also told that all but the three nomination forms were correct, any errors having been pointed out to the candidates or their agents and subsequently corrected in time.

33.

As to the jurisdiction to make the order, the judge observed that rule 7(6) excluded a challenge to a decision by the returning officer that a nomination paper is valid but did not exclude such a challenge to a decision that a nomination is invalid. He referred to the views expressed by Scott Baker J in the De Beer case (quoted above), including the view that judicial review does lie in principle but that the court should be extremely slow to interfere with a decision of a returning officer. The judge however also correctly observed, first, that the challenge in this case is not to the decision of the returning officer that the respondents nomination papers were invalid, because it is accepted that they were indeed invalid; and secondly, that her decision to that effect was the only decision she could have reached.

34.

The judge identified the challenge as being to the deputy returning officer's failure to examine the papers and to notify the respondents in sufficient time to enable the errors to be corrected. The judge granted the relief set out in the order to which I referred earlier on the basis that that failure was unlawful because the respondents had a legitimate expectation that she would do so.

35.

Essentially four grounds of appeal are advanced on behalf of the returning officer:

- (1) that the judge was wrong to hold that a legitimate expectation could arise on the facts of this case;
- (2) alternatively if it could, that he was wrong to hold that it in fact arose on the facts;

(3) that in any event the judge was wrong to hold that the court has power to countermand an election; and

(4) alternatively, that the judge was wrong to exercise that power on the facts.

36.

Mr Southey submitted before the judge that, quite apart from legitimate expectation, the returning officer was in breach of duty under the rules. He submitted that the returning officer was in breach of rule 7(3) in failing to decide whether the respondents' nomination papers were valid or invalid as soon as practicable after the papers were submitted. He submitted that the purpose of that rule was to enable the returning officer, if reasonably practicable, to make his decision in time to inform the nominee in time to enable him to correct any error before the deadline and that, on the facts, if the returning officer had discharged his duty, Mr Doherty would have been informed and corrected the error before the deadline. The judge rejected that submission. He held that there was no requirement that the returning officer should notify the nominee as to his decision as soon as practicable. He made three points: (1) that the word 'send' in rule 7(5) implies that the decision will be notified by post; (2) that the requirement was that the notification of the decision would be sent to the nominee's home address and not to his agent; and (3) that the notification was not required before a specified time. The judge added that any telephone notification, although laudable, was an informal practice not required by the rule. The judge held on the facts that if the papers were delivered on 29 March it was reasonably practicable for them to have been examined on that day, and that if they were delivered on 30 March it was reasonably practicable for them to have been examined on that day instead, in either case, of their being misfiled. After all, the other papers were all checked. Moreover only the numbers were inaccurate and they could have been checked against the register. As I read his judgment, the judge was there holding that the returning officer was in breach of rule 7(3).

37.

The judge, however, said that, although the respondents may well have learned of the error if the deputy returning officer had called Mr Doherty on examination of the papers on either 29 or 30 March, their difficulty was that there was no certainty that notification under rule 7(5), would have occurred in sufficient time for the papers to be correct. He said at the end of paragraph 19 of his judgment:

"Indeed, the overwhelming likelihood is that they would have received notification of their invalidity well after the deadline had expired".

38.

Mr Southey challenges those conclusions in this appeal. He submits that there was a plain breach of rule 7(3) and that, on the facts, but for that breach Mr Doherty would have been notified and the errors rectified before the deadline, as occurred with the errors in the other papers of which he was informed.

#### Discussion

39.

It is convenient to consider first the alleged breach of rule 7(3) and then legitimate expectation. However, before doing so, I should I think say a further word about the scheme of the Act and the rules. It is important to note that it is the duty of the nominee, either himself or through an agent, to present valid nomination papers in time. Thus it was throughout the duty of the nominees to ensure, among other things, that the correct electronic number should be used for each of the required eight

supporting electors and that it should be stated on the form. On the facts of this case the respondents failed to discharge that duty. Moreover, whatever can be said about the failings on the part of the returning officer, the deputy returning officer or their staff, the respondents' responsibility to put the correct information on the forms was at no stage transferred to the returning officer.

40.

Put at its highest, the case against the returning officer is that someone in her office or that of her deputy made a mistake which ought not to have been made by filing the papers in the wrong place. There is no evidence or suggestion that a decision was made by the returning officer or the deputy returning officer or anyone else not to discharge their duties, or not to comply with the rules or the practice which it appears was normally adopted, namely to examine the forms as soon as reasonably practicable and to point out errors to the nominees or their agents.

#### Rule 7(3)

41.

