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

Claim no: CO/ /2014

BETWEEN

THE QUEEN
(on the application of LUTFUR RAHMAN)

Claimant

and

THE LOCAL GOVERNMENT ELECTION COURT

Defendant

GROUNDS FOR JUDICIAL REVIEW

Suggested core reading

- Judgment in *Erlam & Ors v Rahman & Anor* [2015] EWHC 1215 (QB) (pages 431 to 630)
- Table of grant decisions prepared by Counsel for Mr Erlam and others for the Election Court (pages 872 to 879)
- Table of grant decisions submitted by the Claimant's counsel to the Election Court (pages 880 to 884)

INTRODUCTION

1. The Claimant is the former Mayor of Tower Hamlets, having held that position from the time of his election in 2010 until 23 April 2015 when his 2014 election was declared void by the Defendant Court. The Claimant had won the 2014 election with 43.38% of the first preference votes (to 32.82% votes cast for the Labour Party candidate John Biggs, who took second place) and a total (first and second preference votes) of 37 395 votes to Mr Biggs' 34 143.

2. The Defendant Court adjudicated an election petition presented on 10 June 2014 by four Petitioners. The Election Commissioner on the Court was Richard Mawrey QC

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who was appointed on 29 July 2014. On 23 April 2015 the Defendant Court ruled that the Claimant was guilty:

1) (by his agents) of corrupt practices contrary to:
   i. s60 of the 1983 Act; and
   ii. s62A of the 1983 Act;
2) (by his agents) of illegal practices contrary to:
   i. s13D(1) of the 1983 Act; and
   ii. s61(1)(a) of the 1983 Act;
3) guilty (personally and by his agents) of an □ illegal practice contrary to s106 of the 1983 Act;
4) guilty (by his agents) of an □ illegal practice contrary to s111 of the 1983 Act; and
5) guilty (personally and by his agents) of a □ corrupt practice contrary to:
   i. s113 of the 1983 Act; and
   ii. s115 of the 1983 Act.

3. This challenge relates to the Defendant Court's findings under §2(4) and (5). The findings under §2(5) were the only findings of corrupt practices made against the Claimant personally, as distinct from by reason of actions found to have been taken by his agents. This being the case, if these findings were to be overturned the period of the Claimant's disbarral from standing for election would be reduced from 5 to 3 years, which would have the effect of allowing an earlier return to politics, should he so wish.

4. The grounds on which the Defendant Court's decision is challenged are that the Court's findings:

   1. in respect of s111 of the 1983 Act, relied on findings of fact for which there was no proper evidential basis, and which therefore amounted to errors of law;
   2. in respect of s113 of the 1983 Act:
      1. involved an erroneous construction of that provision, and
      2. relied on findings of fact for which there was no proper evidential basis, and which therefore amounted to errors of law; and
   3. in respect of s115 involved an approach being taken to that provision which was contrary to authority and incompatible with Article 9 (and/or 10) ECtHR and so contrary to ss3 & 6 of the Human Rights Act 1998;

5. An analysis of the relevant law is set out at §§6-23 below with the relevant factual background at §§24-28, the decision under challenge at §§29, the Grounds at §§30-58 and the relief sought thereafter.

THE LAW

The Scope for Challenge to the Defendant's Decision

6. The Defendant Court's powers are set out in the Representation of the People Act 1983 Part III which provides, so far as relevant, that:

> 130(1) A petition questioning an election in England and Wales under the local government Act shall be tried by an election court consisting of a person qualified and appointed as provided by this section…
>
> 145(1) At the conclusion of the trial of a petition questioning an election under the local government Act, the election court shall determine whether the person whose election is complained of, or any and what other person, was duly elected, or whether the election was void, and the determination so certified shall be final to all intents as to the matters at issue on the petition.

7. In *R (Woolas) v The Parliamentary Election Court* [2012] QB 1 the Divisional Court ruled that the decision of an Election Court is amenable to Judicial Review for error of law, notwithstanding the statement in s144(1) of the 1983 Act, which is materially identical to s145(1) of the Act, that the decision of a Parliamentary Election Court "shall be final to all intents as to the matters at issue on the petition". According to Thomas LJ, for the Court:

> "**47** … the fact that the decision of an election court as a judgment declaring the status of the election is a judgment in rem and in that sense is final and binding on the whole world does not mean that it cannot be challenged, if the judgment has been reached on the basis of a wrong interpretation of the law. Although it is plain that Parliament intended that a lawful decision of the election court must be final in all respects, we do not consider that Parliament intended to provide that a decision that had been made on a wrong interpretation of the law could not be challenged. An express provision to that effect would have been required...
>
> **58** It is clear from the statutory provisions which we have set out that Parliament never intended an election court to be the final arbiter of the law, though it was to be the final arbiter of fact. It was always envisaged that this would be the function of what is now the High Court. Thus in our judgment the parliamentary election court was not the type of court described by Lord Diplock in *In re Racal Communications Ltd* [1981] AC 374, 383 as a court where Parliament intended it to be the final arbiter of questions of law. On that basis, the jurisdiction in judicial review is not confined to an excess of jurisdiction in the narrow sense but extends to correcting errors made in the law it has to apply…

8. Thomas LJ stated at §9 that "the 1983 Act does not provide for any appeal on any issue of fact and that no challenge can be made to the findings of fact on any judicial review that may be available to him given the limited scope of any such judicial review". It is the Claimant's position that many of the Defendant Court's conclusions are wrong. No challenge is brought to them, however, except in those cases in which they amount to errors of law.

9. It is clear from the decision of the House of Lords in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 that a finding of fact which is unsupported by any evidence, or which is based upon a view of the evidence which could not reasonably be held, amounts to an error of law. That case involved, in a jurisdiction in which there was an appeal from the General Commissioners on questions of law only, a challenge to the Commissioners' conclusion that a joint venture to purchase a spinning plant in order to make a quick resale of it for profit was not an "adventure in the nature of trade" for income tax assessment purposes.

