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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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18/97399/01

IN THE MATTER OF THE LOCAL GOVERNMENT ACT (NORTHERN IRELAND) 2014 PART IX

AND IN THE MATTER OF THE NORTHERN IRELAND LOCAL GOVERNMENT CODE OF CONDUCT FOR COUNCILLORS

AND IN THE MATTER OF AN ADJUDICATION BY THE NORTHERN IRELAND LOCAL GOVERNMENT COMMISSIONER FOR STANDARDS

AND IN THE MATTER OF JOLENE BUNTING AN APPLICANT FOR LEAVE TO APPEAL UNDER SECTION 60(9) OF THE LOCAL GOVERNMENT ACT (NORTHERN IRELAND) 2014 PART IX

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MAGUIRE J

Introduction

[1] The applicant in this case is Jolene Bunting. In 2014 she was elected to Belfast City Council. The applicant seeks leave to appeal against a decision of the Acting Local Government Commissioner for Standards. This decision is dated 15 September 2018. In his decision the Acting Commissioner concluded that there was *prima facie* evidence that the applicant had breached the Northern Ireland Local Government Code of Conduct for Councillors (hereinafter "the Code"). In the Acting Commissioner's view the alleged breach of the Code justified the step of suspending the applicant from the Council for a period of four months, pending the outcome of an on-going investigation into complaints which had been made against her.

[2] The sequence of events leading to the impugned decision arose from a number of complaints in respect of the applicant's conduct made to the Local Government Commissioner for Standards. Some of these were from members

of the Council; some were from the Chief Executive Officer of the Council; and some originated from members of the public. The detail of the complaints will be dealt with hereafter.

[3] Following the receipt of the complaints an investigation into them was initiated. This was carried out by the Deputy Local Government Commissioner for Standards. In the course of his investigation (pursuant to section 58 of the Local Government Act (Northern Ireland) 2014) an interim report was produced by the Deputy Commissioner and was provided on 16 August 2018 to the Acting Commissioner. In the light of this interim report, the Acting Commissioner decided to convene an interim hearing into the matters reported upon. This was held on 4 September 2018. This hearing consisted of the receipt of submissions from Ms Herdman BL, on behalf of the applicant, and from Mr Anthony BL, on behalf of the Deputy Commissioner. The hearing did not involve the receipt of oral evidence.

[4] On 15 September 2018 the Acting Commissioner made and announced the interim decision which has been described above and which is impugned in these proceedings.

[5] An application for leave to appeal was lodged in the High Court on 1 October 2018 and, following a mention before the court on 12 November 2018, it was agreed that the applicant's application by way of appeal should be dealt with at a "rolled up" hearing at which the application for leave to appeal could be considered together with the substantive argument in the case.

The interim report

[6] The interim report which was the subject of the submissions before the Acting Commissioner as aforesaid was prepared by Paul McFadden, the Deputy Commissioner, and is dated 14 August 2018. It is a substantial report which runs to some 28 pages together with 5 appendices. It refers by serial number to 14 complaints which had been filed with the Commissioner's Office in respect of the applicant. The substance of each complaint helpfully is summarised in the interim report. A serial number is recorded against each complaint as, in the majority of cases, is the date of receipt of the complaint.

[7] The summary provided reads, in substance, as follows:

> "C00164 – Received 15 December 2017
>
> …. Councillor Donal Lyons referred to a video, published on 13 December 2017, which is 'widely available on various social media networks' in which Councillor Bunting is seen to make comments which Councillor Lyons believed are in breach of the Code. In the video, Councillor Bunting is pictured standing

alongside Ms Jayda Fransen, Deputy Leader of the far right Political Group, Britain First. Both individuals speak on camera as they stand outside the Belfast Islamic Centre, Wellington Park, South Belfast.

… Councillor Lyons alleged that Councillor Bunting's comments 'constitute incitement'. He claimed that 'these actions' [were] designed to incite hostility in a society transitioning from conflict [and] would constitute a very serious breach of the Code.

…. Both Ms Fransen and Councillor Bunting speak on the video in the context of their opposition to the growth of Islam in Belfast. Councillor Lyons referred specifically to the following comments of Councillor Bunting:

> '"We were told it's moving" … "It's not moving, it's extending" "they don't like you calling it a Mosque because of funding reasons and things like that" … "the amount of ghetto Mosques we have had reported to us".'

C00172 - Received 29 December 2017

…. This complaint, submitted by Councillor Georgina Milne, also relates to the video published on 13 December 2017. Councillor Milne stated that 'it encapsulates both parties prejudice against, and intolerance of, the Muslim faith'. She also argued that Councillor Bunting endorsed Ms Fransen's comments in the video, and she highlighted the following quotations [from] Ms Fransen …

> 'Islam coming to Northern Ireland would be a very bad thing" … "This is how Muslim communities have achieved colonisation of entire areas of the mainland" … "that monstrosity behind me is Mosque" … "creeping Islamification" … "we [Britain First] will be campaigning against every one of these dens of iniquity [Islamic centres].'

C00177 – Received 11 January 2018

… This complaint was submitted by the Chief Executive of Belfast City Council, Mrs Suzanne Wylie. Mrs Wylie stated that she had been advised that 'the Britain First Group, including Ms Fransen, were escorted by Councillor Bunting during their visit to City Hall on 9 January 2018' … Mrs Wylie complained that Councillor Bunting appeared to facilitate the filming of Ms Fransen seated in the Lord Mayor's chair in the Council Chamber and wearing the ceremonial robes provided for councillors. …

Mrs Wylie stated that she was particularly concerned about 'how the Council Chamber was used as a platform by Ms Fransen for commenting upon the active legal proceedings being taken through the criminal courts, which is again entirely inappropriate' … I note that since then, Ms Fransen has been convicted and imprisoned in England for separate offences to those referred to in her video. These convictions related to religiously aggravated harassment.

… The Chief Executive believed that Councillor Bunting's facilitation of these activities 'potentially breaches the Local Government Code of Conduct and her duty as an elected member not to bring the Council into disrepute. The Chief Executive also referred to 'the use of Council resources to further political purposes' as having 'the potential to offend the Code of Conduct'.

… The Chief Executive provided a written statement relating to her complaint … The statement refers to a meeting held on 12 January 2018 as a result of the visit on 9 January 2018, between the Chief Executive and Councillor Bunting at which Councillor Bunting had commented: 'In hindsight perhaps it wasn't the best thing to do' … I understood this to be a reference to Councillor Bunting's facilitation of the Britain First visit on 9 January 2018, including the filming of Ms Fransen in the Council Chamber.

… I note that, immediately following her meeting with the Chief Executive, Councillor Bunting produced a video which informed viewers that the Chief Executive had told her she would be making a complaint to the Local Government Commissioner for Standards. The video was posted on-line at 18.41 hrs on 12 January 2018 …

… Two minutes into the video Councillor Bunting stated:

> 'I have no issue with the Commissioner investigating this as I have done nothing wrong.'

These remarks conflict with those comments made to the Chief Executive at the meeting that had occurred just a few minutes earlier. This contrast indicates a failure on the part of Councillor Bunting to appreciate the seriousness of the allegations that have been made in respect of her conduct.

C00178 – Received 12 January 2018

… Councillor Emmett McDonough-Brown complained that Councillor Bunting had referred to Islam in a context of 'problematic people' during the meeting of full Council held on 3 January 2018. He stated that:

> 'Clearly this is prejudiced in that it assumes people belonging to a specific religious and racial group are problematic by dint of their membership of that group.'

… The Council meeting is available on the Council's website as a webcast. The relevant contributions begin at one hour ten minutes into the meeting. My staff have viewed the webcast and the following comments among others are recorded as being said by Councillor Bunting:

> 'Lord Mayor what worries me is that in the future we are not going to be able to speak about problematic members of

> society in Belfast. We aren't going to be able to – the amendment is so broad that we're [not] going to be able to say very much in the Council Chamber especially about problematic sections of society.'

C00181 – Received 29 January 2018

… The complainants, 79 members of the public in total, made a number of allegations against Councillor Bunting which I have listed in the following paragraphs.

… It is alleged that 'Councillor Bunting co-organised a 'Northern Ireland against Terrorism' rally in Belfast on 6 August 2017, in conjunction with Britain First'. A video of the rally is available on line …

… During the rally, Ms Jayda Fransen, stated the following:

> 'The biggest threat to civilisation, across the world, is Islam.'

