Neutral Citation Number: [2017] EWHC 1413 (Admin)

Case No: CO/3413/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/06/2017

Before :

LORD JUSTICE LLOYD JONES

and

MR. JUSTICE SUPPERSTONE

- -

Between :

THE QUEEN (on the application of LUTFUR RAHMAN)	**Applicant**
- and -	
THE LOCAL GOVERNMENT ELECTION COURT	**Defendant**
- and -	
(1) ANDREW ERLAM **(2) DEBBIE SIMONE** **(3) AZMAIL HUSSEIN** **(4) ANGELA MOFFAT** **(5) COMMISSIONER OF POLICE FOR THE METROPOLIS** **(6) DIRECTOR OF PUBLIC PROSECUTIONS**	Interested Parties

- -
- -

Paul Bowen QC and **Tim Johnston** (instructed by **Irvine Thanvi Natas Solicitors**) for the **Applicant**
The Defendant did not appear and was not represented
Francis Hoar (instructed by **Edmonds Marshall McMahon**) for the **First, Second, Third and Fourth Interested Parties**
James Segan (instructed by **Directorate of Legal Services, Metropolitan Police**) for the **Fifth Interested Party**
Martin Evans QC (instructed by **Crown Prosecution Service, Special Crime and Counter Terrorism Division**) for the **Sixth Interested Party**

Hearing dates : 17 and 18 May 2017

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JUDGMENT APPROVED

LORD JUSTICE LLOYD JONES :

1. This is the judgment of the court to which we have both contributed.

Origin of the Appeal

2. This is an application for permission to amend the grounds of a judicial review claim initiated on 2 July 2015 by Mr Lutfur Rahman ("the Applicant") of a decision of the Local Government Election Court which found the Applicant personally guilty and guilty by his agents of a number of electoral offences under the Representation of the People Act 1983 ("the 1983 Act"). The findings of the Election Court had the effect of automatically disqualifying the Applicant from holding elected office until 23 April 2020.

3. The Respondent is a court and is not contesting the judicial review claim. However, there are several interested parties who have made written and oral submissions in the course of these proceedings, namely the Metropolitan Police ("the MPS"), the Director of Public Prosecutions ("the DPP") and the four members of the public who brought the election petition which led to the challenged decision of the Election Court ("the Petitioners").

Background Facts and Procedural History

4. By an election petition, the Petitioners sought to have the election of the Applicant as Mayor of the London Borough of Tower Hamlets on 22 May 2014 set aside on the grounds that he and his agents were guilty of corrupt and illegal practices. The trial of the petition was held between 2 February and 13 March 2015 before the Election Commissioner, Mr Richard Mawrey QC, with final written and oral submissions made on 20 March 2015 and 24 March 2015 respectively.

5. The Election Court gave its ruling on 23 April 2015. The relevant findings for present purposes are that the court found the Applicant personally guilty and guilty by his agents of offences under section 106 of 1983 Act (the illegal practice of making false statements as to candidates), section 113 (the corrupt practice of bribery) and section 115 (the corrupt practice of undue influence). The Election Court found that the last dates on which these three offences were committed were respectively: 23 April 2014 for the section 106 offence, January 2013 for the section 113 offence and 16 May 2014 for the section 115 offence.

6. The court also made further findings which are not (or are no longer) challenged in these proceedings, namely that Mr Rahman was guilty by his agents of various other corrupt and illegal practices, and that corrupt and illegal practices undertaken for the purpose of promoting or procuring the election of Mr Rahman so extensively prevailed that they might reasonably be supposed to have affected the result of the election.

7. These findings had the consequence of invalidating the election of the Applicant under section 159(1) of the 1983 Act and disqualifying him under section 164(1)(b) of the 1983 Act from standing as a candidate for the election for Mayor of London Borough of Tower Hamlets that became necessary as a result of the first election being declared void. The findings of personal guilt also had the consequence of disqualifying the Applicant from standing as an election candidate for five years in

respect of the corrupt practices of bribery and undue influence and three years in respect of the illegal practice of making false statements as to candidates.

8. On 2 July 2015 the Applicant filed an application for judicial review challenging the decision of the Election Court. The judicial review was advanced on three grounds:

(1) The finding that the Applicant was guilty by his agents of the illegal practice of paying canvassers under section 111 of the 1983 Act was challenged on the ground that it was reached without any evidential basis.
(2) The finding that the Applicant was personally guilty and guilty by his agents of the corrupt practice of bribery under section 113 of the 1983 Act was challenged on the grounds that the court had erred in its construction of section 113 or alternatively that there was insufficient evidence for the conclusions that the judge drew.
(3) The finding that the Applicant was personally guilty and guilty by his agents of the corrupt practice of undue influence by way of spiritual injury was challenged on the basis that it was perverse, contrary to existing authorities and contrary to Article 9 ECHR.

9. The permission application was determined by this court (Lloyd Jones LJ. and Supperstone J.) following an oral hearing on 26 January 2016. The court accepted that the claim could be brought by way of judicial review. It refused permission on the first two grounds but granted permission on the third ground (undue influence). Success on this ground would not, by itself, lead to the Applicant's disqualification being lifted.

10. On 9 February 2017 Ouseley J. granted permission for the original judicial review application (which had been closed following the failure of the solicitors previously instructed to pay the appropriate fee) to be reopened and ordered that the application for permission to amend be heard by a Divisional Court. He also ordered the application to amend the grounds to be served on the DPP as an interested party. An application by the MPS to be joined as an interested party was allowed by Ouseley J on 24 March 2017.

The MPS investigation

11. Following the 2014 Mayoral election in Tower Hamlets, the MPS received 164 allegations relating to electoral fraud and malpractice. Each allegation was recorded and investigated. During its investigation the MPS sought advice from the Crown Prosecution Service ("CPS") Special Crime and Counter Terrorism Division. In cases where the MPS considered there was sufficient evidence to charge, individual files were submitted to the CPS for a charging decision. In cases that did not meet this threshold, the police made the decision as to outcome.

12. The MPS reviewed the judgment of the Election Court delivered on 23 April 2015. On 27 May 2015, Detective Superintendent John Sweeney QPM wrote to the Applicant's solicitors to notify them that he was the Senior Investigating Officer in charge of the MPS Special Enquiry Team responsible for dealing with allegations relating to electoral fraud and malpractice. In the letter he stated that he had "tasked [his] officers from the Special Enquiry Team to conduct an assessment and (*sic*) of the issues raised in the Election Court Judgment".

13. As a result of that review, the MPS investigated a further five cases that had not previously been reported to the police. No persons were charged or cautioned in relation to these matters. At that time, the MPS did not consider the 27 files of evidence that were before the Election Court.

14. In a witness statement, Commander Stuart Cundy of the MPS stated that "Lutfur Rahman was not a named suspect for any of the allegations investigated by the MPS". No file was ever passed to the CPS, or by extension the DPP, for consideration of whether to bring a prosecution against the Applicant.

15. On 16 March 2016 the MPS issued a press statement indicating that their assessment into allegations of electoral fraud in Tower Hamlets was complete. It was stated that:

> "After full consultation with the Crown Prosecution Service a decision has been made that there is insufficient evidence that criminal offences had been committed."

and

> "The Election Petition Hearing was a civil process through the High Court. Within that hearing the rules regarding admissibility of evidence and liability were different to those applied for any criminal prosecution."

16. On 22 March 2016, the MPS wrote a letter to the Applicant's solicitors stating,

in relevant part, that:

> "In accordance with section 181 [of the 1983 Act] the [MPS] Special Enquiry Team consulted with the DPP in relation to the review findings in order to determine whether any criminal offences have been committed.
> The DPP decision is that there is insufficient evidence that crime (*sic*) has been committed in this instance."