10. The leading judgment was given by Lord Radcliffe with whom Lords Tucker and Somervell agreed. At p.36 his Lordship stated that where:

> "[w]ithout any misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test".

11. In *RB (Algeria) v Secretary of State for the Home Department* [2009] 2 WLR 512 Lord Hope referred at §215 to the speech of Lord Radcliffe in *Edwards* and concluding that "In short the question is whether, as Lord Hoffmann has stated in para 191, no reasonable tribunal could have come to the same conclusion on the evidence". Lord Brown also agreed with Lord Hoffmann. And at §261 Lord Hope, referring to the approach taken by Lord Phillips in the same case (at §73) that the conclusions below "could only be attacked on the ground that they failed to pay due regard to some rule

of law, had regard to irrelevant matters, failed to have regard to relevant matters or were otherwise irrational", remarked that:

> "This is the language of judicial review, as stated by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 228.... So, although I prefer the way Lord Hoffmann puts it, I am willing to accept that the word "irrational" that Lord Phillips uses captures the same idea. If SIAC's determination can be shown to have been one which no reasonable tribunal could have reached, or to have been irrational in the *Wednesbury* sense, the appellate court must assume that there has been an error in point of law which entitles it to intervene. That having been said, however, I think that it is preferable, in a statutory appeal from a fact-finding tribunal, to approach the question whether its determination was erroneous in point of law by asking whether it was one that no reasonable tribunal, properly directed, could have reached".

12. In *Office of Fair Trading & Ors v IBA Healthcare Ltd* [2005] 1 All ER (Comm) 147 Carnwarth LJ, with whom Mance LJ agreed, said this about *Edwards*:

> **[95]** The case is sometimes misrepresented as a mere application of *Wednesbury* unreasonableness. This may owe something to the fact that it was cited by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410 ... However, his reference to *Edwards v Bairstow* was simply in relation to his view that 'irrationality' could now 'stand on its own feet', without resort to the inference of a mistake of law. The actual decision in *Edwards v Bairstow* could certainly not be described as 'outrageous' in any sense (at least without gross unfairness to the tax commissioners who made it). The issue was whether a particular transaction was 'an adventure in the nature of trade'. Although the House of Lords accepted that this was 'an inference of fact', they held that on the primary facts as found by the commissioners 'the true and only reasonable conclusion' contradicted that decision (see [1956] AC 14 at 36 per Lord Radcliffe).
>
> **[96]** The concluding remarks of Lord Radcliffe's speech are often overlooked. He criticised the tendency of the courts to treat such questions as 'pure questions of fact', so as to exclude review:
>
> > 'As I see it, the reason why the courts do not interfere with the commissioners' findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the commissioners of greater experience in the matters of business, or any other matters. The reason is simply that, by the system that has been set up, the commissioners are the first tribunal to try an appeal and, in the interests of the efficient administration of justice, their decisions can only be upset on appeal if they have been positively wrong in law. The court is not a second opinion, where there is a reasonable ground for the first. But there is no reason to make a mystery about the subjects that commissioners deal with, or to invite the courts to impose any exceptional restraint on themselves because they are dealing with cases that arise out of facts found by the commissioners. *Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and, if they think that the only reasonable conclusion on the facts found is inconsistent with the*

determination come to, to say so without more ado.' (See [1955] 3 All ER 48 at 59, [1956] AC 14 at 38–39; Carnwarth LJ's emphasis.)

13. Finally, in *Tesco plc v Customs & Excise Commissioners* [2003] STC 1561, Jonathan Parker LJ, with whom Schiemann and Latham LJJ agreed, cited Lord Radcliffe in *Edwards* and, having concluded that there was (§153) "nothing on the face of the [tax] tribunal's decision which is erroneous in point of law. However, in my judgment the instant case falls, potentially, within the second of the two categories of case identified by Lord Radcliffe in the above passage" (i.e., "one in which the true and only reasonable conclusion contradicts the determination")…

> **[154]** Moreover, in so far as the tribunal's determination was based on a finding that 'the Ford Sierra driving Clubcard member' (ie 'the ordinary customer'…) considered that he was paying for the vouchers when purchasing premium goods, that was not a finding of primary fact but (at most) an inference drawn from the primary facts. In my judgment an appellate court is in as good a position to draw the necessary inferences from the primary facts in the instant case as was the tribunal, and must be free to do so. In any event, in my judgment, for reasons given below, the tribunal erred in law in so far as it based its determination on that finding.
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> **[155]** In my judgment, therefore, it was open to the court below, as it is open to this court, should it disagree with the tribunal's determination of the issue as to the application of para 5, to substitute is own determination of that issue.

The Offences

14. Turning to the offences to which this application relates, the Defendant Court ruled against the Claimant, *inter alia*, in respect of offences under ss111, 113 and 115 of the 1983 Act. These provide, so far as relevant, as follows:

> **111** If a person is, either before, during or after an election, engaged or employed for payment or promise of payment as a canvasser for the purpose of promoting or procuring a candidate's election—
> (a) the person so engaging or employing him, and
> (b) the person so engaged or employed, shall be guilty of illegal employment.
>
> **113**(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.

For the purposes of this subsection—

(i) references to giving money include references to giving, lending, agreeing to give or lend, offering, promising, or promising to procure or endeavour to procure any money or valuable consideration; and

(ii) references to procuring any office include references to giving, procuring, agreeing to give or procure, offering, promising, or promising to procure or to endeavour to procure any office, place or employment…

(3) A person shall be guilty of bribery if he advances or pays or causes to be paid any money to or for the use of any other person with the intent that that money or any part of it shall be expended in bribery at any election or knowingly pays or causes to be paid any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any election.