… We are at war with Islam, the world is at war with Islam. Jihad and Islam are one and the same, it's not a separate entity.

… 'For those of you that have bothered to read any of the Islamic scriptures, and I know they are not pleasant, you will know that the Quran, the Hadiths, they are riddled with instructions, for every single Muslim, not just the extremists, not just Isis, don't listen to that nonsense, every single Muslim is obliged to kill you and your husbands, and your wives and your children.'

… 'There is no moderate Islam'.

… 'Islam says every single one of you wonderful people here today, deserves to be killed, every single one of you.'

'You follow the Quran, you have to kill every non-Muslim in sight, that's the reality that is the new threat.'

'Britain First will be leading the campaign against every single Mosque that is proposed in Northern Ireland.'

'Britain First will make sure that these dens of iniquity do not cover every street corner of this beautiful country.'

Councillor Bunting is recorded as saying, 'Jayda I will be holding you to what you said today.'

'Jayda has made some extremely good points about Islam. This is a worldwide threat.'

… The complainants argued that Councillor Bunting endorsed the statements in language used at the event.

… Jayda Fransen is facing criminal charges related to her comments during the event. The case against her is due to be heard at Belfast Magistrates' Court on 14 September 2018.

… In a News Letter article dated 8 August 2017 … Councillor Bunting reportedly reiterated her support for the claims made by Britain First at the rally two days earlier. The first line of the article states:

> 'A Belfast councillor has said she is happy to stand over claims that "all Muslims" are obliged to "wage war" on the Christian population of the UK and Europe.'

… On 19 November 2017, Councillor Bunting gave a video update on her Facebook page informing her followers that Jayda Fransen had been released from custody. Two minutes and 40 seconds into the video, Councillor Bunting refers to Ms Fransen 'telling the truth about the Islamification of the UK and the world.' …

…The complainants refer to the video in which Councillor Bunting appeared alongside Jayda Fransen

outside the Belfast Islamic Centre published on 13 December 2017.

… Also on this date Councillor Bunting appeared on the BBC radio programme, Talk Back. … During the programme Councillor Bunting confirmed that she supported Ms Fransen's views. She said: 'I'm not going to distance myself from her opinion.' With respect to the Quran, Councillor Bunting referred to the 'evil within this book' and the 'hatred within this book'. She also agreed with sentiments expressed by a caller to the programme, 'Sophie', who claimed that the Quran 'teaches hate and evil, it's disgusting'. She claimed that Muslims are 'taught to hate' and that the Quran directs that Muslims have to 'kill us (non-Muslims) for not believing in Allah.'

… The complainants referred to the visit of the right wing group, Britain First, to Belfast City Hall in January 2018. They argued that 'it is not routine that such tours are used to facilitate a video update on criminal proceedings, and proceedings linked to anti-Islamic conduct.'

… The complainants claimed that Councillor Bunting co-ordinated, crowdfunded and hosted an event on 14 January 2018 when a film entitled 'Can't We Talk About This' was aired in public. The film seeks to make a case that there is a threat posed by Islam to society. A trailer for the film is available on-line. …

… Information obtained separately indicates that the event occurred the day before, Saturday 13 January 2018.

C00200

… The complainant, a member of the public known in a personal capacity to Jayda Fransen, alleged that Councillor Bunting's association with, and public support of, a hateful, openly Islam phobic group known as 'Britain First' as well as her promotion of convicted criminals, Jayda Fransen and Paul Golding, have an adverse impact on the Council's reputation and on public trust in the position of a councillor …

… He also referred to the requirement under the Code to have regard to the desirability of promoting good relations between people of different racial groups, religious beliefs and political opinion. The complainant stated that Councillor Bunting's anti-Islamic posts on social media are manifestly in conflict with this requirement and threaten social cohesion in Northern Ireland …

C00299

… In a second complaint, submitted on 8 June 2018, the Chief Executive of Belfast City Council alleged that Councillor Bunting 'made statements in relation to a leaflet widely condemned as being racist, as being a document that was produced for the purpose of providing information to the public'. Also, '… [Councillor Bunting] claimed that the Quran incited Muslim attacks thus inferring it promoted terrorist atrocities'. … The Chief Executive indicated that these statements had been made by Councillor Bunting at the meeting of Belfast City Council which was held on 9 April 2018 and she had received a number of complaints from City councillors in respect of them. She believed that Councillor Bunting's comments were 'demonstrative of a failure to honour the Code of Conduct and to promote equality of opportunity as required by law and by the Code.'

… The Chief Executive also referred to a social media post … attributed to Councillor Bunting which depicted a cartoon character dressed in an Irish Tricolour and wearing a hat bearing the phrase 'Please be Patient I have Famine'. Numerous complaints had been received about this cartoon meme; these are addressed separately …

… The Chief Executive indicated that, on 3 May 2018, she had received complaints regarding the social media post.

C00171; 206, 251; 257; 279; 285; 288; 299 – Cartoon Meme Complaints

> … At the time of writing LGES has received eight complaints about the content of a social media posting which was posted by Councillor Bunting on 3 May 2018. A copy of the post is provided … all of the complaints received are broadly similar in that they allege the meme contains highly offensive material which is sectarian and racist in nature and which would incite hatred. For example, the phrase 'please be patient I have famine' is very likely to cause significant offence in light of the tragic national famine that occurred in Ireland between 1845 and 1852, the Great Famine. One complainant … stated: 'I wonder if she made a similar type of reference to the holocaust or to slavery would she not already be out of her position [as an elected member].'
>
> … The meme can also be said to be sectarian given the depiction of two frogs, one wearing Union Jack colours and the other the Tricolour. The meme clearly portrays the frog wearing the Tricolour as inferior.
>
> … Another complainant has alleged that the depiction of the smaller frog, in the social media posting, is one which is used by white supremacists to make fun of children with autism.
>
> … My office has received unprecedented contact about the posting on 3 May 2018 with 87 complaints to the LGES Directorate having been made; 76 of which were within two days. Eight of these became formal complaints made in line with the Commissioner's requirements. These are in addition to the nine complaints received which again is an unprecedented level of complaints about any one matter involving an individual councillor."

[8] At paragraphs [59] and [60] of the interim report there is reference to the specific rules of the Code which may have been breached. The author indicates that the following rules apply, taken from the Code:

(a) 4.1(b) – "Councillors hold public office under the law and must act in accordance with the Code."

(b) 4.2 – "You must not conduct yourself in a manner which could reasonably be regarded as bringing your position as a councillor, or your council, into disrepute."

(c) 4.11 – "You must ensure that you are aware of your council's responsibilities under equality legislation, and that you are familiar with the relevant legislative statutes and provisions, in particular, with the obligations set out in your council's equality scheme."

(d) 4.12 – "You are entitled to legally express any political opinion that you hold. In doing so, however, you should have regard to the Principles of Conduct and should not express opinions in a manner that is manifestly in conflict with the Principles of Conduct."

(e) 4.13(a) – "You must show respect and consideration for others."

(f) 4.16(a) – "You must not use, or attempt to use, your position improperly to confer on, or secure, an advantage for yourself or any other person."

(g) 4.16(c) – "You must not use, or attempt to use, your position improperly to avoid a disadvantage for yourself or any other person, or to create a disadvantage for any other person."

(h) 4.18(a) - "You must not use, or authorise others to use, the resources of your council imprudently."

(i) 4.18(b) - "You must not use, or authorise others to use, the resources of your council in breach of your council's requirements."

(j) 4.18(c) – "You must not use, or authorise others to use, the resources of your council unlawfully."

(k) 4.18(d) – "You must not use, or authorise others to use, the resources of your council other than in a manner which is calculated to facilitate, or to be conducive to, the discharge of the functions of your council or of the office to which you have been elected or appointed."

(l) 4.18(e) - "You must not use, or authorise others to use, the resources of your council improperly for political purposes."

[9] Between paragraphs [61] and [92] of the interim report, there is an extensive discussion by the author of the evidence which, in his view, supported the conclusion that *prima facie* the applicant had failed to comply with the Code of Conduct. While the court has considered these paragraphs closely, it will not seek to set them out in this judgment.

[10] Thereafter, the interim report addresses the question of the imposition of interim sanctions. For this purpose the author refers to the Sanctions Guidance which is to apply where a councillor has been found to have failed to comply with the Code of Conduct. In this case, the author concluded that the following five factors were applicable in this case:

(i) The applicant had deliberately sought to misuse her position in order to disadvantage some other person.