17. The MPS and DPP have clarified that the description of the decision as the "DPP decision" was inaccurate. The decision that there was insufficient admissible evidence to prosecute the Applicant was made by the MPS.

18. In or about March 2017 the MPS issued a press release stating that the "CPS and the [MPS] have agreed to undertake a further joint assessment of the files to see whether they contain anything that changes the advice previously provided by the CPS, changes the decisions previously made by the [MPS], or requires further investigation by the [MPS]". This review is focused upon the 27 files of evidence that had been before the Election Court. The Applicant indicated that he was content to be guided by the court as to whether the permission application should go ahead in view of the MPS's announcement to review the decision not to prosecute.

Relevant law

19. The 1983 Act establishes two concurrent but distinct jurisdictions for addressing electoral offences: a civil regime whereby allegations may be tried before an election

court and a criminal regime whereby the same offences may be tried before the Magistrates' Court or the Crown Court. Electoral offences are described as "corrupt practices" or "illegal practices", with the former attracting more serious consequences. Where an election court finds that an election candidate is personally guilty of a corrupt practice this leads to that candidate being automatically disqualified from standing for election for five years, while a finding that a candidate is personally guilty of illegal practices leads to disqualification for a period of three years.

20. Section 106 provides in material part:

> "Section 106: False statements as to candidates.
>
> (1) A person who, or any director of any body or association corporate which—
>
> > (a) before or during an election,
> > (b) for the purpose of affecting the return of any candidate at the election,
>
> makes or publishes any false statement of fact in relation to the candidate's personal character or conduct shall be guilty of an illegal practice, unless he can show that he had reasonable grounds for believing, and did believe, the statement to be true."

21. Section 113 provides in material part:

> "Section 113: Bribery
>
> (1) A person shall be guilty of a corrupt practice if he is guilty of bribery.
>
> (2) A person shall be guilty of bribery if he, directly or indirectly, by himself or by any other person on his behalf—
>
> > (a) gives any money or procures any office to or for any voter or to or for any other person on behalf of any voter or to or for any other person in order to induce any voter to vote or refrain from voting, or
> >
> > (b) corruptly does any such act as mentioned above on account of any voter having voted or refrained from voting, or
> >
> > (c) makes any such gift or procurement as mentioned above to or for any person in order to induce that person to procure, or endeavour to procure, the return of any person at an election or the vote of any voter,
>
> or if upon or in consequence of any such gift or procurement as mentioned above he procures or engages, promises or endeavours to procure the return of any person at an election or the vote of any voter."

22. Section 115 provides in material part:

> "Section 115: Undue influence
>
> (1) A person shall be guilty of a corrupt practice if he is guilty of undue influence.
>
> (2) A person shall be guilty of undue influence—
>
> > (a) if he, directly or indirectly, by himself or by any other person on his behalf, makes use of or threatens to make use of any force, violence or restraint, or inflicts or threatens to inflict, by himself or by any other person, any temporal or spiritual injury, damage, harm or loss upon or against any person in order to induce or compel that person to vote or refrain from voting, or on account of that person having voted or refrained from voting; or
> >
> > (b) if, by abduction, duress or any fraudulent device or contrivance, he impedes or prevents, or intends to impede or prevent, the free exercise of the franchise of an elector or proxy for an electors, or so compels, induces or prevails upon, or intends so to compel, induce or prevail upon, an elector or proxy for any elector either to vote or to refrain from voting."

23. Section 158(1) makes provision for the Election Court to state matters relating to corrupt and illegal practices in its report following the conclusion of the hearing:

> "Section 158: Report as to candidate guilty of a corrupt or illegal practice
>
> (1) The report of an election court under section 144 or section 145 above shall state whether any corrupt or illegal practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at the election, and the nature of the corrupt or illegal practice."

24. Section 159 provides that the election of a person who is reported personally guilty or guilty by his agents of any corrupt or illegal practices shall be void. Section 160 sets out further consequences of such a finding by the election court:

> "Section 160: Persons reported personally guilty of corrupt or illegal practices
>
> (1) The report of the election court under section 144 or section 145 above shall state the names of all persons (if any) who have

been proved at the trial to have been guilty of any corrupt or illegal practice, but in the case of someone—

(a) who is not a party to the petition, or

(b) who is not a candidate on behalf of whom the seat or office is claimed by the petition,

the election court shall first cause notice to be given to him, and if he appears in pursuance of the notice shall give him an opportunity of being heard by himself and of calling evidence in his defence to show why he should not be so reported.

(3) The report shall be laid before the Director of Public Prosecutions.

(4) Subject to the provisions of subsection (4A) and section 174 below, a candidate or other person reported by an election court personally guilty of a corrupt or illegal practice—

(a) shall during the relevant period specified in subsection (5) below be incapable of—

(i) being registered as an elector or voting at any parliamentary election in the United Kingdom or at any local government election in Great Britain,

(ii) being elected to the House of Commons, or

(iii) holding any elective office; and

(b) if already elected to a seat in the House of Commons, or holding any such office, shall vacate the seat or office as from the date of the report.

(4A) The incapacity imposed by subsection (4)(a)(i) above applies only to a candidate or other person reported personally guilty of a corrupt practice under section 60 , 62A or 62B above or of an illegal practice under section 61 above.

(5) For the purposes of subsection (4) above the relevant period is the period beginning with the date of the report and ending—

(a) in the case of a person reported personally guilty of a corrupt practice, five years after that date, or

(b) in the case of a person reported personally guilty of an illegal practice, three years after that date.

(5A) Subject to the provisions of section 174 but in addition to any incapacity arising by virtue of subsection (4) above, a candidate or other person reported by an election court personally guilty of a corrupt practice—

(a) shall for the period of five years beginning with the date of the report, be incapable of holding any public or judicial office in Scotland, and

(b) if already holding such an office, shall vacate it as from that date.

(6) Without prejudice to the generality of the provisions of section 205(2) below, nothing in subsection (4) or subsection (5) above affects matters relating to the Northern Ireland Assembly or local elections or holding office in Northern Ireland.

(7) The provisions of this section as to the consequences of the report that a candidate was guilty by his agents of a corrupt or illegal practice have effect subject to the express provisions of this Act relating to particular acts which are declared to be corrupt or illegal practices."

25. Sections 168 and 169 provide for criminal penalties (a term of imprisonment or a fine) upon a successful criminal prosecution for election offences. By section 173 the same disqualificatory periods apply where an election candidate is convicted of corrupt or illegal practice.

26. Section 173 provides in material part:

"Section 173: Incapacities on conviction of corrupt or illegal practice.

(1) Subject to subsection (2) below, a person convicted of a corrupt or illegal practice—

(a) shall, during the relevant period specified in subsection (3) below, be incapable of—

(i) being registered as an elector or voting at any parliamentary election in the United Kingdom or at any local government election in Great Britain, or

(ii) being elected to the House of Commons, or

(iii) holding any elective office; and

(b) if already elected to a seat in the House of Commons or holding any such office, shall vacate the seat or office subject to and in accordance with subsections (4) and (5) below.

(2) The incapacity imposed by subsection (1)(a)(i) above applies only to a person convicted of a corrupt practice under section 60 , 62A or 62B above or of an illegal practice under section 61 above.

(3) For the purposes of subsection (1)(a) above the relevant period is the period beginning with the date of the conviction and ending—

(a) in the case of a person convicted of a corrupt practice, five years after that date, or

(b) in the case of a person convicted of an illegal practice, three years after that date,

except that if (at any time within that period of five or three years) a court determines on an appeal by that person against the conviction that it should not be upheld, the relevant period shall end at that time instead."

