

Local Government Act (Northern Ireland) 2014

In the Matter of Councillor Padraig McShane (Causeway Coast & Glens Borough Council)

Decision of the Acting Northern Ireland Local Government Commissioner for Standards following the Adjudication Hearing held at the offices of Causeway Coast & Glens Borough Council, Cloonavin, 66 Portstewart Road, Coleraine on 15 November 2016 and 24 November 2016.

Adjudication Hearing: Mr Ian Gordon, OBE, QPM, Acting Local Government Commissioner and Mr Michael Wilson, Solicitor, Legal Assessor

The Northern Ireland Local Government Commissioner for Standards, Mrs Marie Anderson, has appointed Mr Ian Gordon as Acting Local Government Commissioner (the Acting Commissioner) in relation to the Adjudication Hearing process. Mrs Anderson excluded herself from the Adjudication Hearing process as, prior to her appointment, she was the Deputy Ombudsman for Northern Ireland and had responsibility for the investigation into the complaint made against the Respondent.

The Deputy Commissioner, Mr Paul McFadden, was represented by Mr Peter Coll QC. The Respondent and his legal representative, Mr Michael Brentnall, were not present at the Hearing.

COMPLAINT

A complaint by Councillor Trevor Clarke (Reference C00030) was made to the Commissioner which alleged that an elected member of Causeway Coast & Glens Borough Council (the Council), Councillor Padraig McShane (the Respondent), had or may have failed to comply with the Northern Ireland Local Government Code of Conduct for Councillors (the Code). The allegation was investigated by the then Deputy Commissioner and her staff in the Local Government Ethical Standards' (LGES) Directorate of the Northern Ireland Ombudsman's Office.

The complaint alleged that Councillor McShane had displayed an Irish tricolour flag and a Palestinian flag in the Chamber at Council headquarters in Coleraine on 19 June 2015¹. A photograph of the display, which included (and named) the Respondent, Mohammed Al-Halabi of the Municipality of Gaza and two councillors, from Derry City and Strabane District Council, was later published in three local

¹ The correct date on which the conduct complained of occurred was 18 June 2015

newspapers; the Londonderry Sentinel, the Newsletter and the Ballymoney and Moyle Times on 23 June 2015.

The Complainant stated that he believed the Respondent had used his position improperly to gain political advantage for himself and others; behaved in a way that negatively impacts the Council's reputation; breached the trust and goodwill in which the Mayor granted permission for the Respondent to show the Chamber to his visitor and breached elements of the Code.

The relevant parts of the Code in relation to whether the Respondent had failed to comply with the Code were:

- Paragraph 4.16(a) of the Code: "You must not use, or attempt to use your position improperly to confer on, or secure, an advantage for yourself or any other person".
- Paragraphs 4.18(b) and (e) of the Code: "You must not use or authorise others to use, the resources of your council in breach of your council's requirements or; improperly for political purposes".
- Paragraph 4.6 of the Code: "You must comply with any request of the Commissioner in connection with an investigation conducted in accordance with the Commissioner's statutory powers".

Following an investigation, Ms Jacqueline O'Brien the Director of Investigations (LGES Directorate), submitted a report dated 11 August 2016 to the Acting Commissioner in accordance with sections 55 and 56 of Part 9 of the Local Government Act (Northern Ireland) 2014. On 19 August 2016 the Acting Commissioner determined to hold an Adjudication Hearing into the Complaint.

THE ADJUDICATION HEARING

The Respondent was not present at the Hearing nor was his legal representative. The Acting Commissioner invited submissions from the Deputy Commissioner's representative (Mr Coll QC) on the absence of the Respondent. Mr Coll QC informed the Hearing that the Respondent, in his undated response to the Investigation Report, received on 11 October 2016 (by email from his legal representative) intimated that he would not attend the Hearing.

The Acting Commissioner adjourned the Adjudication Hearing for a short time to consider whether or not to proceed in the absence of the Respondent.

When reconvened: The Acting Commissioner had considered the papers in the Hearing bundle and the submissions from Mr Coll QC. The Acting Commissioner was very aware that it was important for him to exercise the utmost care and caution in deciding whether or not to proceed in the absence of the Respondent. The Respondent had failed to appear at the Hearing and had offered no substantive

reason for that failure; further he had instructed his legal representative not to represent him at the Hearing.

The undated response to the Investigation Report by the Respondent clearly showed that he and his legal representative were aware of the contents of the Investigation report, which he stated that he did not accept, and also that an Adjudication Hearing would take place. He had engaged in the process by submitting his response form in which he indicated that he would not be calling any witnesses nor providing any additional documentary supporting evidence. He had decided, of his own volition, not to attend and he had not instructed his legal representative to do so on his behalf. In an email to the office of the Acting Commissioner, dated 13 October 2016, the Respondent's legal adviser informed the Acting Commissioner:

“My instructions from my client are that he does not require representation at the Hearing nor will he be present”.

There was no reason to believe there had been any change in the Respondent's intention of not attending the Hearing; there had been no further communication from the Respondent and he had not sought a further adjournment. His response could indicate that he had an expectation that the matter would go ahead in his absence, therefore it appeared to be unlikely that a further adjournment would result in the Respondent appearing at a later date.

