

THE HIGH COURT JUDICIAL REVIEW**[2011 No. 541 J.R.]****BETWEEN****DESMOND SHIELS****APPLICANT****AND****DONEGAL COUNTY COUNCIL****RESPONDENT****AND****MICHAEL McBRIDE****NOTICE PARTY****JUDGMENT of Ms. Justice Dunne delivered the 7th day of November 2012****Background**

The applicant herein has sought a declaration that the co-option of the notice party as a member of the respondent was unlawful. He has sought other related relief and the grounds upon which his application has been brought are set out in the statement of grounds as follows:-

"Immediately upon Mr. (now Senator) Harte being appointed to Seanad, he became disqualified from membership of the Council; Local Government Act 2001, s. 13(1)(e) as amended, and a casual vacancy there then occurred. Because at the time of his election on or about the 6th day of June 2009, he was a non party candidate, the procedure for filling the vacancy was that in s. 19(3)(b) of the this Act which applies the Council's standing orders. Order 84, requires the vacancy to be filled by a non party candidate. But the notice party did not fit this description when he was co-opted on or about the 30th May, 2011, because at the time he was a Labour Party candidate/nominee. Were Mr. McBride an independent candidate when co-opted, the procedure provided for in Standing Order 84(b) should have been followed, but that did not occur. If indeed he was a Labour Party candidate, Standing Order 84(a) should have governed and been applied to the procedure for filling the vacancy and accordingly the vacancy was not lawfully filled."

It would be helpful to set out the provisions of s. 19 of the Local Government Act 2001 (the "2001 Act") and in particular the provisions of s. 19(3)(b) which provides as follows:-

"Where the person causing the casual vacancy was a non-party candidate at his or her election to the local authority, the vacancy shall be filled by the co option by the local authority of a person to fill the vacancy (except where paragraph (c) or (d) or (e) of subsection (1) apply) in accordance with such requirements and procedures as may be set out in its standing orders."

The standing orders ("S.O") of the respondent deal with the issue of filling casual vacancies in S.O. 84 which provides:-

"A casual vacancy in the membership of the Council in the circumstances as set out in s. 19(3)(b) of the Act shall be filled by the co-option by the Council of a person in accordance with the following requirements and procedures -

(a) Where the non party candidate who caused the vacancy has at any time prior to the occurrence of such vacancy lodged with the meetings administrator a list of his preferred nominees (not exceeding three in number) to take his place in the event of a casual vacancy occurring in its membership, the Council will consider (in the order they were nominated) the co-option of one of those persons, subject to compliance with subs. (5) of the said section or

(b) In the event that if for whatever reason the Council do not co-opt a person in accordance with subpara. (a) above, a non party candidate will be co-opted from the same electoral area (as the member who caused the casual vacancy) and while subject to this the Council will have full discretion to decide such person, it is intended that it will be someone who so far as the Council can ascertain represents the same broad constituency as elected the member causing the vacancy."

Councillor Harte (as he then was) was elected to Seanad Éireann on the 28th April, 2011, thereby causing a casual vacancy of a non party seat on Donegal County Council. Senator Harte had been elected to the Council as a non party candidate but subsequently joined the Labour Party. The notice party herein was co-opted as a member of the Council on the 30th May, 2011. The question that has been raised in these proceedings is whether or not Councillor McBride was an independent candidate when co-opted. It is contended by the applicant that he was a Labour Party nominee at the time of his co-option.

The Affidavits

A large number of affidavits have been exchanged herein. In his verifying affidavit, Mr. Shiels noted that Mr. McBride, formerly an unsuccessful Fianna Fáil candidate in the local elections of 2009, in an interview in the Donegal Daily announced that he was selected by Labour Party headquarters to be co-opted to replace Senator Harte as a Labour Party candidate and was endorsed as such by Senator Harte in the same publication on the 27th May, 2011. Mr. McBride was then nominated by members of the Labour Party and co-opted to replace Senator Harte on the 30th May, 2011. Mr. Shiels explained that he had concerns about the apparent co option of a Labour Party member to a non party candidate's seat.

