



## BRIEFING PAPER

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# Parliamentary election petitions

By Isobel White

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## Summary

On 9 December 2015 the election court in Edinburgh which had heard the petition against the election of Liberal Democrat MP Alistair Carmichael at the general election in May 2015 published its judgment.

The petition was refused; the judges ruled that it had not been proven beyond reasonable doubt that Alistair Carmichael had committed an illegal practice under the provisions of the *Representation of the People Act 1983*.

Four constituents had brought the petition which alleged that Mr Carmichael, who was Secretary of State for Scotland in the Coalition Government, had misled voters over a memo which was leaked to the Daily Telegraph at the beginning of the election campaign.

This Briefing Paper also gives details of the election court which heard the petition concerning the election of Phil Woolas in Oldham East and Saddleworth in 2010. Phil Woolas was found guilty of the illegal practice of making a false statement about a candidate and his election was declared void.

The Paper provides information about election petitions and the procedures following the decision of an election court.



# 1. Orkney and Shetland petition 2015

An election court in Edinburgh heard the petition against the election of Liberal Democrat MP Alistair Carmichael at the general election in May 2015. Four constituents brought the petition and alleged that Mr Carmichael, who was Secretary of State for Scotland in the Coalition Government, had misled voters over a memo which was leaked to the Daily Telegraph at the beginning of the election campaign. The civil service memo had suggested that the Scottish First Minister, Nicola Sturgeon, had told the French Ambassador that she would prefer David Cameron as Prime Minister rather than Ed Miliband.

Throughout the election campaign Alistair Carmichael denied leaking the memo but later admitted full responsibility for sanctioning its release.<sup>1</sup>

Four constituents raised the money to bring the petition by using crowdfunding and argued that Mr Carmichael had authorised the leak of the memo in order to influence the outcome of the election.

The election court sat for two days at the Court of Session in Edinburgh and was heard in front of Lady Paton and Lord Matthews.

## 1.1 Judgment

On 9 December 2015 the opinion of the Election Court was published. The petition was refused after the judges ruled that it had not been proved beyond reasonable doubt that Alistair Carmichael had committed an “illegal practice”. The Court held that Mr Carmichael had been duly elected and that his election was not void in terms of section 106 of the *Representation of the People Act 1983*. The summary of the Court’s opinion gave further details:

Lady Paton and Lord Matthews had previously ruled that “a false statement by a candidate about his own personal character or conduct made before or during an election for the purpose of affecting his return at the election has the effect of engaging section 106” of the 1983 Act, but ordered that evidence be led to assist in the resolution of the two remaining issues, namely: did the words complained of in the petition amount to “false statements of fact...in relation to the personal character or conduct” of the first respondent?; and were the words complained of uttered “for the purpose of affecting the return of any candidate at the election”?

On the first issue, the court observed that the first respondent [Mr Carmichael] had told a “blatant lie” when, in the course of a Channel 4 interview on Sunday 5 April 2015, he claimed that he had only become aware when contacted by a journalist of a memo leaked to the press by his special adviser Euan Roddin, which stated that First Minister and leader of the SNP Nicola Sturgeon had told the French ambassador that “she’d rather see David Cameron remain as PM”.

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<sup>1</sup> [Alistair Carmichael leak denial was an ‘untruth’](#), BBC News, 8 September 2015

Lady Paton said: “There is no dispute that the words ‘I told you the first I became aware of this, and this is already on public record, was when I received a phone call on Friday afternoon [i.e. Friday 3 April 2015] from a journalist making me aware of it’ constituted a false statement of fact, in other words, a lie. Obviously the first respondent had been aware of the existence of the memo and its contents as described to him by Mr Roddin since the flight to the Faroe Islands in March 2015. Moreover he had authorised Mr Roddin to release the memo to the Daily Telegraph.”

However, on the matter of whether the lie could properly be characterised as a false statement of fact “in relation to [his] personal character or conduct”, the judges were left with a reasonable doubt.

“It is of the essence of section 106 that it does not apply to lies in general: it applies only to lies in relation to the personal character or conduct of a candidate made before or during an election for the purpose of affecting that candidate’s return,” Lady Paton said.<sup>2</sup>

The full [judgment](#) can be accessed via the Scottish Courts and Tribunals Service website.