The Acting Commissioner considered that an expeditious conclusion to the case was in both the Respondent's interest and the public interest. He concluded that any possible prejudice to the Respondent, who had of his own volition waived his right to attend, was outweighed by the public interest in the case proceeding in his absence.

Evidence presented at the Adjudication Hearing

The Deputy Commissioner's Representative led evidence from the Investigation Report and statements taken from witnesses: Councillor Michelle Knight-Quillan (the former Mayor), Stephanie McLaughlin (P.A. to the Mayor), David Jackson (Chief Executive) and Tara Cunningham (former Head of Communications at the Council).

The Respondent is an elected member of the Council; he signed the declaration of acceptance of office dated 7th June 2014. The Local Government Act (Northern Ireland) 2014 provides that the Code will apply to all Councillors. In signing the declaration, the Respondent undertook to observe the Code.

Mr Coll QC submitted that the legislature's purpose in providing for and approving such a code of ethical conduct may be seen to be best encapsulated at paragraph 1.5 of the Code under the heading “Public Expectations”:

“The Northern Ireland public has the right to expect high standards of behaviour from councillors and the manner in which they conduct themselves in undertaking their official duties and in maintaining working relationships with fellow councillors and council employees. As a councillor, you must meet those expectations by ensuring that your conduct complies with the Code. The Code details the principles and rules of conduct which you are required to observe when acting as a councillor and in conducting council business. Therefore, your behaviour will be judged against these standards of conduct.”

Mr Coll QC submitted that Councillors’ words, deeds and omissions in that role must meet certain standards and requirements. They were not necessarily free to act as they might please simply on the basis that they have the benefit of democratic support and election.

In relation to the allegations set out in the Investigation Report:

1. Para 4.16(a) of the Code: “You must not use, or attempt to use your position improperly to confer on, or secure, an advantage for yourself or any other person.”

On 17 June 2015 Councillor McShane obtained the verbal consent of the Chief Executive (David Jackson) and the then Mayor (Ms Knight-McQuillan) to show some visitors, including a visitor from Gaza, around the Council Chamber at the Council's Coleraine Headquarters.

On 18 June 2015 at 10.38am the Respondent visited the Council's headquarters accompanied by four men. They spent some time inside the Council Chamber during their visit. Later that day, in the evening, the Respondent and his visitors met again at the Council's premises.

On 23 June 2015 a photograph of the Respondent accompanied by three other men appeared in three local papers: the Londonderry Sentinel, the Newsletter, and the Ballymoney and Moyle Times newspaper. The photograph showed the men sitting behind a table which had draped in front of it the Irish flag and the Palestinian flag. The article was entitled "Row after tricolour and Palestinian flag displayed in council chamber". The caption below the photograph read: "Councillors Darren O'Reilly, Gary Donnelly and Padraig McShane with Mohammed Al Halabi in Coleraine council chamber". In his statement dated 7 November 2015, the Chief Executive said he had been shown a photograph of Councillors Padraig McShane, Darren O'Reilly, Gary Donnelly and Mohammed Al-Halabi and he believed they had been photographed whilst sitting at the top of the room in the Chamber.

If the Mayor and the Chief Executive had known that such a photograph was to have been taken they would not have given permission to the Respondent for

that to take place. The Council was established on 1st April 2015 and there had not been a display of any flag in the Chamber since that date.

The Respondent's response, via his solicitor, to the draft Investigation Report (dated 27th July 2016) stated:

"In respect of the issues that appeared in the Press email request, this is unclear as to the veracity of the email or whether this can be truly attributed to the actions of Cllr McShane as there does not appear to be any evidence other than a comment from the press verifying that this emanated from Cllr McShane".

Mr Coll QC submitted that, at that stage, it was not said on behalf of the Respondent that he did not provide the media with the photograph and the caption. He said that would have been an opportunity for the Respondent or his representative to have taken that course if that were so. They did not do so.

Mr Coll QC said that the statement by Tara Cunningham, dated 1 November 2016, spoke of receiving media enquiries from journalists on local newspapers. These were by email and were asking for comment on the event in the Council Chamber, which had involved the Respondent. Ms Cunningham had stated that one journalist, identity not recalled, had sent her an email containing a statement and photograph which had been provided by the Respondent. She had removed the identity of the journalist (as was her practice) and forwarded the email to the Chief Executive and the Mayor. The email from the journalist read:

"Hi Tara. Further to our telephone conversation: Here is the report sent in by Cllr P McShane. Pic attached".

"Political representatives from Derry City and Strabane District Council, Cllr Gary Donnelly Independent, Cllr Darren O'Reilly Independent, and Cllr Padraig McShane from the Causeway Coast and Glens Borough Council with Mr Al-Halabi international director of Cooperation for the Municipality of Gaza in the Causeway Coast and Glens Borough Council Chamber in Coleraine with an Irish Tricolour and Palestine flag were erected for the meeting in the Unionist controlled council. Cllr Padraig McShane held a meeting in the Causeway Coast and Glens Borough council offices in Coleraine with an Irish Tricolour and a Palestine flag draped over the Chamber".