Mr. Shiels sought clarification from the respondent on the procedure adopted at the meeting of the 30th May 2011 in a faxed letter of the 7th June, 2011. He was not satisfied with the response and following correspondence between Mr. Shiels and the Council, he commenced these proceedings.

In a further affidavit sworn on the 4th July, 2011, Mr. Shiels exhibited correspondence with, amongst others, the chairperson of Donegal County Council and the County Manager. He referred to a previous meeting of Donegal County Council and to the co-option of a number of individuals arising from the election of three Councillors to the Dáil in the general election as a result of which they became disqualified. He contrasted the manner of co-option on that occasion with the method adopted by Senator Harte in respect of his disqualification. It appears that Mr. Thomas Pringle, a successful non party candidate in the general election had, prior to being disqualified, submitted a list of non party nominees as provided for in S.O. 84(a). No such list was submitted by Senator Harte.

There is a suggestion in that affidavit that the correct procedure was not followed at the meeting of the 30th May, 2011, or at least was procedurally less than perfect as Mr. Eunan Sweeney, the meetings administrator of Donegal County Council was not present and "therefore could not assist the chair in relation to correct procedure". It is necessary to emphasise that judicial review was not sought nor was it granted on the basis that the meeting at which Councillor Harte was co-opted was in any way procedurally flawed. I will refer to this point later.

A statement of opposition was duly filed and served in which reference was made to the relevant statutory provisions and to the Standing Orders of Donegal County Council. It was then pleaded that the requirements of the 2001 Act and Standing Orders were fulfilled and that the respondent acted according to law in connection with the filling of the casual vacancy in its membership. An issue was also raised as to the reliance on media reports referred to in the affidavits of Mr. Shiels. It was further pleaded that Councillor McBride was proposed and elected as a non party candidate and remains an independent member of the County Council. A number of other points were raised as to why the applicant was not entitled to the reliefs sought and where necessary, I shall refer to those later in the course of this judgment.

A verifying affidavit was sworn by Liam Ward, the director of Corporate and Housing Services of Donegal County Council, on its behalf. He noted that the meetings administrator of the County Council, Mr. Sweeney, wrote to each elected member of the respondent in early May to inform them that a casual vacancy had arisen and advising that the provisions of s. 19 of the Local Government Act 2001, as amended and S. O. 84, applied to the filling of casual vacancies and enclosed a copy of same. In a further letter to each elected member, he drew attention to the fact that Mr. Harte had been elected as a non party candidate and that he had not lodged a list of his preferred nominees so that S. O. 84(b) applied to the filling of the casual vacancy. Such a letter was also written to Mr. Harte. He then referred to a meeting that Mr. Sweeney had with Mr. Harte on the 25th May, 2011, at the respondent's offices in Lifford. He exhibited a memorandum in respect of that meeting. He stated that it appeared therefrom that Senator Harte was noted as having made assurances that Labour had no role to play in the matter. It is worth quoting from that memorandum:-

"On the first topic I made it clear to Senator Harte that the Labour Party had no role in the nomination of the candidate to fill the casual vacancy as Senator Harte was a non party candidate at the date of his election to Donegal County Council. Senator Harte fully accepted that position and stated that he had made it clear to the Labour Party hierarchy that they had no role and they understood this."

Mr. Ward went on to describe the meeting at which the notice party was co-opted as a member of Donegal County Council. He pointed out the difference between the events that occurred in relation to the co-options that took place on the 21st March, 2011, for the purpose of filling casual vacancies arising from the election of three members of the respondent to Dáil Éireann and that which arose in relation to the casual vacancy caused by the election of Senator Harte to the Seanad Éireann. The casual vacancy caused by the election of Mr. Pringle to Dáil Éireann was filled in accordance with Standing Order 84(a). By contrast the casual vacancy that arose as a result of Senator Harte's election to the Seanad was governed by Standing Order 84(b).