27. Section 174 permits a court to order that an incapacity imposed by the election court will cease where the individual in question is acquitted of the matters in respect of which the incapacity was imposed. It provides in relevant part:

> "Section 174: Mitigation and remission etc.
>
> (1) Where—
>
> > (a) any person is subject to any incapacity by virtue of the report of an election court, and
> >
> > (b) he or some other person in respect of whose acts the incapacity was imposed is on a prosecution acquitted of any of the matters in respect of which the incapacity was imposed,
>
> the court may order that the incapacity shall thenceforth cease so far as it is imposed in respect of those matters.
>
> (2) Where any person who is subject to any incapacity as mentioned above is on a prosecution convicted of any such matters as are mentioned above, no further incapacity shall be taken to be imposed by reason of the conviction, and the court shall have the like power (if any) to mitigate or remit for the future the incapacity so far as it is imposed by section 160 above in respect of the matters of which he is convicted, as if the incapacity had been imposed by reason of the conviction.
>
> (3) A court exercising any of the powers conferred by subsections (1) and (2) above shall make an order declaring how far, if at all, the incapacities imposed by virtue of the relevant report remain unaffected by the exercise of that power, and that order shall be conclusive for all purposes.
>
> (4) Where a person convicted of a corrupt or illegal practice is subsequently reported to have been guilty of that practice by an election court, no further incapacity shall be imposed on him under section 160 by reason of the report.

(5) Where any person is subject to any incapacity by virtue of a conviction or of the report of an election court, and any witness who gave evidence against that person upon the proceeding for the conviction or report is convicted of perjury in respect of that evidence, the incapacitated person may apply to the High Court, and the court, if satisfied that the conviction or report so far as respects that person was based upon perjury, may order that the incapacity shall thenceforth cease."

28. The time limits for the prosecution of electoral offences and the power to extend time within which proceedings must be commenced are set out in section 176, which provides:

"Section 176: Time limit for prosecutions

(1) A proceeding against a person in respect of any offence under any provision contained in or made under this Act shall be commenced within one year after the offence was committed, and the time so limited by this section shall, in the case of any proceedings under the Magistrates' Courts Act 1980 (or, in Northern Ireland, the Magistrates' Courts (Northern Ireland) Order 1981) for any such offence, be substituted for any limitation of time contained in that Act or Order.

(2) For the purposes of this section—

(a) in England and Wales, the laying of an information;

(b) in Scotland, the granting of a warrant to apprehend or cite the accused (if, in relation to an offence alleged to have been committed within the United Kingdom, such warrant is executed without delay); and

(c) in Northern Ireland, the making of a complaint,

shall be deemed to be the commencement of a proceeding.

(2A) A magistrates' court in England and Wales may act under subsection (2B) if it is satisfied on an application by a constable or Crown Prosecutor–

(a) that there are exceptional circumstances which justify the granting of the application, and

(b) that there has been no undue delay in the investigation of the offence to which the application relates.

(2B) The magistrates' court may extend the time within which proceedings must be commenced in pursuance of subsection (1) above to not more than 24 months after the offence was committed.

(2C) If the magistrates' court acts under subsection (2B), it may also make an order under subsection (2D) if it is satisfied, on an application by a constable or Crown Prosecutor, that documents retained by the relevant registration officer in pursuance of rule 57 of the parliamentary elections rules may provide evidence relating to the offence.

(2D) An order under this subsection is an order–

(a) directing the relevant registration officer not to cause the documents to be destroyed at the expiry of the period of one year mentioned in rule 57, and

(b) extending the period for which he is required to retain them under that rule by such further period not exceeding 12 months as is specified in the order.

(2E) The making of an order under subsection (2D) does not affect any other power to require the retention of the documents.

(2F) An application under this section must be made not more than one year after the offence was committed.

(2G) Any party to–

(a) an application under subsection (2A), or

(b) an application under subsection (2C),

who is aggrieved by the refusal of the magistrates' court to act under subsection (2B) or to make an order under subsection (2D) (as the case may be) may appeal to the Crown Court."

29. Section 181 sets out the duties and powers of the DPP where an election petition is brought.

"Section 181: Director of Public Prosecutions

(1) Where information is given to the Director of Public Prosecutions that any offence under this Act has been committed, it is his duty to make such inquiries and instituted (*sic*) such prosecutions as the circumstances of the case appear to him to require.

(2) The Director by himself or by his assistant or by his representative appointed under subsection (3) below may and, if the election court so requests him, shall attend the trial of every election petition.

(3) The Director may nominate, a barrister, solicitor or authorised person to be his representative for the purposes of this Part of this Act.

(3A) In subsection (3) "authorised person" means a person (other than a barrister or solicitor) who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience (within the meaning of that Act).

(5) There shall be allowed to the Director and his assistant or representative for the purposes of this Part (other than his general duties under subsection (1) above) such allowances for expenses as the Treasury may approve.

(6) The costs incurred in defraying the expenses of the Director incurred for those purposes (including the remuneration of his representative) shall, in the first instance, be paid by the Treasury, and shall be deemed to be expenses of the election court; but if for any reasonable cause it seems just to the court so to do, the court shall order all or part of those costs to be repaid to the Treasury by the parties to the petition, or such of them as the court may direct.

(7) In the application of this section to Scotland, subsections (2) to (6) shall be omitted."

30. The Applicant also relies on the right to a fair trial protected by Article 6 ECHR. That article provides in material part:

"(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
…
(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.
(b) to have adequate time and facilities for the preparation of his defence.
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

Proposed amended grounds for review

31. The Applicant requests the permission of the court to amend his application for judicial review to include three new grounds for review. Two of these grounds were raised in an application to amend submitted by the Applicant on 10 August 2016 (Grounds 1 and 3), while a third was first raised in the skeleton argument of the Applicant prepared for this hearing, dated 9 May 2017 (Ground 2).

Ground 1

32. By his Ground 1 the Applicant submits that the Election Commissioner's findings that the Applicant was "personally guilty" of offences under sections 106, 113 and 115 of the 1983 Act violate Article 6(2) ECHR because they are incompatible with the presumption of innocence. The Applicant submits that the findings of the Election Court were followed by a decision to discontinue criminal proceedings that had been initiated against the Applicant, on the basis that there was insufficient evidence to bring a prosecution. It is said that the findings of the Election Court should therefore be quashed.

33. Ground 1 raises a number of issues which will be considered in turn.

The scope of Article 6(2)

34. In *Allen v. United Kingdom* (Application no. 25424/09; Judgment 12 July 2013; (2016) 63 EHRR 10) the Grand Chamber of the European Court of Human Rights distinguished between two aspects of the right contained in Article 6(2). The first safeguards the right to be presumed innocent until proved guilty according to law. The second protects individuals who have been acquitted of a criminal charge from being treated by public officials and authorities as though they are in fact guilty of the offence charged. The Grand Chamber in *Allen* observed (for example at [94]) that this second aspect of the rule also applies where criminal proceedings have been discontinued, provided the decision to discontinue was made on the merits of the case. It formulated this aspect of the principle of the presumption of innocence as follows:

> "103 … [T]he presumption of innocence means that where there has been a criminal charge and criminal proceedings have ended in an acquittal, the person who was the subject of the criminal proceedings is innocent in the eyes of the law and must be treated in a manner consistent with that innocence. To this extent, therefore, the presumption of innocence will remain after the conclusion of criminal proceedings in order to ensure that, as regards any charge which was not proven, the innocence of the person in question is respected. This overriding concern lies at the root of the Court's approach to the applicability of Art. 6(2) in these cases.
>
> 104 Whenever the question of the applicability of Art. 6(2) arises in the context of subsequent proceedings, the applicant must demonstrate the existence of a link, as referred to above, between the concluded

> criminal proceedings and the subsequent proceedings. Such a link is likely to be present, for example, where the subsequent proceedings require examination of the outcome of the prior criminal proceedings and, in particular, where they oblige the court to analyse the criminal judgment; to engage in a review or evaluation of the evidence in the criminal file; to assess the applicant's participation in some or all of the events leading to the criminal charge; or to comment on the subsisting indications of the applicant's possible guilt."