Mr Coll QC drew attention to the response to the draft investigation report, by the Respondent, where he disagreed with the finding that his political standing would have increased as a result and gained political advantage. The response continued:

"...rather than increasing his political standing, the Respondent had highlighted the links between Ballycastle and Gaza that still exist. The motivation for doing

so was on humanitarian grounds for which he had highlighted previously and been quoted on this basis”.

Mr Coll QC submitted that the Respondent had clearly used the Council Chamber to display flags without permission and without the benefit of policy backing, and further engaged in/promoted the publication of photographs showing same, in order to make a political point to secure advantage for himself with others, namely his supporters and those who share his political outlook, and/or to secure similar advantage for others. He said that it was beyond argument that these elements of the paragraph of the Code have been made out, the Respondent:

- a. Had used/attempted to use his position as a Councillor.
- b. He did so to secure an advantage for himself/others.

2. Para 4.18(b) & (e) of the Code: “You must not use or authorise others to use the resources of your council in breach of your council’s requirements; or improperly for political purposes.”

Mr Coll QC referred to the submissions made under the previous sub-heading in respect of this alleged breach of the Code.

In his statement, the Chief Executive specifically referred to the very sensitive nature of issues pertaining to flags in the Council area and stated that he regarded the Respondent’s actions as unacceptable, especially given the fledgling nature of the new council and the sensitivities in regards to flags. In the absence of a specific policy on the matter the Chief Executive stated that he would expect common sense and for elected representatives and any staff member to do what is decent and the right thing to do. He went on to state that he would have expected that he (the Respondent), or indeed any democratically elected representative would have respected the Chamber.

3. Para 4.6 of the Code: “You must comply with any request of the Commissioner in connection with an investigation conducted in accordance with the Commissioner’s statutory powers.”

Mr Coll QC said that during the course of the investigation conducted by the Director on behalf of the Deputy Commissioner, staff on their behalf wrote to the Respondent asking him to attend for interview in connection with the complaint that had been made against him. Initially that was by way of letter on 29 January 2016. The Respondent did not respond to that letter.

He was then written to on 24 March 2016 to inform him again that he was required to attend for interview, and that was posted to his home address by

recorded delivery. The letter was signed for on 26 March, and there was no response at that point from the Respondent in respect of that letter.

A third letter was then sent to the Respondent on 8 April informing he had not responded to the requirement that he attend an interview and it was considered by this Office that he was not prepared to cooperate with the investigation process as a result. He was further advised that his failure to cooperate would be taken into account when the report was being prepared. Again that was sent by recorded delivery to his home address. Both of those letters also informed the Respondent that he was required to treat correspondence from the Commissioner's office as confidential.

Mr Coll said that on 4 May 2016, in the Irish News newspaper, there was an article entitled "Padraig McShane refuses to take part in council tricolour probe". The Respondent made the point therein that he had no intention of taking part in this investigation.

The Respondent did not make himself available for interview, this fact is not disputed in the response to the draft Investigation Report. In his response to the final Investigation Report, the Respondent had no comment to make on that fact.

FINDINGS OF FACT:

The evidential test for consideration of findings of fact is on the 'Balance of Probabilities'. Although there was no express challenge from the Respondent to the presentation of facts on behalf of the Deputy Commissioner, he must still satisfy the Acting Commissioner, on the balance of probabilities, of the facts contended for.

In the absence of the Respondent or his legal representative and the absence of any further relevant submissions, from either person following notification to hold the Hearing, the Acting Commissioner relied on:

1. The letter dated 27 July 2016 submitted by his solicitor, on behalf of the Respondent setting out his response to the draft Investigation Report.
2. The pro forma document provided by Councillor McShane, stamped by his solicitor but without a date (received by the Acting Commissioner on 11 October 2016), in response to the report and in connection with the Adjudication Hearing.

The Acting Commissioner found the following facts:

1. The Respondent was an independent member of the Council.
2. He signed his Declaration of Office on the 7 June 2014.

3. The Code applied to the Respondent.
4. As set out at paragraph 20 sub paragraphs (a) to (i) of the Investigation Report (extracts from the report are at Annex A): the Acting Commissioner was satisfied that the evidential burden had been discharged in relation to that paragraph.
5. In relation to paragraph 25 of the Investigation Report: the Acting Commissioner was satisfied that the Respondent had no express approval from the Mayor or council officials to use the Chamber for the purpose of a photo opportunity involving the display of flags.
6. The issue of flags on council premises was, at the time, the subject of an equality impact assessment.
7. The Acting Commissioner had also considered the content of four statements open to the Adjudication Hearing, comprising:
 - a. Michelle Knight-Quillan, dated 8 Feb 2016
 - b. Stephanie McLaughlin, dated 7 July 2016
 - c. Tara Cunningham, dated 1 November 2016
 - d. David Jackson, dated 7 November 2016

The factual content of these statements, which had not been challenged by the Respondent, was accepted by the Acting Commissioner.

