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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* 07/02/2025

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY CLIFFORD PEEPLES
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Ronan Lavery KC & Conor Leonard (instructed by McIvor Farrell Solicitors) for the Applicant
Tony McGleenan & Philip McAteer (instructed by the Departmental Solicitor's Office) for the Proposed Respondents

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HUMPHREYS J

Introduction

[1] The applicant, who describes himself as a writer and political commentator with an interest in the politics of Northern Ireland, seeks leave to apply for judicial review of a policy adopted by the proposed respondents, the Northern Ireland Executive ('the Executive') and The Executive Office ('TEO'). This policy, it is said, ensures the non-disclosure of information relating to meetings of the Executive and TEO and consequently the public is not informed of either the schedule or the content of such meetings.

[2] The applicant seeks a declaration that this policy, and the decisions made pursuant to it, are unlawful and an order of certiorari quashing the policy and the decisions.

[3] In particular, the applicant refers to a statement made by TEO on 18 July 2024 to the effect that:

> "All aspects of the Executive business are regarded as confidential, we will not be providing a running commentary on the schedule for future executive meetings."

[4] This statement was not made as a result of anything said or done by the applicant but was in response to a request made by journalists for a schedule of forthcoming Executive meetings.

[5] The applicant also seeks to impugn the decision of TEO not to provide any notice of, or release the records of, a meeting which took place between Ministers and a senior Chinese diplomat in May 2024.

[6] By these proceedings, the applicant seeks to reverse what he describes as a "policy of secrecy."

The Ministerial Code and Guidance

[7] Section 28A of the Northern Ireland Act 1998 ('NIA') provides that Ministers shall act in accordance with the Ministerial Code. The Code itself requires Ministers to follow the seven Nolan principles of public life, one of which requires holders of public office to be as open as possible about the decisions and actions which they take.

[8] Paragraph 1(1)(i) of Schedule 4 to the NIA requires Ministers to comply with rules regarding the management of official information.

[9] The "Guidance for Ministers in the Exercise of their Official Responsibilities", agreed by the Executive Committee in March 2020 confirms that Ministers must adhere to the rules regarding the management of official information. Paragraph 7.2 provides:

> "Ministers have a personal responsibility to safeguard the integrity and confidentiality of official papers, including Executive papers"

[10] The "Conduct of Executive Business Protocol", published by TEO in May 2016, addresses this question of confidentiality at paragraph 35:

> "The content of Executive papers and all aspects of Executive business are regarded as confidential, and Ministers should at all times observe the need for confidentiality in relation to the conduct of Executive business and the proceedings of its meetings, other than by means of any agreed statement which may be issued following a meeting. Ministers should ensure that the necessary steps are taken to protect the detailed content of papers and Executive minutes which are to be, or have been, considered by the Executive."

[11] The same document does, however, recognise that there may be circumstances in which information ought properly to be disclosed. At paragraph 37, Ministers are advised that requests may be made under the Freedom of Information Act 2000 ('FOIA') and, in any given case, consideration should be given to whether any of the statutory exemptions apply. It explicitly states:

> "…a case by case public interest test must be carried out on all information under consideration for disclosure: it should not be assumed that Executive papers and associated correspondence can be automatically withheld."

The statutory framework

[12] Parliament has provided, by enacting the FOIA, a bespoke scheme whereby any person can make a request to a public authority for disclosure of information. The statute recognises a general entitlement to such information, subject to a number of exemptions. Section 35 of FOIA relates to the formulation of government policy and states:

> "(1) Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—
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> (a) the formulation or development of government policy,
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> (b) Ministerial communications,
>
> (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
>
> (d) the operation of any Ministerial private office."

[13] This provision does not make such information automatically or absolutely exempt from disclosure but rather engages a public interest test. By section 2(2) the information is not subject to disclosure if:

> "In all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

[14] The FOIA prescribes the requirements for a request for disclosure and fixes the time for compliance. Section 50 of FOIA gives a right to challenge a decision to the Information Commissioner and, from there, an appeal lies by either the complainant or the public authority to the First-tier Tribunal under section 57.