On the evidence and the findings of the judge it appears to me that the returning officer was in breach of rule 7(3). She failed, through the deputy returning officer or her staff as soon as reasonably practicable after the respondents' nomination papers were delivered, to examine them and decide whether the respondents had been validly nominated. She was in breach of duty because the documents had been filed in the wrong place. As a result, the deputy returning officer did not discover the errors, whereas if she had, she would have informed Mr Doherty, who would have corrected the errors, as he had in the case of other similar errors which she had identified and brought to his attention.

42.

In these circumstances the returning officer or another person on her staff was in breach of her official duty within the meaning of section 48(1) of the Act set out above. Moreover, that breach was causative of the fact that the respondents were unable to stand in the election because, absent that breach of duty, the errors in the nomination forms would have been corrected before the deadline. In this connection I am not persuaded that it is relevant that there was, as the judge explained, no breach of any of the other rules contained in rule 7. I will return in a moment to consider what, if any, relief should be granted to the respondents at this stage.

#### Legitimate Expectation

43.

In the passages from his judgment which I have quoted the judge held that the statement by the deputy returning officer on 7 March gave rise to a legitimate expectation in the respondents that papers which were not submitted at the last minute would be considered and errors pointed out so as to enable them to be corrected in time. He further held (in the passages quoted above) that in these circumstances the failure to consider the papers as soon as reasonably practicable and to notify errors to the respondents was unfair and therefore unlawful, especially given the fact that the papers of other candidates were considered and corrected as a result of errors notified on behalf of the returning officer.

44.

The relevant principles can I think be sufficiently taken from the judgment of Peter Gibson LJ in paragraphs 67 and 68 of his judgment in *Rowland v Environment Agency* [2003] EWCA Civ 1885, [2005] Ch 1:

"67. The public law concept on which Mrs. Rowland relies is that of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power. Lord Lester accepted the judge's summary of the general principles of English law on this subject as correct:

68. By a representation (a term which embraces a regular practice and a course of dealing) a public body does not give rise to an estoppel but may create an expectation in another ("the citizen") from which it would be an abuse of power to resile: R v. East Sussex County Council ex parte Reprotech Pebsham Ltd [2002] 4 All ER 58. The principle of good administration prima facie requires adherence by public authorities to their promises. Whether it does so require must be determined in the light of all the circumstances. The public body can only be bound by acts and statements of its employees and agents if and to the extent that they had actual or ostensible authority to bind the public body by their acts and statements: South Bucks District Council v. Flanagan [2002] 1 WLR 2601 at 2607 para 18 per Keene LJ. The relevant representation must be unequivocal and lack any relevant qualification: see R v. Inland Revenue ex parte MFK Underwriting [1990] 1 WLR 1545 . The citizen must place all his cards on the table, making full disclosure and his expectation must be objectively reasonable: R v. Secretary of State for Education ex parte Begbie [2000] 1 WLR 1118 (" Begbie ") per Peter Gibson LJ at p.1124 and Laws LJ at p.1130. Where the expectation relates to matters of substantive law as to which both parties are ignorant or in error, it is relevant both to reasonableness and fairness that the citizen had access to legal advice had he wished to take it: see Henry Boot Homes Ltd v. Bassetlaw DC 28.11.02 CA per Keene LJ at para 58 (" Boot "). The expectation may be substantive or procedural and the categories of legitimate expectation are not closed: Begbie . Once the claimant has established the legitimate expectation, he must show that it would be unfair of the public body to resile from giving effect to the legitimate expectation. Lord Woolf in R v. North and East Devon Health Authority ex parte Coughlan [2001] QB 213 at paragraphs 57-8 identified three kinds of unfairness, namely:

'(1) unfairness consisting in an irrational (in a Wednesbury sense) failure by a public body to take its representations into account (together with the legitimate expectation to which it may have given rise before resiling from the representation);

(2) unfairness consisting in a procedurally unfair failure by a public body to afford the citizen affected by its decision to resile from its expectation an opportunity for consultation.' ..."