8. The photograph complained of was taken with the knowledge or approval of the Respondent. There was nothing in the letter of 27 July 2016, from the Respondent's legal representative, which would cause the Acting Commissioner to doubt his conclusion.
9. In relation to the photograph which appeared in the Press on 23 June 2016, on the balance of probabilities, the Acting Commissioner was satisfied from the evidence of Tara Cunningham that the photograph complained of, with a brief written report to put the photograph into context, was provided to the Press by the Respondent.

SUBMISSIONS

Paragraph 4.16(a) of the Code

Mr Coll QC submitted:

1. The Respondent had used a publicly owned facility, the Council Chamber, to display flags in a fashion that he would have known would attract controversy and dispute, surreptitiously, in the sense that he did not obtain prior permission and it was outwith the protection of a prior agreed Council position/policy.
2. Photographs of the same were taken and published to the media. Press enquires made to the Council after the event in the Chamber show that the photographs and the accompanying text were provided to the media by Councillor McShane.
3. The Respondent could not but have realised that the flags issue was one characterised by division and controversy within the Council and in the wider society. For example, as evidenced in the Chief Executive's statement of 7th November 2016, that at that time a flags policy was a matter of specific political debate and disagreement within the Council and it remained unresolved, unfinalised, and there was an interim position.
4. The statement of the then Mayor that no flags had been flown in the Chamber since the coming into existence of the Council on 1 April 2015.
5. The display of flags and emblems can often be an emotive and divisive matter in Northern Ireland given the well-established disputes and differences relating to national identity. The Respondent's response at Part C to the Investigation Report clearly demonstrated his own recognition of the political and public interest sensitivities arising in respect of flags issues in relation to the Council: "I was expressing the views of those people who elected me. This relates to the preferential treatment of the status of the Union flag by the Council..."
6. The Respondent had clearly used the Council Chamber to display flags without permission, without the benefit of policy backing, and he further engaged in and promoted the publication of the photographs showing same in order to make a political point to secure advantage for himself with others; namely his supporters and those sharing his political outlook.
7. The key issue is whether the action of the Respondent was improper; the dictionary definition of improper, meaning not in accordance with accepted standards.

8. The above points demonstrated satisfactorily that his actions, as found, were in breach of Paragraph 4.16(a) of the Code.

Paragraph 4.18(b) and (e) of the Code

Mr Coll QC drew on the submissions made above in relation to paragraph 4.16(a) and further submitted:

1. The Commissioner's Guidance on the Code (at paragraph 37 of the Investigation Report) which stated:

"Where the council provides you with a resource, you must only use that resource for carrying out official council business or any other activity for which its use has been expressly authorised by your council".

2. The Respondent had manifestly failed to obtain permission to use the Council Chamber for the display of flags. Similarly, and further, he failed and omitted to obtain permission for the display of flags to be photographed and subject to publication through him in the media.
3. In respect of 4.18(e) the key was whether it was improper. It was undoubtedly the case there had been a use of Council's facilities for political purposes, but was it an improper use? For the reasons already given and that which are set out in the investigation report, Mr Coll QC submitted that it most definitely was an improper use and that by itself amounted to a breach of the Code.

Paragraph 4.6 of the Code

Mr Coll QC submitted:

1. By his own admission, the Respondent was in breach of that element of the Code; that had been accepted in his solicitor's communication.
2. In various newspaper reports, the Respondent made it clear that he would not make himself available for interview by the investigating officers.
3. That the facts incontrovertibly demonstrated a failure by the Respondent to abide by paragraph 4.6 of the Code. He did not make himself available for interview as part of the investigation and the same had been admitted on his behalf.

Article 10 of the European Convention on Human Rights (ECHR)

Mr Coll QC submitted that:

1. The purpose of, and the legitimate aim being furthered by the Code, was to provide for and secure the high standards required from elected Councillors thereby seeking to protect the rights of others and prevent crime and disorder.
2. To the extent that it may be considered to have been raised as a contention, there was no basis upon which it could be said that requiring the Respondent to operate within the confines of the Code was an unlawful interference with his Article 10 ECHR right to freedom of expression.
3. Freedom of expression, particularly in a political context, was plainly an important and enhanced right (*Heesom v Public Services Ombudsman for Wales [2014] EWHC 1504 (Admin)*), but that it was however a qualified right, subject to restriction in order to protect against its abuse. (See for example, *Re Misbehavin' Ltd [2006] NI 181 NICA* and *[2007] 3 All ER 1007 HL*).
4. The identified and purported breaches of the Code did not relate to nor did they result in any form of prohibition upon the Respondent from expressing his views about the flags issue or indeed the Palestine issue; rather they simply served to ensure that such expression did not diminish the rights of others by improper use of the position as Councillor and by the improper use of Council resources in the making of political points and advantage in a divisive and controversial area of discourse.