35. *Allen* and a subsequent line of authority founded on it have demonstrated that this aspect of the protection afforded by Article 6(2) applies in proceedings subsequent to the acquittal or discontinuance of criminal proceedings. (See, for example, *Allen* at [94], [103], [104]; *R (Adams) v. Secretary of State for Justice* [2012] 1 AC 48 at [58], [108]; *Coşkun v. Turkey* (Application No. 45028/07; Judgment of 28 March 2017)). The rationale of this aspect of Article 6(2) is that once a person has been acquitted in criminal proceedings, the presumption of innocence applies to prevent that finding from being undermined or contradicted in any subsequent civil proceedings. That would be so, for example, in subsequent civil proceedings linked with the acquittal in the manner described in *Allen* where the criminal standard of proof applies, but not in subsequent civil proceedings where a lower standard of proof applies. It is the prior acquittal which renders a later contradictory finding unjust and an infringement of Article 6(2).

36. In the present application, the Applicant seeks to establish that the decision of the MPS not to refer the case against the Applicant to the DPP is the equivalent of an acquittal and that the prior decision of the Electoral Court finding the Applicant personally liable of election offences is inconsistent with this acquittal and should therefore be quashed. The Applicant seeks to overcome the difficulty that the decision of the Election Court pre-dated the decision not to bring criminal proceedings against the Applicant by relying on the decision of the Strasbourg court in *Vanjak v. Croatia* (Application no. 29889/04; Judgment of 14 January 2010).

37. The sequence of events in *Vanjak* is of some importance. It was alleged that Mr. Vanjak, a police officer in Karlovac, had acted as an intermediary in procuring a forged certificate of citizenship. On 26 June 1996 disciplinary proceedings were instituted against him. By a judgment dated 10 October 1996 the Karlovac Police Department Disciplinary Court found the case proved, pronounced him "guilty", because, inter alia, he had committed a serious breach of work discipline under section 82, paragraph 1(14) of the Interiors Act, and terminated his employment. On 3 December 1996, on an appeal against the judgment of 10 October 1996, the Appellate Disciplinary Court of the Ministry of Interior upheld the first instance judgment but altered the qualification of the offence finding that the act in question constituted an offence under section 82, paragraph 1(13) and (17) of the Interiors Act which refer to inappropriate conduct, rather than paragraph 1(14), on the ground that

> "… no-one, including the defendant, can be considered liable for a criminal offence as long as [his or her liability] has not been established in a final judgment (Article 28 of the Constitution)."

A further appeal to the Administrative Court against the disciplinary courts' judgments was dismissed on 6 May 1998.

38. Meanwhile, there were parallel criminal proceedings. On 24 June 1996 the State Attorney's Office lodged a request that an investigation be opened against the applicant. During the investigation Mr. Vanjak was heard by an investigation judge but remained silent. On 5 June 1998 the State Attorney's Office sought that the criminal investigation against Mr. Vanjak be discontinued on the ground that a statement given by the recipient of the certificate of citizenship that he had given no money to Mr. Vanjak meant that there was insufficient evidence that Mr. Vanjak had committed a criminal offence. On 18 June 1998 an investigation judge discontinued the criminal investigation on the basis of the request from the State Attorney's Office. The discontinuance of the criminal proceedings therefore post-dated the decisions of the Disciplinary Court and the Appellate Disciplinary Court.

39. Mr. Vanjak lodged a constitutional complaint against the Administrative Court's judgment of 6 May 1998 arguing, inter alia, that the disciplinary courts found that he had committed a criminal offence although he had not been convicted in the criminal proceedings against him which had been discontinued. On 4 February 2004 the Constitutional Court dismissed his complaint. He then applied to the European Court of Human Rights.

40. In its judgment the First Section noted at the outset that a criminal investigation had been opened against the applicant. Accordingly, he was charged with a criminal offence which attracted the application of Article 6 in respect of those criminal proceedings. It observed that the question remained whether there were such links between the criminal proceedings and "the parallel disciplinary proceedings" as to justify extending the scope of Article 6(2) to cover the latter (at [36], [37]). The Court gave a wide answer. It stated in this connection that the scope of Article 6(2) was not limited to pending criminal proceedings against an applicant. The Court had also found the provision applicable "to judicial decisions taken after the discontinuation of such proceedings" (at [38]). It then stated:

> "The scope of Article 6 § 2 extends as well to various administrative proceedings conducted simultaneously with the criminal proceedings against an applicant or after the conclusion of criminal proceedings ending without a decision finding the accused guilty (see *Stavropoulos v. Greece*, no. 35522/04, 27 September 2007, *Paraponiaris v. Greece*, no. 42132/06, 25 September 2008)." (at [38])"

and made the following assessment of the case before it:

> "40. As to the present case the Court notes that the disciplinary proceedings against the applicant ran parallel to an investigation on suspicion that he had committed a criminal offence and that the findings of the disciplinary courts had no influence or prejudicial effect on the criminal investigation.
>
> 41. However, the Court considers that where the criminal proceedings end prior to the formal indictment, irrespective of the ground for their discontinuation, the lack of a person's criminal conviction shall as to

> the presumption of innocence be preserved in any other proceedings of whatever nature, including disciplinary proceedings (see, *mutatis mutandis*, *Y v. Norway*, no. 56568/00, § 41, ECHR 2003-II (extracts). Therefore, Article 6 § 2 applies in the circumstances of the present case."

41. In its assessment of the merits, the First Section of the Strasbourg court concluded that the decision on Mr. Vanjak's dismissal did not run contrary to the right guaranteed under Article 6(2). In this regard it noted, first, that the Constitutional Court in dismissing the applicant's complaint applied a different standard of proof required in disciplinary proceedings from that required for a conviction of a criminal offence (at [68]). Secondly, in the disciplinary proceedings the applicant had not been found guilty of a criminal offence but of a disciplinary offence (at [69]). Thirdly, the disciplinary bodies were empowered to and capable of establishing independently the facts of the case before them. The First Section did not consider that in doing so such language was used – other than that rectified by the appeal court – so as to call in question the applicant's right to be presumed innocent (at [70]). (This is a matter of some relevance in relation to Ground 2 considered below.) Fourthly, the constitutive elements of the disciplinary and the criminal offences in question were not identical (at [71]).

42. We note that the decision of the First Section of the Strasbourg court in *Vanjak* pre-dated that of the Grand Chamber in *Allen*, where the second aspect of the principle in Article 6(2) was first clearly identified in terms which emphasised that the principle requires that an acquittal in criminal proceedings should not be contradicted by a subsequent decision in civil or disciplinary proceedings. Nevertheless, *Vanjak* does provide support for the view that the second aspect of Article 6(2) could apply to a civil determination prior to the acquittal provided there were simultaneous civil and criminal proceedings. (See also in this regard *Coşkun v. Turkey* at [41] cited below.) The starting point of the Court's assessment in *Vanjak* is that Article 6(2) was engaged by the parallel criminal proceedings. In this regard Mr. Paul Bowen QC on behalf of the Applicant accepts that in the present case, Ground 1 can succeed only if there can be shown to have been parallel criminal and election proceedings. He accepts that the proceedings before the Election Court in themselves did not engage Article 6(2) but maintains that at the time of the election proceedings there were pending criminal proceedings which engaged Article 6(2).