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<sup>2</sup> [Timothy Morrison and others v Alistair Carmichael MP and Alistair Buchan: summary of the Election Court’s opinion](#), 9 December 2015

## 2. Oldham East and Saddleworth 2010

The election court in Saddleworth heard a petition from Elwyn Watkins, the Liberal Democrat candidate for Oldham East and Saddleworth at the 2010 general election. Mr Watkins alleged that Phil Woolas, the Labour candidate who was elected, had made false statements about him in an election pamphlet. The *Times* gave further details about the statements made about Mr Watkins in Mr Woolas's campaign literature:

The material that Mr Woolas distributed during his increasingly desperate electoral campaign was dreadful. His team published a pamphlet and two mock newspapers that, in the court's judgment, misled the electorate by claiming, among other unproven things, that the Liberal Democrats had expressly sought the support of extremist Muslims and had illicitly received funds from a foreign donor.<sup>3</sup>

Mr Woolas was charged with the illegal practice of making a false statement about a candidate under Section 106 of the *Representation of the People Act 1983*.

### **106 False statements as to candidates**

(1) A person who, or any director of any body or association corporate which—

(a) before or during an election,

(b) for the purpose of affecting the return of any candidate at the election,

makes or publishes any false statement of fact in relation to the candidate's personal character or conduct shall be guilty of an illegal practice, unless he can show that he had reasonable grounds for believing, and did believe, that statement to be true.

(2) A candidate shall not be liable nor shall his election be avoided for any illegal practice under subsection (1) above committed by his agent other than his election agent unless—

(a) it can be shown that the candidate or his election agent has authorised or consented to the committing of the illegal practice by the other agent or has paid for the circulation of the false statement constituting the illegal practice; or

(b) an election court find and report that the election of the candidate was procured or materially assisted in consequence of the making or publishing of such false statements.

(3) A person making or publishing any false statement of fact as mentioned above may be restrained by interim or perpetual injunction by the High Court or the county court from any repetition of that false statement or of a false statement of a similar character in relation to the candidate and, for the purpose of granting an interim injunction, prima facie proof of the falsity of the statement shall be sufficient.

[subsection (4) repealed]

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<sup>3</sup> Court in the Act, *Times*, 6 November 2010

(5) Any person who, before or during an election, knowingly publishes a false statement of a candidate's withdrawal at the election for the purpose of promoting or procuring the election of another candidate shall be guilty of an illegal practice.

(6) A candidate shall not be liable, nor shall his election be avoided, for any illegal practice under subsection (5) above committed by his agent other than his election agent.

(7) In the application of this section to an election where a candidate is not required to have an election agent, references to an election agent shall be omitted and the reference in subsection (6) above to an illegal practice committed by an agent of the candidate shall be taken as a reference to an illegal practice committed without the candidate's knowledge and consent.<sup>4</sup>

The provisions in the *Representation of the People Act 1983* relating to illegal practices at elections date originally from the *Corrupt and Illegal Practices Act 1883* which was a stringent measure designed to address the electoral malpractice that was prevalent in the nineteenth century.

## 2.1 Judgment

The judges hearing the election petition, Mr Justice Nigel Teare and Mr Justice Griffith Williams, found that Mr Woolas was guilty of an illegal practice and the judgment of the court was published on 5 November 2010. The summary of the judgment is given below:

In an election address entitled *The Examiner*, the respondent (Mr Woolas) made a statement of fact, the meaning of which was that the petitioner attempted to woo, that is to seek, the electoral support of Muslims who advocated violence, in particular violence to the respondent.

In a further election address entitled *Labour Rose*, he made a statement of fact the meaning of which was that the petitioner had refused to condemn extremists who advocated violence against the respondent.

We have concluded that both of these statements, although made in the context of an election and said to arise from a political position adopted by the petitioner, were in relation to the petitioner's personal character or conduct.

In our judgment to say that a person has sought the electoral support of persons who advocate extreme violence, in particular to his personal opponent, clearly attacks his personal character or conduct.

It suggests that he is willing to condone threats of violence in pursuit of personal advantage.