DECISION

The Acting Commissioner considered all of the evidence including the submissions given orally at the Adjudication Hearing and found as follows:

1. The Code applied to the Respondent.
2. The Respondent had failed to comply with:
 - Paragraph 4.16(a) of the Code: “You must not use, or attempt to use your position improperly to confer on, or secure, an advantage for yourself or any other person”.
 - Paragraph 4.18(b) and (e) of the Code: “You must not use or authorise others to use, the resources of your council in breach of your council’s requirements or; improperly for political purposes”.
 - Paragraph 4.6 of the Code: “You must comply with any request of the Commissioner in connection with an investigation conducted in accordance with the Commissioner’s statutory powers”.

REASON FOR DECISION

1. Paragraph 4.16 (a)

“You must not use, or attempt to use your position improperly to confer on, or secure, an advantage for yourself or any other person”.

- a. There was no express permission granted or sought by the Respondent to use the Chamber to display flags. If he had declared his intended purpose, it would have been refused as evidenced by the statements of the then Mayor and Council officials.
- b. No flag had been shown in the Chamber since the Council was established on 1 April 2015.
- c. Against the background of a divisive and emotive issue, concerning the display of flags, the council operated on the basis of an interim flags policy where only the Union flag was flown outside the Council building.
- d. The council policy remained a matter of debate and due to the sensitivity concerning flags, a final policy remained to be determined by the whole Council.
- e. The Respondent must have been aware of the current sensitivity and issues around flags both in his council and elsewhere in Northern Ireland. His own response at Part 3 of that document, to the investigation report, demonstrated his own recognition of political and public interest.
- f. The Respondent’s misuse of the Council Chamber and his subsequent publication of the photograph was an attempt to use his position as a councillor to secure an advantage for himself or others. The surreptitious manner in which he did so was improper and he knew or ought to have known it would attract publicity and controversy in equal measure.

2. Paragraph 4.18 (b) and (e)

“You must not use the resources of your council...”:

4.18(b) - in breach of your council requirements:

- a. The Acting Commissioner relied on what was said above on 4.16(a). In addition, the Commissioner’s Guidance on the Code which states:

“Where the council provides you with a resource, you must only use that resource for carrying out official council business or any other activity for which its use has been expressly authorised by your council”.

- b. The failure to inform the council of the intended display was key to establishing a breach under sub paragraph (b). Whilst the Acting

Commissioner accepted this was not a formal council meeting, the private nature of the meeting, in the Council Chamber, was none the less conditioned by the choice of venue.

4.18 (e) – improperly for political purposes:

- c. This followed from what had been said in relation to 4.18 (b). The use of the Chamber was clearly for political purposes and in the absence of permission to display flags and given the surreptitious manner in which the Council Chamber was used – this was an improper use.

3. Paragraph 4.6

“You must comply with any request of the Commissioner in connection with an investigation conducted in accordance with the Commissioner’s statutory powers”.

- a. The Respondent on his own admission accepted that he did not make himself available for interview and does not dispute that he was in breach of this paragraph of the Code.
- b. Even in the absence of the Respondent’s admission the evidence clearly established that he had failed to respond to correspondence from the Commissioner’s office, concerning the investigation and had failed to attend for interview.
- c. The Acting Commissioner did not rely on the allegation of ‘breach of confidentiality’ in paragraphs 41 and 42 of the Report as he had agreed to it being withdrawn by the Deputy Commissioner.

4. Consideration of Article 10 of the ECHR

- a. In the section of his Response Document in which the Respondent rejects the findings of the Investigation Report he stated:

“I am an elected politician expressing freedom of speech rights. I was expressing the views of those people who elected me.”

- b. Pursuant to the Local Government Act (Northern Ireland) 2014, the Northern Ireland Assembly approved the Code on 27 May 2014.



In the course of his submissions Mr Coll QC, on behalf of the Deputy Commissioner, referred to paragraph 1.5 of the Code under the heading “*Public Expectations*”:

“The Northern Ireland public has the right to expect high standards of behaviour from councillors and the manner in which they conduct themselves in undertaking their official duties and in maintaining working relationships with fellow councillors and council employees. As a councillor, you must meet those expectations by ensuring that your conduct complies with the Code. The Code details the principles and rules of conduct which you are required to observe when acting as a councillor and in conducting council business. Therefore, your behaviour will be judged against these standards of conduct.”

The Acting Commissioner accepted the submission of Mr Coll QC that high standards were expected and demanded of those who enter into public life. He was also satisfied that the requirement imposed on the Respondent, as a Councillor, to respect the Code was not an unlawful interference with his rights under Article 10 or to his freedom of expression.

- c. The United Kingdom gave direct effect to the ECHR under the Human Rights Act 1998. Section 3 of that Act provides that legislation, including subordinate legislation, must be read as compatible with the Convention rights, so far as it is possible to do so. Article 10 makes it clear that this right is not absolute and that it may be restricted if (and in so far as) restriction is prescribed by law and is:

“necessary in a democratic society.... for the protection of the reputation or rights of others” (see *Heesom v Public Service Ombudsman for Wales* [2014] 4 All ER 269).