Mr. Ward proceeded to outline the manner in which Councillor McBride was co-opted and he took issue with the suggestion that at the time of the co-option of Councillor McBride he was a "Labour Party candidate/nominee" and, in particular, with the contention of Mr. Shiels that the fact that the notice party was proposed and seconded for co-option by members of the Labour Party meant that Mr. McBride was a Labour Party candidate for co-option and therefore not a non party candidate. It would be helpful to refer to para. 23 of his affidavit in full:-

"I believe it is plainly wrong and wholly at odds with the political realities and practice of local government in this country to assert that the nomination of the notice party by two Labour Party representatives is tantamount to making him a Labour Party candidate. The notice party was not put before the respondent as a member of the Labour Party or otherwise as a Labour Party candidate, nor was he elected as such. The applicant offers no admissible evidence in support of his statement that the notice party was a member of the Labour party or, more pertinently for the purposes of SO 84(b) for the proposition that he was a Labour party candidate for the filling of the casual vacancy."

Thus, it was contended by Mr. Ward that the proceedings herein are based on a fundamental misapprehension as to the status of the notice party at the time of his co-option.

Councillor McBride, the notice party, also swore an affidavit on the 5th October, 2011. He described his interest and background in politics and his previous membership of Independent Fianna Fail. He ran unsuccessfully as a candidate in a number of local elections. He decided to bow out of politics before the general election of 2011. Subsequently, he got a phone call on the 23rd May, 2011, from Senator Harte asking if he was interested in Senator Harte's seat in the County Council. Councillor McBride indicated that he wished to contact those people who had supported him when he ran for election previously. He added:-

"I wish to make clear that when Senator Harte discussed it with me, there were no conditions attached to the offer. It was never mentioned that I would have to join the Labour Party at that time or any time in the future. I was however fully aware that Senator Harte was now a member of the Labour Party and had been a Labour Councillor for some time (even though at the time of the local election in 2009, he ran and was elected as an independent). It was left that I would come back to Senator Harte in the following days."

After discussions with Senator Harte, he confirmed that he would accept the co-option. He said that there was no requirement or arrangement that he would join the Labour Party when co-opted. Nor was it mentioned as a condition for his cooption. He went on to dispute a number of quotations attributed to him on the Donegal Daily website.

He described a meeting he had with Mr. Ward on the morning of the 30th May, 2011, drawing attention to the legislation and the requirements of the Standing Orders. It was explained that only a non party candidate could be proposed and that the Labour Party had no role in selecting the proposed candidate. He acknowledged that up to the point when he met with Mr. Ward that morning, it was an assumption on his part that as Senator Harte had been a Labour party Councillor, that in replacing him he would have to be nominated by and become a Labour Party Councillor. It was only as a result of that meeting that he became aware that the reverse was the position and that to be lawfully co-opted he had to be nominated as a non party candidate. He referred to further comments

that had been attributed to him in the Donegal Daily website and stated that he had no recollection of making those comments. Finally he stated that he was not and never had been a Labour Party member or candidate for election or co-option to any position.

A number of other affidavits were sworn by Mr. Ward, Councillor McBride and Mr. Shiels. The third affidavit of Mr. Shiels referred, *inter alia*, to a number of radio interviews and to newspaper articles containing quotations from Councillor McBride. Having set out the contents of those quotations, Mr. Shiels then referred to the meeting involving Mr. Ward, Senator Harte and Councillor McBride on the morning of the Council meeting and went on to state:-

"I respectfully suggest that what was going on here was that these two politicians were being advised by (sic) that, under no circumstances, when the selection was being made in about an hour's time, Mr. McBride should not be openly characterised as a Labour party man, whatever the true position might be."

Councillor McBride in a second affidavit reiterated that he was a non party candidate and dealt with some of the media reports referred to by Mr. Shiels. There is criticism of the use made by Mr. Shiels of media reports, but notwithstanding that and for what was described as the sake of completeness, Councillor McBride exhibited a large number of media reports/interviews from the period immediately before and after he was co-opted. In the course of that affidavit he accepted that comments made by him to Mr. C.J. McGinley, a journalist with the Donegal News, were correct, although he did not have a specific memory of a phone call in which they were made. In an article written by Mr. McGinley, Councillor McBride had been quoted as saying "The political landscape has changed dramatically in the last year or so and people's attitudes have also changed. Labour is a fresh party and I am looking forward to getting tore into it".

