



29 July 2010

PRESS SUMMARY

R (on the application of the Electoral Commission) (Respondent) v City of Westminster Magistrates Court (Respondent) and the United Kingdom Independence Party (Appellant) [2010] UKSC 40

On appeal from the Court of Appeal (Civil Division) [2009] EWCA Civ 1078

JUSTICES: Lord Phillips (President), Lord Rodger, Lord Walker, Lord Brown, Lord Mance, Lord Kerr, Lord Clarke

BACKGROUND TO THE APPEAL

The appeal concerns an order made by City of Westminster Magistrates Court for forfeiture of donations made to the United Kingdom Independence Party (UKIP), a registered political party. Restrictions on donations to political parties are set out in Chapter II of Part IV of the Political Parties, Elections and Referendums Act 2000 ("PPERA").

Section 54 PERA provides that a donation must not be accepted by a political party if the donor is not a permissible donor at the time of receipt. Permissible donors are defined in section 54(2)(a) as individuals registered in an electoral register. Under section 56(1) PERA, a political party which receives a donation must take all reasonable steps to verify the identity of the donor and whether he is a permissible donor. Under the terms of the statute, if a party is not satisfied that a donation is made by a permissible donor it can return the donation within thirty days. Only if it fails to do so will it be regarded as having accepted the donation. Sections 58-60 of PERA provide for forfeiture in relation to donations made by impermissible donors. In particular, section 58(2) provides that where a political party has accepted a donation which it is prohibited from accepting, the Electoral Commission may apply to a Magistrates' Court for an order of forfeiture by the party of an amount equal to the value of the donation.

Mr Alan Bown, a member of UKIP, was entitled to be registered as an elector but, for the period 1 December 2004 - 2 February 2006, his name was not on any electoral register. During that period Mr Bown made donations to UKIP amounting to £349,216. UKIP did not return any of the donations within thirty days, or at all. On 16 March 2007, the Electoral Commission applied to the City of Westminster Magistrates Court for an order of forfeiture of an amount equal to the donations.

The judge ordered the forfeiture of only £14,481, being the value of donations received by UKIP after the date of a meeting between the Electoral Commission and the party at which UKIP was aware that Mr Bown was not on the electoral roll.

Following judicial review proceedings challenging the decision of the Magistrates' Court brought by the Electoral Commission, the Court of Appeal held that the Magistrates' Court had erred in its construction of PERA and had not made a valid exercise of discretion under s58(2): its decision was irrational and inadequately reasoned. The Court held that (1) s.58(2) of PERA required that an order for forfeiture of an unlawful donation must reflect the full sum of the donation, and (2) on the exercise of the discretion by the Magistrates' Court, there is a strong presumption in favour of forfeiture. UKIP appealed to the Supreme Court.

JUDGMENT

The appeal was allowed and the order of the Magistrates' Court restored. The majority of the Court (Lords Phillips, Mance, Kerr and Clarke) held that section 58(2) permitted the forfeiture of a sum less than the total donation and that the presumption in favour of forfeiture was displaced in the present case where the donor was eligible to be on the UK electoral register but had not been registered by reason of administrative oversight. UKIP would be required to forfeit £14,481.

Three dissenting Justices (Lords Rodger, Brown and Walker) would have held that the full donation must be forfeited.