See also Mance LJ at paragraph 130, where he said this:

"130. In R v. Secretary of State for Education and Employment, ex p. Begbie [2000] 1 WLR 1115 , Laws LJ commented (at p.1129f) that 'abuse of power has become, or is fast becoming, the root concept which governs and conditions our general principles of public law' and that 'it informs all three categories of legitimate expectation case as they have been expounded by this court' in Coughlan . Later (at para. 78) he identified as the correct test whether an authority's change of attitude 'would be so unfair as to amount to an abuse of power'. He went on (at pp.1130f-1131c): 'As it seems to me the first and third categories in the Coughlan case .... are not hermetically sealed. The facts of the case, viewed always in their proper statutory context, will steer the court to a more or less intrusive quality of review. In some cases a change of tack by a public authority, though unfair from the applicant's stance, may involve questions of general policy affecting the public at large or a significant section of it (including interests not represented before the court); here the judges may well be in no position to adjudicate save at most on a bare Wednesbury basis, without themselves donning the garb of policy-maker, which they cannot wear. .... In other cases the act or omission complained of may take place on a smaller stage, with far fewer players. Here .... lies the importance of the fact in the Coughlan case ..... that few individuals were affected by the promise in question. The

case's facts may be discrete and limited, having no implications for an innominate class of person. There may be no wide-ranging issues of general policy, or none with multi-layered effects, upon whose merits the court is asked to embark. The court may be able to envisage clearly and with sufficient certainty what the full consequences will be of any order it makes. In such a case the court's condemnation of what is done as an abuse of power, justifiable (or rather, falling to be relieved of its character as abusive) only if an overriding public interest is shown of which the court is the judge, offers no offence to the claims of democratic power. There will of course be a multitude of cases falling within these extremes, or sharing the characteristics of one or other. The more the decision challenged lies within what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision. ..."

45.

Those judgments show that whether or not there is a relevant legitimate expectation depends on all the circumstances of the particular case. When all the circumstances of the instant case are taken into account, I have reached the conclusion that the deputy returning officer did not create a legitimate expectation in the respondents, the denial of which amounted to an abuse of power. My reasons may be summarised as follows:

i) The evidence in paragraph 3 of the deputy returning officer's statement quoted above does not amount to a clear and unequivocal statement that she would examine every nomination paper such that a subsequent inadvertent failure to do so could fairly be said to amount to an abuse of power.

ii) Her statement must be seen in the context of the rules, which provide, on the one hand in rule 7(3) that the returning officer will examine each nomination paper within a reasonable time of receipt and decide whether it is valid, but on the other hand in rule 7(5) that the returning officer will send it (as the judge correctly held) by post to the nominee's address and not to the agent. Thus the rules do not provide for any overall urgency and they certainly do not impose on the returning officer the responsibility, which is that of the nominee or his agent, of taking steps to correct any errors.

iii) The deputy returning officer's evidence does not support the assumption of any legal responsibility but simply indicates a willingness to help the candidates in an informal way, which, as the judge put it, was a laudable practice not required by the rule. There is no indication that the deputy returning officer was offering to accept the responsibility which was the nominee's throughout. The deputy returning officer indeed emphasised that the nominees must use the up-to-date register.

iv) The deputy returning officer would, as it seems to me, have been justifiably astonished if it had been suggested to her at the time that, if the papers were misfiled by mistake and errors made by the nominees were not discovered, that that would or might invalidate the election. The sensible view would be that the fact that there were errors was because the nominees had failed to do what she herself had told the agents to do, namely to use the correct register, and that all that could be said was that her offer to help had not worked out because of an unfortunate mistake in the office.

v) Unlike other cases of legitimate expectation, this is not a case in which a public authority subsequently resiled from a policy which the claimant had a legitimate expectation would be continued.

vi) I do not accept Mr Southey's submission that it is unfair, let alone an abuse of power, to allow the returning officer to rely upon the fact that the nomination forms were invalid, even though some of the other candidates made errors which were pointed out to them. It is not unfair, because the

principal cause of the problem was the failure of the nominees or their agents to fill in the forms correctly.

vii) There is no evidence that the respondents relied upon any representation made by the deputy returning officer. They were told to use the correct register but did not. There is no evidence that they or their agent acted more carelessly or less carefully than they would otherwise have done as a result of any actual remission on the part of the returning officer, the deputy returning officer or their staff. Even if they had, it would be a somewhat indulgent basis upon which to found a legal obligation, especially as the lack of care was the very one warned against on 7 March. All that can be said is that if the deputy returning officer had been able to help them as she said she would they would have acted differently. That is not to rely upon the representation on 7 March.

viii) Insofar as it is said that a representation is not a necessary condition for a legitimate expectation to be held to exist, and that there was here a practice upon which the respondents relied, again there is no evidence of reliance. Further, the evidence does not support the conclusion that everyone was aware of the deputy returning officer's practice and, so far as what was said on 7 March was concerned, that was some 17 days before the publication of notice of the election was given and was thus not given to all possible candidates or their agents.

ix) As Peter Gibson LJ put it in paragraph 68(2i) of the judgment in Rowland v Environment Agency , quoted above, the test is whether the public authority has acted so unfairly that its conduct amounts to an abuse of power. I do not think that it can fairly be said that, in misfiling the respondents' nomination papers and thus failing to check them as soon as reasonably practicable and to notify them of errors which they or their agents should not have made in the first place, the returning officer acted so unfairly that her conduct amounts to an abuse of power.

x) If all these factors are taken into account, this was not in my opinion a case of legitimate expectation.