(4) The foregoing provisions of this section shall not extend or be construed to extend to any money paid or agreed to be paid for or on account of any legal expenses incurred in good faith at or concerning an election.

(5) A voter shall be guilty of bribery if before or during an election he directly or indirectly by himself or by any other person on his behalf receives, agrees, or contracts for any money, gift, loan or valuable consideration, office, place or employment for himself or for any other person for voting or agreeing to vote or for refraining or agreeing to refrain from voting.

(6) A person shall be guilty of bribery if after an election he directly or indirectly by himself or by any other person on his behalf receives any money or valuable consideration on account of any person having voted or refrained from voting or having induced any other person to vote or refrain from voting.

(7) In this section the expression

"voter" includes any person who has or claims to have a right to vote.

115(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…

Agents

15. The finding made against the Claimant under s111 of the 1983 Act turned on the Court's findings of fact as to the activities of his "agents". It is accepted on the Claimant's part that the doctrine of agency has wide application in the context of election law, and that it was accurately summarised in the *Wakefield Case XVII* (1874) 2 O'M&H 100, at 102-103, cited with approval by Commissioner Mawrey in *Ali v Bashir & Anor* [2013] EWHC 2572 (QB) at §72:

> "By election law the doctrine of agency is carried further than in other cases. By the ordinary law of agency a person is not responsible for the acts of those whom he has not authorised, or even for acts done beyond the scope of the agent's authority … but he is not responsible for the acts which his alleged agents choose to do on their own behalf. But if that construction of agency were put upon acts done at an election, it would be almost impossible to prevent corruption. Accordingly, a wider scope has been given to the term 'agency' in election matters, and a candidate is responsible generally, you may say, for the deeds of those who to his knowledge for the purpose of promoting his election canvass and do such other acts as may tend to promote his election, provided the candidate or his authorised agents have reasonable knowledge that those persons are so acting with that object."

16. As Commissioner Mawrey went on to state in *Ali v Bashir*,:

> [73] "Agent" is thus not by any means restricted to the candidate's official "party agent" but covers a wide range of canvassers (See for example *Westbury Case* (1869) 20 LT 16 and *Tewkesbury Case, Collings v Price* (1880) 44 LT 192), committees (See for example *Stalybridge Case, Ogden Woolley and Buckley v Sidebottom* (1869) 20 LT 75) and supporters (See for example *Great Yarmouth Borough Case, White v Fell* (1906) 5 O'M & H 176.). The candidate is taken to be responsible for their actions even though he may not have appointed them as agents. Knowledge of what they are doing does not need to be proved against a candidate for him to be fixed with their actions."

Spiritual Influence

17. As to s115 of the 1983 Act, in *Southern Division of the County of Meath* (1892) 4 O'M & H 130 the Court considered the meaning of "spiritual injury" in a predecessor provision to §115. There the Catholic Bishop of Meath had said, in a letter read from the diocese's pulpits, the following about Charles Stewart Parnell (who was standing for election at the material time):

> "Now Parnellism strikes at the root, and saps the very foundations of the Catholic faith ... all the successors of the Apostles have solemnly warned and taught their respective flocks that Parnellism was unlawful and unholy, that it was in distinct, direct, and essential antagonism with the principles of Christian morality, and even dangerous to their faith as Catholics, and consequently that they should shun and avoid it. They who refuse to accept

that teaching or that principle on the unanimous authority of the whole Irish hierarchy deprive themselves of every rational ground or motive for believing in the truth of any of the other doctrines of religion ... [N]o intelligent or well-informed man can continue and remain a Catholic so long as he elects to cling to Parnellism... I earnestly implore you then, dearly beloved, to stamp out by your votes at the coming election, this great moral, social and religious evil."

18. Andrews J said the following in the *Meath South* case:

> "Having spent my life in Ireland, I well know the weight which a sincere member of the Roman Catholic Church attaches to what emanates from his clergy – the credence he desires to give to their teaching, the trust he reposes in their guidance, and the sanctity with which he regards their sacred office – and I cannot entertain a shadow of doubt that the powerfully written pastoral of the Bishop of Meath was calculated, in this Roman Catholic constituency, to seriously interfere with the free will of the electors in the exercise of their franchise at the late election...□ I shall not occupy time in going through the pastoral in detail, and, as has been done so frequently, repeating the passages of it, which plainly threaten with spiritual injury and loss those electors who should vote in support of the Parnellite candidate, and are as plainly directed to induce the electors to refrain from so voting, and to vote for the chosen candidate of the clergy."

19. In *County of Longford* (1870) 2 O'M & H 6 Fitzgerald J stated that it was "not [his] intention in any way to detract from the proper influence which a clergyman has, or by a single word to lessen its legitimate exercise":

> "The Catholic priest has, and he ought to have, great influence. His position, his sacred character, his superior education, and the identity of his interests with his flock ensure it to him; and that influence receives tenfold force from the conviction of his people that it is generally exercised for his benefit. In the proper exercise of that influence on electors, the priest may counsel, advise, recommend, entreat, and point out the true line of moral duty and explain why one candidate should be preferred to another, and may, if he think fit, throw the whole weight of his character into the scale; but he may not appeal to the fears, or terrors, or superstition of those he addresses. He must not hold hopes of reward here or hereafter, and he must not use threats of temporal injury, or of disadvantage, or of punishment hereafter. He must not, for instance, threaten to excommunicate, or to withhold the sacraments, or to expose the party to any other religious disability, or denounce the voting for any particular candidate as a sin, or as an offence involving punishment here or hereafter. If he does so with a view to influence a voter, or to affect an election, the law considers him guilty of undue influence.