Having considered the evidence which was adduced in court we are sure that these statements were untrue. We are also sure that the respondent had no reasonable grounds for believing them to be true and did not believe them to be true.

We also found that in an earlier election address the respondent had made a statement in fact, namely, that the petitioner had reneged on his promise to live in the constituency. This too, although made in the context of an election and said to arise from

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<sup>4</sup> <http://www.legislation.gov.uk/ukpga/1983/2/section/106>



a statement made by the petitioner as a candidate in that election, was in relation to his personal character or conduct.

It suggests that he is untrustworthy. The statement was false and the respondent had no reasonable ground for believing it to be true and did not believe it to be true.

It follows in our judgment that the respondent is guilty of an illegal practice, contrary to section 106 of the Representation of the People Act 1983 with regard to those statements.

With regard to the allegations of an illegal practice in connection with statements made in connection with the Petitioner's election expenses the Respondent made a statement in the *Examiner* and in the *Labour Rose* that an estimate had been made that the likely cost of the Petitioner's campaign was in excess of £200,000. That statement, that an estimate had been made, was true in that it appears to have been made by a member of his election team, notwithstanding that it is unclear how the estimate was reached.

The Respondent also made statements in the same publication that the Petitioner had breached the law by spending a sum of money in excess of that which had been declared and that the money came from Sheikh Abdullah. Those statements were untrue but we are not sure that the Respondent lacked reasonable grounds for believing them to be true. We therefore do not find the Respondent guilty of an illegal practice with regard to those statements.

The consequence of our finding that the respondent is guilty of an illegal practice with regard to the statements we have referred to is that, pursuant to section 159(1) of the Act, his election as Member of Parliament for the constituency of Oldham East and Saddleworth is void and we have so reported to the Speaker of the House of Commons. We are satisfied that the statutory penalties for the illegal practices committed by the respondent are both necessary and proportionate, having regard to the seriousness of the statements made with regard to the petitioner's alleged attitude to the Muslim extremists who advocated violence.<sup>5</sup>

This is the first time since 1911 that an election court has found a Member of Parliament guilty of the illegal practice of making a false statement about a candidate at his election and declared the election void.<sup>6</sup>

## 2.2 Mr Speaker's statement

Mr Speaker made the following statement on 8 November 2010:

I have a statement to make to the House. I have to inform the House that, as required by section 144 of the Representation of the People Act 1983, I have received the certificate from the judges appointed to try the election petition relating to the Oldham East and Saddleworth constituency election on 6 May 2010. The judges have determined that the election was void

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<sup>5</sup> Summary of Judgment to be given on November 5 when handing down Judgment. The summary and the full judgment are available at <http://www.judiciary.gov.uk/media/judgments/2010/watkins-v-woolas-judgment-05112010>

<sup>6</sup> This was in the constituency of North Louth, see the Hansard record of the result of the petition at <http://hansard.millbanksystems.com/commons/1911/mar/01/north-louth-election-petition>

pursuant to section 159 of the Act because the candidate, Philip James Woolas, was personally guilty of an illegal practice. I shall lay the report and certificate on the Table, together with the full judgment and the shorthand writer's notes, and will cause the full text of the report and certificate to be entered in the *Journal*. Members wishing to read the report and certificate for themselves will find it set out in the *Votes and Proceedings* for today, which will be circulated with the Order Paper in tomorrow's Vote Bundle, available online and from the Vote Office. The full text of the judgment has been published by the court on the judicial communications website. I shall place a copy in the Library.

In accordance with section 160(4) of the Act, Mr Phil Woolas has been reported personally guilty of an illegal practice and must vacate his seat from the date of the report, 5 November 2010. I am advised that a renewed application for judicial review has today been made to the administrative court. The administrative court judge has ordered an expedited hearing of the renewed application as he considers it essential that the electorate of Oldham East and Saddleworth should know who is their Member of Parliament as soon as possible. My ruling is that this engages the House's sub judice resolution, and that therefore the judgment of the election court cannot be debated in the House until court proceedings are concluded. I will not take points of order on this matter now; the opportunity for points of order will come after the 3.30 pm statement.<sup>7</sup>