(ii) There had been repeated failures to comply with the Code by her.

(iii) She had misused Council resources.

(iv) She had brought the Council into disrepute. This meant that a relevant issue would be the extent of any reputational damage to the Council.

(v) The need to consider whether failure to comply with the Code was such as to render the applicant entirely unfit for public office.

[11] The author then discusses each of the above items in turn.

[12] At paragraph [104] of the interim report the following conclusion on the 'sanctions' issue is set out:

> "In conclusion, I am of the view that it is in the public interest to suspend Councillor Bunting immediately for a period not exceeding six months, given:
>
> - The serious nature of the allegations that have been made and, that the alleged breaches appear to have been motivated by discrimination against a person's national origin, disability [the potential reference to child with autism] and Muslims living in Northern Ireland and the Councillor has demonstrated hostility towards specific groups based on these characteristics.
>
> - Some of the matters complained of are inextricably linked to the subject matter of separate criminal proceedings.
>
> - The unprecedented number of contacts and complaints that had been received about the Councillor's conduct.

> - The repetitive and escalated nature of the conduct complained of.
>
> - The impact that the alleged breaches have had on certain groups within the community.
>
> … I believe the above factors represent compelling public interest grounds for making such a recommendation. Furthermore, the circumstances to be investigated and the prima facie evidence obtained to date suggests that there could be further disruption to the functioning of the Council and a loss of public confidence in the Council if Councillor Bunting continues in her role as a Councillor whilst my investigations are on-going. In the intervening period I believe it is highly probable that Councillor Bunting will engage in further activity which could be the source of additional complaints similar to those received to date. This would impact on the effective and efficient completion of my investigation."

[13] In the above circumstances the author of the report decided to recommend suspension.

The interim hearing

[14] As already noted, the interim hearing was convened by the Acting Commissioner to enable him to hear submissions on behalf of the applicant and the Deputy Commissioner and reach conclusions. The key legal provision dealing with decisions on interim reports is section 60 (1) of the Act. In its material part it reads:

> "(1) Where the prima facie evidence is such that it appears to the Commissioner –
>
> (a) That the person who is the subject of an interim report has failed to comply with the Code of Conduct;
>
> (b) That the nature of that failure is such as to be likely to lead to disqualification under section 59 (3) (c); and
>
> (c) That it is in the public interest to suspend or partially suspend that person immediately,

> the Commissioner may give notice to the clerk of the council concerned that that person is suspended or partially suspended from being a councillor for such period and in such way as may be specified in the notice."

[15] A central issue in the proceedings before the Acting Commissioner therefore was whether the above three tests were fulfilled.

[16] In his adjudication the Acting Commissioner dealt with these matters at section 6 and ultimately found that each of the tests was satisfied.

[17] As regards the first he held:

> "The parties agree that, in relation to each of the complaints, the Code applied to the respondent. Based on the Deputy Commissioner's interim report and the submissions made by each representative, the Acting Commissioner finds there is prima facie evidence that the respondent failed to comply with the Code for the reasons set out below:
>
> - In relation to the allegations about the meme and the Council Chamber the respondent has accepted that the Acting Commissioner may conclude she has breached the Code.
>
> - The Acting Commissioner has considered the complaints made against the respondent and their investigation both as individual matters and as a course of conduct followed by the respondent.
>
> - The Acting Commissioner finds that the interim report on complaints C00164, 172, 177, 178, 200 appears to provide prima facie evidence of the respondent's public association with the far right political group, Britain First.
>
> - There is video evidence of the respondent organising events involving Britain First in Belfast on 6 August 2017 and on 13 December 2017, outside the Belfast Islamic Centre, then supporting the views expressed there by Ms Fransen, the Deputy Leader of Britain First. Those views appear to be critical of Islam and Muslims living in Northern Ireland. The respondent had the

opportunity to distance herself from them, if indeed these were very much more extreme than her views as has been submitted. She chose not to do so, in particular in the Newsletter article of 8 August 2017 and in the Talk Back programme on 13 December 2017.

- The Acting Commissioner is not convinced by the respondent's assertion that her association with Britain First was to encourage it to become more moderate and to improve its structure.

- The respondent's association with Britain First was over a period of time, between August 2017 and January 2018 and events appeared to be planned and their content pre-meditated.

- The organisation of the visit to Belfast City Council Chamber by Ms Fransen; allowing her to wear councillor ceremonial robes; allowing her to make comments on her forthcoming criminal proceedings arising from the rally in Belfast on 6 August 2017, which relate to the incitement of hatred of Muslims.

These actions all raise questions about the respondent's conduct as a councillor.

The Acting Commissioner finds that the interim report on complaints C00171; 206; 257; 279; 285; 288; 299; appears to provide prima facie evidence that the respondent used a social media posting on 3 May 2018 where the complainants alleged that its contents, a cartoon meme, was sectarian and racist in nature.

In relation to complaint C00178, the Acting Commissioner has viewed the webcast of the council meeting to which the complaint relates. Given that, at one hour 19 minutes and 40 seconds into the meeting, Councillor Bunting can be seen and heard to make specific reference to Islam and then the Quran, apparently in the context of "problematic members/problematic sections" of society, the Acting Commissioner does not accept the submissions made on behalf of the respondent that "at no time during that exchange within the council meeting did she

mention Islam or anything like it … or mention Islam at any stage during that exchange". The Acting Commissioner therefore finds that there is prima facie evidence to support this complaint.

The Acting Commissioner is satisfied that there is prima facie evidence that the respondent has failed to comply with the Code."

[18] As regards the second he held:

"The Acting Commissioner will only decide on this interim hearing; any later adjudication hearing will take place before the Commissioner. In deciding whether or not the nature of the failure is such as to be likely to lead to disqualification, the Commissioner will consider the circumstances of the case itself, the procedures for adjudication hearings, in particular the sanctions guidelines, together with the guidance issued by the Commissioner in relation to the Code.

Drawing on the submissions in the interim hearing, the relevant procedures and guidance documents, the Acting Commissioner finds that, if substantiated:

- The failures to comply with the Code were serious breaches which have been repeated over a period of time.

- The respondent has misused council resources.

- The failures arose from events which had been pre-planned, which may indicate an intentional failure to comply with the Code.

- The respondent's actions have brought the council into disrepute and the extent of the reputational damage is so serious as to warrant a disqualification.

- The respondent has failed to heed appropriate advice from the CEO.

- The Acting Commissioner notes the respondent's previous record of good service, which can be

raised as a mitigating factor at any later adjudication hearing.

- The Acting Commissioner finds that in this case the nature of the failures is such as to be likely to lead to disqualification under Section 59(3)(c)."

[19] As regards the third he held:

> "The Acting Commissioner has taken into account Ms Herdman's submissions regarding the significant impact which suspension would have on the respondent, both as a councillor and in her personal life. He has also taken into account the fact that there is a series of events which appears to show some serious breaches of the Code by the respondent. Paragraph 32 of the Sanctions Guidance provides that:
>
> > "Some allegations may be of such gravity as to lead to a loss of public confidence in the council if the respondent were to remain in office whilst the allegations are being investigated."
>
> The Acting Commissioner is satisfied that, in this case the 'maintenance of public confidence' outweighs the personal and financial impact on the respondent.
>
> The Acting Commissioner has considered the Deputy Commissioner's submission that it is likely that a period of 6 months will be required to complete the investigation.
>
> The decision of the Acting Commissioner, made under Section 60(1) of Part 9 of the Local Government Act (Northern Ireland) 2014, is to suspend the respondent for a period of 4 months. The sanction is to have effect from 4pm on Friday 21 September 2018."

[20] In the light of his findings, the Acting Commissioner, having applied the terms of the Sanctions Guidance, arrived at the following conclusion:

"The Acting Commissioner notes that the key principle, when considering sanction, is "public interest".

Both representatives made submissions in line with paragraph 33 of the sanctions guidelines which require account to be taken of:

(a) the proper functioning of the council;

(b) the maintenance of public confidence;

(c) the effective completion of the investigation.

The Acting Commissioner notes the CEO's view, on the proper functioning of the council, based on the respondent being an independent councillor that:

> "In my view her conduct has not had a significant impact on the proper functioning of the council."

But the CEO went on to say:

> "This needs to be distinguished from reputational damage which I am satisfied her conduct has had the potential to cause."

