

Are Politicians Who Lie in an Election Campaign Guilty of a Criminal Offence?

London

In Tuesday evening's debate between the Prime Minister, Rishi Sunak, and the leader of the Labour Party, Sir Kier Starmer, the Prime Minister claimed that "independent Treasury officials" had costed Labour's policies "and they amount to a £2,000 tax rise for everyone".

It has since emerged that on Monday the Treasury's most senior civil servant wrote to a member of Labour's shadow Treasury team stating that "civil servants were not involved in the production of presentation of the Conservative Party's document 'Labour's Tax Rises' or in the calculation of the total figure used" and that "any costings derived from other sources or produced by other organisations should not be presented as having been produced by the Civil Service." Senior Labour figures spent Wednesday accusing the Prime Minister of having lied multiple times during the debate.

I will allow readers to draw their own conclusions as to whether the Prime Minister lied, but the controversy raises the interesting question of what, if any, criminal offence is committed by a politician who lies in an election campaign.

The Representation of the People Act

The starting point is Section 106(1) of the Representation of the People Act 1983 (the "RPA"), which provides that:

"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

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reasonable grounds for believing, and did believe, that statement to be true.”

A person convicted of an illegal practice under the RPA is liable to an unlimited fine. Subsection (3) gives the court power to grant an injunction to prevent any repetition of the statement.

Where a petition is brought to an Election Court under the RPA, and a candidate who has been elected is found by the Election Court to have been guilty of an illegal practice, then pursuant to section 159(1) of the PRA, the election is void.

The ingredients for an illegal practice are that:

- (a) a person makes or publishes a statement;
- (b) the statement relates to a candidate;
- (c) it must be a statement of fact;
- (d) the statement must be false;
- (e) the statement is made in relation to a candidate's personal character or conduct;
- (f) the statement is made for the purpose of affecting the election of the candidate; and
- (g) the statement is made before or during an election.

Is the question made in relation to the candidate's personal character or conduct?

This is a key limitation in the RPA. In order for an illegal practice to have taken place under section 106, the false statement of fact must have been made in relation to the candidate's personal character or conduct.

The courts have shown that they interpret this limitation widely. The Divisional Court in *(ao Woolas) v The Parliamentary Election Court* [2010] EWHC 3169 (Admin) stated as follows:

“Statements about a candidate which relate, for example, to his family, religion, sexual conduct, business or finances are generally likely to relate to the personal character of a candidate. In our view, it is of central importance to have regard to the difference between statements of that kind and statements about a candidate which relate to his political position but which may carry a implication which, if not made in the context of a statement as to a political position, impugn the personal character of the candidate.”

In that case, Mr Woolas had been returned as an MP with a majority of 103 votes. He was found by the Election Court to have been guilty of an illegal practice by making false statements in campaign leaflets in relation to the personal conduct of his Liberal Democrat opponent. The election was declared void and Mr Woolas was barred for standing for parliament for three years, and was thus prohibited from standing in the

following by-election.

The Election Court found that certain statements had been made on behalf of Mr Woolas to the effect that his opponent “had attempted to woo the vote, that is, that he had attempted to seek the electoral support, of Muslims who advocated violence, in particular to [Mr Woolas]”.

The Election Court concluded that this amounted to a statement in respect of his opponent’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 political opponent, clearly attacks his personal character or conduct. . . . [S]uch a statement attacks his "honour" and "purity" in that it suggests that he is willing to condone threats of violence in pursuit of personal advantage. That is also an attack on his political conduct (because the advantage sought was an electoral victory) but that does not put the attack outside the protection afforded by s.106 if his personal character is also attacked."

On an application for judicial review of the Election Court’s decision, the Divisional Court upheld this decision, concluding that “There is in our judgment a very significant difference between a statement that goes to the political conduct of a candidate and one that goes beyond it and says something about his personal character.”

The Divisional Court also noted that “Freedom of political debate must allow for the fact that statements are made which attack the political character of a candidate which are false but which are made carelessly. Such statements may also suggest an attack on aspects of his character by implying he is a hypocrite. Again, imposing a criminal penalty on a person who fails to exercise care when making statements in respect of a candidate’s political position or character that by implication suggest he is a hypocrite would very significantly curtail the freedom of political debate so essential to a democracy.”

They concluded however that the comments in the present case “were a serious personal attack on a candidate by saying he condoned violence by extremists and refused to condemn those who advocated violence”.