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<sup>7</sup> HC Deb 8 November 2010 c1

### 3. Election petitions procedure

A Parliamentary election can only be questioned by a petition complaining of an undue election or undue return presented in accordance with the procedure laid down by Part III of the *Representation of the People Act 1983*. An election petition can be presented by:

- a person who voted as an elector at the election or had a right so to vote;
- a person claiming to have had a right to be elected or returned at the election; or
- a person alleging himself to have been a candidate at the election.<sup>8</sup>

The Member whose election or return is complained of must be a respondent to the petition, and if the petition complains about the conduct of the (Acting) Returning Officer or their staff during the election, the (Acting) Returning Officer is deemed to be a respondent.

The petition must be issued within 21 days after the date of the return of the Writ (which in most cases will be the day after the election) and can be issued at any time up to, but no later than, midnight on the last day. However, if the petition complains of corrupt or illegal practices involving the payment of money or other reward that has taken place since the election, or an illegal practice relating to election, further time may be allowed.

The petition itself should follow the form prescribed by the *Election Petition Rules 1960*, and include the following information:

- in which capacity the petitioner or petitioners present the petition;
- the date and result of the election in question and, in the case of a Parliamentary election, on which the return was made to the Clerk of the Crown;
- the date from which the time for lodging the petition is calculated, if not within 21 days;
- the grounds on which relief is sought; and
- the relief claimed.

The petition must be signed personally by each petitioner. The petition must be presented together with three copies at the elections petitions office at the Royal Courts of Justice (or the Petitions Office of the Court of Session in Edinburgh). A copy will be sent to the Returning Officer of the constituency to which the petition relates and he has a duty to publish it in the constituency.

#### 3.1 Election Courts

Election courts are held when a petition is issued following an election, whether parliamentary or local. Election courts to hear petitions relating

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<sup>8</sup> *Representation of the People Act 1983* Section 121 (1)

to parliamentary elections were established in the nineteenth century, when the Commons ceded the power to investigate disputed results to the courts.

The trial of a petition takes place in open court without a jury, and is tried by two judges who are on a rota for the trial of parliamentary election petition. This is known as an election court under s123 of the *Representation of the People Act 1983*. An election court has the same powers, jurisdiction and authority as a judge of the High Court and is a court of record.<sup>9</sup>

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<sup>9</sup> In England they are basically the same as a Divisional Court of the Queen's Bench Division of the High Court. In Northern Ireland petitions are heard by the High Court. In Scotland they are heard by the Court of Session

## 4. Procedure following the decision of the election court

*Parker's Law and Conduct of Elections* states that at the end of the trial of a Parliamentary election petition 'the election court must determine whether the person whose election or return is complained of, or any and what other person, was duly returned or elected or whether the election was void (section 144(1) of the [RPA] 1983 Act and section 145(1) of the 1983 Act)...The court has the power to declare some other person elected as well as declaring an election void.'<sup>10</sup>

Under s144 (7) of the *Representation of the People Act* 1983 the election court produces a certificate and report for the Speaker which is entered into the Commons Journal. The Commons is bound to give the necessary direction for confirming or altering the list or returns compiled after the general election, or to issue a writ for a new election or to "carry the determination into execution as the circumstances may require".

Section 160(4)(b) of the RPA 1983 states that the decision of the election court is effective from the date of the court's report; in the case of the Oldham East and Saddleworth petition the report was dated 5 November 2010 and Mr Woolas ceased to be a Member on that day. Section 160(4)(b) also states that a person found guilty of an illegal practice will not be able to hold elected office or be able to vote for a period of three years from the date of the report.

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

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

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

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

(iii) holding any elective office; and

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

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

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

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

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<sup>10</sup> *Parker's Law and Conduct of Elections*, 19.38

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

It should be noted that the *Political Parties, Elections and Referendums Act 2000* amended the RPA 1983 so that if a Member of Parliament is found guilty of electoral offences through a criminal prosecution there is a three month suspension before the seat is vacated, to allow for an appeal. This change to the law followed the prosecution of Fiona Jones MP in 1999 for election expenses fraud (see below).