20. Fitzgerald J had concluded in the *Longford* case that the adoption of the candidate at a closed meeting of the Catholic clergy was "however objectionable ... lawful... It is quite as open to the clergy as electors of the county, as it would have been to any

other body of electors … to separate themselves from the general mass of electors, select a candidate, and agree to support that candidate" (p.14). Section 115 must, in addition, be interpreted taking into account Article 9 of the ECHR which provides that:

> **Article 9 – Freedom of thought, conscience and religion**
> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

21. The fact that attempts to persuade which would be unchallengeable if voiced by a layperson, or by a religious leader in clearly secular terms, are capable of offending s115 of the 1983 Act if voiced in religious terms (in particular by reference to religious obligation) is clearly capable of amounting to an interference with Article 9. The articulation of such views will, by definition, involve the manifestation of a religious belief and so any interference requires justification (and, in light of the fact that criminal offences are at issue), strong justification.

22. In *Kokkanis v Greece* 17 EHRR 397 the ECtHR ruled that the conviction of the Claimant for proselytising was contrary to Article 9:

> 48. …a distinction has to be made between bearing Christian witness and improper proselytism. The former corresponds to true evangelism, which a report drawn up in 1956 under the auspices of the World Council of Churches describes as an essential mission and a responsibility of every Christian and every Church. The latter represents a corruption or deformation of it. It may, according to the same report, take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others…

23. It is clear from *Kokkanis* that the application of s115 is capable of involving a breach of Article 9. The same is true, it is submitted, in respect of Article 10 ECtHR which protects freedom of expression subject to justified limitations in the interests, *inter alia*, of "the rights of others".

FACTS

Background

24. The background is referred to briefly above. In short, the Claimant was elected Mayor of Tower Hamlets after a contested election in 2010 He had joined the Labour Party in 1989 and was elected as Labour Councillor in 2002 for Spitalfields and Banglatown, a ward he represented until his election in 2010 as Mayor. He unsuccessfully sought nomination as the Labour Party Parliamentary candidate for Bethnal Green & Bow in 2007 and became leader of the Labour Group in Tower Hamlets and of the Council in 2008. He was the subject of a leadership challenge in 2009. As summed up in the Defendant Court's decision §220:

> "The leading light in this faction was Mr Helal Abbas, who had been Council Leader in the early 2000s. The faction, again inevitably, used the media in its campaign, suggesting that Mr Rahman had links with Islamist extremists. At the same time, Mr Rahman's espousal of what were seen as left-wing policies earned him the obloquy of the right-wing media which were ready to accept the allegations of his flirting with extremism".

25. The Claimant successfully resisted the challenge in 2009 and in 2010 stood against the Labour Party's position on whether there should be an elected mayor in Tower Hamlets (it was the Claimant's view that there should be). In May 2010 the voters of Tower Hamlets elected Labour Party candidates to three quarters of the Council seats and voted by almost two to one for an elected mayor, and in October 2010 the Claimant was elected Mayor. He had not been endorsed by the national Labour Party which controlled the shortlist for mayoral candidates, however, despite being Leader of the Council and despite being selected on 4 September 2010 in the teeth of Labour Party opposition and after the Claimant had had to take legal action to secure a place on the selection list (see §§226-229 of the Judgment). Following that selection Mr Abbas made a number of allegations against the Claimant (as the Election Commissioner pointed out at §§230-236 of his judgment, Abbas:

> "was unable to provide any explanation as to why he had not raised any of these complaints earlier, in particular during the period when Mr Rahman was attempting by the use of legal proceedings to obtain a place on the shortlist. . One might have thought that the time to make the accusations was before the vote to select the candidate but in fact this document was produced nearly a fortnight later by Mr Abbas (who had come a poor third in the contest). Unsurprisingly, Mr Abbas did not inform Mr Rahman of his accusations before sending the document to the NEC".

26. Again as found by the Defendant Court, a meeting of the NEC was called at which the Claimant was not present but which, without having but Mr Abbas' allegations to him, holding any investigation or speaking to the Claimant, resolved to suspend him and (§234):

> "then and there, to select and impose a new candidate. There was no suggestion that the Tower Hamlets Labour Party might be consulted, still less that there might be a new ballot. It was not even suggested that, as Mr Biggs had come second in the original ballot, he might, so to speak, move up to become the candidate. The NEC simply decided *ad hoc* that it would vote, then and there, between Mr Biggs and, of all people, Mr Abbas, whose accusations could have been, for all the NEC knew about it, a complete tissue of malicious falsehoods. 16 voted for Mr Abbas and 2 for Mr Biggs. The upshot of the meeting was thus that Mr Rahman, completely unaware of the accusations and given no opportunity to counter them, was summarily sacked as candidate and his accuser substituted."

27. The Election Commissioner indicated support for Ms Shawcroft's view that the selection Mr Abbas was (§235) "motivated by the desire 'not to leave themselves open to the charge of deselecting a Bangladeshi and replacing him with a white man'". At §236 he stated that the Claimant's "treatment by the NEC was, by any standards, utterly shameful and wholly unworthy of the Party which, rightly, prides itself on having passed the Human Rights Act 1998". The Claimant was not informed of the NEC's decision, of which he remained unaware until a month before the mayoral election. He (§238) "mobilised his supporters … obtained sufficient signatures to be nominated and got his nomination papers in before the deadline. Clearly he had to stand as an independent candidate and his 'party organisation' was no more than he was able to cobble together in the few days remaining before the election". He was elected on 21 October, ("very unusually for a transferable-vote election", as the Election Commissioner pointed out) having "he obtained more than 50% of the first preference votes and twice as many votes as Mr Abbas".

28. The Claimant was re-elected in May 2014, on this occasion as leader of Tower Hamlets First (a party he formed), Mr Biggs (by then Labour candidate) coming second. On 10 June 2014 the petitioners presented their petition.