- d. Article 10(2) expressly recognises that the right to freedom of expression brings with it duties and responsibilities. As with all ECHR rights that are not absolute, the State has a margin of appreciation in how it protects freedom of expression and how it restricts that right. As a qualified right, Article 10 is subject to restriction in order to protect against its abuse (see *Re Misbehavin’ Limited* [2006] NI 181 NICA and [2007] 3 All ER 1007 HL).
- e. The Acting Commissioner accepted the submission of Mr Coll QC that the purpose of, and the legitimate aim being furthered by the Code is to provide for and secure the high standards required from elected Councillors thereby seeking to protect the rights of others and prevent crime and disorder. He was satisfied that in construing the Code in the present case, any restriction upon the Respondent’s freedom of

expression in the context of the facts which he had established, was a necessary and proportionate restriction.

- f. The Acting Commissioner took into account the importance of allowing a tolerance of views that others in Society may find offensive but, in the context of what Mr Coll QC described as the difficult issue of the flying of flags associated with national identity as being a keen area of political and public dispute in Northern Ireland, the Code should be construed in the present case to restrict the ability of a Councillor, such as the Respondent, to take it upon himself to display flags in the Council Chamber, without permission from the Council, and/or without the benefit of an agreed Council policy permitting such display. In coming to this conclusion the Acting Commissioner had also taken into account the decisions in:

Re Byers [2004] NIJB 252, Re McCafferty QBD NI 9/2/07 and Re Donaldson [2009] NICA 25 and (2011) 53 EHRR.

- g. A prohibition on the Respondent's wish to display flags in the Council Chamber was, at most, a very small but proportionate restriction on his freedom of expression, and did not inhibit his right, under Article 10, "to hold opinion". The Respondent remained free to exchange and discuss his political ideas and the restriction on the use of the Council Chamber was a minimal interference with any Article 10 right and was justifiable in the context of the sensitive issue of flags and emblems in Northern Ireland, and in the context where the Council itself operated under an interim policy on flags.

For those reasons outlined above, the Acting Commissioner found that the Respondent had failed to comply with the paragraphs: 4.16(a), Paragraph 4.18(b) and (e) and 4.6 of the Code.

EVIDENCE IN RELATION TO SANCTION

The Deputy Commissioner's representative informed the Adjudication Hearing that there was nothing known in relation to any previous breaches of the Code by the Respondent.

Mr Coll QC stated that he would refer to 'Appendix A' to the Sanctions Guidelines headed: "Factors that the Commissioner may take into account when determining the appropriate sanction". Mr Coll QC then drew attention to other factors pursuant to paragraph 67 of the Adjudication Procedure document concerning aggravating and/or mitigating factors that should be taken into account.

In mitigation, Mr Coll QC did not make any specific submission.

On aggravating factors, Mr Coll QC submitted that bullet point 3 on page 9 of Appendix A might be engaged: "Misusing powers for political gain".

He also referred to the need for engagement of Article 10 of the ECHR, in the Acting Commissioner's finding, where infringement of Article 10(1) would have to be justified under Article 10(2) and, likewise, sanction would have to be justifiable under 10(2) in terms of proportionality.

The Acting Commissioner adjourned the Adjudication Hearing to 24 November 2016 to allow him to consider sanction. The adjournment was notified to the Respondent and his legal representative by staff in the Acting Commissioner's office.

THE RECONVENED HEARING ON 24 NOVEMBER 2016

The Respondent did not attend the reconvened Adjudication Hearing and had not instructed his legal representative to represent him in his absence. The Acting Commissioner again invited submissions from the Deputy Commissioner's representative who said the Respondent was clearly aware of the hearing and had chosen not to participate, and that was obviously his right to do. Nothing had changed since the hearing held on 15 November 2016 and it was appropriate to proceed.

SANCTION

The decision of the Acting Commissioner, made under Section 59(3)(c) of Part 9 of the Local Government Act (Northern Ireland) 2014, was to suspend the Respondent for a period of three (3) months.

The sanction is to have effect from 9am on Monday 28 November 2016.

The Acting Commissioner had referred to the Adjudication Procedures Document – Guidance on Sanction and considered all of the sanctions set out therein. The principal purpose of sanctions is the preservation of public confidence in local government representatives.

Mitigating Factors:

- In the absence of evidence to the contrary the Respondent had a previous record of good service and compliance with the Code.
- The Respondent did not dispute that he had failed to comply with Paragraph 4.6 of the Code.

Aggravating Factors:

- The Respondent's actions were such as to bring the council into disrepute.