## 4.1 Judicial review of the election court's decision

It has not been clear whether the decision of an election court hearing a Parliamentary election petition could be subject to judicial review. Parker's *Law and Conduct of Elections* comments:

...it now seems to be accepted that a local government election court is subject to judicial review. The position remains unclear in respect of a parliamentary or European Parliamentary election court. Having regard to the powers conferred on election courts by section 123(2) of the [RPA] 1983 Act (and regulation 91(2) of the European Regulations), the view that its determinations are not subject to judicial review is probably to be preferred, but has not yet been decided.<sup>11</sup>

Phil Woolas's first application for a judicial review was rejected at the High Court on 8 November 2010. The BBC reported that:

Judge Mr Justice Silber said it was "not amenable to judicial review because it is a decision of High Court judges sitting in their capacity as High Court judges". He said it was "settled law" that the decisions of High Court judges sitting in their capacity as High Court judges "cannot be subject of applications for judicial review". But he said Mr Woolas could apply to the Court of Appeal.<sup>12</sup>

Mr Woolas renewed his application for judicial review. On 3 December 2010 the Administrative Court decided that it had the necessary jurisdiction to review the decision of a parliamentary election court but found that the election court had acted lawfully when it found Mr Woolas guilty of an illegal practice under the *Representation of the People Act 1983*. The summary of the judgment gives further details:

7. The Administrative Court, sitting as a Divisional Court, has concluded it has jurisdiction to consider the interpretation of s.106. On the basis of the facts found by the Election Court, it has decided that:

(1) An election court has to decide whether a statement was a statement in relation to the personal conduct or character of a candidate or a statement in relation to his political character, conduct or position. It could not be both.

(2) The statement in *Choose* was not a statement in relation to the personal character or conduct of Mr Watkins. Although it was

<sup>11</sup> Parker's *Law and Conduct of Elections*, 19.35

<sup>12</sup> <http://www.bbc.co.uk/news/uk-politics-11708723>

a statement that implied he was untrustworthy, it was a statement in respect of his political position.

(3) The statement in *The Saddleworth and Oldham Examiner* was a statement that had gone beyond being a statement in relation to Mr Watkins' political position in relation to wooing extremist voters to being a statement in relation to his personal character in that he was a man who condoned extreme violence.

(4) The statement in *Labour Rose* was a statement that had gone beyond being a statement in relation to Mr Watkins' political position in relation to wooing extremist voters to being a statement in relation to his personal character in that he refused to condemn threats of violence.

8. It followed that the Certificate and Report of the Election Court must be upheld.<sup>13</sup>

An article in the *Law Society Gazette* discussed the case:

There is no right of appeal, as such, against the finding of an election court. So Woolas sought to apply for judicial review, the process by which the High Court can put right errors of law made by inferior bodies. But an election court dealing with a parliamentary election is made up of judges from the High Court itself. Is their decision open to judicial review?

That was a question the courts had never been asked before...three judges headed by Lord Justice Thomas decided last week that they had the necessary jurisdiction to review the decision of a parliamentary election court. Even though it consisted of High Court judges, they decided that an election court was a tribunal of inferior or limited jurisdiction. That meant the High Court could correct any errors of law it had made.

[...]

The next question for the High Court was whether the election court had used the correct legal test in deciding that the statements Watkins had complained about related to his 'personal character or conduct'. This issue was last considered 99 years ago by a court sitting in what is now Ireland.

On this, Woolas also had some success. The High Court decided that a statement must be either personal or political; it could not be both. One of the false statements made by Woolas – that Watkins had reneged on a promise to live in the constituency – had been wrongly categorised by the election court as personal. False statements about a candidate's political position or character could not amount to illegal practices.

But the election court had been right to say that two other false statements about Watkins had gone beyond political allegations and amounted to statements about his personal character. These were the entirely untrue allegations that the Liberal Democrat had wooed the support of Muslims who advocated extreme violence and that he had refused to condemn threats of violence by extremists.

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<sup>13</sup> The summary and the full judgment can be found at <http://www.judiciary.gov.uk/media/judgments/2010/judgment-wollas-03122010>

These lies amounted to a 'serious personal attack' on Watkins and entitled him to have the vote set aside.<sup>14</sup>

Mr Woolas decided not to appeal the decision of the Administrative Court.