There has been considerable publicity of the events to which the complaints relate and the number of complaints against the respondent is unprecedented. Much of that publicity was generated by the respondent, regardless of the reaction to her actions and comments which was clear from the complaints made against the respondent and from her meeting with the CEO. It is difficult to see how this would not be detrimental to the reputation of the Belfast City Council in the eyes of the public, yet the respondent continued with her actions over a period of time.

The aim of the Code is to improve the standard of conduct expected of councillors and to foster public confidence in the ethical standards regime.

The Acting Commissioner is satisfied that the conduct of the respondent, with the attendant media publicity,

is such that it is likely to diminish the trust and confidence that the public places in her as a councillor and in the council, which the public expects to ensure an appropriate standard of conduct from councillors and to uphold the ethical standards regime. He is therefore determined that a member of the public, knowing all of the relevant facts, would reasonably consider that the respondent's conduct is such that it brought her position as a councillor and her council into disrepute by her actions.

The Acting Commissioner has considered points a. and b. collectively. On the prima facie evidence of the failure of the respondent to comply with the Code, he finds there has been an impact on the proper functioning of the council. It is likely that there has been reputational damage to the city council. The repeated failures by the respondent to comply with the Code and the subsequent publicity, often self-generated, is likely to have had a negative impact on public confidence.

The Acting Commissioner has considered whether further inappropriate conduct by the respondent would be likely to impact on the effective completion of the Deputy Commissioner's investigation. He notes the submission by Ms Herdman that there was no evidence that the respondent would interfere with the investigation. However, this alone cannot be determinative of the Acting Commissioner's decision. There has been a series of intentional actions, by the respondent, which led to this investigation and there is now prima facie evidence of serious breaches of the Code. There is prima facie evidence that those breaches are likely to diminish the trust and confidence that the public places in her as a councillor and in the council. The respondent has failed to heed previous concerns about her conduct which raises a question regarding further inappropriate conduct in the future.

The Acting Commissioner has taken account of all three elements of Section 33 of the Sanctions Guidelines and the weight which, in his consideration, should be attached to each element in the circumstances of this case. He has also considered

> the Deputy Commissioner's submission in relation to partial suspension. The Acting Commissioner is satisfied that a complete interim suspension of the respondent is necessary in this case."

The width of these proceedings

[21] A question which arises in these proceedings relates to the width of the appeal. As already noted, the appeal in this case is that provided for by Section 60 (10) of the 2014 Act *supra*.

[22] This reads:

> "An appeal under sub-section 9 may be made –
>
> (a) against the suspension (or partial suspension);
>
> (b) against the length of the suspension (or partial suspension)."

[23] Two particular matters arise. The first is the issue of whether it is necessary for the court to have regard to the tests set out in Section 60(1) and, in particular, as to whether they are met in order to judge whether a suspension (or partial suspension) should be imposed and/or its length. Secondly, there is an issue as to whether an appeal under Section 60(9) is sufficiently wide as to embrace issues about whether there has been any breach of Article 10 of the European Convention on Human Rights ("ECHR").

[24] As regards the first, the court is of the opinion that the better view is that it should approach the appeal to it by considering whether the tests at Section 60(1) are satisfied and should judge the suspension and its length in the light of this. Section 60(1) appears to be a gateway provision and certainly is the means of access to any possible interim suspension. It would, in the court's view, be unattractive to seek to divorce any suspension from a discussion of the gateway provisions which allow for it.

[25] As regards the second, the court appreciates that there is no reference in Section 60(9) of the 2014 Act *supra* to Article 10 of the ECHR. However, it is difficult to see how the court, which itself is bound by the Human Rights Act 1998, could ignore it as the court, as a public authority, is obliged to comply with the Act. In these circumstances, the court is willing to consider the Article 10 issues which arise within the overall context of the present appeal, which is concerned with the imposition of a period of interim suspension in respect of the applicant.

The correct approach to the appeal

[26] The proceedings before the court are not by way of judicial review but take the form of a statutorily mandated appeal.

[27] The approach to the court's role therefore must be shaped by this factor.

[28] This issue of the approach which the court should adopt in relation to an appeal was the subject of some consideration in the recent case of *Patrick Brown's Application* [2018] NIQB 62. While that case did not involve an interim report or an interim adjudication and so was not governed by Section 60(9), it nonetheless took the form of an appeal to the High Court by a person "censured, suspended or disqualified by the Commissioner" as prescribed in Section 59(13). The appeal right at issue in that case was set out at Section 59(14) as follows:

> "An appeal under sub-section (13) may be made on one or more of the following grounds –
>
> (a) that the Commissioner's decision was based on an error of law;
>
> (b) that there has been a procedural impropriety in the conduct of the investigation under Section 58;
>
> (c) that the Commissioner has acted unreasonably in the exercise of the Commissioner's discretion;
>
> (d) that the Commissioner's decision was not supported by the facts found to be proved by the Commissioner;
>
> (e) that the sanction imposed was excessive."

[29] It is plain from the above that the grounds of appeal as set out at Section 59(14) are much wider than the grounds of appeal found at Section 60(10). It thus seems inevitable that this court must take account of the difference.

[30] For the moment, however, the issue is what the appellate role embraces which arises similarly whether the grounds of appeal are those at Section 59(14) or Section 60(10).

[31] Keegan J in *Brown's Application* dealt with the nature of the court's role in a number of places in her judgment. At paragraph [27], she said:

> "It is important to note that this is a statutory appeal. It is not a simple judicial review, neither is it a hearing *de novo*. However, the court must apply some test to assess whether the appeal should succeed. It seems to me that there is strength in the submission that the first port of call is the statutory language which sets out when a court can intervene. The various headings there are in relation to error of law, procedural impropriety, error of fact, excessive sanction."

[32] The judge also referred to the case of *Heesom v Public Services Ombudsman for Wales* [2014] EWHC 1504 (Admin) which, as she noted, involved a different piece of legislation. She noted that it contained some useful guidance at paragraphs 43-53 in relation to the scope of an appeal of this nature. She also referred to a case called *Sibesh* which had itself been referred to in *Heesom*.

[33] Hickinbottom J in *Heesom* is quoted by Keegan J as follows:

> "45. However, in doing so, the court is required to give due deference to the tribunal below, because:
>
> (i) The tribunal has been assigned, by the elected legislature, the task of determining the relevant issues. In my view, although it is a more forceful point in respect of issues where the legislature is not providing an appeal, this is relevant even in an open ended appeal such as this.
>
> (ii) It is a specialist tribunal, selected for its experience, expertise and training in the task …
>
> (iii) It has the advantage of having heard oral evidence …"

[34] Keegan J also cited paragraph 46 of *Heesom*:

> "Applying that general proposition, the courts have considered a wide spectrum of cases:
>
> (i) Moving outside factual issues, if the issue is essentially one of statutory interpretation, the deference due may be limited. …

(ii) If it is one of disputed primary fact which is dependent upon the assessment of oral testimony, the deference will be great.

(iii) The appeal court will be slow to impose its own view and will only do so if the tribunal below was plainly wrong.

(iv) Where the issue is essentially one of discretion, the court will only interfere if the tribunal was plainly wrong.

(v) Similarly, where an evaluative judgment has to be made on the primary facts, involving a number of different factors that have to be weighed together. In respect of such open textured issues Beatson J said in *Calver* at 46:

> 'The relevant legal principles in this area do not provide the panel or the court with bright lines … they lead to a process of balancing a number of issues.'"

[35] In the light of the above citations, Keegan J at paragraph 30 of *Brown* went on:

> "In my view the test is best described as whether or not the decision was wrong applying the statutory language. I do not consider that the adverb 'plainly' adds anything for the reasons given by the Supreme Court in *Re B* …. The appellant must satisfy the burden of proof. I do not accept the argument made by the respondent that the court is simply exercising a supervisory function as in a judicial review. In my view, the jurisdiction of the court is broader within the parameters of the statutory provisions, allowing due deference to the decision maker. I proceed on that basis."

[36] Later in the judge's judgment when dealing with the issue of whether an appeal should be successful in respect of the length of a suspension which had been imposed on Councillor Brown, Keegan J noted:

> "In relation to the length of sentence, the Commissioner reached her view having heard the evidence and considered all of the facts. This is a discretionary exercise. I must be careful not to simply

> substitute my own view. I must decide whether the Commissioner was wrong. She can only have been wrong if she strayed outside the bounds of her discretion and imposed an excessive suspension. The length of suspension is mid-range. As such I do not consider that it is unreasonable or excessive. Therefore, I do not consider that I should interfere with the decision of the Commissioner on the basis of her application of the current provisions."