The decision

29. The facts pertaining to the 2014 election are in dispute. As above, however, it is accepted that the Claimant cannot, for the purposes of this application, challenge the conclusions of fact reached by the Defendant Court except where such conclusions amount to errors of law. The Claimant does, however, challenge the Defendant Court's conclusions on three of the charges it upheld, as follows.

    1. The Court ruled that canvassers working on the Claimant's behalf were paid by his election agent Mr Choudhuy, this in breach of s111 of the 1983 Act.

    2. The Court ruled that the Claimant was personally guilty of corruption contrary to s113(2) of the 1983 Act by reason of:

        1. grants to community organisations made (§486) for the "purpose (albeit not the only purpose) … [of] convinc[ing] the beneficiaries of the activities of the organisations concerned that the Mayor was looking after their community and the continuance of this benefit depended on his being re-elected in 2014"; and
        2. payments to broadcasters "which were ostensibly about the Borough and its administration but which were in fact personal political broadcasts on behalf of Mr Rahman, promoting him to the Bengali-speaking electorate of Tower Hamlets" and to Mr Jubair, chief political correspondent of Channel S, as "a publicist for Mr Rahman".

    3. The Court ruled that the Claimant was personally guilty of undue influence contrary to s115(2) of the 1983 Act by reason of:

        1. Statements made by Mr Hoque, Chairman of the Council of Mosques, at a public meeting and at a wedding, and
        2. A letter signed by 101 Imams and other religious leaders and scholars and published, in Bengali, in the dual-language (English and Bengali) Weekly Desh

GROUNDS FOR JUDICIAL REVIEW

30. As above, the grounds on which the Defendant Court's decision is challenged are that the Court's findings:

    1. in respect of s111 of the 1983 Act, relied on findings of fact for which there was no proper evidential basis, and which therefore amounted to errors of law;

    2. in respect of s113 of the 1983 Act:

        1. involved an erroneous construction of that provision, and

        2. relied on findings of fact for which there was no proper evidential basis, and which therefore amounted to errors of law; and

3. in respect of s115 involved an approach being taken to that provision which was contrary to authority and incompatible with Article 9 (and/or 10) ECtHR and so contrary to ss3 & 6 of the Human Rights Act 1998;

31. These will be taken in turn.

Ground 1: s111

32. The challenge to the Defendant Court's findings on s111 rests on the fact that, on the Commissioner's own admission (§453), the evidence underpinning this conclusion was "limited". It came from Labour candidates/ relatives who were unable to provide the name of any canvasser said to have been paid to canvass. It is submitted that there was no proper evidential basis for the findings of fact underpinning the Election Commissioner's findings on s111, and that these findings of fact therefore amounted to errors of law.

Ground 2: s113

33. The Commissioner's findings on s113 relied on a legally erroneous construction of that provision as well as on conclusions of fact, and/or inferences therefrom, which amounted to errors of law. The Commissioner's approach to s113(2) is so wide as to capture within the corrupt practice of bribery *any* payment made which has a purpose (which (§486) does not need to be the only or the main purpose) of inducing anyone to vote. Such an approach would have the effect that any pursuit of politically popular spending policies in the hopes of winning the next election would amount to bribery. At §386 the Commissioner accepted that a line had to be drawn between bribery and "pork-barrel politics" (the channeling by those in power of "public money, projects and jobs to areas either occupied by their existing supporters or occupied by people who might become supporters if the pork-barrel came their way… all pork-barrel politics is, ethically, a form of bribery of the electorate, its ethical dubiousness in no way diminished by its universal practice by politicians of all stripes"). As the Commissioner there recognised, "It is when we come to draw the line between pork-barrel politics (unethical but legal) and bribery (unethical and illegal) that the difficulties start to arise.

The Award of Grants

34. At §498 the Commissioner concluded that "The difference between 'pork-barrel politics' and bribery is that the former is not in the hands of a single individual or directed to the election of an individual candidate", further that the Claimant's conduct was "on the wrong side of the line … because he was, in reality, the sole controller of the grant funds and he manipulated them for his own personal electoral benefit". And at §499: " A man in control of a fund of money, not his own, who corruptly uses his control to make payments from the fund for the purposes of inducing people to vote for him is, in the judgment of the court, within the opening words of s 113(2) and thus guilty of bribery."

35. This conclusion is one of law which is subject to challenge by way of judicial review. The Commissioner appears to have determined that the element of corruption brought conduct within s113(2) which would not otherwise have been within it, whereas s113 *defines* a corrupt practice rather than *requiring* corruption as an element of the offence. The Commissioner's approach is circular. Further, his conclusion that the Claimant was corrupt rested on conclusions of fact (that "grants were not based on need" and that "the lion's share of grants went to organisations that were run by and/or for the □ Bangladeshi community") which (*Edwards*) were contradicted by the "true and only reasonable conclusion" on the evidence, and/or on inferences which were wrongly drawn.

36. The Commissioner's erroneous conclusions that "grants were not based on need" and that "the lion's share of grants went to organisations that were run by and/or for the □ Bangladeshi community" underpinned his conclusions (at §484-488) that:

    1. "the main thrust of Mr Rahman's political campaigning both as leader of the Council □ and later as Mayor was to target the Bangladeshi community and to convince that □ community that loyalty to the community meant loyalty to him";
    2. "even within the Bangladeshi community, grants were targeted at the wards where □ support for Mr Rahman and his candidates was strongest while wards where their chances of success were slim lost out";
    3. "those grants which were improperly made (whether by increasing the grant from the officers' recommendations, or by making grants to those deemed ineligible, or by making grants to those who had not sought them) [were]

targeted at the Bangladeshi community in general and at that community in the wards likely to vote for Mr Rahman and to return THF Councillors"; and therefore

4. "the making of those grants [was] corrupt".