Parallel criminal proceedings

43. This brings us to what is, perhaps, the central issue in this case: whether there were parallel proceedings with the result that Article 6(2) was engaged during the proceedings before the Election Court.

44. Ground 1 as pleaded (at para 52 of the Amendment to Statement of Grounds of Judicial Review dated 8 August 2016) did not suggest that at the time of the proceedings before the Election Court there were pending criminal proceedings which engaged article 6(2). The contention was that once the DPP decided that there was insufficient evidence that any criminal offence had been committed the findings of the Election Court then ("*now*") contravened the presumption of innocence contrary to

article 6(2). As Mr James Segan observed, in his exemplary submissions on behalf of the MPS, the Claimant's case was therefore that the Election Court's decision became incompatible with article 6(2) as at 22 March 2016, being the date of the letter from the MPS informing the Claimant's solicitors of the outcome of the MPS review.

45. However, before this court Mr Paul Bowen QC, on behalf of the Applicant, submits that whilst the Applicant was not formally charged with a criminal offence he was treated as a suspect in a criminal investigation by the time the Election Court proceedings commenced on 10 June 2014 taken in conjunction with the first MPS/CPS investigation; alternatively, at the latest once the Election Court's judgment was handed down on 23 April 2015 and the MPS/CPS began their second investigation.

46. In support of this submission Mr Bowen relies on the judgment of Lord Hope in *Ambrose v Harris* [2011] 1 WLR 2435 at para 62, and in particular on the following sentence:

> "The moment at which the individual is no longer a potential witness but has become a suspect provides as good a guide as any to when he should be taken to have been charged for the purposes of article 6.1".

47. The contention that the Applicant had become a suspect essentially rested in Mr Bowen's oral submissions on the fact that the DPP performed her duties and exercised her powers under s.181 of the 1983 Act. In that regard Mr Bowen noted that the CPS instructed Counsel to attend the Election Court throughout the hearing (indeed the Applicant was ordered to pay their costs at the end of the hearing). He submits that in so doing the CPS were discharging their duty (1) under s.181(1) by which the DPP is subject to a duty where information is given to the DPP that any offence under the Act has been committed "to make such enquiries and institute such prosecutions as the circumstances of the case appear to her to require", and (2) under s.181(2) by which the DPP may attend the trial of every election petition, either by herself or by a representative appointed under s.181(3). Further, Mr Bowen points to the fact that the CPS appointed a specialist prosecutor who received daily transcripts and regular reports from their counsel.

48. We firmly reject this submission. The fact that the DPP, in the exercise of her powers under s.181(2) and (3) attended the hearing before the Election Court through a representative, and then through a special prosecutor appointed by her considered daily transcripts and reports from the trial cannot, in our view, begin to form the basis of an argument that the Applicant had become a suspect. Plainly what the DPP was doing (and no more) was exercising her powers in the performance of her duty under s.181(1), having received information that an election offence had been committed, "to make such enquiries and instituted [*sic*] such prosecutions as the circumstances of the case appears to her to require".

49. There is no evidence that the Applicant had become a suspect by the time of the Election Court proceedings, and we consider there is no real prospect of the Applicant establishing that he became a suspect thereafter.

50. The evidence of Commander Cundy of the MPS with responsibility for Specialist Crime Investigations is clear. Following the election the MPS received 164 allegations relating to electoral fraud and malpractice, each of which they investigated. After the judgment of the Election Court the MPS investigated a further five cases that had not previously been reported to the police. At paragraph 13 of his witness statement dated 16 March 2017 Commander Cundy stated that the Applicant "was not a named suspect for any of the allegations investigated by the MPS".

51. None of the other matters on which Mr Bowen relies advances the contention that the Applicant became a suspect. Much emphasis was placed on the language used in the Election Court proceedings such as that the Claimant was personally "guilty" of electoral fraud, amounting to corrupt and/or illegal practices referred to in the judgment of the Election Court as "charges", and that the findings were made to the criminal standard and in respect of matters that were also offences under the criminal law. However the Election Court was required by the Act to pronounce upon the Applicant's personal guilt, and required to apply the criminal standard of proof; and the Election Court made clear (in its judgment at [32]) that it was not determining criminal liability and that its decisions were "entirely separate from any criminal sanctions that might be imposed if the candidate concerned is prosecuted to conviction for an electoral offence". On 22 March 2016 the Applicant was informed of the decision taken by the MPS not to refer the file to the DPP for prosecution on the grounds that there was insufficient information to prosecute him. It is not possible, in our view, to infer from that decision that the Applicant had become a suspect in the second investigation following the judgment of the Election Court.

52. We have so far dealt with the Applicant's contention that he had been charged with a criminal offence on the basis that he was a suspect. That is, we consider, the Applicant's case put at its highest by reference to the sentence in Lord Hope's judgment in *Ambrose* on which Mr Bowen, in particular relies (see [46] above). However in our view a proper understanding of the relevant test for determining when a person is charged for the purposes of article 6.1 requires reading that sentence in para 62 of Lord Hope's judgment together with what he said in paras 62 and 63 of the judgment as a whole.

53. The material parts of paras 62 and 63 read:

> "The correct starting point, when one is considering whether the person's Convention rights have been breached, is to identify the moment as from which he was charged for the purposes of article 6.1. The guidance as to when this occurs is well known. The test is whether the situation of the individual was substantially affected: *Deweer v Belgium* 2 EHRR 439, para 46; *Eckle v Germany* 5 EHRR 1, para 73. His position will have been substantially affected as soon as the suspicion against him is being seriously investigated and the prosecution case compiled: *Shabelnik v Ukraine* (Application No.16404/03) (unreported) given 19 February 2009, para 57. In *Corigliano v Italy* 5 EHRR 334, para 34 the court said that, whilst 'charge' for the purposes of article 6.1 might in general be defined as the official notification given to the individual by the competent authority of an allegation that he has committed an criminal

> offence, as it was put in *Eckle's* case 5 EHRR 1, para 73, it may in some instances take the form of other measures which carry the implication of such an allegation. In *Subinski v Slovenia* (Application No.19611/04) (unreported) given 18 January 2007, paras 62-63 the court said that a substantive approach, rather than a formal approach, should be adopted. It should look behind the appearances and investigate the realities of the procedure in question. This suggests that the words 'official notification' should not be taken literally, and that events that happened after the moment when the test is to be taken to have been satisfied may inform the answer to the question whether the position of the individual has been substantially affected.
>
> 63. It is obvious that the test will have been satisfied when the individual has been detained and taken into custody. It must be taken to have been satisfied too where he is subjected to what *Salduz's* case 49 EHRR 421, para 52 refers to as the initial stages of police interrogation. This is because an initial failure to comply with the provisions of article 6 at that stage may seriously prejudice his right to a fair trial. The moment at which article 6 is engaged when the individual is questioned by the police requires very sensitive handling if protection is to be given to the right not to incriminate oneself. The mere fact that the individual has been cautioned will not carry the necessary implication. But, when the surrounding circumstances or the actions that follow immediately afterwards are taken into account, it may well do so. The moment at which the individual is no longer a potential witness but has become a suspect provides as good a guide as any as to when he should be taken to have been charged for the purposes of article 6.1: *Shabelnik v Ukraine* given 19 February 2009, para 57…"

54. Accordingly, in summary, the test for determining whether a person is charged for the purposes of article 6.1 is as follows:

(1) A person is subject to a charge within the meaning of article 6.1 when he is "substantially affected" by the proceedings taken against him.

(2) His position will have been substantially affected as soon as the suspicion against him is being seriously investigated and the prosecution case compiled.

(3) In general "charge" for the purposes of Article 6.1 is defined as the official notification given to the individual by the competent authority of an allegation that he has committed a criminal offence.