Article 10 of the European Convention on Human Rights

[37] The terms in which Article 10 ECHR is cast are well-known. The provision reads:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society…for the protection of the reputation or rights of others …".

[38] The Human Rights Act 1998 has subsumed the terms of Article 10 into domestic law. In particular, Section 3 of the Act provides that legislation, including subordinate legislation, must be read as compatible with Convention Rights, so far as it is possible to do so. Section 6 provides that it is unlawful for a public authority to act in a way that is incompatible with Convention Rights, including rights under Article 10.

[39] As can be seen from the terms of the Article, *supra*, the right is not absolute. It may be restricted if (and insofar) as the restriction is prescribed by law and necessary in a democratic society for the protection of the reputation or rights of others.

[40] The provisions of Article 10 in this context have recently been the subject of consideration by the English and Welsh High Court in *Heesom supra*. While in that case there was reference to the common law also recognising freedom of expression there was no suggestion that the scope of the common law concept is in any way broader than Article 10. This court will therefore focus on the latter.

[41] In *Heesom* Hickinbottom J provides a helpful summary of the case law at that time, which the court will set out below:

> "[34] While freedom of expression is important to everyone, Strasbourg has recognised the importance of expression in the political sphere. It has long-recognised that what is said by elected politicians is subject to 'enhanced protection', i.e. a higher level of protection, under Article 10.
>
> [35] One of the first cases to explore the right in this context was Castells v Spain (1992) 14 EHRR 445, which concerned the publication in a weekly magazine of an article by an opposition senator, elected on the list of a political grouping supporting independence for the Basque Country. It was highly critical of the Spanish Government, accusing it of having been responsible for the murders and attacks perpetrated in the Basque Country by extremist organisations who acted (the article said) with total impunity. The Senate withdrew the senator's parliamentary immunity; and he was prosecuted and convicted of insulting the government. He was sentenced to imprisonment for one year and one day, and disqualified from office.
>
> [36] Before the European Court of Human Rights, he complained that his prosecution and conviction contravened article 10. The court said this:
>
>> "42. The Court recalls that the freedom of expression, enshrined in paragraph 1 of Article 10, constitutes one of the most essential foundations of a democratic society and one of the basic conditions for its progress. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.
>>
>> While freedom of expression is important for everyone, it is especially so for an elected

> representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition Member of Parliament, like the applicant, call for the closest scrutiny on the part of the Court.
>
> 43. In the case under review, Mr Castells did not express his opinion from the senate floor, as he might have done without fear of sanctions, but chose to do so in a periodical. That does not mean, however, that he lost his right to criticise the Government…

Hickinbottom J continued:

> "I have quoted that early case at some length because it reflects a number of the propositions that are developed in later cases.
>
> [37] I was referred to a very large number of Strasbourg cases…
>
> [38] … From them, the following propositions can be derived.
>
> i) The enhanced protection applies to all levels of politics, including local …
>
> ii) Article 10 protects not only the substance of what is said, but also the form in which it is conveyed. Therefore, in the political context, a degree of the immoderate, offensive, shocking, disturbing, exaggerated, provocative, polemical, colourful, emotive, non-rational and aggressive, that would not be acceptable outside that context, is tolerated … Whilst, in a political context, Article 10 protects the right to make incorrect but honestly made statements, it does not protect statements which the publisher knows to be false …
>
> iii) Politicians have enhanced protection as to what they say in the political arena…
>
> iv) …

v) The protection goes to "political expression"; but that is a broad concept in this context. It is not limited to expressions of or critiques of political views …, but rather extends to all matters of public administration and public concern including comments about the adequacy or inadequacy of performance of public duties by others … The cases are careful not unduly to restrict the concept; although gratuitous personal comments do not fall within it.

vi) …The cases draw a distinction between fact on the one hand, and comment on matters of public interest involving value judgment on the other. As the latter is unsusceptible of proof, comments in the political context amounting to value judgments are tolerated even if untrue, so long as they have some – any – factual basis … What amounts to a value judgment as opposed to fact will be generously construed in favour of the former … and, even where something expressed is not a value judgment but a statement of fact …, that will be tolerated if what is expressed is said in good faith and there is some reasonable (even if incorrect) factual basis for saying it, "reasonableness" here taking account of the political context in which the thing was said …

vii) As Article 10(2) expressly recognises, the right to freedom of speech brings with it duties and responsibilities. In most instances, where the State seeks to impose a restriction on the right under Article 10(2), the determinative question is whether the restriction is "necessary in a democratic society". This requires the restriction to respond to a "pressing social need", for relevant and sufficient reasons; and to be proportionate to the legitimate aim pursued by the State.

viii) As with all Convention rights that are not absolute, the State has a margin of appreciation in how it protects the right of freedom of expression and how it restricts that right. However, that margin must be construed narrowly in this context:

> "There is little scope under Article 10(2) of the Convention for restrictions on political speech

> or on debate on questions of public interest …"
>
> ix) Similarly, because of the importance of freedom of expression in the political arena, any interference with that right (either of politicians or in criticism of them) calls for the closest scrutiny by the court …"

[42] The domestic courts have on numerous occasions adopted a high degree of protection for freedom of political speech. As Lord Nicholls put it in *ProLife Alliance*, [2003] 1 AC 185 at [6]:

> "Freedom of political speech is a freedom of the very highest importance in any country which lays claim to being a democracy. Restrictions on this freedom need to be examined rigorously by all concerned, not least the courts".

[43] Moreover it is well established that 'political speech' is to be widely defined embracing communications on matters of public interest generally: see, for instance, the discussion of Beatson J, (as he then was) on this aspect at paragraph 64 of *Calver v Adjudication Panel for Wales* [2012] EWHC 1172 (Admin) amidst an erudite general discussion of Article 10 jurisprudence between paras [39]-[64] of his judgment.

[44] Of particular interest is Beatson J's fifth proposition where as a general proposition he offers the view that freedom of expression includes the right to say things which "right thinking people" consider dangerous or irresponsible or which shock or disturb.

The Court's assessment

[45] The court will assess the applicant's case by utilising the tests set out at section 60 (1) of the 2014 Act *supra.* At this stage the court will leave to one side issues of Convention compliance.

The first test

[46] To begin with the court will consider whether there has been assembled *prima facie* evidence that the applicant has failed to comply with the Code of Conduct.

[47] On this issue the court must take into account the wide terms in which the Code has been drafted, bearing in mind both the specific rules found in the Code and the principles of conduct which have been identified, of which the most notable for present purposes, are those of 'Equality', 'Promoting Good Relations ', and 'Respect'. It may be said that a councillor is exhorted to promote equality of

opportunity and to treat people with respect regardless of race, age, religion, gender, sexual orientation, disability, political opinion or marital status. In short, he or she should, under these principles, reinforced by the specific rules set out in the Code, act in a way that is conducive to promoting good relations. The principal rules relevant in this context have been described earlier in this judgment (see paragraph [8] *supra*) but, in brief, councillors should not conduct themselves in a manner which could reasonably be regarded as bringing their position as a councillor, or their council, into disrepute (rl 4.2); they should maintain and strengthen public trust and confidence in the integrity of the council (rl 4.8); and they should be aware of the council's responsibilities under equality legislation and of the council's equality scheme (rl 4.11). Moreover, a councillor should show respect and consideration to others (rl 4.13(a)); should not harass any person (rl 4.13 (b)); and should not attempt to use their position as a councillor improperly (rl 4.16). Additionally, a councillor should not use the resources of their council improperly for political or private purposes (rl 4.18).

[48] In considering the above and other provisions within the principles and the rules it seems to the court that they have been drafted in a broad but flexible manner so that the behaviour of a councillor or a course of behaviour may at the same time offend against a number of principles or rules or a mixture of both.

[49] The court will not here re-state the conclusions reached on this aspect of the case by the Acting Commissioner, as they are set out above, but without prejudice to the generality of what he decided, at the centre of his decision were findings of a *prima facie* case of breach in three main areas:

(i) Firstly, in respect of the *meme* which was viewed as disclosing a *prima facie* case of breach of the Code as the *meme* was sectarian or racist in nature.