REASONS FOR THE JUDGMENT

- Lord Phillips, with whom Lords Mance, Kerr and Clarke agreed, decided that the appeal should be allowed. Lord Phillips stated that the primary issue is whether section 58(2) confers a broad discretion on the court to choose to make an order for forfeiture or whether there is a strong presumption in favour of forfeiture (the “presumption issue”). Related to the presumption issue is the issue of whether section 58(2) PPERA permits the court to make an order for partial forfeiture (the “all or nothing” issue).
- In order to answer the questions raised in the appeal, it was necessary to look at the legislative history of PPERA, in particular the Fifth Report of the Committee on Standards in Public Life on “the Funding of Political Parties in the United Kingdom”, published in October 1998 (“the Neill Report”), and White Paper Cm4413. That history provided a clear picture of the objects of Chapter II of Part IV of PPERA. The primary object is to prevent donations to political parties from foreign sources. Parliament made a significant change to the test proposed in the Neill Report in restricting permissible donors to those actually on an electoral register, excluding those eligible to be put on one. The change was not due to the fact that there is anything undesirable about parties being funded by those who are not on an electoral register; rather, it was made for pragmatic reasons. The secondary object of the Chapter II of Part IV of PPERA is to provide a scheme for achieving the primary object that is easy to apply, easy to police and that contains adequate sanctions for non-compliance (paras [25]-[26]).
- There are two distinct objects of the power to forfeit in section 58(2). The primary object of forfeiture is the direct prevention of the mischief that the legislation is designed to prevent – the receipt by a political party of foreign funding. The second object of the power to forfeit is to provide a deterrent or sanction against failure to comply with the requirements of the Act that are designed to make sure that donations are not received from an impermissible donor (paras [31]-[35]).
- Rather than following the eligibility test proposed by the Neill Report, Parliament chose to adopt a different scheme under which impermissible donations may or may not be foreign. Under this scheme, the significance of an individual impermissible donation may vary widely. It was clear that in making the power to forfeit discretionary, Parliament intended that the Magistrates' Court should discriminate between cases where forfeiture was warranted and cases where it was not. Parliament intended the court to consider whether forfeiture was a proportionate response to the facts of the particular case (paras [35]-[36]).
- Where a political party has accepted a donation from an impermissible source, there should be an initial presumption in favour of forfeiting the donation. If the donor was eligible to be registered on the electoral roll, the initial presumption in favour of forfeiture will have been rebutted and the question will then be whether there have been failures to comply with those requirements of the Act that are designed to ensure that such donations are not accepted, and the nature of those failures (paras [47]-[49]).

- On the “all or nothing” issue, Lord Phillips noted that the language of section 58(2) suggests that there is only one amount that can be forfeited. However, the word “forfeit” is used in an unusual way in the context of the statute, in a manner which is more akin to a fine. Considering the context, the preferable interpretation is to treat the power to order forfeiture of an amount equal to the value of an impermissible donation as implicitly including the power to order forfeiture of a lesser sum (paras [50]-[51]).
- Lord Kerr (with whom Lord Mance agreed), whilst agreeing with the outcome proposed by Lord Phillips, held that the critical issue was the “all or nothing” issue. If partial forfeiture is possible it follows that the court’s discretion as to whether or not to order forfeiture should be wide; if not, a broad discretion is not likely to be appropriate. As the primary aim of PPERA was to ban foreign donors, it was possible to hold that Parliament did not intend that where other donors were caught because of the simplicity and breadth of the provision that was adopted to achieve that aim, they would be subject to the same draconian penalty as those to whom the legislation was principally directed (para [114]). The court has the power to make an order of forfeiture for less than the full amount of the donation, and its discretion as to the level at which to fix the sanction at less than full forfeiture must be wide. Agreeing with Lord Phillips, where it is shown that a donation has come from an impermissible source it should be presumed that it is a foreign donation and, if that presumption is not rebutted, forfeiture should follow. If, however, it can be shown that the donation came from someone who was entitled to be on an electoral register, the level of forfeiture should reflect the particular circumstances of the case (para [116]).
- The dissenting judgments of Lord Rodger and Lord Brown (with whom Lord Walker agreed) held that the language of PPERA was clear. UKIP was not permitted to retain money that it had not lawfully been entitled to receive. Section 58(2) does not permit the forfeiture of a sum less than the donation. In most cases, and certainly in this case where neither the benefit nor its value has ever been returned, it is difficult to see how the discretion could properly be exercised other than by order for forfeiture (paras [63]-[64], [90]-[95]).

NOTE

This summary is provided to assist in understand the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.gov.uk/decided-cases/index.html