(4) However it may in some instances take the form of other measures which carry the implication of such an allegation.

(5) The test will have been satisfied when the individual has been detained and taken into custody.

(6) It must also be taken to have been satisfied where he is subjected to the initial stages of police interrogation.

(7) The mere fact that the individual has been cautioned will not carry the necessary implication.

(8) But, when the surrounding circumstances or the actions that follow immediately afterwards are taken into account, it may well do so.

(9) The moment at which the individual is no longer a potential witness but has become a suspect provides as good a guide as any as to when he should be taken to have been charged for the purposes of Article 6.1.

55. In the present case there is no evidence that the situation of the Applicant was substantially affected. There is no evidence that any suspicion against him was being seriously investigated (as in *Vanjak*, see para 38 above) and that a prosecution case against him was compiled. He was not officially notified of an allegation that he had committed a criminal offence; nor were any measures taken which carry the implication of such an allegation. He was not detained or taken into custody; nor was he subjected to the initial stages of police interrogation. He was not questioned by the police and he was not cautioned. There are in this case no surrounding circumstances or any actions that were taken from which it could be implied that an allegation had been made that he had committed a criminal offence. Having regard to all the circumstances we do not consider that at any time he had become a suspect.

56. It follows that in our judgment the Applicant was never charged with a criminal offence. Accordingly there were no parallel criminal proceedings. This is fatal to the Applicant's case on Ground 1.

Acquittal

57. In these circumstances it is not necessary to consider whether what occurred in this case was capable in law of constituting an acquittal or a discontinuance equivalent to an acquittal for the purposes of this aspect of Article 6(2). However, we should draw attention to the following matters.

58. First, if we are correct in our conclusion that the Applicant was never charged with criminal offences corresponding to the election offences alleging personal guilt, there can have been no acquittal or discontinuance equivalent to an acquittal for the purposes of the application of the second aspect of Article 6(2) on which Ground 1 is founded.

59. Secondly, the extension of Article 6(2) effected by the Strasbourg court in *Allen* is capable of operating in circumstances where criminal proceedings have been discontinued. However, as Mr. Segan pointed out, if a discontinuance is to be sufficient for this purpose, it must reflect a decision on the merits. It is unclear whether what occurred in the present case constituted a discontinuance on the merits as required by the Strasbourg case law. Mr. Bowen rightly relies on the fact that the Applicant was informed by letter dated 22 March 2016 that the decision was that

"there is insufficient evidence that crime has been committed in this instance". On the other hand there is evidence before us that the decision of the MPS was based in part on the different criteria for admissibility of evidence in criminal proceedings and that a number of witnesses who gave evidence to the Election Court were unwilling to give statements to the police as part of a criminal investigation. As it is not necessary for us to decide whether what occurred in this case was capable in law of constituting an acquittal, or a discontinuance equivalent to an acquittal for the purposes of this aspect of Article 6(2), we do not do so.

60. We should make clear, however, that we have excluded from consideration for present purposes the press statement by the MPS made in or about March 2017 that the CPS and MPS have agreed to undertake a further joint assessment of the 27 files of evidence that had been before the Election Court "to see whether they contain anything that changes the advice previously provided by the CPS, changes the decisions previously made by the [MPS], or requires further investigation by the [MPS]". It seems to us that there is force in Mr. Bowen's submission that the principle of regularity requires that this court should approach the issues in this application on the basis of the existing decision of the MPS that there is insufficient evidence that crime has been committed in this instance.

The language of the impugned decision

61. In its judgment in *Allen*, the Grand Chamber observed that there is no single approach to ascertaining the circumstances in which Article 6(2) will be violated in the context of proceedings which follow the conclusion of criminal proceedings. Much will depend on the nature and context of the proceedings in which the impugned decision was adopted. In all cases and no matter what the approach applied, the language used by the decision maker will be of critical importance in assessing the compatibility of the decision and its reasoning with Article 6(2) (at [125] – [126]).

62. For reasons which we develop under Ground 2 below, we consider that it is not arguable that any part of the judgment of Commissioner Mawrey QC in the Election Court is in any way inconsistent with the presumption of innocence contained in Article 6(2).

Conclusion on Ground 1

63. For these reasons we consider that Ground 1 has no reasonable prospect of success and we refuse permission to amend to include this new ground.

Ground 2

64. In Ground 2, which was first raised in a skeleton argument dated 9 May 2017, the Applicant submits that the Election Commissioner's findings of personal guilt violate Article 6(2) and must therefore be quashed because they amount to an imputation of criminal liability by a public authority while criminal proceedings were pending and had not yet established the Applicant's criminal liability. The Applicant submits that the presumption of innocence applies even if the court decides against the Applicant on Ground 1. Moreover, it is submitted that in this aspect of the presumption the

outcome of any subsequent criminal proceedings is irrelevant. Accordingly, it is said that there may be a breach of Article 6(2) even if the MPS or CPS reverse the previous decision not to prosecute.

65. On behalf of the Applicant it is stated that this ground is based upon the very recent decision of the Strasbourg court in *Coşkun v. Turkey*, (Application no. 45028/07; Judgment of 28 March 2017). There the Second Section distinguished between the two aspects of Article 6(2) in the following terms:

> "41. Article 6 § 2 safeguards the right to be "presumed innocent until proved guilty according to law". The Court has acknowledged in its case-law the existence of two aspects to the protection afforded by the presumption of innocence: a procedural aspect relating to the conduct of the criminal trial, and a second aspect which aims to ensure respect for the applicant's established innocence in the context of subsequent proceedings where there is a link with the criminal proceedings which have ended with a result other than a conviction (see, generally, *Allen v. the United Kingdom* [GC], no. 25424/09, §§ 93-94, ECHR 2013). Under its first aspect, the principle of presumption of innocence prohibits public officials from making premature statements about the defendant's guilt and acts as a procedural guarantee to ensure the fairness of the criminal trial itself. However, it is not limited to a procedural safeguard in criminal matters: its scope is broader and requires that no representative of the State should say that a person is guilty of an offence before his guilt has been established by a court (*Konstas v. Greece*, no. 53466/07, § 32, 24 May 2011). In that respect the presumption of innocence may be infringed not only in the context of the criminal trial, but also in separate civil, disciplinary or other proceedings that are conducted simultaneously with the criminal proceedings."

66. The Applicant places particular reliance on the following exposition of the first aspect of Article 6(2) by the Second Section:

> "42. Regarding the first aspect of protection under Article 6 § 2, in Allen, cited above, § 93, the Grand Chamber reiterated that, viewed as a procedural guarantee in the context of a criminal trial, "the presumption of innocence imposes requirements in respect of, inter alia, ... premature expressions by the trial court or by other public officials of a defendant's guilt". The Court has previously held in this context that the presumption of innocence will be violated if a judicial decision or, indeed, a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before his guilt has been proven according to law. It suffices, even in the absence of any formal finding, that there is some reasoning to suggest that the official regards that person as guilty (see, *inter alia*, *Allenet de Ribemont v. France*, no. 15175/89, § 35, Series A no. 308; *Daktaras v. Lithuania*, no. 42095/98, § 41, ECHR 2000-X; *A.L. v. Germany*, no. 72758/01, § 31, 28 April 2005; and *Caraian v. Romania*,

no. 34456/07, § 74, 23 June 2015). The scope of the protection under the first aspect of presumption of innocence therefore extends to all statements made by a public authority regardless of whether they have been pronounced in the confines of the criminal trial, in a different public setting or in other parallel judicial proceedings. Nevertheless, whether a statement of a public official is in breach of the presumption of innocence must be determined in the context of the particular circumstances in which the impugned statement was made (see, among others, *Daktaras*, cited above, § 43; and *Caraian*, cited above). The presumption of innocence, considered in the light of the general obligation of a fair criminal trial under Article 6 § 1, excludes a finding of guilt outside the criminal proceedings before the competent trial court, irrespective of the procedural safeguards in such parallel proceedings and notwithstanding general considerations of expediency (see *Böhmer v. Germany*, no. 37568/97, § 67, 3 October 2002). In this connection, the Court considers that the duty to refrain from making prejudicial or premature comments regarding a person's guilt applies *a fortiori* to courts other than the one determining the criminal charge. The Court emphasises that the purpose of the right to be presumed innocent until proven guilty is not only to guarantee the fairness of the criminal trial from undue influences but also to protect a person's reputation from unjustified brandings of guilt (see *El Kaada v. Germany*, no. 2130/10, § 42, 12 November 2015, and *mutadis mutandis, Allen*, cited above, § 94)."