37. The Commissioner's conclusion that "grants were not based on need" rested on the findings of the PwC report whose (§484(g)) "careful attempts … to marry up grants to ascertainable levels of deprivation and need in the Borough had resulted in the conclusion that it was impossible to do so". At §468 the Commissioner included the following extract from the PwC report:

> The Authority has stated that the 'Authority has provided PwC with a wealth of analysis demonstrating clearly that resource has followed need'. The Authority have stated also that there are "clear and direct references to relevant needs analysis within the grant specification documentation". Figure 6 below, when reviewed in conjunction with the overall award data presented in the table at paragraph in 4.68 above, and our knowledge of the decision making process as a whole, does not clearly demonstrate the basis on which relative deprivation has been a consideration in the decision to make the final MSG 2012-2015 awards. This is in light of the fact that certain areas in the east of the Borough, with levels of deprivation equal or greater to those wards situated in the west, were awarded less monies in the final MSG 2012-2015 awards than had been recommended by officers in August 2012.

38. The Commissioner's conclusion that "the lion's share of grants went to organisations that were run by and/or for the □ Bangladeshi community" flew in the face of the evidence.

39. This allegation had not been made in the Petitioners' Petition as it was served or as it was subsequently particularised. The Petition had instead focused on grants made to 5 individual organisations, the allegations made in relation to 2 of these having fallen away over the course of the proceedings. It was not until the Petitioners' closing submissions that their Counsel included a table at Appendix 1 entitled "Table of increases made by the mayor to grant recommendations of officers in respect of particular organisations".

40. This table provided a partial view, listing primarily grants to organisations with apparently Asian/ Muslim titles (the Osmani trust, Bangladeshi Youth Movement, Jagonari Women Educational Resource Centre, Wadajir Somali Community Centre and Da'watul Islam), as well as to 2 of the 5 organisations – the Dorset Community

Association and Island Bengali Welfare Organisation, whose grants had been particularised in the Petitioners' amended Petition). (The only other grants recipients listed in that document had been the Rooted Forum, the Wapping Women's Centre and the Stifford TJRS TRA, which, with the Dorset Community Association, were recorded as having received £354 380 in excess of officer recommendations by comparison with the £694 580 recorded as having been received by organisations which would appear from their names to have been Bengali/ Muslim.)

41. Counsel for the Claimant, faced for the first time with the implication that there was a religious/ ethnic pattern to the grants decisions, managed to obtain and to produce to the Court a table of grant decisions which had been omitted from the table at Appendix 1 of the Petitioners' closing submissions. As Mr Penny QC submitted (p.4297 of the transcript), the evidence showed that awards were made contrary to the officers' recommendations to organisations which "do not, on the face of it, provide services to the Muslim or the Somali community" and the Petitioners' evidence on s113 provided a "selective picture".

42. The table indicates that grants were increased to organisations including the Rainbow Hamlets LGBT Group, Age Concern and the Mudchute Association (both mentioned by Mr Penny in his submissions), The Royal London Society for the Blind, Glamis Adventure Playground, Hackney Playbus, Chisenhale Dance Space, East End CAB, etc. None of these organisations could reasonably be characterised as "run by and/or for the Bangladeshi community". An analysis of that table shows that, of the organisations that at least arguably could be so characterized by reason of their titles, of the £1.44M awarded in excess of officer recommendations no less than £1.27M went to organisations which could not reasonably be characterised as "run by and/or for the Bangladeshi community".

43. The biggest beneficiaries of such awards were the East End CABx which received an "excess" of £111 737, the Limehouse Project (£136 975) and Tower Hamlets Law Centre (£119 793). Both the Limehouse Project (£136 975) and Tower Hamlets Law Centre are in the centre of the Borough and, while the registered address of the CABx is Greatorex St E1 (the west of the Borough), the East End CABx also consist of Hackney and Newham CABx (the former in the centre of the Borough and the

latter in the East); according to the East End CABx Annual Report 2013/14, Bangladeshi clients comprised around 2% of their clientele.

44. The Commissioner's conclusion at §484(g) is simply inconsistent with the table of grants handed up by Mr Penny QC, and the foundation for it is not laid in the decision. The decision does not make any reference to the table upon which the Claimant relied, the accuracy of which was not disputed by the Petitioners.

Media Payments

45. Turning to the conclusions in respect of media bribery, these rested on payments made by Tower Hamlets Council to a number of Bengali media organisations for broadcasts which were, according to a PwC report commissioned by central government quoted by the Election Commissioner at §504:

> "ostensibly about the Borough and its administration but which were in fact personal political broadcasts on behalf of Mr Rahman, promoting him to the Bengali-speaking electorate of Tower Hamlets. In the context that Mr Rahman fully intended to stand for re-election when his first term of office expired, the broadcasts cannot be regarded as other than intended to promote his political career…"

46. There were in addition payments made to Mohammed Jubair, chief political correspondent of Channel S, who was (§508) "employed by the Council (at taxpayers' expense), apparently to advise on media relations with the Bangladeshi community…", the Commissioner concluding at §511 that "public money was misused to pay a publicist for Mr Rahman" and at §512 that "Mr Jubair's appointment [w]as … part of the corrupt relationship between Mr Rahman and Channel S rather than a free-standing episode of bribery". In the Commissioner's judgment the payments to the media fell within s113 of the 1983 Act because the Claimant "knew that it was wrong for him to spend public money in this way and he persisted even after the initial Ofcom rulings" (which found political advertising of the Claimant by a number of Bengali media organisations).

47. The Court found that the payments were corrupt because the Claimant "knew that it was wrong for him to spend public money in this way and he persisted even after the initial Ofcom rulings". And at §511 the Commissioner found that "public money was misused to pay a publicist for Mr Rahman" (Mr Jubair, chief political correspondent of Channel S).

48. The approach taken by the Commissioner to s113 renders the offence of bribery sufficiently wide to encompass any payment made in breach of advertising guidelines and/or public law principles the effect of which is to advance the cause of an election candidate, even where services are rendered or value otherwise given for that payment. It is submitted that this approach is erroneous as a matter of law.