Councillor McBride repeated that events before the Council on the 30th May did not follow the course he had expected as he had expected to be nominated by the Labour Party and he found out on the morning that he had to be nominated as a non party or independent member of the Council and that he was so nominated.

The fourth affidavit of Mr. Shiels referred to further newspapers articles including an article written by Ms. Farrar in the Donegal Democrat which was based on an interview she had with Councillor McBride immediately after his co-option. Based on his observations in relation to the those articles, Mr. Shiels complained that the process which led to the co-option of Councillor McBride was not an open transparent process and that a valid co-option of a *bona fide* non party candidate which ought to have occurred did not in fact occur. In support of this contention, Mr. Shiels placed reliance squarely on the media interviews given before and after the co option by Senator Harte and Councillor McBride. There was also an affidavit of Carolyn Farrar, sworn on the 15th March 2012, on behalf of the applicant in relation to an article written by her and published in the Donegal Democrat confirming the accuracy of the article based on interview with Councillor McBride. The contents of that affidavit have not been contradicted.

In his fifth affidavit, Mr. Shiels referred mainly to correspondence between himself, the Labour Party, Mr. Eamon Gilmore and the solicitors for the Labour Party and Mr. Gilmore, O'Mara, Geraghty, McCourt. Mr. Shiels had requested that an affidavit be sworn by Mr. Gilmore in relation to this matter. In their letter of the 16th November, 2011, on behalf of Mr. Gilmore, O'Mara, Geraghty, McCourt stated: "Our client does not propose to file an affidavit as sought by you. However, we are instructed to inform you that Councillor McBride is not and never has been a member of the Labour Party".

The sixth affidavit of Mr. Shiels referred to further correspondence between Mr. Shiels and the Labour Party and the solicitors acting on their behalf. He also referred to correspondence with Donegal County Council. A number of points were raised by Mr. Shiels in relation to the manner in which the co-option was effected and to that extent it seems to me that this is a complaint about the procedures followed at the meeting on the 30th May, 2011.

Before dealing with the submissions made on behalf of the respective parties and bearing in mind that there is a dispute between the parties as to the use of media reports/interviews in the course of the hearing, I would make the observation that anyone reading a number of the comments made to the media prior to the co-option of Councillor McBride would be forgiven for thinking that the successor to Senator Harte was going to be a member of the Labour Party. For example, the interview on Highland Radio with Senator Harte on the 10th May, 2011, and the comments of Councillor McBride as reported in the Donegal Daily website on the 27th of May, 2011, could lead to such a view. It is also clear from media reports subsequent to the co-option that there was disappointment among members of the Labour Party at the appointment of someone who was not a Labour Party member. (See the Donegal Daily of the 3rd June, 2011). In addition, Councillor McBride following his co-option spoke of increasing Labour Party representation in the Council (See Tirconail Tribune of the 2nd June, 2011). Thus, it seems to me that there was scope for confusion before and, indeed, after the co-option of Councillor McBride as to what his precise status was, namely whether he was co-opted as a member of the Labour Party or as a non party candidate. I observe, however, that subsequent to his co option, as pointed out by Mr. Ward in his first affidavit, Councillor McBride provided the County Council with "his political designation, contact details and a photograph to be placed on the respondent's website". This showed Councillor McBride's designation as "independent". Taking all of these matters into account, it would not be surprising that the casual observer of politics in Donegal at the time of Councillor McBride's co-option could have been confused as to his precise status.

Submissions

I have had the benefit of helpful written and oral submissions from Michael Francis Forde on behalf of the applicant and Brian Murray S.C. on behalf of Donegal County Council. Councillor McBride was not represented at the hearing before me despite the fact that he has sworn two affidavits herein.

On considering the provisions of s. 19 of the Local Government Act 2001, and S. O. 84, and bearing in mind that Senator Harte had not provided a list of preferred nominees in accordance with S. O. 84(a), it is clear that S. O. 84(b) was applicable to the filling of the casual vacancy caused by the disqualification of Senator Harte on his becoming a member of Seanad Eireann thus requiring that only a non party candidate could be co-opted. The definition of a non party candidate is of assistance and I was referred to Local Government Regulations 1995, (SI 297/1995) and to the provisions of s. 16(6) of the Electoral (Amendment) Act 2009, which are in similar terms.