67. In *Coşkun* the applicant complained of his dismissal from the police force and the way in which his objection concerning the alleged violation of his right to the presumption of innocence was treated by the Administrative Courts reviewing his dismissal. The disciplinary proceedings concerning his dismissal ran parallel to the criminal proceedings against him. Both sets of proceedings were initiated against the applicant on suspicion that he had committed criminal offences. The Administrative Courts reviewing the disciplinary sanction gave substantial consideration to whether the applicant had in fact committed the offences of false imprisonment, robbery and attempted rape with which he had been charged and in respect of which criminal proceedings were pending against him. When the Administrative Courts reviewed the applicant's dismissal, no final judgment had yet been adopted in the criminal proceedings and his right to be presumed innocent until proven guilty in the context of the criminal charges against him remained valid under the first aspect of Article 6(2) (at [44]).

68. The Second Section confined its attention to the first aspect of the presumption of innocence under Article 6(2) and assessed whether the reasoning adopted in the disciplinary proceedings, before the final decision in the criminal proceedings, violated the applicant's right to be presumed innocent. It considered that, as a result, Article 6(2) applied in the context of the disciplinary proceedings at issue (at [44]). Turning to the merits the Second Section observed that Article 6(2) places an obligation on judicial authorities in parallel or subsequent proceedings to stay within their respective fora and refrain from commenting on the person's criminal guilt when no such guilt has been established by the competent court. It continued:

> "The Court has repeatedly stressed the importance of the choice of words by public authorities both in the context of the criminal trial and in parallel or subsequent proceedings … Where the criminal proceedings are pending and have not yet resulted with a final conviction or where they have ended with a result other than a conviction, any official statement that calls into question the person's presumed or established innocence may fall foul of the presumption of innocence" (at [52]).

69. The Second Section noted that the Administrative Court had upheld the dismissal on the grounds that he had committed the acts of false imprisonment, robbery and attempted rape.

> "53. … Although criminal proceedings concerning the same accusations arising out of the same facts were pending against the applicant, the Administrative Court rendered a decision which, by the wording used in its reasoning, unequivocally pronounced the applicant guilty on those charges. Furthermore, the impugned decision contained no reservation or qualification that could lead the reader to conclude that the pronouncement of the applicant's guilt was confined strictly to the disciplinary sphere …
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> 54. In the absence of any reasoning that would allow a reader to discern how the disciplinary and judicial authorities established and evaluated the facts from the perspective of disciplinary law, that is the compatibility of the applicant's conduct with work discipline and the requirements of civil service, the lines separating disciplinary liability from criminal liability become theoretical and illusory. In that respect, the Court reiterates that no authority may treat a person as guilty of a criminal offence unless he has been convicted by the competent court. …"

70. Having regard to the "explicit and unqualified character" of the statements by the Administrative Court, the Second Section found that they amounted to a pronouncement on the applicant's guilt before he was proved guilty according to law (at [56]). There had, accordingly, been a violation of Article 6(2).

Pending criminal proceedings

71. The Applicant's case on Ground 2 depends on his demonstrating that, at the time of the decision of Commissioner Mawrey in the Election Court, there were criminal proceedings pending against him such that Article 6(2) was engaged and the presumption of innocence applied. For the reasons set out at paragraphs [43] to [56] above, we do not consider that that proposition is arguable. Accordingly, for this reason alone, Ground 2 cannot succeed.

Statements inconsistent with the presumption of innocence.

72. In support of his submission that the statements and conclusions of Commissioner Mawrey in his judgment in the Election Court amount to an imputation of criminal liability, Mr. Bowen is able to point to the fact that the civil scheme relating to

election petitions under the 1983 Act employs the language of criminal liability. Thus, for example, it speaks of persons being convicted of and being guilty of illegal and corrupt practices. The election offences and criminal offences are expressed in the same terms and have the same ingredients. (This may be a result of the fact that prior to 1985, the Election Court itself was, in certain circumstances, empowered to hear the criminal proceedings subsequent to the civil proceedings on an election petition. That position changed when the 1983 Act was amended and any subsequent criminal proceedings are now brought before courts of criminal jurisdiction, either a Magistrates' Court or a Crown Court). Moreover, allegations of personal guilt or guilt by one's agents must be proved in proceedings on an election petition to the criminal standard, whereas the impact of such conduct on the outcome of the election is determined on the civil standard of proof. Nevertheless, the scheme of the 1983 Act establishes two concurrent but distinct jurisdictions and distinguishes clearly between civil proceedings on an election petition and criminal proceedings. Furthermore, while the disqualificatory consequences of an election offence are the same as those of the corresponding criminal offence, a criminal offence under the 1983 Act may be punished in addition by a fine or a term of imprisonment.

73. We agree with the Applicant that the statutory language used in the 1983 Act, which refers to "personal guilt", "conviction" and "offence" does carry with it connotations of criminal guilt, and we note that such terminology may be infelicitous when applied to election proceedings which are clearly civil in nature. The Law Commission is currently conducting a review into electoral law in the United Kingdom, which extends to electoral offences and the election petition process. The interaction between the civil and criminal dimensions of election oversight may be appropriate for consideration by the Law Commission.

74. Commissioner Mawrey, in his judgment in the civil election proceedings, necessarily employed the language of the statute as he was required to do. He did, however, go to some lengths to explain the differences between the two jurisdictions and the nature of the proceedings before him. As Mr. Segan on behalf of the MPS pointed out, Commissioner Mawrey explained in his judgment the civil scheme in relation to election petitions and courts (at [17]–[38]), the differences between an election court, a civil court and a criminal court (at [39]–[44]) and the differences and similarities in burden and standard of proof (at [45]–[50]). In particular he stated with regard to the periods of disqualification:

> "These penalties are entirely separate from any criminal sanctions that might be imposed if the candidate concerned is prosecuted to conviction for an electoral offence." (Judgment at [32])

We therefore accept the submission of Mr. Segan that, by contrast with *Coşkun,* (employing the language used by the Strasbourg court in *Coşkun*), this is not a case where the judge in civil or disciplinary proceedings has unequivocally pronounced the Applicant guilty without any reservation or qualification that could lead the reader to conclude that the pronouncement of the Applicant's guilt was confined strictly to the civil or disciplinary sphere.

75. For these reasons we do not consider it arguable that the statements or conclusions of Commissioner Mawrey in his judgment in the Election Court amount to an imputation of criminal liability.