Ground 3: s115

49. On the Commissioner's own analysis of the facts, that which was said by Mr Hoque at the meeting and wedding amounted to no more than urging those present to vote for the Claimant and endorsing the latter's candidature (§§535, 539, 541, 545). At the meeting, on the account preferred by the Commissioner, Mr Hoque and other "Islamic scholars and community leaders":

    1. "urged "the general public" to reject hatred and discrimination" and vote for the Claimant "to retain equal rights and the development of the borough";
    2. "said that once highly deprived Tower Hamlets was now placed in higher grid of national evaluation list in education, development and housing";
    3. said that "[a]fter a long struggle against racism and discrimination, Tower Hamlets is now the first choice for people of all races and religious background";
    4. said that a "group of people, who never appreciate development and cohesion are now practicing dirty tricks to stop this progress" and "want to achieve their goal by dividing the community";
    5. said that "we" "have been treated as second class citizens because of our faith and race" and "become targets in election time which is causing panic and tension in the community";
    6. said that "Islamic Scholars, mosques and Imam of Kaba have been targets of political misrepresentation";
    7. "condemn[ed] these actions";
    8. "said that the society of Islamic scholars want good relations and cohesion in the society";
    9. said that "when some people target us on purpose, it is our moral duty to protect us";
    10. stated "without any hesitation that religion never creates division in society but unites everyone";
    11. "urged everyone to vote for Mayor Lutfur Rahman to retain truth, righteousness and practice religious belief".

50. As to what was said at the wedding by Mr Hoque:

    1. "we, our relatives, neighbours and the residents of Tower Hamlets living in this community, we are fortunate that we are able to give a gift from our community to the people of Britain we have decided to nominate our Mayor

again, the Mayor is also present here, Insha'Allah; we will pray now and would like to thank the two families who have invited us"

2. "At this moment the responsibility we have as we are celebrating the wedding event, we will elect the Mayor again and celebrate his victory. I urge all of you to keep in mind that the forthcoming election will be held on 22nd. We have to forget 'win or lose'; this election is to sustain our own existence and asking you to prayer. I think the Mayor would like to say you all 'Thank you'".

51. The Commissioner interpreted the text of a letter published in the *Weekly Desh* as stating "that it was the religious duty of Muslims to support the Claimant" (§§551, 554). But the text of that letter is simply inconsistent with that conclusion. In the translation endorsed by the Court the signatories stated the following:

1. "everyone has a freedom of right to choose a candidate who is suitable and able to provide the services",
2. "the media propagandas, narrow political interests etc involving the Mayoral election of Tower Hamlets Council have created a kind of a negative impression which in turn have created confusions amongst the public, divided the community and put the community in question;
3. "today's Tower Hamlets have made significant and enviable improvements in the areas of housing, education, community cohesion, inter-faith harmony, road safety and youth developments";
4. "[i]n order to retain this success and make further progress it is essential that someone is elected as Mayor of the Tower Hamlets Borough on 22nd May who is able to lead these improvements and who will not discriminate on the basis of language, colour and religious identities;
5. "some people are targeting the languages, colours and religions and attempting to divide the community by ignoring the cohesion and harmony of the citizens";
6. "these acts as abominable and at the same time condemnable";
7. "Islamophobia … has been made an agenda for voting and voters"
8. "mosques and religious organisations have been targeted";
9. "[i]t is being publicised that any relationship [involvement] with the religious scholars and clerics are condemnable and is an offence";
10. "[r]eligious beliefs and religious practice are being criticized";
11. "One of the local former councillors of the Labour Party has stated in the BBC's Panorama programme that 'Religions divide people'";
12. "in the same programme the honourable Imam of the Holy Kaba Sharif was presented in negative and defaming ways and thus all the religious people, particularly the Muslims, have been insulted and thrown in to a state of anxiety"
13. "we cannot support these ill attempts under any circumstances"
14. "[w]e believe that it is not an offence to be a Muslim voter, an imam or Khatib of a mosque and have involvement with all these"
15. "[u]nder no circumstances it is acceptable to give a voter less value or to criticise them on the basis of their identity:
16. "[a]s voters, like in any other elections we also have a right to vote in the forthcoming Tower Hamlets Mayoral Election and we should have the opportunity to cast our votes without fear";

17. [a]s a cognisant group of the community and responsible voters and for the sake of truth, justice, dignity and development we express our unlimited support for Mayor Lutfur Rahman and strongly call upon you, the residents of Tower Hamlets, to shun all the propagandas and slanders and unite against the falsehood and injustice [emphasis added].

52. The Commissioner concluded at §§551-4 that this letter amounted to a "pastoral letter, remarkably similar to his letter to the faithful of County Meath and published in the Drogheda Independent on 2 July 1892' (in the *Southern Meath* case):

> "In other words it is a letter from an influential cleric – in this case 101 influential clerics – informing the faithful as to their religious duty. As with the Bishop, the Imams' message is clear; our religion is under attack, our enemies despise us and wish to humiliate us; it is your duty as faithful sons and daughters of the [Church][Mosque] to vote for candidate X: only he will defend our religion and our community. As the Imams' letter puts it '[our opponents are] spreading jealousy and hatred in the community. We consider these acts as abominable and at the same time condemnable'. The Bishop could not – indeed did not – express it more succinctly.
> ...What the Imams are saying, as the Bishop was saying, is: 'this is not the view of one man: this is the considered consensus of your religious leaders'.