Section 16(6) provides:-

"Where a candidate is not a candidate of a political party registered in the Register of Political Parties as a party organised to contest a local election, the candidate shall be entitled to enter after his or her name on the nominating paper the expression 'Non-Party' and, if the candidate does so, the returning officer shall cause a statement of that expression to be specified in relation to the candidate on all the ballot papers and on notices."

The essential question to be decided in this case is whether or not Councillor McBride at the time of his co-option was or was not a

non party candidate. There is no disagreement between the parties that in order to have been co-opted on the 30th May, 2011, it was necessary for him to be a non party candidate. I will now proceed to consider that question.

The applicant's submissions ranged over a number of issues including the requirements of the Local Government Act 2001 in relation to giving a public notice of a County Council meeting including the agenda of the meeting. There was a complaint as to the alleged failure of the County Secretary, Mr. Eunan Sweeney, to notify Council members of the legislation, standing orders and procedure for nomination and filling of a non-party vacancy. An issue was raised also as to the notice of meeting and agenda dated the 24th May, 2011 as issued by Mr. Sweeney to Council members. Other matters referred to included the failure to mention to councillors the right to nominate non-party candidates in a letter dated the 24th May, 2011 and the failure to amend the agenda in advance of the meeting; other complaints in relation to the conduct of the meeting and events immediately before and after the meeting were also raised. Leave to apply for judicial review was granted on the basis set out in the statement of grounds to the effect that the notice party, Councillor McBride, was ineligible as he did not fit the description of a non-party candidate. I do not propose to consider matters and issues in respect of which the applicant was not given leave to apply for judicial review. The applicant could have challenged the co-option of Councillor McBride on the basis of alleged procedural flaws in the process leading to the co-option had that been appropriate but chose not to do so. In circumstances where leave was not granted in respect of any issue other than that to which I have referred, I do not think it is necessary or appropriate to consider those matters and therefore I do not propose to address those issues any further.

In the course of the submissions counsel on behalf of Mr. Shiels referred to the role of Standing Order 84(b) and to a decision in the case of *O'Doherty v. The Attorney General and Limerick County Council and Fianna Fail* [2010] 3 I.R. 482 in which Birmingham J. stated (at p. 497):

"One of the advantages of the multi-seat system is that it facilitates the election of minorities which gives rise to the prospect that a number of different viewpoints will be represented in the council chamber. In the case of a three seat constituency, the quota required is 1/4 plus one of those who cast votes, and in the case of a seven seater the quota is only 1/8 plus one. Many candidates will of course be elected who do not secure a quota on the first count, so that in practice the level of support required to achieve election is even less than this. This means that there is a very real prospect that different viewpoints, including minority viewpoints, will be represented in the council chamber."

He continued (at p. 498) at follows:

"It does seem to me that maintaining the balance decided upon by the voters in a multi-seat constituency is a legitimate objective and one which the Oireachtas was entitled to take into account.

Of course, the Oireachtas could have decided otherwise and indeed, even if setting its face against by-elections might have approached the matter somewhat differently. There might, for example, be thought to be merit in a provision similar to that which applies in the case of election to the European Parliament requiring candidates contesting the general election to identify substitutes who would then take their place if for any reason they did not see out their term. This might be seen as particularly advantageous in the case of non-party candidates, where it may not be clear who has the greatest claim on a seat that falls vacant."

Birmingham J. also noted (at p. 497) as follows:

"Having regard to the position of non-party candidates would seem to have been a matter that was regarded as significant by the Oireachtas, which in the legislation provided that when the vacancy arising involves a councillor of a registered political party, that his or her successor will be a nominee of that party and dealt with the situation of non-party candidates by providing that the co-option will be by the local authority and that a local authority in making standing orders shall consider the inclusion of provisions in this regard. The effect of these provisions is to increase the likelihood that the political balance that resulted from the fully contested general local election will not be altered by chance vacancies that may arise later."

