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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY PATRICIA BURNS AND DANIEL McCREADY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE SECRETARY OF STATE FOR NORTHERN IRELAND

Mr Macdonald QC with Mr Malachy McGowan (instructed by Harte Coyle Collins Solicitors) for the Applicants
Dr McGleenan QC with Mc Philip McAteer (instructed by the Crown Solicitor's Office) for the Proposed Respondent

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Before: Keegan LCJ, Maguire LJ and Horner J

KEEGAN LCJ (delivering the judgment of the court)

Introduction

[1] This is an appeal from the refusal of leave to apply for judicial review contained in a decision of Colton J of 25 November 2021. Colton J has helpfully set out the background in some detail and so we need only summarise it as follows. Both applicants have been affected by the deaths of their loved ones during the so-called Troubles in Northern Ireland. There is therefore no issue with the standing of the applicants in both of these related cases.

[2] Patricia Burns is the daughter of Thomas Aquinas Burns who was shot dead by a member of the British army as he attempted to leave Glenpark Social Club on 13 July 1972. She awaits the outcome of an investigation by the Legacy Investigation Branch ("LIB") into this death and has issued judicial review proceedings challenging the refusal by the Attorney General to direct a fresh inquest into this and other deaths. Daniel McCready is the nephew of Jim McCann, one of six people killed in the New Lodge on 3/4 February 1973 outside Lynch's bar. A fresh inquest has been directed by the Attorney General.

[3] The impugned decision is described in the Order 53 statement. It emanates from government proposals to deal with legacy issues in Northern Ireland announced by Command Paper 498. The Command Paper was published on 15 July 2021. We were informed that no further formal steps have been taken in relation to the proposals. It is a matter of public record that the Secretary of State for Northern Ireland has recently indicated to the Northern Ireland Affairs Select Committee that the process was ongoing given the legal complexities involved. In the meantime, legacy type litigation in Northern Ireland has continued on the basis of the current law.

[4] The impugned decision has various limbs and is categorised by the appellant as a decision within the Command Paper to:

(i) Create a statute of limitations to apply to all Troubles' related incidents;

(ii) Create a statutory bar preventing the PSNI and Police Ombudsman of Northern Ireland from investigating Troubles' related incidents thereby bringing to an end criminal investigations into Troubles' related offences and removing the prospect of prosecutions; and

(iii) Prevent the courts from hearing any cases concerning Troubles' related matters, whether criminal cases, civil claims, judicial reviews or inquests or other proceedings and whether or not such cases are already before the courts or even at hearing.

[5] The applicants also seek to challenge the refusal of the proposed respondent to acknowledge that the above would be "so fundamentally unconstitutional" that it could not lawfully be enacted by Parliament.

[6] The relief sought is declaratory, as follows:

(i) The proposals would be so fundamentally unconstitutional that it could not lawfully be enacted by Parliament or given effect by the courts.

(ii) That the proposals are incompatible with rights under the Convention including articles 2, 3 and 6 which are offended.

(iii) That the proposals are incompatible with Article 2 of the Northern Ireland Protocol which operates to uphold human rights and equality standards.

[7] The applicants base the above claims on allegations of illegality, irrationality, improper motive/bad faith and breach of EU law.

The Command Paper

[8] The Command Paper, at internal page 6 contains the following statement of purpose from the Secretary of State for Northern Ireland:

> "The purpose of this paper is to set out a series of proposed measures for addressing the past that will be considered as part of the ongoing engagement process with a view to informing discussion and subsequent legislation."

[9] An oral statement was made by the Secretary of State for Northern Ireland on 14 July 2021 accompanying release of the paper as follows:

> "The objective of this engagement is to deal with legacy issues in a way that supports information recovery and reconciliation, complies fully with international human rights obligations, and responds to the needs of individual victims and survivors, as well as society as a whole, this is a hugely difficult and complex issue, and many have strongly held and divergent views on how to move forward. But I hope that we can all agree that this issue is of the utmost importance to the people of Northern Ireland and beyond. It is critical that all involved continue to engage in a spirit of collaboration, in order to deliver practical solutions on this most sensitive of issues. This Government reaffirms its commitment to intensive engagement in this spirit and we are committed to introducing legislation by the end of this autumn."

[10] Following introduction of the Command Paper there was engagement with multiple stakeholders on the proposals, including the Irish Government, the Northern Ireland parties, victims' groups and others. Should these proposals become law, there would be an impact upon the investigations relating to the deaths of Thomas Burns and James McCann. However, the effect of any change in the law would also have a significant impact on a wider cohort of legacy litigation in this jurisdiction. Opposition to the proposals has already been expressed from a variety of quarters to the plans. This opposition is rightly acknowledged by the proposed respondent. In that context the government has continued with consultation and engagement.