[15] The applicant in this case has not made any application under FOIA. The evidence in the case does, however, include a decision made by the Information Commissioner on 16 October 2023. In that case, an unnamed complainant sought the agendas and minutes of Executive Committee meetings and these were refused by TEO in reliance on the section 35 exemption. The Commissioner determined that in the case of the minutes, the public interest in maintaining the exemption outweighed the public interest in disclosure but the reverse was true with regard to the agendas for meetings. As such, TEO was directed to disclose the agendas to the complainant.

[16] In arriving at this decision, the Commissioner took into account how the different United Kingdom administrations deal with the minutes of government meetings. It was noted:

(i) The UK Government does not publish such minutes but they are transferred to The National Archives and are considered for publication after 20 years;

(ii) The Scottish Government publishes Cabinet minutes after 15 years although it has published some in response to requests under the Scottish equivalent of FOIA;

(iii) The Welsh Government publishes minutes as soon as possible following meetings, although certain redactions may be made.

[17] The Commissioner considered that the 'safe space' arguments put forward by TEO carried particular weight in allowing Ministers to formulate positions in respect of policy matters.

[18] The applicant also places reliance on the meeting with a Chinese diplomat which occurred on 23 April 2024. The applicant himself raised no concern about this but Amnesty International made an FOIA request on 26 April in the following terms:

> "The Executive Office has reported that a meeting took place at Stormont Castle between the First Minister Michelle O'Neill, deputy First Minister Emma Little-Pengelly and Junior Ministers Aisling Reilly and Pam Cameron with Madane Zhang Meifang, Consul General of the People's Republic of China. I request that the Executive Office please supply me with full minutes or report of this meeting."

[19] On 20 May 2024 TEO replied stating that the requested information could not be disclosed as it fell under the exemption in section 27 of FOIA concerning international relations, duly weighing up the respective public interests. Following a request for an internal review, TEO determined on 19 June 2024 that information should be disclosed with appropriate redactions.

[20] On 21 May 2024 Amnesty International made a second FOIA request, seeking disclosure of the agenda and full minutes of another meeting which took place on 1 May 2024 between the First and deputy First Ministers and Chinese officials.

[21] The requested information was released, with certain redactions, on 6 September 2024.

[22] The applicant's pleaded case that no records of any such meeting have been disclosed is therefore demonstrably incorrect. Instead, the evidence demonstrates the role of the FOIA in determining whether, and to what extent, the minutes of meetings involving Ministers ought to be disclosed.

The test for leave

[23] At the leave stage, an applicant must demonstrate an arguable case with realistic prospects of success which is not subject to a discretionary bar such as delay or alternative remedy.

Alternative Remedy

[24] The proposed respondents say that the grounds advanced by the applicant are unarguable but, in any event, the court should refuse to grant leave on the basis that the applicant enjoys a suitable and adequate alternative remedy.

[25] The Supreme Court held in *Re McAleenon's Application* [2024] UKSC 31:

> "A court may refuse to grant leave to apply for judicial review or refuse a remedy at the substantive hearing if a suitable alternative remedy exists but the claimant has failed to use it. As stated in *R (Glencore Energy UK Ltd) v Revenue and Customs Comrs* [2017] EWCA Civ 1716; [2017] 4 WLR 213, paragraph 55, "judicial review in the High Court is ordinarily a remedy of last resort, to ensure that the rule of law is respected where no other procedure is suitable to achieve that objective." If other means of redress are conveniently and effectively available, they ought ordinarily to be used before resort to judicial review: *Kay v Lambeth London Borough Council* [2006] UKHL 10; [2006] 2 AC 465, paragraph 30; *R (Watch Tower Bible & Tract Society of Britain) v Charity Commission* [2016] EWCA Civ 154; [2016] 1 WLR 2625, paragraph 19." (paragraph [50])

[26] In particular:

> "Where Parliament has enacted a statutory scheme for appeals in respect of certain decisions, an appeal will in ordinary circumstances be regarded as a suitable alternative remedy in relation to such decisions which ought to be pursued rather than having resort to judicial review" (paragraph [51])

[27] The applicant in this challenge has eschewed the remedies available to him via the FOIA. This is fatal to his judicial review leave application. Parliament has created a scheme which is intended to balance the competing public interests at play when disclosure is sought from public authorities. It has enacted a detailed set of statutory principles upon which decision makers must act and it has provided for determination by an independent officer in the form of the Information Commissioner and onwards by way of appeal to a specialised tribunal. This system ensures that decisions are made fairly and in accordance with legal principle by those with specialist knowledge in the field. This will always provide a better remedy than that which may be available by way of judicial review. The FOIA is inescapably a suitable alternative remedy which this applicant has failed to use.

[28] In the exercise of my discretion, I therefore refuse leave to apply for judicial review.

[29] However, in light of the fact that I heard detailed arguments on the grounds which were advanced, I will address those in the remainder of this judgment.

The grounds of challenge

[30] The applicant contends that the policy and decisions are unlawful on the basis that:

(i) They are unconstitutional and inconsistent with the principles of transparency and accountability in government;

(ii) The proposed respondents have acted in breach of the Ministerial Code;

(iii) The policy and decisions are irrational; and

(iv) The policy runs contrary to the applicant's rights under article 10 ECHR.

(i) An unconstitutional policy

[31] The applicant relies, in particular, on the Supreme Court decision in *R (Miller) v The Prime Minister* [2019] UKSC 41 ('Miller 2'). At paragraph [46] the court observed:

> "…a second constitutional principle, that of Parliamentary accountability, described by Lord Carnwath in his

> judgment in the first Miller case as no less fundamental to our constitution than Parliamentary sovereignty *(R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, para 249). As Lord Bingham of Cornhill said in the case of *Bobb v Manning* [2006] UKPC 22, paragraph 13, "the conduct of government by a Prime Minister and Cabinet collectively responsible and accountable to Parliament lies at the heart of Westminster democracy." Ministers are accountable to Parliament through such mechanisms as their duty to answer Parliamentary questions and to appear before Parliamentary committees, and through Parliamentary scrutiny of the delegated legislation which ministers make. By these means, the policies of the executive are subjected to consideration by the representatives of the electorate, the executive is required to report, explain and defend its actions, and citizens are protected from the arbitrary exercise of executive power."

[32] It is argued that the policy adopted in relation to confidentiality breaches this principle of accountability since members of the public are stymied from bringing concerns to their elected representatives and thence from having Ministers held to account by the legislature.

[33] As Lord Bingham found in *Robinson v Secretary of State* [2002] UKHL 32, the NIA is effectively the constitution of Northern Ireland. By virtue of it, the Assembly makes laws within its legislative competence. Ministers have executive authority but remain at all times accountable to the Assembly. Where a policy decision is made by the Executive Committee, the relevant Minister informs the members of the Assembly by way of an oral statement. The Assembly's proceedings are conducted in public and members of the legislature can subject to the Minister to questioning and scrutiny. Paragraph 3.1 of the March 2020 Guidance for Ministers states:

> "Ministers must at all times be accountable to the Assembly for the decisions and actions of their departments and agencies…Ministers must be as open as possible with the Assembly and Assembly Committees"

[34] The Northern Ireland system reflects and recognises the importance of the principle of Parliamentary accountability referenced in *Miller 2*. It is noteworthy that there is no complaint raised by any member of the Assembly to the effect that any policy or protocol of the Executive operates in such a way as to prevent proper accountability.

[35] This ground of challenge is entirely unarguable.

(ii) Breach of the Ministerial Code

[36] The Ministerial Code does not require that every discussion which takes place between Ministers must be the subject of open disclosure. Indeed, it would be very surprising if this were the case. The formulation of policy will often involve frank discussions and disputes. An obligation to disclose the positions adopted by each Minister in this process would clearly have the potential to restrict the candour of those discussions, harm the proper formulation of policy and undermine collective responsibility.