REASONS FOR SANCTION

1. The Respondent had failed to comply with the Code.
2. The circumstances of this case were such that it would be inappropriate to take no action against the Respondent in relation to his failures to comply with the Code.
3. The allegations against the Respondent were serious; his conduct was deliberate and demonstrated a disregard for the Code to the extent that which censure would not be an appropriate sanction
4. The Respondent had sought permission to show personal visitors the Council Chamber and Mayor's Parlour; he had not sought permission to display flags in the Chamber. He was aware of the current sensitivity and issues around flags both in his council and elsewhere in Northern Ireland. This was a misuse of the Council Chamber and his subsequent publication of the photograph was an attempt to use his position as a councillor to secure a political advantage for himself or others.
5. The surreptitious manner in which the flags were displayed demonstrated the Respondent's disregard for his council's developing policy on flags and was an improper use of the Chamber. His deliberate actions and the subsequent publicity, generated by himself, were likely to cause controversy and brought the role of a councillor and his council into disrepute. It was not, however, considered such as would justify a finding of failing to comply with paragraph 4.2 of the Code for the reasons set out at paragraphs 26 to 30 of the investigation report.
6. For the reasons stated in paragraphs 3, 4 and 5 above, partial suspension would not be appropriate given the nature of the conduct by the Respondent.
7. The Respondent had embarked on a deliberate course of action which was politically motivated and contrary to what his council would expect from an elected member. He accepted that he had failed to comply with Paragraph 4.6 of the Code. The Acting Commissioner acknowledged the Respondent's right not to appear at the Hearing and have an opportunity to comment on his actions there was, however, no evidence that he had shown insight or reflection on any of his failures to comply. To the contrary, it appeared from quotes in the media, attributed to the Respondent, that he was unconcerned about the outcome of his actions.
8. Such conduct and lack of insight or understanding of the purpose of the Code, gave rise to a question on the likelihood of further failures to comply with the Code, on the part of the Respondent.

9. The Acting Commissioner accepted the submission of Mr Coll QC that the purpose of, and the legitimate aim being furthered by the Code, is to provide for and secure the high standards required from elected Councillors thereby seeking to protect the rights of others and prevent crime and disorder. In relation to ECHR Article 10, the Acting Commissioner was satisfied that in construing the Code in the present case, any restriction upon the Respondent's freedom of expression in the context of the facts which he had established, was a necessary and proportionate restriction.
10. A prohibition on the Respondent's wish to display flags in the Council Chamber was, at most, a very small but proportionate restriction on his freedom of expression, and did not inhibit his right, under Article 10, "to hold opinion". The Respondent remained free to exchange and discuss his political ideas and the restriction on the use of the Council Chamber was a minimal interference with any Article 10 right and was justifiable in the context of the sensitive issue of flags and emblems in Northern Ireland, and in the context where the Council itself operated under an interim policy on flags.
11. In relation to the determination of Paragraph 4.6 of the Code where the Respondent had failed to cooperate with the investigation: this showed disregard for the standards regime and left the impression that he was taking the proceedings lightly.
12. It was not considered that the conduct was sufficiently serious as to warrant disqualification, whereas it was of a nature:
 - a. That it was necessary for the sanction to uphold public confidence in the standards regime and local democracy - as shown in paragraph 4 and 5 above.
 - b. There was a need to reflect the seriousness of the matter - as shown in paragraphs 8 and 11 above.
 - c. There was a need to make it understood that the conduct should not be repeated - as shown in paragraphs 8 and 11 above.
13. It had been taken into account that the Respondent may be denied payment of allowances during the period of suspension under the terms of his Council's Scheme for the Payment of Allowances to Councillors and Committee Members.
14. It was therefore appropriate to suspend the Respondent for the period of 3 months. The sanction of suspension was a proportionate restriction in the circumstances of the failures to comply with the Code and the outcomes of the Respondent's conduct. In this regard, the Acting Commissioner reiterated his comments, set out above, in relation to Article 10 of the ECHR.

RIGHT OF APPEAL

The Respondent may appeal to the High Court against this decision in accordance with the provisions of Section 59(14) of the Local Government Act (Northern Ireland) 2014.

Date: 20 December 2016



Ian A. Gordon OBE, QPM

Extracts from the Investigation Report of 11 August 2016

Paragraph 20 (a) to (i) - Findings of Fact

20. The following are my findings of fact:

- (a) On 17 June 2015 Councillor McShane obtained the verbal consent of the Chief Executive and the Mayor to show some visitors (including a visitor from Gaza) around the Council chamber at the Council's Coleraine headquarters office. Verbal consent was also given for the visitors to look into the Mayor's Parlour from the doorway.
- (b) On 18 June 2015 at 10.30am Councillor McShane visited the Council's Coleraine headquarters office accompanied by four men. Council officials provided refreshments and accompanied the visitors as they looked into the Mayor's Parlour. The visitors spent some time inside the Council chamber during their visit.
- (c) Councillor McShane's visitors returned to the Council premises later that evening and met again with Councillor McShane.
- (d) On 23 June 2015 a photograph of Councillor McShane accompanied by three other men appeared in three newspapers: the Londonderry Sentinel, the Newsletter and the Ballymoney and Moyle Times newspaper. The photograph showed the men sitting behind a table draped with both the Irish tricolour and Palestinian flags. The article was entitled "Row after tricolour and Palestinian flag displayed in council chamber". The caption below the photograph read: "Councillors Darren O'Reilly, Gary Donnelly and Padraig McShane with Mohammed Al-Halabi (second left) in Coleraine council chamber".
- (e) On 29 January 2016, as part of my investigation, my staff wrote to Councillor McShane, at the Council's headquarters address, informing him that he was required to attend for interview in connection with the complaint that had been made against him (Appendix E). Councillor McShane did not respond to this letter.
- (f) On 24 March 2016, my staff wrote to Councillor McShane a second time to inform him that he was required to attend for interview (Appendix F). This

letter was posted to Councillor McShane's home address by 'Signed For' delivery. The letter was signed for on 26 March 2016 at 11.28am. (Appendix G). The signature reads "P McShane". My staff received no response from Councillor McShane in respect of this second letter.