Consideration

[11] There are obvious sensitivities and concerns raised about the issues which frame this case. However, the legal question is whether it is appropriate for the court to intervene prior to the introduction and passing of legislation. The applicants say that the court should do so on the basis that the proposals would represent a fundamental unconstitutional change and offend human rights. The proposed respondent says this would be a constitutionally inappropriate intervention by the court in an area that is generally considered to be non-justiciable and, in any event, that the application is premature. Colton J agreed with the proposed respondent and refused leave to apply for judicial review.

[12] This is a court of supervisory jurisdiction. It performs an important function to scrutinise the actions of public authorities including government. As a general rule, the courts are concerned in judicial review with adjudicating on issues of law that have already arisen for decision and where the facts are established. The courts will not generally consider cases which are brought prematurely because, at the time the claim is made, the relevant legal or factual events to which the claim relates have not yet occurred.

[13] The courts may have jurisdiction to grant what are sometimes referred to as "advisory declarations." This facility is discussed in *R (on the application of Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs & Orders* [2016] EWHC 2010 (Admin) at para [62] as follows:

> "The jurisdiction to grant declaratory relief to clarify an issue of law is not controversial. Wade and Forsyth on Administrative Law, 11th edition, observe (at p. 484):
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> > 'The declaration is a discretionary remedy. This important characteristic probably derives not from the fact that the power to grant it was first conferred on the Court of Chancery, but from the discretionary power conferred by the rules of court. There is thus ample jurisdiction to prevent its abuse; and the court always has inherent powers to refuse relief to speculators and busybodies, those who ask hypothetical questions or those who have no sufficient interest. As was said by Lord Dunedin [in Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd [1921] 2 AC 438 at 448]:

> 'The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.'
>
> In other words, there must be a genuine legal issue between the parties."

[14] We are not aware of an advisory opinion having been issued in Northern Ireland to date. However, we note the cases referred to by counsel such as *The Queen (On the Application of Unison) v Secretary of State for Health* [2010] EWHC 2655 which was a claim against the Secretary of State in relation to a White Paper dealing with changes to the Health Service. From the above it is clear that the court has discretion when asked to take such a course. It is equally clear that there must actually be a real point of law to declare upon.

[15] Paragraphs [9]-[11] of the *Unison* case are instructive and so we set them out as follows:

> "9. The ground rules are not controversial. The courts cannot question the legitimacy of an Act of Parliament or the means by which its enactment was procured: see British Railways Board v Pickin [1974] AC 765, and as to proceedings in Parliament, Article 9 of the Bill of Rights). Nor may they require a bill to be laid before Parliament: see Wheeler v Office of the Prime Minister and others [2008] EWHC 1409 Admin.
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> 10. The converse must also be true. The courts cannot forbid a Member of Parliament from introducing a Bill. To do so would be just as much an interference with Parliamentary proceedings as to require the introduction of a Bill.
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> 11. The Unison challenge is not so blunt, but if successful it would require the Secretary of State to defer or delay introducing the Health Bill until he had consulted on its principle. Any court ordered prohibition would be conditional, but it would nevertheless be a prohibition. I consider that it would go against the restraint exercised by the judiciary in relation to Parliamentary functions, for the reasons explained by

> Sir John Donaldson MR in Her Majesty's Treasury v Smedley [1985] QB 657 at 666C to E. For that reason alone, I would decline to make a prohibitory or mandatory order which in any way inhibited the Secretary of State from introducing legislation to Parliament at a time and of a nature of his choosing."

[16] The above passage highlights the fact that in this area, courts must proceed with caution. Any declarations on points of law of general importance are only made where there is an identified point of law and there are important reasons in the public interest for doing so.

[17] What is clear is that the Parliamentary process should not be interfered with. Article IX of the Bill of Rights 1688 provides "that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament." In *R (on the application of Wheeler) v Officer of the Prime minister & Others* [2008] EWHC 1409 at para [49] the court reiterated the fact that the introduction of a Bill into Parliament forms part of the proceedings of Parliament and for the courts to require Ministers to introduce a Bill as sought in that case would be to trespass impermissibly on the province of Parliament. This principle has been affirmed more recently in *R (Adiatu) v HM Treasury* [2020] PTSR 2198.

