Neutral Citation No: [2023] NIDiv 4 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **McC12363** *ICOS No:* **22/100760/01** *Delivered:* **12/12/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION

DIVISIONAL COURT

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IN THE MATTER OF AN APPLICATION BY CHARLES McDONAGH FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Before: McCloskey LJ and Horner LJ

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Mr Ronan Lavery KC and Ms Kelly Doherty (instructed by Oliver Roche Solicitor) for the Applicant
Mr Philip Henry (instructed by the Departmental Solicitor's Office) for the Proposed Respondent

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McCLOSKEY LJ (*delivering the judgment of the court*)

History

[1] Charles McDonagh (hereinafter the "applicant") brings this application for leave to apply for judicial review. As is noted above, the only public authority participating actively in these proceedings is the Department for Infrastructure ("DFI").

[2] In the original Order 53 Statement, five proposed respondents were named: DFI, the Minster for Infrastructure, the Northern Ireland Courts and Tribunals Service, the Ministry for Justice and the Department of Justice. Following amendment, DFI became the sole respondent.

[3] The "impugned decision" section of the Order 53 Statement reveals that the applicant is challenging:

(i) Article 6 of the Road Traffic (Amendment) Act (NI) 2016 (the "2016 Act").

(ii) The Road Traffic (Amendment) (Commencement No 2) Order (NI) 2020 (the "2020 Order").

(iii) "The ongoing decision of [DFI] reiterated in correspondence dated 6 July 2022 that they consider the provisions of Article 6 of the 2016 Order to be lawful and to refuse to amend or repel these provisions."

(iv) The decision of the district judge to convict the applicant on the charge of driving with excess alcohol on 11 April 2022.

Material Factual Matrix

[4] The material facts are few in number and may be summarised thus:

(a) On 9 November 2020 section 6 of the 2016 Act was commenced via the 2020 Order.

(b) On 19 December 2020 the applicant was observed by police at 4.10am parking his car at the entrance to a shop in Enniskillen in a manner which partially blocked two petrol pumps. When he alighted from his vehicle, he was observed to be unsteady on his feet. Police approached him and smelled alcohol. He was required to take part in a preliminary breath test (the "roadside" sample). He blew 58mcg. The statutory limit is 35mcg. He was arrested and conveyed to Omagh Police Station. He provided his "evidential" samples of breath at 5.22am and 5.23am. The lower of those two results was 43mcg. He was charged with driving with excess alcohol.

(c) On 11 April 2022, following a contested hearing, the applicant was convicted of the charge by Omagh Magistrates' Court.

(d) This was followed by a PAP letter dated 15 June 2022 and a letter of response from the Departmental Solicitor's Office ("DSO"), on behalf of DFI, dated 6 July 2022.

(e) Having applied for legal aid on 12 August 2022, on 2 September 2022 the applicant's solicitors received a Legal Services Agency ("LSA") Certificate granting civil legal aid "to apply … for judicial review … the respondents being the Department for Infrastructure and the Department of Justice … [and] … to take all necessary steps to prepare and lodge a leave application for judicial review and for junior counsel to appear and to present the said leave application."

(f) These proceedings were commenced on 22 November 2022.

(g) On 25 January 2023 the proceedings were adjourned because the applicant was pursuing an appeal against his conviction.

(h) On 21 June 2023 his appeal was dismissed. (This fact was not communicated to the court.)

(i) On 2 August 2023 the court office requested an update of the applicant's solicitors.

(j) Four further case management listings of the court ensued: on 15 September, 17 November, 30 November and 4 December 2023. On the third of these listings the applicant did not appear and was not represented. (The ruling and order of the court have been transcribed and are available separately).

(k) Upon the most recent listing the court was driven to make an unless order.

(l) Most recently, legal aid for two counsel has been granted.

Material Statutory Matrix

[5] The material statutory framework and history may be summarised thus. Under Article 19 of the Road Traffic (NI) Order 1995 (the "1995 Order"), as originally enacted, an arrested person providing a specimen of breath containing no more than 50mcg had the right to require that this be substituted by a sample of blood or urine. This was commonly known as "the statutory option." Pursuant to the later statutory provisions noted in para [3] above the statutory option was repealed with effect from 9 November 2020.

Merits

[6] The prosecution and conviction of the applicant unfolded in accordance with the legislation prevailing on the date of his offending viz 9 December 2020. Thus, the statutory option was not available to him after he had provided his two specimens of breath at the police station.

[7] The applicant's case is, per counsel's skeleton argument:

> "The applicant asserts that section 6 of the 2016 Act, and the decision to implement it, gives [sic] rise to a breach of the applicant's rights under Article [sic] 6 and 8 ECHR."

Notably, there is no mention of the Human Rights Act 1998 in this formulation. The court will assume, favourably to the applicant, that section 6 is the provision invoked.

[8] What is the argument underpinning the contention set out above? It is suggested that (a) the results of breath tests are "arbitrary", (b) there is "no evidence" that modern breath testing machinery is more accurate than its predecessors, (c) there will never be any delay in securing the services of a medical practitioner as one must

be available for every custody suite and (d) all suspects must be conveyed to the relevant police station for the purpose of further testing.

[9] What has any of the foregoing got to do with the right lying at the core of article 6 ECHR, namely the right of every accused person to a fair trial? The particular elements of article 6 invoked on behalf of the applicant are (per counsel's skeleton argument) "the principle of equality of arms, the presumption of innocence, the right to call witnesses and challenge prosecution witnesses."

[10] The short and robust riposte is that the new statutory regime does not deprive an accused person of any of these rights. Each of them is wholly unaffected. In the particular case of the applicant:

(a) The bare assertion of inequality of arms is unevidenced is light years removed from the impugned statutory provisions in any event.