#### Relief

46.

If, contrary to the opinion just expressed, this is a case of legitimate expectation, the question remains whether the court should stop the election or leave the respondents to challenge it afterwards. In this regard there does not seem to me to be any significant difference between the respondents' case that there was a breach of rule 7(3) and their case that they had a legitimate expectation of the kind found by the judge. In either case the question arises whether it is appropriate for the court to grant relief by way of judicial review. The question in each case is essentially the same.

47.

I was somewhat concerned in the course of the argument as to whether the election should be stopped on the basis of an argument along these lines. There was a breach of rule 7(3) or (let it be supposed) an interference with the respondents' legitimate expectation that the papers would be checked and errors notified to them. In each case, the effect of the breach or unfairness was that the errors did not come to light in time. The election should therefore be declared invalid now because a petition under section 48 of the Act would be bound to succeed because there is no realistic possibility of the returning officer (or anyone else) being able to satisfy paragraph (b), namely that "the act or omission did not affect the result". That is because the respondents are the only Respect candidates standing in the ward and Respect is an important party in the locality so that the result of an election without any Respect candidates is bound to be materially different from an election with Respect



candidates. In these circumstances, it would be a waste of time and money to permit the election to proceed. It would moreover be unfair to all the parties and, indeed, to the electorate. Given that the election court would be bound to hold that the election was invalid, the only sensible and just course would be to exercise the court's power to grant a mandatory injunction and to direct the returning officer to countermand the poll under section 39(1) of the Act.

48.

This was not the first way in which the case was put by Mr Southey. His first point was that the court should not focus on the question raised by paragraph (b) of section 48(1) and consider the relative positions of the parties but simply hold, without regard to those positions, that an election petition would be bound to succeed. For my part, I would not accept that submission. It appears to me that paragraph (b) raises a question which must be answered on all the evidence, including the relative positions of the parties. I can see no basis upon which it could properly be held that, in answering the question posed by the paragraph, the position of the parties is irrelevant.

49.

Although I was initially attracted by the argument summarised above, I have reached the conclusion that it should not be accepted. As stated earlier, it will be the rare case indeed in which it will be appropriate for the court to interfere by countermanding a poll or interfering with an election before it takes place. In principle, elections should be contested by those who have been properly nominated in accordance with the rules. Moreover local elections should, if at all possible, all take place on the day appointed by section 37(1) of the Act, namely the first Thursday in May. The Act sets out a detailed procedure for challenging the result of an election. It involves a trial in public at which oral evidence can be given and all those interested, including the other candidates, can take part if they wish. The present proceedings have not been served on the other candidates, who may or may not be aware of them.

50.

It is not in my opinion possible to say on the present state of the evidence that the respondents to any election petition will not be able to establish that the results of the election would have been the same but for the breach of duty on the part of the returning officer. As Mr Straker observed in reply (and as is obvious) we do not know what the result of the election on Thursday will be and we do not know whether the respondents will in fact choose to challenge the result, whatever it is. They may or they may not. The evidence does not focus on this question. Indeed, it does not focus on the question raised by section 48(1)(b) at all. Thus there is no evidence as to the relative strengths of the parties or as to the position of Respect either in the ward or in the locality more widely. Respect may receive large number of votes in the locality or its votes might collapse. We simply do not know, both because the election has not yet taken place and because the respondents have chosen not to address these questions in the evidence.

51.

In these circumstances it is impossible for the court to hold that the respondents would be bound to succeed on any election petition which they choose to file. It follows that it would be wrong for the court to interfere with the election, especially since it is reasonable to suppose that canvassing is well under way and the candidates must have spent both time and money in relation to it.

### Conclusion

52.

It was for these reasons that I concluded on Friday that the appeal should be allowed and the election should be allowed to proceed, leaving the respondents to take such steps as may be appropriate to challenge the result by way of petition to the election court. Nothing in this judgment is intended to prejudice any of the issues which might arise on the hearing of such a petition, whether arising under any part of section 48 or otherwise.

53.

LORD JUSTICE RIX: I agree.

54.

LORD JUSTICE MAURICE KAY: I also agree.

**Order:** Appeal allowed.