[18] The making of primary legislation is a Parliamentary function. The terms of the Human Rights Act 1998 excludes either Houses of Parliament or a person exercising functions in connection with proceedings in Parliament from the definition of a public authority. However, Parliament must when scrutinising any legislation, consider Convention compliance. This is reiterated by the pledge contained in Article 2 of the Northern Ireland Protocol which is part of domestic law. Judicial scrutiny is also available to consider any claims relating to compliance with the Human Rights Act post legislation.

[19] We can see that when points of law arise the courts may be asked to provide an opinion. However, this court is not in a position to know with sufficient certainty what issues will actually arise in the circumstances of this case. Put simply, we can discern no actual point of law. In our view it is neither appropriate nor wise to make rulings on questions of law until the precise terms of any legislation are known. In the present case, both applicants seek rulings in relation to an alleged decision which, has not yet finally been reached and which may or may not come to pass.

[20] This differs from the situation in *R v Her Majesty's Treasury, Ex parte Smedley* [1985] QB 657 where the court was asked to provide an opinion on the terms of an Order in Council. Putting aside the fact that here it is an Act in Parliament which would be at issue, the actual terms of the Order in Council were available for the court to consider in *Smedley*.

[21] We do not consider that the case of *Wightman v Secretary of State for Exiting the European Union* [2018] CSIH 62 is of assistance as that was an unusual case where the terms of the Treaty on the Functioning European Union ("TFEU") were under scrutiny and where the court was asked to request the Court of Justice of the European Union ("CJEU") to answer a question as to the scope of Article 50. The function of the question was to enable certain persons, notably MPs, to be properly informed about the law. This is distinct from a court as here being asked to issue an advisory opinion on government proposals.

[22] Equally, reliance on the case of *JR 80* [2019] NIQB 1 and [2019] NICA 58 does not take us much further. That case concerned the alleged failure of the responsible agencies to give effect to the recommendations of the Northern Ireland Historical Institutional Abuse Inquiry report. There was therefore a tangible issue for determination.

[23] The case of *The Queen (On the Application of A, J, K, B and F) v Secretary of State for the Home Department* [2022] EWHC 360 Admin has also been relied on. In that case Fordham J declined to make a declaration in relation to common law standards of legally adequate consultation and statutory duties in the Equality Act 2010. This is a different context from the present case nonetheless the discussion of justiciability affirms the limits of the court's supervisory jurisdiction with which we agree.

[24] The context of this case differs from any of the cases we have been referred to. Put simply, there is no justiciable decision to review in this case given that the Command Paper sets out government proposals which have not yet resulted in the introduction of legislation. In our view this presents an insurmountable obstacle to the argument that this court can declare on the law.

[25] It remains to be seen what will happen in relation to this proposed legislation. In such a fluid situation, it would not be prudent for us to offer any further opinion on the substantive issues raised.

[26] In a highly political and contentious context such as this we do not favour the approach suggested especially as there is an ongoing process of consultation. In *R (SC) v Secretary of State for Work and Pensions* [2021] 3 WLR 428 Lord Reed dealt with the respective roles of the courts and Parliament when he said:

> "That risk can only be avoided if the courts apply the principle in a manner which respects the boundary between legality and the political process. Judicial independence is accepted only if the judiciary refrains from interfering with political processes. If the judicial power is to be independent that judicial and political sphere have to remain separated."

[27] Therefore, and because of its hypothetical nature we do not make any finding as regards the constitutional issue which has been raised in this case. We note Mr Macdonald's reliance on the dicta of Lord Steyn in *Jackson v AG* [2006] 1 AC 102 in relation to the potential role of the courts within our constitutional structure. The Court of Appeal also referenced this issue at paras [51]-[53] of *JR 80*. Since *Jackson* the cases of *R (on the application of) Miller v the Secretary of State for Exiting the European Union* [2017] UKSC 5 and *R(Miller) v Prime Minister (No2)* [2020] AC 373 have reaffirmed the principle of parliamentary sovereignty. If there is to be a debate on the boundaries of this, it is for another day.

Conclusion

[28] We acknowledge the strength of feeling expressed by the applicants in their affidavits, the importance of this issue and the wider implications of any changes in the law. However, this is a court of supervisory jurisdiction. In reaching our conclusion we have applied the standard for judicial review which emanates from *Omagh District Council's Application* [2004] NICA 10 that there must be an arguable case with a reasonable prospect of success. We do not consider that there is for the reasons we have given. Accordingly, we consider that the claims are premature, and non-justiciable. The subject matter is also part of an ongoing consultative process which is firmly within the political arena.

[29] Therefore and in broad agreement with the reasons provided by Colton J this court refuses leave to apply for judicial review and the appeal will be dismissed.