That was a case in which the plaintiff had been an elector in the Rathkeale electoral area of Limerick County Council. One of the Fianna Fail councillors that had been elected from that area resigned, creating a casual vacancy on the Council and the plaintiff sought an interlocutory injunction to restrain the filling of the vacancy by co-option. In the proceedings before Birmingham J., the plaintiff then sought a declaration that s. 19 of the Local Government Act 2001 was unconstitutional on the grounds that the Constitution mandated directly elected local authorities and that a local authority to which co-options could take place was not directly elected. The proceedings were dismissed by Birmingham J. who held, *inter alia*, that in a situation where the Constitution specifically entrusted the making of decisions in a particular area to the Oireachtas, a considerable margin of appreciation had to be afforded. Providing for the filling of vacancies by co-option did not fail to comply with the fundamental norms of the legal order in a democracy postulated by the Constitution. That case was relied on by counsel on behalf of Mr. Shiels to argue that the provisions of Standing Order 84(b) placed a duty on the respondent to ensure that the political balance as expressed through the vote of the electorate was maintained and to emphasise the importance of ensuring that where a casual vacancy arose in the context of a non-party candidate, that a non-party candidate had to be co-opted in place of the candidate whose seat required to be filled. I do not disagree with that proposition.

It was maintained on behalf of Mr. Shiels that Councillor McBride was, in effect, a Labour party candidate. The fact that he had been nominated by a member of the Labour Party was relied on in this regard.

Mr. Murray, S.C., on behalf of the respondent made a number of points by way of response to the argument on behalf of Mr. Shiels. He noted that the main contention of the applicant is that Councillor McBride at the time he was co-opted was not a non-party candidate and that consequently his co-option was not a lawful co-option. That contention is refuted by the respondent.

It was pointed out that the arguments of Mr. Shiels assume that Councillor McBride was not a non-party candidate as he was a Labour Party candidate/nominee. Having regard to the meaning of a non-party candidate relied on by Mr. Shiels, it was pointed out that for him to succeed in his application it is necessary for the Court to come to the conclusion that Councillor McBride was in fact a Labour Party candidate. It was argued that for Councillor McBride to be a Labour Party candidate there was a necessary implication that he had to be a Labour Party member. Mr. Murray then proceeded to examine the evidence before the Court on that issue.

Mr. Murray referred to the extensive media reports, statements and commentaries relied on by Mr. Shiels and exhibited by him in his affidavits. I have already referred to some of those in some detail together with those exhibited by Councillor McBride. I have also commented on the impression created by those reports. It is Mr. Murray's contention that none of the media reports provide evidence

that Councillor McBride was at any stage a candidate of the Labour Party. The averments contained in the affidavits of Councillor McBride were contrasted with the position contended for by Mr. Shiels on foot of the media reports.

Councillor McBride has expressly averred that when approached by Senator Harte in relation to his possible co-option to the Council on the 23rd May, 2011, it was never mentioned that he would have to join the Labour Party at that time or at any time in the future. On the 27th May, 2011 in the course of their discussions there was no requirement or arrangement to the effect that Councillor McBride would join the Labour Party when co-opted or that he would later act as or become a Labour Councillor. Councillor McBride also referred to the meeting that took place on the morning of the 30th May, 2011 with Mr. Ward. It was made clear to Councillor McBride at that stage that only a non-party candidate could be proposed for the co option and that the Labour Party had no role in electing the proposed candidate. Councillor McBride frankly admitted that it was his assumption up to that point that he would have to be nominated by and become a Labour Party candidate. He went on to aver that he was co-opted as and remains an independent member of the respondent and he added that he was not now, nor had he ever been, a Labour Party member or candidate for election or co-option to any position. Mr. Ward in his affidavit pointed out that subsequent to his co-option the notice party, Councillor McBride provided the County Council with details of his political designation, contact details and a photograph to be placed on the respondent's website and in that website he was designated as "independent". Further, in the correspondence between the applicant and the Labour Party, Mr. Eamon Gilmore, the leader of the Labour Party and O'Mara, Geraghty and McCourt, the solicitors for the Labour Party and Mr. Gilmore, a letter was exhibited confirming that Councillor McBride was not and never was a member of the Labour Party.