(ii) Secondly, in respect of the applicant's associations with Britain First and her apparent support for the views of Ms Fransen, as explained in the videos of addresses made by her outside the City Hall at a rally and outside the Islamic Centre in Belfast, both raising questions about her conduct as a councillor.

(iii) Thirdly, in respect of events involving the videoing of an interview of Ms Fransen when she was wearing a Councillor's Gown and seated in the Lord Mayor's seat in the Council chamber. *Prima facie* this was viewed as conduct which would breach the Code.

[50] The court has asked itself whether the Acting Commissioner has erred in his conclusions on these points. In doing so, the court will treat the issue as one of substance rather than form. While the Acting Commissioner might have expressly linked specific aspects of behaviour to specific provisions within the principles and rules expressed in the Code, in the court's view, given the detail contained within

the report of the adjudication, this was not strictly necessary as it is not difficult to see that it is likely that the various allegations and complaints are capable of being related to multiple aspects of the scheme for advancing the conduct expected of councillors which underlies the 2014 Act.

[51] In the court's judgment the findings of the Acting Commissioner, provisional though they may be viewed pending the outcome of the investigation as a whole, are not to be characterised as wrong. The court is content to uphold them. In other words, the court is of the opinion that the complaints upon which the Acting Commissioner was adjudicating disclose *prima facie* evidence of potential breaches of the Code. Moreover, the court would add that this is so whether (as the Acting Commissioner has done) one looks at the matter broadly focussing on a categorisation of the areas of complaint or whether one look at complaints individually. On either approach, the first test is satisfied and the court sees no basis upon which it should do other than accept the correctness of the conclusion reached on this aspect.

The second test

[52] The second test is concerned with whether there is *prima facie* evidence that the nature of any breach of the Code is such as to be likely to lead to disqualification under section 59 (3) (c) of the 2014 Act. Under section 59 (3), where an investigation is completed and the Commissioner decides there has been a failure to comply with the Code, there are a number of courses which he/she may decide to take in his/her discretion. The most severe of these in terms of sanction is that found at section 59 (3) (c) where power is conferred on the Commissioner to disqualify the person from being, or becoming, a councillor.

[53] It may reasonably be supposed that the draft-person's reference to disqualification in this context is intended to introduce a gravity test into when resort can be made to suspension of a councillor in an interim report case, which is what section 60 (1) is dealing with. Another way of putting this test is that suspension should only be used in a case where the nature of the failure supported by the *prima facie* evidence is such that it would be likely to attract the severest sanction if the failure to comply with the Code was demonstrated at the end of the process.

[54] It is clear that the Acting Commissioner viewed the present case as such a case as he regarded the 'likely disqualification' test as satisfied: see paragraph [18] above. The question now is whether he was wrong to reach this conclusion?

[55] The Acting Commissioner was influenced to this conclusion by a number of factors. These included:

- The seriousness of the potential breaches.
- The allegation that the applicant has misused council resources.

- The pre-planning which appeared to have preceded the failures giving rise to *prima facie* breaches of the code.
- The concern that the applicant had brought the council into disrepute together with the risk that serious reputational damage to the council may be sustained.
- The fear that similar *prima facie* breaches may occur in the future.
- The applicant's apparent failure to heed appropriate advice offered to her by the Chief Executive Officer.

[56] None of these appear to be fanciful and the court can see why they will have concerned the Acting Commissioner.

[57] Against this background the likelihood of the *prima facie* breaches, if later proved, giving rise to the need for a condign response of disqualification betokens no obvious infirmity. The court therefore would not view such a conclusion as wrong though it confesses it might have arrived at the same conclusion by adopting a different route to the same result. This route would have placed emphasis primarily on the seriousness of some of the likely breaches in this case, if proved. If it is ultimately established that the applicant breached the Code in significant respects, such as in the context of Ms Fransen's address at the City Hall on 6 August 2017 (Complaint C00181) in respect of which the applicant has chosen to associate herself, it is difficult to see, given the seriousness of the sentiments expressed and their apparent purpose in indiscriminately vilifying those of the Muslum faith, including those who live in this community, that it would be other than likely, that such conduct would be sanctioned by disqualification of some length. This would therefore overcome the hurdle which the second test has established irrespective of whether additional matters are viewed alongside this incident (a step which would be logically open to the decision maker to take without acting wrongly).

The third test

[58] This test is found in section 60 (1) (c) and requires a view to be taken as to whether it is in the public interest to suspend or partially suspend a person immediately in an interim adjudication situation.

[59] On the face of it, this test calls for the making of a judgment as to what is in the public interest taking into account the particular circumstances of the case[1].

[60] The way the Acting Commissioner dealt with it is recorded at paragraph [19] and [20] above and it is clear that he took into account the impact on the applicant and weighed that against the gravity of the allegations and complaints in this case, which he saw as leading to a loss of confidence in the council and the erosion of the

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[1] For this reason the court would place little weight on how the Commissioner has decided a case in which no interim hearing has taken place, an example being that of Councillor Patrick Clarke which was referred to in argument.

maintenance of public confidence more generally. In the Acting Commissioner's view, these latter factors outweighed any personal or financial impact on the applicant.

[61] As before the question is whether the court believes that the Acting Commissioner was wrong to adopt the view he adopted that it was in the public interest to suspend the applicant immediately.

[62] On this issue, the court is satisfied that the Acting Commissioner was not wrong to take this view. In particular, he appears to the court to be in a good position to make a judgment of this kind as he is involved in issues of this type on a regular basis and can be taken to have acquired a measure of expertise and experience in assessing the operation of the ethical standards framework as it beds in. While Ms Herdman has suggested that the Acting Commissioner failed to provide 'a compelling reason in the public interest' for an interim suspension, the court does not consider that this does justice to the totality of the Acting Commissioner's reasoning.

Discretion

[63] The court leaves this part of the case by acknowledging that even in cases where the three tests discussed above when applied all point in the direction of imposing a suspension or partial suspension, nonetheless there remains an area of discretion available to the Acting Commissioner as he is not required to suspend or partially suspend because the three tests have been passed. He retains discretion.

[64] While not to take suspensory action in some form where all three of the tests in section 60 (1) are satisfied would be a most unlikely outcome, this is not to say it could not be done.

[65] However, on the facts of this case the court is unable to identify any sound reason why such an unusual step would be taken and the court is content to adopt the view that in the circumstances there is no reason of substance why the Acting Commissioner should have done other than he did in the context of the exercise of discretion.

Convention compliance

[66] The discussion above has taken place against the backdrop that Convention compliance has been left to one side.

[67] However, for reasons already given it is not possible to avoid this issue because, irrespective of how the matter is packaged, there are Article 10 issues which arise in this case.

[68] These issues arise because the alleged breaches of the Code or, at least, some of them, raising issues of political expression on the part of an elected councillor and may result, even at this stage, in a sanction which involves the suspension of the councillor from elected office, albeit that the suspension is of an interim nature, pending the final determination of the complaints which have been levelled at her.

[69] In the context of Article 10, the court proceeds on the basis that it ought to consider each complaint separately with a view to determining whether there has been any breach of it. This approach is, however, contested by Mr Anthony for the Acting Commissioner. He submitted that the court should consider the cumulative effect of all of the complaints in the Article 10 context. In support of this submission he cited the judgment of Beatson J in the case of *Calver*, which has been mentioned above. At paragraph [66] of *Calver* the Judge said in respect of the facts of that case that "the panel was entitled to take a cumulative view of the effect of the Claimant's postings" (which was the behaviour at issue in that case).

[70] The court is not minded to accept this submission. Whether there is a breach of the appellant's Article 10 rights, it seems to the court, will usually be the product of a distinct factual situation and will depend on the circumstances which apply to that situation. If there is a breach the court should so find. If there is not a breach the court should so find. The court sees little room for an analysis which deviates from this approach. It is doubtful that if there is a *prima facie* breach found in a particular situation, such could be justified under Article 10 (2) by some form of cumulative approach to justification depending on what occurred in other situations, especially if those situations had not themselves resulted in a finding of justification. While it is unnecessary for the court to express itself definitively on this point, it envisages that ordinarily the approach should be to consider in an Article 10 context each complaint on an individual basis.

[71] The citation from Beatson J's judgment does not deter the court from the view it is expressing. In the court's view, the words quoted above have to be read in context. The Judge was not at that stage of his judgment discussing breach of Article 10. What he was discussing was breach of a Code of Conduct[2]. In that context, there may well be situations where the decision maker can legitimately have regard to a cumulative view of a course of conduct but it does not follow from this that such an approach should be taken to an alleged breach of Article 10.