53. It is submitted that this conclusion is perverse and that these statements, and those attributed to Mr Hoque, fall squarely within the area regarded as entirely legitimate by Fitzgerald J in the *Longford* case:

> "In the proper exercise of that influence on electors, the priest may counsel, advise, recommend, entreat, and point out the true line of moral duty and explain why one candidate should be preferred to another, and may, if he think fit, throw the whole weight of his character into the scale; but he may not appeal to the fears, or terrors, or superstition of those he addresses. He must not hold hopes of reward here or hereafter, and he must not use threats of temporal injury, or of disadvantage, or of punishment hereafter. He must not, for instance, threaten to excommunicate, or to withhold the sacraments, or to expose the party to any other religious disability, or denounce the voting for any particular candidate as a sin, or as an offence involving punishment here or hereafter. If he does so with a view to influence a voter, or to affect an election, the law considers him guilty of undue influence".

54. In the *Southern Meath* case O'Brien J, with whom Andrews J concurred, endorsed the approach taken by Fitzgerald J which he expressed as being that "it is the undoubted right of the clergy to canvass and induce persons to vote in a particular way, but that it is not lawful to declare it to be a sin to vote in a particular manner, or to threaten to refuse the Sacraments to a person for so doing" (emphasis added). The conclusion of the Court in the *Southern Meath* case was based on the fact that the Bishop of Meath

had arranged to be read from the pulpit a letter which, *inter alia*, stated in terms that "Parnellism … str[uck] at the root and sap[ped] the very foundations of the Catholic faith", that it had been "declared unlawful and unholy by the successors to the Apostles"; that those who did not accept this had "deprived themselves of every reason for believing in the doctrines of a revealed religion" and that "no intelligent or well-informed person 'could remain a Catholic and continue to cling to Parnellism'" (pp.133-134). The Bishop had, in addition, stated in a sermon that "Parnellism was nothing but a heresy, and that he would approach the death-bed of the heretic and the profligate with a greater confidence of his salvation than that of a Parnellite", also that "Parnellism was moral ruin, that it was improper and unholy, that Parellites were losing the faith and becoming heretics" (p.135).

55. Even leaving aside the impact of Article 9, it is patently the case that the statements upon which the Election Commissioner relied simply do not cross the s115 threshold, and that any determination to the contrary is irrational. That these statements do not involve any is made clear by the exercise, in relation to the letter dealt with above, of substituting the word "racism" for "Islamophobia" at §7 above, "BME" for "Mosques and religious organisations' at §8, "anti racist activists" for "religious scholars and clerics" at §9, "anti-racist" for "religious" at §10, "equality politics" for "Religions" at §11, "Chair of the EHRC" for 'honourable Imam of the Holy Kaba Sharif', "BME" for "religious" and "Asians" for "Muslims" at §12, "Asian", "anti-racist activist" for "Muslim voter" and "imam or Khatib of a mosque" at §14. There is, in short, nothing approaching any "appeal to the fears, or terrors, or superstition of those he addresses"; holding out of "hopes of reward here or hereafter" or "threats of temporal injury, or of disadvantage, or of punishment hereafter". There is nothing equivalent to a threat to "excommunicate, or to withhold the sacraments, or to expose the party to any other religious disability". There is no denunciation of any failure to vote for the Claimant "as a sin, or as an offence involving punishment here or hereafter".

56. A similar exercise could be carried out in relation to Mr Hoque's speech at the meeting while the words attributed to him at the wedding do not amount to more than a statement of support for the Claimant coupled with the expression of a hope that those at the wedding would vote for him.

57. The only reference which could conceivably be regarded as having been made to any religious obligation to vote for the Claimant is the final encouragement at the political meeting as translated by a blogger whose account was regarded by the Election Commissioner as (only) "substantially accurate", "to vote for Mayor Lutfur Rahman to retain truth, righteousness and practice religious belief". Categorising this as approaching the kind of evil at which s115 is directed would require this to be read to refer to encouragement to vote for the Claimant "to retain truth, righteousness and [as the obligatory] practice [of] religious belief".

58. The words are more readily interpreted, given the nature of all else that is said, to refer to encouragement to vote for the Claimant "to retain [the position in Tower Hamlets which facilitates] truth, righteousness and [the] practice [of] religious belief". It is submitted that it is perverse to adopt a strained interpretation of words expressed in poor English in a translation which is taken to be only "substantially accurate" interpretations, and then to take these words as amounting to or involving an "appeal to the fears, or terrors, or superstition of those [the speaker] addresses"; holding out of "hopes of reward here or hereafter" or "threats of temporal injury, or of disadvantage, or of punishment hereafter", threatening to "excommunicate, or to withhold the sacraments, or to expose the party to any other religious disability" or denouncing any failure to vote for the Claimant "as a sin, or as an offence involving punishment here or hereafter".

RELIEF

59. The Claimant respectfully seeks the following:

(1) An Order quashing the Defendant's conclusions that the Claimant was guilty personally and by his agents of corrupt practices contrary to ss113 and 115 of the 1983 Act;

(2) An Order quashing the Defendant's conclusions that the Claimant was guilty by his agents of an illegal practice contrary to ss113 and 115 of the 1983 Act decisions on 2012-13 and 2013-14 fees.

(3) An order quashing the Defendant Court's certification that the Claimant was guilty of a corrupt practice contrary to ss113 of the 1983 Act;

(4) An order quashing the Defendant Court's certification that the Claimant was guilty of an illegal practice contrary to ss111 of the 1983 Act;

(5) An order quashing the Defendant Court's report under s145 of the 1983 Act that the Claimant was guilty of a corrupt practice contrary to ss113 of the 1983 Act;

(6) An order quashing the Defendant Court's report under s145 of the 1983 Act that the Claimant was guilty of an illegal practice contrary to ss111 of the 1983 Act;

(7) Such other orders as may be necessary to remedy the unlawful actions of the Defendant;

(8) An Order that the Defendant shall pay the Claimants' costs in these proceedings.

BEN EMMERSON QC
AILEEN McCOLGAN
MATRIX CHAMBERS
2 July 2015