In *Cooper v Evans & Anor* [2023] EWHC 2555 (KB) (12 October 2023), the Conservative Party’s candidate at the Tamworth by-election was Mr Cooper. The Conservative Party had however selected Mr Hughes MP to be its candidate for the constituency at the General Election which would be held some months after the by-election. Mr Hughes was the sitting MP for another constituency that would cease to exist at the General Election as a result of boundary changes and so could not stand at the by-election. Mr Justice Kay determined that an allegation by the Labour Party that a “dodgy deal” had been done between Mr Cooper and Mr Hughes to the effect that Mr Cooper would make way for Mr Hughes at the General Election, as a result of which Mr Cooper would receive a taxpayer funded pay-off upon standing down as an MP, was on the “political” side of the line and was not made in relation to Mr Cooper’s personal character or conduct. The

judge therefore rejected Mr Cooper's application for an injunction against the Labour Party.

A further illustration is *Johnson v Westminster Magistrates' Court* [2019] EWHC 1709 (Admin), in which Boris Johnson, prior to his becoming Prime Minister, challenged the decision of a District Judge in the Magistrates' Court that there was a proper case to issue a summons against him for three offences of misconduct in public office. These alleged offences arose from his famous assertions in the Brexit referendum campaign that "*We send the EU £350 million a week let's fund our NHS instead*" and "*Let's give our NHS the £350 million the EU takes every week*" which were deployed variously on billboards and on the side of a bus by the Vote Leave campaign.

An anti-Brexit campaigner had crowd-funded in order to bring a private prosecution against Mr Johnson, alleging that Mr Johnson as an MP and Mayor of London misconducted himself in a public office by endorsing and making statements which were false and misleading regarding the cost of membership of the European Union.

Mr Johnson was successful in quashing the summons. The High Court held that the requirements for the offence of misconduct in public office were not met. A key point was that there was no evidence that the actions complained of were made as part of Mr Johnson's discharge of the offices which he held. He simply held the office and whilst holding it expressed the views.

Lady Justice Rafferty and Mr Justice Supperstone, referring to the offence under section 106 of the RPA discussed above, concluded that:

"It is an illegal practice to make or publish a false statement of fact about the personal character or conduct of a candidate during a parliamentary election for the purpose of affecting his/her return. The scope of the protection is narrow and in enacting the prohibition Parliament must deliberately have excluded any other form of false statement of fact, including those relating to publicly available statistics."

The court also drew attention to the Electoral Commission Report on the Brexit referendum which highlighted that during the course of a referendum campaign it is the role of the campaigners to debate the relative merits of the arguments and claims being made by those campaigning for the opposing outcome. This ensures that voters understand the issues and positions on both sides of the referendum question. There is also a role for the media in analysing the claims made on both sides of the campaign and for voters themselves in ensuring that they have the information they feel they need to enable them to make an informed decision when casting their vote.

Change coming?

Moves have been made in the Welsh Senedd to introduce a law which would make it an offence for a Senedd member, or a candidate for election to the Senedd, to wilfully or with intent to mislead make or publish a statement that is known to be false or deceptive. It would be a defence if it could be "reasonably inferred" to be a statement of opinion, or

if it was retracted with an apology given within 14 days. This is currently opposed by the Welsh government and it is not clear if it will become law.

Conclusion

There are very good reasons why the courts should not become involved in policing election campaigns, other than in extreme situations. For them to be required to do so, runs the risk of moving the courts and judges into the political realm and potentially undermines their independence and impartiality. For this reason the courts have historically been very reluctant to involve themselves in elections. In response to the proposal to introduce the Election Court in 1868, the Chief Justice wrote to the Lord Chancellor referring to the importance of the confidence of the public in the impartiality of the judiciary, and warning that:

"This confidence will speedily be destroyed, if, after the heat and excitement of a contested election, a Judge is to proceed to the scene of recent conflict, while men's passions are still roused, and, in the midst of eager and violent partisans, is to go into all the details of electioneering practices, and to decide on questions of general or individual corruption, not unfrequently supported or resisted by evidence of the most questionable character. The decision of the Judge given under such circumstances will too often fail to secure the respect which judicial decisions command on other occasions. Angry and excited partisans will not be unlikely to question the motives which have led to the judgment. Their sentiments may be echoed by the press. Such is the influence of party conflict, that it is apt to inspire distrust and dislike of whatever interferes with party objects and party triumphs."

We therefore rightly have to rely on our politicians and the media to scrutinise what is said in election campaigns, particularly where statistics are involved.