76. We should add that if the case advanced by the Applicant on Ground 2 were correct, the implications for electoral law in this jurisdiction would be profound. Where an election is challenged, for example on the ground that it was avoided by corrupt or illegal practices, the protection of democracy and the democratic process requires that the issue should be resolved and the Commissioner should be able to report as a matter of urgency. (See, generally, *R (Woolas) v. Parliamentary Election Court* [2010] EWHC 3169 (Admin) per Thomas L.J. at [46].) As a result, strict and brief time limits apply under the 1983 Act to the bringing of an election petition. If it were the case that a Commissioner hearing an election petition is prevented from expressing in civil election proceedings conclusions as to the personal guilt of a candidate, such as those of Commissioner Mawrey in this case, on the ground that to do so would violate the candidate's right to the protection of the presumption of innocence under Article 6(2), until such time as his guilt or innocence on corresponding criminal charges were finally determined by a court of criminal jurisdiction, a vital legislative purpose would be frustrated. We are satisfied, however, for the reasons set out in the preceding paragraphs, that that has not occurred in the present case. Moreover, we note that the Strasbourg jurisprudence expressly acknowledges that Article 6(2) does not require a stay of disciplinary or civil proceedings even where criminal proceedings are pending. (See, for example, *Coşkun* at [68].) What is required is that the outcome and true nature of the civil proceedings should be appropriately expressed. We are satisfied that in this case the distinct but concurrent jurisdictions were appropriately explained.

Conclusion on Ground 2

77. For these reasons we consider that Ground 2 cannot succeed. We refuse permission to amend to add this ground.

Ground 3

78. By his Ground 3 the Applicant seeks a declaratory judgment as to the proper interpretation of section 174(1) of the 1983 Act. That sub-section provides that where a person who is subject to any incapacity by virtue of the report of an election court and "is on a prosecution acquitted of any of the matters in respect of which the incapacity was imposed" the court may order that the incapacity shall thenceforth cease so far as it is imposed in respect of those matters. The Applicant submits that the words "on a prosecution acquitted", both on ordinary principles of construction and considered in the light of Article 6(2), should be interpreted to include the situation where a criminal investigation into an individual is discontinued. The Applicant also submits that this court has jurisdiction to grant a declaration as to the meaning to be given to section 174(1) under section 31(2) Senior Courts Act 1981 and CPR 54.3(1)(a) and CPR 40.20 and that it is appropriate to do so because there is currently no authority concerning the circumstances in which section 174(1) applies, nor as to which court should exercise that jurisdiction.

79. We consider that this proposed ground has no reasonable prospect of success for the reasons set out below.

Prosecution

80. First, the Applicant has not been prosecuted. He has not been subjected to prosecution for any crime. He has not been charged with any criminal offence. No information has been laid against him and he has not been summonsed to attend court. The decision taken by the MPS was a decision not to forward the papers to the CPS for it to consider a prosecution. Furthermore, we do not consider that Article 6 can be invoked in the circumstances of this case so as to require that an extended meaning be given to the concept of being prosecuted as, for the reasons stated earlier in this judgment, there have been no criminal proceedings within the autonomous concept employed by ECHR and Article 6 has not been engaged.

Acquittal

81. In these circumstances it is not necessary to consider whether what occurred in this case was capable in law of constituting an acquittal. If the Applicant has not been prosecuted, he cannot have been "on a prosecution acquitted". The decision of the MPS not to forward the papers to the CPS for consideration for prosecution does not seem to us to be capable, on any ordinary understanding of the word, of being an "acquittal". We reject the submission on behalf of the Applicant that the words "on a prosecution acquitted" should be given a broad autonomous meaning in the context of electoral law and taken to include a situation where a decision has been taken not to prosecute on the basis that there is insufficient evidence of a criminal offence. Moreover, if we are correct in our view that Article 6(2) is not engaged in the circumstances of the present case, there can be no justification for giving that term an extended meaning so as to conform with ECHR law.

Jurisdiction under section 174(1)

82. We heard submissions as to the meaning of the words "the court" in section 174(1) and whether it refers to the Election Court, to a court of criminal jurisdiction or to the High Court. In that regard we were also referred to section 157(3) of the 1983 Act. However, it is not necessary for us to decide this issue.

Delay

83. The report of the Election Court was given on 23 April 2015. On 2 July 2015 the Applicant filed an application for permission to apply for judicial review challenging that decision. The permission application was decided by this court on 26 January 2016. Permission was granted on one ground only, that relating to undue influence. However, those proceedings were closed following the failure of the solicitors then acting for the Applicant to pay the appropriate court fee. The Applicant was notified of the decision of the MPS by letter dated 22 March 2016. An application to amend the grounds so as to include what are now Grounds 1 and 3 was lodged on 10 August 2016. On 9 February 2017 Ouseley J. granted permission for the original judicial review proceedings (now limited to the undue influence issue) to be reopened and ordered that the application for permission to amend be heard by a Divisional Court. The application to amend to include what is now Ground 2 was first notified by the Applicant's skeleton argument dated 9 May 2017, some eight days before the hearing. The CPS and the MPS oppose the application for permission to amend on the additional ground of delay.

84. Public law challenges by judicial review are governed by CPR Part 54. CPR 54.5(1) requires a claim to be filed promptly and in any event not later than 3 months after the grounds to make the claim first arose. CPR 54.15 and Practice Direction 54A, paragraph 11.1 permit a claimant to rely on new grounds of judicial review with the court's permission up to seven days before the substantive hearing. No distinction is drawn for this purpose by the rule or the practice direction between amendments within and outside the period specified in CPR 54.5. (See generally *San Vicente v. Secretary of State for Communities and Local Government* [2014] 1 WLR 966 per Beatson L.J. at [46]-[53].)

85. In considering an application to amend grounds for judicial review, where the original application was in time and the application to amend is made outside the period specified in CPR 54.5, a court is likely to take account of the following considerations, amongst others:

(1) The brevity of the initial time limit in public law cases;
(2) The length of time which has passed before the application to amend;
(3) The proximity of the application to amend to the substantive hearing of the application;
(4) The extent, if any, to which the material factual context would be changed by the amendment;
(5) The importance of the court hearing and deciding the real issues of public interest or policy raised by the challenge;
(6) The possibility of prejudice to the respondent or any interested parties.

86. In the present case, Grounds 1 and 3 turn on the Applicant's contention that he has been acquitted in criminal proceedings. He was notified of the decision of the MPS, which he maintains constitutes an acquittal, by letter dated 22 March 2016. Mr. Bowen has explained that the Applicant and his advisers then waited for a period of three months in order to see whether there would be any legal challenge to that decision. There was none and the application for permission to amend to include those two new grounds was made thereafter by application notice dated 10 August 2016. We consider that that was an appropriate way in which to proceed. We would not refuse permission to amend to add Grounds 1 and 3 on grounds of delay.

87. Different considerations apply, however, in relation to Ground 2.

(1) This ground does not require an acquittal but invokes the first aspect of Article 6(2) which confers the protection of the presumption of innocence in criminal proceedings prior to their determination by conviction or acquittal. Accordingly, the justification for the passage of time in relation to Grounds 1 and 3 is not available here.
(2) The Applicant's submissions on this ground were, understandably, prompted by the very recent decision of the Strasbourg court in *Coşkun* (Judgment of 28 March 2017). However, *Coşkun* did not make new law. The principle applied there is well established in the Strasbourg case law. (See *Coşkun* at [41] and [42], cited above at [65] and [66] and the cases referred to there.)

(3) The Applicant's case on Ground 2 is, essentially, that the proceedings before the Election Court unfairly impugned the Applicant and violated his entitlement to the presumption of innocence under Article 6(2). For the reasons explained above we do not consider that the Applicant's case on Ground 2 is well founded. However, if it were, it is a matter which should have been raised by the Applicant before the Election Court at the outset of its proceedings. If rejected by the Election Court, it could have been pursued by way of judicial review immediately. In fact, the proceedings before the Election Court were not challenged on this basis. The failure to do so would, in our view, provide a further reason why permission to amend to include Ground 2 should be refused.

Conclusion

For these reasons we refuse the application to amend the grounds of the application for judicial review.