Mr Speaker made a statement on 6 December 2010 about the application of the sub judice rule to the Oldham East and Saddleworth judgment:

I have a short statement to make further to my statement of 8 November on the application of the sub judice rule to the matter of the judgment of the election court in the petition relating to the Oldham East and Saddleworth constituency.

The House will know that the administrative court has upheld the certificate and report of the election court. I understand that Mr Woolas is not intending to appeal, although the period for applying for leave to appeal has not yet expired. However, I can inform the House that the sub judice resolution no longer applies to this matter.

So far as the seat is concerned, it has been vacated since 5 November, the date on which I received the election court's certificate and report, as I informed the House in my previous statement.<sup>15</sup>

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<sup>14</sup> Disgraced MPs broke new legal ground last week, by Joshua Rozenberg. *Law Society Gazette*, 9 December 2010 <http://www.lawgazette.co.uk/opinion/joshua-rozenberg/disgraced-mps-broke-new-legal-ground-last-week>

<sup>15</sup> HL Deb 6 December 2010 c1



## 5. Previous election petitions

The Winchester election petition of 1997 remains the most recent election court decision which resulted in the re-run of an election (technically this counts as a by-election as a new writ is issued). On that occasion the grounds for the petition were irregularities by the Returning Officer. The original result had been a victory for Mark Oaten (Liberal Democrat) by two votes; the defeated Conservative MP, Gerry Malone, argued that some ballot papers had been improperly excluded. In the re-run of the contest Mr Oaten won a majority of 21,556.

Prior to the Winchester case, the last successful petition to come before the House was that for Bristol South East where Tony Benn was declared by the election court not duly elected since he was a peer. The Commons voted on the motion "that the Clerk of the Crown do attend the House forthwith with the last return for Bristol, South East, and amend the same by substituting the name of Malcolm Archibald James St Clair for that of Anthony Neil Wedgewood Benn as the Member returned for the said constituency". The motion was moved by Martin Redmayne, for the Conservative government and was resolved in the affirmative.<sup>16</sup> The new Member took the oath immediately afterwards.

Apart from Bristol, South East, the only other post-war election court decisions overturning election results were in Fermanagh and South Tyrone and Mid Ulster in the 1955 general election where both the successful candidates were convicted prisoners. The election court recommended that the losing candidates be returned as the Members. The reports were entered into the Commons Journal of 25 October 1955 and the motion to amend the return for Fermanagh and South Tyrone was voted upon.<sup>17</sup> The motion was passed; the motion for Mid Ulster was agreed without a vote. The Clerk of the Crown attended and altered the return and the two new MPs took the oath immediately.

### 5.1 Fiona Jones case

In March 1999 Fiona Jones MP was convicted at Nottingham Crown Court of election expenses fraud. This followed a criminal prosecution, not an election petition. It was alleged that, when handing in their official election expense form after the 1997 ballot, she and her agent either omitted or under declared significant amounts of expenditure. As a result, under s 160(4) of the *Representation of the People Act 1983*, as applied by s173, Mrs Jones was immediately obliged to vacate her seat. On 15 April the Court of Appeal overturned the conviction. It remained unclear, however, whether this judgement allowed Mrs Jones automatically to resume her seat or merely allowed her to contest the by-election which was expected to follow the vacancy. The Speaker asked the Attorney-General to refer this point to the High Court for a

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<sup>16</sup> The Speaker refused to allow debate on the motion, on the basis of the 1911 and 1955 precedents HC Deb vol 645 31.7.61 c 944

<sup>17</sup> The Speaker referred to the 1911 precedent in refusing to allow debate on the motion HC Deb vol 54525.10.97 c45

'true construction of the 1983 Act'.<sup>18</sup> On 30 April 1999 Lord Justice Kennedy and Mr Justice Mitchell ruled that an MP convicted in a criminal court of malpractice was entitled to resume his or her seat following a successful appeal against conviction if the seat had remained vacant.<sup>19</sup>

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<sup>18</sup> HC Deb 19 April 1999 c571

<sup>19</sup> Law Report, *Independent*, 13 May 1999



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