[72] The court considers that in this area of the case it is obliged to consider the following issues:

(i) In respect of the complaints which have been made, does the applicant's alleged behaviour attract enhanced protection in terms of freedom of speech, which is a tenet of Strasbourg jurisprudence?

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[2] The judgment deals with breach of Article 10 from paragraph [71] et seq.

(ii) If elements of the applicant's alleged behaviour do attract enhanced protection is there a *prima facie* breach of Article 10?

(iii) If there is a *prima facie* breach of Article 10 in one or more situations, can the interference be justified under Article 10 (2)?

(iv) In the light of the response given to the above questions, is the sanction of suspension a proportionate response at this stage?

Enhanced protection?

[73] The notion of enhanced protection is linked to the question of whether or not the behaviour at issue can be said to consist of political expression. In respect of the complaints levelled at the applicant, is the subject matter of them of a sort which qualifies for enhanced protection?

[74] On this issue, Mr Anthony for the Acting Commissioner says that at least some of the relevant behaviours do not attract enhanced protection. He referred specifically to the applicant's behaviour in respect of the *meme*. On the other hand, Ms Herdman says that all of them do so.

[75] As is made clear in the authorities cited above, political expression is to be viewed as a broad concept which extends generally to matters of public concern. The court should be slow to interpret it narrowly or in an unduly restrictive way.

[76] The court has considered each of the complaints which have been described earlier in this judgment. Where there is reference to particular modes of expression – whether by way of recorded speech at a meeting or a video recording or publication by social media and so on - the court has ensured that it has had the opportunity to consider these first hand in the presence of representatives of the parties. To appreciate fully the gravamen of the various complaints, this has been helpful and the court is grateful to have been facilitated in this regard.

[77] It is correct to say that, as the case-law demonstrates, not every episode involving an elected representative, whose behaviour is at issue, can properly be viewed as attracting the enhanced protection of Article 10 relating to political expression.

[78] The court will bear this in mind. A case which exemplifies the point is *Sanders v Kingston* [2005] EWHC 1145 (Admin). In that case the court viewed the behaviour of a leader of a Council, in the particular circumstances in question, even though he was acting in his role as leader, as not amounting to behaviour which enjoyed enhanced protection under Article 10. Rather it was behaviour which involved

expressions of personal anger and personal abuse on his part and belonged in a different category.

[79] The court has reminded itself of the alleged conduct which lies behind the complaints in this case, as already summarised at paragraph [7] above.

[80] Having done so, the court is satisfied that the bulk of the behaviour involved in all of these instances has a sufficient connection with the applicant's role as a councillor and her contribution to issues of public debate to come within the category of enhanced protection. The major exception relates to the *meme*, which was made available on social media. While the content of it may be interpreted as racist and sectarian and it might reasonably be viewed as being aimed negatively against a section of the community defined by national origin, it is not easy to view the *meme* as a coherent contribution to national or local public debate. Notably, the reference to the famine found within it appears to be directed at past history rather than any form of contemporaneous comment, though the court acknowledges that the overall effect, nonetheless, is misguided and offensive. There is force in the view, therefore, that the *meme*, on proper analysis, is simply abusive and reflective of a warped outlook and mind-set and discloses no true contribution to political discourse. If this is correct, as the court thinks it is, the *meme* is not the exercise of the right to engage in protected political speech and falls outside the enhanced protection associated with Article 10. The steps taken on behalf of the State, by reason of the operation of the terms of the Code, therefore, would be unlikely to result in any breach of Article 10. If the court is wrong about this, and the communication contained in the *meme* is a form of protected speech, the court would doubt that, taking by itself, a suspension based only on the *meme*, would pass the test of justification for the purpose of Article 10 (2), though this is not to say that for other reasons the suspension could not be justified or that this would make any substantial difference to the overall outcome of this appeal.

Is there a prima facie case of breach?

[81] This is not a difficult question to answer. Once the court views the subject matter of the complaints as being within the sphere of enhanced protection, there is, it seems to the court, an irresistible argument that what is occurring in this case, in terms of the applicant being suspended as a councillor for a period as a result of the complaints made, is *prima facie* an interference with the terms of Article 10 (1). After all, the effect of suspension has immediate political consequences for the ability of the applicant to serve her constituents and for the electors who elected her.

Justification under Article 10(2)

[82] The terms of Article 10 (2) have already been set out above (paragraph [37]). The court is satisfied that the action of suspension adopted in this case is within the expression 'prescribed by law'. This has not been in dispute. The real issue is whether it is 'necessary in a democratic society for the protection of the reputation or

rights of others', a phrase which the court should, in accordance with the jurisprudence, interpret narrowly.

[83] Another way of putting this is to ask whether the restriction responds to a pressing social need for relevant and sufficient reasons and is proportionate to the legitimate aim being pursued.

[84] In arriving at a view on this issue, the court must examine these issues rigorously.

[85] In this context, each of the complaints which were examined by the Acting Commissioner should be scrutinised individually. While there may be (and in this case there are) thematic connections between the complaints, it is obvious that some of the complaints which have been made are more serious than others. Consequently, in some cases, interference will be easier to justify than others.

[86] For the purpose in hand, it would be a mistake to view all of the complaints together as some sort of job lot.

[87] It is of importance for the court, when conducting its audit of the complaints, to bear in mind, but as no more than as a guide, what has been the outcome in other cases raising similar issues which have been drawn to the court's attention.

[88] The court has considered the following examples, which appear to be generally relevant:

(i) *Feret v Belgium* App No 15615/07 (2009)

In this case the central figure was chairman of the National Front in Belgium. He was alleged to have incited discrimination or hatred by distributing leaflets during election campaigns. At the time Mr Feret was a member of the Belgian House of Representatives. The distribution had resulted in criminal proceedings and Mr Feret was convicted and sentenced to a period of community service, together with a suspended sentence of imprisonment.

Subsequently, Mr Feret made a complaint to the ECtHR relying on Article 10. His argument was that the conviction was an excessive restriction on his right of freedom of expression.

The ECtHR held that there had been interference with his right under Article 10 but the State was able to justify it. The leaflets in question had presented the communities in question as criminally minded and keen to exploit the benefits they derived from living in Belgium. They also made fun of the immigrants concerned, with the inevitable risk of arousing, particularly among less knowledgeable members of the public, feelings of distrust, rejection or even hatred towards foreigners.

According to the court, it was crucial for politicians, when expressing themselves in public, to avoid comments that might foster intolerance. To recommend solutions to immigration-related problems by advocating racial discrimination was likely to cause social tension and undermine trust in democratic institutions.

It was held that on the facts of this case, there had been a compelling social need to protect the rights of the immigrant community.

(ii) *Le Pen v France* App no 18788/09 (20 April 2010)

This was an admissibility decision of the ECtHR. The applicant was the president of the French National Front party. In 2000 he had been fined for incitement to discrimination, hatred and violence towards a group of people because of their origin or their membership or non-membership of a specific ethnic group, nation, race or religion.

The applicant had been interviewed in Le Monde, a daily newspaper and he had asserted that "the day there are no long[er] 5 million but 25 million Muslims in France, they will be in charge".

In 2008 the applicant was fined in relation to a similar situation. In that interview he had suggested that the security of the people of France depended on them rejecting the Muslim community.

The French Court of Appeal held that the applicant's freedom of expression was no justification for statements that were an incitement to discrimination, hatred or violence towards a group of people.

The ECtHR held that the interference with the applicant's enjoyment of his right to freedom of expression had been necessary in a democratic society.

(iii) *Norwood v United Kingdom* (2005) 40 EHRR SE11 App no 23131/03 (16 November 2004)

This case arose out of the display of a poster by the applicant, Mr Norwood, in 2002. The poster had appeared in the first floor window of his flat in a small town and had contained the words "Islam out of Britain" and "Protect the British people". It also bore a reproduction of a photograph of one of the twin towers of the World Trade Centre in flames on 11 September 2001 and a Crescent and Star surrounded by a prohibition sign.

The applicant was convicted of public order offences connected with the above and was fined. He then complained to the ECtHR.

The ECtHR rejected his application as inadmissible. The court held that the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, was incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The display of the poster in the window constituted an act within the meaning of Article 17 which did not enjoy the protection of Articles 10 and 14 of the Convention.