[37] The Nolan principle of openness is not in absolute terms and the Guidance and Protocol adopted by the Executive Committee recognise the importance of confidentiality in this area.

[38] This is reflected in section 35 of FOIA whereby such information is exempt from disclosure, subject to the application of the public interest test.

[39] It is also noteworthy that the approach adopted in Northern Ireland is closely mirrored in England and Scotland, although the Welsh Government has taken a different course.

[40] The adopted policy does not entail a breach of the Ministerial Code. It does not amount to a 'blanket ban' and it is always subject to the provisions of FOIA. This ground of challenge is unarguable.

(iii) Irrationality

[41] Given the court's findings in relation to legality of the policy and approach adopted by TEO, the assertion of irrationality is clearly unsustainable.

(iv) Article 10 ECHR

[42] Article 10 enshrines the right to freedom of expression and this includes the freedom to "receive and impart information and ideas without interference by public authority." However, article 10(2) states that the exercise of such freedoms may be subject to restrictions and conditions as are prescribed by law and necessary in a democratic society.

[43] In *Kennedy v Charity Commission* [2014] UKSC 20, the Supreme Court held, by a majority, that, despite a developing trend of Strasbourg jurisprudence, article 10 did not give rise to a right of access to information.

[44] However, in *Magyar Helsinki Bizottsag v Hungary* (Application no. 1830/11, judgment 8 November 2016), the Grand Chamber held:

> "Article 10 does not confer on the individual a right of access to information held by a public authority nor oblige the Government to impart such information to the individual. However…such a right or obligation may arise, firstly, where disclosure of the information has been imposed by a judicial order which has gained legal force…and, secondly, in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where it denial constitutes an interference with that right." (paragraph [156])

[45] In *Saure v Germany* (Application no. 6106/16), the court explained that the following criteria would be considered in determining whether article 10 was engaged:

(i) The purpose of the information request;

(ii) The nature of the information sought;

(iii) The role of the applicant; and

(iv) Whether the information was ready and available.

[46] When faced with a conflict between decisions of the Supreme Court and those of the Grand Chamber of the ECtHR on human rights issues, Lord Bingham advised in *Kay v Lambeth LBC* [2006] 2 AC 465:

> "As Lord Hailsham observed ([1972] AC 1027, 1054), "in legal matters, some degree of certainty is at least as valuable a part of justice as perfection." That degree of certainty is best achieved by adhering, even in the Convention context, to our rules of precedent. It will of course be the duty of judges to review Convention arguments addressed to them, and if they consider a binding precedent to be, or possibly to be, inconsistent with Strasbourg authority, they may express their views and give leave to appeal, as the Court of Appeal did here. Leap-frog appeals may be appropriate. In this way, in my opinion, they discharge their duty under the 1998 Act. But they should follow the binding precedent, as again the Court of Appeal did here."

[47] In light of this, I held in *Re Lavery's Application* [2022] NIQB 19 that the *Kennedy* approach was to be preferred and that, as a matter of domestic law, article 10 did not

create a right of access to information from a public authority. Colton J determined likewise in *Re JR209's Application* [2022] NIKB 30. In each case, it was found that article 10 was not engaged and the ground of challenge therefore unarguable.

[48] In any event, this applicant has not made any request for information. It is evident from the facts of *Kennedy*, *Magyar Helsinki* and *Saure* that such a request is a necessary prerequisite in order to contend that there has been a breach. Each request must be subjected to individual analysis. In the absence of any such request being made by the applicant which could be considered within the *Saure* criteria, this claim simply does not get off the ground.

[49] For both these reasons, therefore, I find that this ground of challenge is also unarguable.

Conclusion

[50] For all these reasons, the applicant has not established an arguable case with realistic prospects of success and, I therefore, dismiss the application for leave to apply for judicial review.