- (g) On 8 April 2016 my staff sent a third letter to Councillor McShane (Appendix H) informing him that as he had not responded to the requirement that he attend interview we considered that he did not wish to co-operate with the investigation process. The letter advised Councillor McShane that his failure to do so would be taken into account when the report on the investigation of Councillor Clarke's complaint is being prepared. This letter was sent to Councillor McShane's home address by 'Signed For' delivery. The delivery was signed for on 9 April 2016 at 9.49am (Appendix I). The signature is indecipherable but the printed name is recorded by Royal Mail as "BM".
- (h) The letters dated 24 March 2016 and 8 April 2016 also informed Councillor McShane that he was required to treat all correspondence from this Office as confidential.
- (i) An article appeared in the 4 May 2016 edition of The Irish News newspaper (Appendix J). The article is entitled: "Padraig McShane refuses to take part in council tricolour probe". The article also attributes the following comment to Councillor McShane: "...Mr McShane said on Tuesday night he has no intention of taking part in the investigation."

Paragraph 25

25. Council officials were unable to provide my investigation with any policy or procedure which would indicate that Councillor McShane had the approval or the authority which would permit the use of the Chamber for the purposes of staging this photo opportunity involving the display of flags. In the absence of express permission, or the existence of a supportive Council policy, in my view Councillor McShane was not entitled to use the Council Chamber for this purpose.

Paragraphs 26 to 30

Potential Breach 1.

Paragraph 4.2

“You must not conduct yourself in a way which could reasonably be regarded as bringing your position as a councillor, or your council, into disrepute.”

26. In considering this potential breach I have taken into account the Commissioner’s Guidance on the Code. The Guidance explains that councillors’ actions, as a councillor or in their private life, have the potential to adversely impact on their position as a councillor or their council. In providing an example of actions which could be considered as bringing a councillor into disrepute the Commissioner refers to *“dishonest and deceitful behaviour or conduct that results in a criminal conviction, such as a conviction for fraud or assault”*. This indicates that a finding of disrepute requires the conduct in question to be both serious and of a nature that undermines the public trust in the office.

27. The Commissioner’s Guidance adds that, in considering whether a councillor’s actions or behaviour could reasonably be regarded as bringing their position, or their council, into disrepute, she will assess:

- whether that conduct is likely to diminish the trust and confidence the public places in your position as councillor, or your council, or is likely to result in damage to the reputation of either: and
- whether a member of the public – who knew all the relevant facts – would reasonably consider that conduct as having brought your position as councillor, or your council into disrepute.

28. I have also taken into account the impact of relevant case law on complaints against local authority members which related to issues of ‘disrepute’. In the case of *Livingstone v Adjudication Panel for England* [2006] EWHC 2533, which considered grossly offensive remarks made by, the then Mayor of London, Ken Livingstone, the judge commented:

“While the appellant has a high profile as Mayor, I doubt that many people would regard what he did as bringing disrepute on the office rather on him personally. Misuse of office can obviously bring disrepute on the office, but personal conduct will be unlikely to do so. I think the Tribunal [which had found against Mr Livingstone] had applied a test which failed to recognise the real distinction between the man and the office”.

29. In my view, it cannot be concluded that a member of the public who knew all the relevant facts would reasonably consider Councillor McShane's conduct to have brought himself or the Council into disrepute. Councillor McShane's conduct is likely to have been applauded by his political supporters. It is equally likely that his conduct would be poorly regarded by other sections of the community but, in my view, this is not sufficient to constitute a breach of Paragraph 4.2 of the Code.
30. In light of the evidence and applying the rationale in the Livingstone case and the Commissioner's Guidance, I am not satisfied that Councillor McShane's conduct in the Council Chamber on 18 June 2015 was so serious in nature or degree that it would be likely to diminish public trust and confidence in the office of councillor in his current council. I am therefore unable to conclude that there is evidence of a breach of Paragraph 4.2 of the Code on Councillor McShane's part.

Paragraphs 37 to 38

37. Referring to the Commissioner's Guidance on the Code of Conduct, a councillor must only use council resources in accordance with his / her council's stated requirements: "Where the council provides you with a resource, you must only use that resource for carrying out official council business or any other activity for which its use has been expressly authorised by your council."
38. From the evidence available, the authority given to Councillor McShane to use the Council's chamber did not extend to participation in a photograph (later published) in which the Palestinian and Irish flags were displayed in the Council Chamber. I am satisfied that express permission would have been required for such conduct given the political sensitivities associated with the display of flags on the Council's premises. The Guidance also makes clear that "you must not use your council's resources improperly for political purposes." Since there is no evidence that permission was given, and it is clear that Councillor McShane's conduct was political in nature, I have concluded that it is likely that Councillor McShane is in breach of this aspect of the Code.