(b) The presumption of innocence applied at all stages of his prosecution.

(c) The applicant's right to call witnesses was unimpaired by the impugned statutory provisions.

(d) His right to challenge prosecution witnesses was similarly unimpaired.

[11] More specifically, the centrepiece of Mr Lavery's argument, namely the contention that there is an analogy to be made with one of the themes of the ECtHR's article 6 jurisprudence viz where the conviction of the defendant is solely or mainly based on the evidence of a witness or witnesses whom the defendant is unable to challenge by questioning a breach of article 6 may occur has in our judgement no traction. We consider that this principle avails the applicant nothing for the simple reason that his ability to challenge the relevant mechanical evidence by the adduction of such evidence, expert or otherwise, as he (a legally assisted person) chose was entirely unimpaired by the impugned statutory provisions. While Mr Lavery sought to pray in aid the applicant's unsuccessful application for disclosure in the Magistrates' Court, the complete answer to this argument is the absence of <u>any evidential foundation</u> that this judicial adjudication either (a) was itself in breach of any of the constituent elements of article 6 or (b) gave rise to any such breach in the ensuing substantive phase of the prosecution.

[12] Properly analysed, the applicant's complaint is that the law became tougher for drunken drivers on 9 November 2020: with effect from that date, prosecutions for the offence of driving with excess alcohol became more difficult to defend. These are all issues of <u>substantive</u> law. They do not impinge on the <u>purely procedural</u> protections which article 6 ECHR protects. Article 6 is a <u>due process</u> provision, which bites in the context of the application, rather than the content, of substantive law, subject only to the case where the relevant substantive law is irredeemably incompatible with one, or more, of the constituent rights protected by article 6: that, by some measure, is not this

case. There is no right not to be prosecuted protected by article 6 (*International Bank etc v Bulgaria* App No 7031/05 at [129]). In a sentence, article 6 ECHR is rooted in the fairness of the citizen's trial. The essence of this applicant's challenge belongs firmly to the notional other side of this bright luminous line.

[13] For the reasons elaborated the applicant's article 6 ECHR challenge is manifestly devoid of merit.

[14] Counsel's skeleton argument also contains the following sentence:

> "Further the restriction and subsequent loss of a driving licence is [sic] in violation of Article 8 of the convention [sic]."

The "restriction" in play is not defined or described. The court will assume, again favourably to the applicant, that this is an oblique reference to the impugned statutory provisions, in tandem with s 6 of the Human Rights Act. Article 8 ECHR is not pleaded in the Order 53 Statement and (a) notwithstanding the protracted and unsatisfactory history of these proceedings from their initiation (the first anniversary having passed) and (b) the facility granted by the court of amending the Order 53 Statement, giving rise to a draft amended pleading dated 27 September 2023, no attempt has been made to extend the grounds of challenge to article 8. This per se is fatal.

[15] It is otiose to add that the impugned statutory provisions in any event are manifestly detached from the rights protected by article 8 namely the right to respect for one's family life and the right to respect for one's private life. If and insofar as the conviction of any accused person under the regime established by the new statutory provisions has, on the particular facts of their case, an adverse impact on either of these rights this flows from the operation of statutory provisions which this court finds to be fully Convention compliant. Furthermore, if and insofar as any article 8(2) analysis falls to be carried out, in any given case or in the applicant's case, the impugned statutory provisions pursue the legitimate aims of incontestable importance namely the protection of public health and the protection of the rights and freedoms of others and, further, are a manifestly proportionate means of securing these aims.

Delay

[16] This application is non-compliant with the time limit prescribed by Order 53, Rule 4 of the Rules of the Court of Judicature. Ample and generous opportunity to address this issue and to provide an evidential foundation for demonstrating that there is good reason to allow this belated challenge to continue have been afforded the applicant. Furthermore, this issue has been explicitly in play from the initial CMD Order of this court dated 2 December 2022. The applicant's solicitor purported to swear an affidavit in an endeavour to establish good grounds for extending time. A

two-fold response is appropriate. First, the jurat of the affidavit is manifestly non-compliant with Order 41. This is a fundamentally defective document which the court will disregard in consequence. It is not an affidavit. It is in effect a draft witness statement. Second, the document manifestly fails in any event to establish even a semblance of any basis for the exercise of the court's discretion to extend time.

Human Rights Incompatibility Notice

[17] Notwithstanding ample and generous opportunity to provide a draft Notice under Order 121, a matter which was specifically raised in the CMD Order of 17 November 2023, the applicant has failed to do so. This is yet another instance of what is addressed in para [16] infra.

Conclusion

[18] This application for leave to apply for judicial review is entirely devoid of merit for the reasons rehearsed above. Having regard to those reasons it has not been necessary for the court to prolong the agony by pursuing appropriate steps under Order 120 and/or 121 of the Rules of the Court of Judicature. This application is also out of time and no persuasive basis for extending time has been established. An order of dismiss follows inexorably.

[19] The court is bound to add that these proceedings were misconceived from the outset, as reflected by the court's determinations that (a) the threshold for granting leave is not overcome and (b) oral argument from the respondent's counsel was not required. These proceedings were further characterised by a repeated failure on the part of the applicant's legal representatives to engage and co-operate satisfactorily with the court, in manifest disregard of case management orders and the overriding objective.

Costs

[20] Where a judicial review leave application is dismissed an order for costs against the challenging party in favour of a participating proposed respondent will not normally be made. Having regard to paras [16]–[19] above, cumulatively, we consider that an order for costs against the applicant, with the usual public funding qualifications, is warranted.