Mr. Murray in the course of his submissions also went on to deal with a number of the points raised by Mr. Shiels in the course of the submissions herein which were not the subject of leave to apply for judicial review. I do not propose to refer to his submissions in that regard for the same reason I have outlined above in relation to the submissions made by Mr. Forde on behalf of the applicant.

Decision

I find it very difficult to go behind the express averments of Councillor McBride in relation to his position as an independent member of Donegal County Council. It seems clear to me that prior to the co-option of Councillor McBride, each member of Donegal County Council had been written to by Mr. Sweeney, the meetings' administrator, reminding them that Senator Harte had been elected as a non-party candidate and that as he had not furnished Mr. Sweeney with a list of preferred nominees, Standing Order 84(b) applied. A similar letter was written to Senator Harte by Mr. Sweeney. In addition, a meeting took place immediately prior to the co-option of Councillor McBride between Senator Harte, Councillor McBride and Mr. Ward. The position was again reiterated that Senator Harte had been a non party candidate at the time of his election to the Council. Only a non-party candidate could be co-opted in his place. The uncontroverted evidence of Councillor McBride as to his status vis-a-vis the Labour Party makes it crystal clear that at the time of his co-option he was not a member of the Labour Party nor in those circumstances, it seems to me, could he be described as a candidate of that party. The fact that he was nominated by two members of that party does not alter the position. I note from the affidavits filed herein that on the co-option of persons to fill the casual vacancies left by the election of a number of candidates in the Dáil elections, and in particular in the case of the co-option caused by the casual vacancy of Mr. Pringle, T.D., the vacancy was filled following a nomination by at least one member of the Labour Party. That did not in any way make the candidate concerned a member of the Labour Party. I accept that confusion was created by some of the comments made around the time of the co-option by Councillor McBride and by Senator Harte. The newspaper articles and commentary constitute hearsay evidence at best. The best evidence before the Court in relation to this matter is the evidence of Councillor McBride himself. It is clear from his evidence, as I have already observed, that he was not a member of the Labour Party. Councillor McBride has sought to explain the comments he made around that time. In fairness to Councillor McBride, a number of the newspaper articles exhibited make clear the internal Labour Party unhappiness at the fact that a non-party candidate had been co-opted to replace Senator Harte.

There is no doubt that the events with which these proceedings are concerned occurred over a relatively short time frame. Councillor McBride was first approached by Senator Harte on the 23rd May, 2011. His co-option took place on the 30th May, 2011. It was not until the morning of the meeting at which he was co-opted that he learned that in order to be co-opted he had to be a non-party candidate. He, not surprisingly, made the assumption that in order to be co-opted he had to be a member of the Labour Party. Some of the comments made by him can be understood in that context. It is probably fair to say that members of the Labour Party in Donegal who were supporters of Senator Harte were equally unaware of the position in relation to the provisions of Standing Order 84(b).

The point was made by Mr. Murray in the course of his submissions that in order to be a candidate of a political party, there had to be a relationship between the party and the candidate, usually membership. Being a candidate of a political party necessarily implies a decision by the Party that an individual is to be the Party's candidate. It is not something that occurs unilaterally. Further, it implies some form of public act or statement by which the person is held out as a party candidate. It is hard to see how someone could be a candidate of a party without knowing it or without the Party knowing it. There is some force in this argument.

I have referred a number of times to the impression created in various media comments around the time of the co-option. Those comments demonstrate the confusion in the mind of Councillor McBride as to the basis on which he would be co- opted, which he has admitted, but equally demonstrate that he was not alone in that confusion. Much of the media speculation is similarly confused as were some local members of the Labour Party. However, I cannot decide this case on the basis of an impression or on newspaper speculation or comment. I have to decide the issue on the basis of the evidence before me. In the light of that evidence and the clear and unambiguous averments of Councillor McBride on affidavit, I am satisfied that it is impossible to reach the conclusion that Councillor McBride was, in fact, either a member or candidate of the Labour Party at the time of his co-option. That being the case, it follows that the applicant cannot succeed in his application.

In the circumstances, I am refusing the relief sought herein.