[89] It is ultimately a matter of judgment on the part of this court as to whether the facts of individual complaints pass over the line between protected political expression and expression which properly may be controlled by measures laid down by the State, such as those found in this case in the Code, and which include, as in this case, provision for interim sanctions.

[90] The court is satisfied that that line has been passed in this case in respect of the following complaints:

(a) Complaint C00181 (see page 6 above).

In the court's judgment Ms Fransen's speech on 6 August 2018, with which the applicant has publicly associated herself, went well beyond the appropriate bounds of protected speech and involved language which was offensive to those who profess the Islamic faith. The suggestion that every single Muslim is obliged to kill the listeners and their families and that there were no moderate lslamic people and that Islamic Mosques are 'dens of iniquity' will be likely, as the court sees it, to vilify Muslims; to stir up hatred against them; and to invite discrimination directed at them, if not something worse.

As the court understands it, Ms Fransen is facing criminal charges in respect of this incident and, in view of those on-going proceedings, the court will limit itself in what it will say.

The effect of the words used, however, suggest strongly to the court that listeners and those exposed to the language deployed, whether via social media or other means, would be aroused to distrust and fear of, and hatred for, Muslims.

In the court's opinion an interim sanction based on the applicant's public alignment with what had been said – all in her presence – disseminated not just to those who attended the meeting but to many others by video or social media - would be likely to be necessary in a democratic society and proportionate, as a protection against the same occurring in future, and as a clear signal of public disapproval of a councillor who seeks to act in this way in the future. The court is inclined to the view that if the applicant was to complain to the Strasbourg Court about such treatment on Article 10 grounds, like *Feret*, *Le Pen* and *Norwood*, she would be unsuccessful. For the avoidance of doubt, the court arrives at this view notwithstanding that it is right to

acknowledge that the applicant's role is capable of being viewed as a lesser one in comparison with that of Ms Fransen and that a distinction between the applicant's case and Ms Fransen's case is that only the latter faces criminal charges arising out of the events under consideration. Equally, the court acknowledges that the cases of *Feret, Le Pen* and *Norwood* were cases where the respective applicants before the Strasbourg court had been convicted of criminal offences, unlike the applicant, but these factors do not deflect the court from to the conclusion it has come to.

(b) Complaints C00164 and C00172 (see pages 2-5 above).

In the court's judgment what it has said above can substantially be replicated in respect of the staged event between Ms Fransen and the applicant outside the Islamic Centre in the video of events on 13 December 2017. What was said on this occasion was said in each other's presence and with each other's apparent approval. In the court's opinion, references to 'ghetto muslims', 'muslim colonisation', to mosques as 'dens of iniquity' and 'monstrosities', and to 'creeping Islamification' are designed to instil public revulsion again those of Islamic faith. While the court would accept that the overall impact of this particular video is not as great as with complaint C00181 above, it nonetheless exceeds the bounds of protected speech and proportionately may attract an interim sanction in the way already described.

[91] Other instances involving remarks made by the applicant against Muslims or followers of Islam are referred to among the complaints summarised above (see C00178 referring to what the applicant said at a full Council meeting on 3 January 2018 about "problematic members of society"; C00200 involving alleged association with Britain First and openly anti-Islamic groups; and C00299 in relation to a Council meeting of 9 April 2018 and remarks attributed to the applicant). These cases might be described as borderline in the present context, though they are thematically linked to the more serious category of complaint already discussed. In themselves, and treated on their own, the court is not minded to view (at least, on the information currently available to it) each as sufficient to justify interference with the applicant's Article 10 rights, though this conclusion should not be viewed as a general licence for the applicant or others to engage in any form of hate speech, whether such occurs in the course of debate within a democratic chamber or otherwise.

[92] As regards the myriad of other complaints, the court is unpersuaded that the seriousness of the complaint merits a conclusion that what has been done or said is such as to cause the applicant to lose the protection she enjoys in respect of political speech, though this is far from a conclusion that, in any way, the court would approve of the behaviour or sentiments expressed.

[93] Into this last category, the court places such incidents as the inappropriate use of the facilities of the City Hall's Council Chamber on 9 January 2018 (C00177); and the use made of the *meme* (C00299 and others) if, contrary to the court's holding above (at paragraph [80]), it is to be viewed as within the boundaries of protected

speech. The court does not believe that upon careful analysis it can be said that either of these matters evidences an incident of such weight and importance as to give rise to a need to impose interim sanctions which would have the effect of limiting or curtailing the applicant's ability to act as a councillor and hence to justifiably interfere with her Article 10 rights. While others may be revolted by what the applicant has said and done in respect of these incidents, the court reminds itself of the width of the ability of an elected councillor to engage in behaviour which shocks or annoys or appears dangerous or irresponsible. The issue is to be determined by the consistency of official action with her right to freedom of expression and not by the standard of whether the applicant's behaviour would diminish public confidence in her behaviour as a councillor or would be damaging to the ethics regime, represented by the Code.

[94] It follows from the above that the court finds itself in disagreement with the broader way in which the Acting Commissioner's report has dealt with the matter of the applicant's Convention rights, particular at page 15 of his report.

Was the interim sanction in this case disproportionate in the court's view?

[95] The final question which the court will consider relates to the 4 months period of suspension which was imposed on the applicant in this case, at the interim stage, as a result of the Acting Commissioner's consideration of the case.

[96] Given the court's findings above, an interim sanction in the form of a suspension could properly be put in place, as the court has found that the seriousness of the applicant's behaviour in respect of the matters described above in paragraph [93] may merit such a reaction. The maximum period of suspension on an interim basis was and is 6 months. The question, therefore, arises as to whether it is this court's judgment that a 4 month suspension was disproportionate or may stand.

[97] In considering this issue, the court has given careful consideration to the published Sanctions Guidelines. The court does not propose to set these out here but it is clear that it is necessary to take into account the particular facts and circumstances of the case which is under consideration and it is necessary to have regard to points of aggravation and mitigation, keeping in view that what is involved at this stage of the process is an interim measure. This, it seems to the court, is not an exercise which is about punishing the applicant for what she is alleged to have done. Insofar as punishment arises, it arises at a later stage in the light of a finding of breach of the code.

[98] The court considers that interim measures should be about ensuring public confidence in the operation of the complaints system and preventing, prospectively, abuse of the system from recurring.

[99] Plainly, interim measures should only be resorted to when necessary and they should not be resorted to as a knee jerk reaction or in every case. Likewise the term of any suspension should be tailored to meet the needs of the individual case.

[100] It is clear to the court, having examined this aspect of the Acting Commissioner's decision, that he was anxious to balance the factors for and against a period of suspension, a balance which he ultimately considered favoured the suspension which was imposed.

[101] The court, on the other hand, has broached the matter with a somewhat different focus in view of its conclusions as to the human rights dimension. While it takes the Acting Commissioner's decision into account, it will make its own decision in these circumstances.

[102] Nonetheless, it finds itself of the view that a suspension on an interim basis in this case was merited. The matters, of which there existed *prima facie* proof, and which survive an Article 10 analysis, were and are serious matters, which raise grave issues about the extent to which confidence in local government institutions in Northern Ireland may, if appropriate steps are not taken, be compromised. They also raise issues about putting in place a suitable regime for preventing behaviour of a similar nature happening again. Once the stage of the analysis required by section 60(1) is completed, the court sees no reason in this case why a suitable period of suspension should not be put in place and it will endorse the view that there should be such a period.

[103] The court believes that such a period should be one of 4 months in this case, taking into account the full range of relevant factors which have been discussed above. In particular, this period, properly in the court's view, should not be viewed as tokenism and should be seen as reflecting the seriousness of the matter at issue and the need to provide a level of deterrence pending the outcome of the full investigation. The effect on the applicant and her constituents is also borne in mind. Finally, in reaching its view, the court will also take into account the approach taken by the Acting Commissioner who, the court accepts, comes to the matter with experience and expertise of this subject area which the court is ready to recognise.

[104] In the end therefore the court, based upon its own assessment of the case, is of the view that it would itself have arrived at a figure of 4 months suspension on an interim basis in this case.

Conclusion

[105] While the court has taken a different view than the Acting Commissioner in this case in respect of some Article 10 issues, it has reached the same terminus as the Acting Commissioner. It will grant leave to appeal for the purpose of section 60 (9) but for the reasons given it dismisses the appeal under section 60 (10) (a) and (b) of the Act.