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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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IN THE MATTER OF AN APPLICATION BY JR83
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Mr Macdonald QC with Mr Magowan (instructed by Hart Coyle Collins Solicitors) for the Applicant
Dr McGleenan QC with Mr Philip McAteer (instructed by the Crown Solicitor for Northern Ireland) for the proposed Respondent

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McALINDEN J

Introduction

[1] Firstly, I would like to express my gratitude to the legal representatives for the applicant and the proposed respondent in relation to the quality of their written submissions supplemented by their oral submissions this morning. The court is deeply indebted to Mr Macdonald QC and Dr McGleenan QC for the quality of their submissions and the conciseness of their arguments. They are both a credit to their profession and the public, I think, in Northern Ireland is well served by the quality of legal representation available to it when it comes to dealing with matters of this importance and complexity.

[2] The first issue that the court will address is the issue of anonymity. The court has given full consideration to the affidavit evidence submitted by and on behalf of the applicant in this matter. The court has also given careful consideration to the judgment of the Supreme Court in the case of *R (In the Application of C v the Secretary of State for Justice)* decision given on 27 January 2016 and also the subsequent decision of the English Court of Appeal in *XXX v Camden London Borough Council* [2020] EWCA Civ 1468 the judgment of Lord Justice Dingemans. The court acknowledges that it is a balancing exercise between two important competing interests those interests being the human rights of the applicant and the interest of an open and transparent administration of justice and the principle of free and

accurate reporting of judicial proceedings. The balancing exercise that must be performed in this case is between those two competing interests neither of which has primacy. It is quite clear from the decision in *Re S (A Child)* Lord Steyn at paragraph 17 identified four principles. He said:

> "First, neither article (let us say Article 8 against Article 10) has as such precedence over the other. Second, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each."

[3] Bearing in mind that guidance from the Supreme Court, the court has to focus in on the key issues in this particular case and determine the matter in light of the evidence that is being adduced by and on behalf of the applicant including a medical report from a general practitioner in relation to an anxiety state. The court obviously has to take into account the advice and guidance given in the case of *Re Officer L* [2007] UKHL 36 and the issue of whether the presence of subjective fears even if not based on facts can be taken into account or balanced against the principle of open justice and it is clear from the *Re Officer L* case that such subjective fears especially fears that relate to impacts on health can be taken into account and balanced against the principle of open justice.

[4] The applicant in this case has been quite candid in stating that despite her anxiety state and despite this litigation and the prospect of adverse comment being made in respect of her engagement in this litigation, she would be minded to proceed with the litigation, even if anonymity was refused in this case and, therefore, the issue of access to justice is not one which is directly engaged in her case. However, the court has to take into account the evidence in relation to potential interference with her right to private and family life and her Article 2 rights and bearing in mind the significant abuse that was meted out to an applicant in other Brexit litigation and bearing in mind the submission of a medical report in this case in relation to the existence of an anxiety state and the general practitioner's comments that this anxiety state could well be exacerbated by reason of adverse comment being made in respect of the applicant arising out of this litigation, and bearing in mind the emotive subject that is at the heart of this litigation, which is the Brexit issue, the court, on balance, considers that it is necessary in the interests of justice to grant anonymity in this case and in light of that conclusion the court will grant the applicant anonymity and this case will be referred to as JR83 No.2.

[5] The next issue which the court has to deal with obviously is the more important issue which is the substantive application for grant of leave in this case and there are a number of issues that the court has to deal with in relation to the issue of leave and the first issue that the court will address is the issue of delay. The

actions that are the subject of challenge here are the actions of the Prime Minister in January 2020. At first blush, it would appear that the challenge to those actions being initiated by way of an Order 53 Statement in late October 2020 is one which is redolent with delay. However, on exploring the issue in greater detail with Mr Macdonald this morning, it became quite clear that, although the applicant had concerns about the state of mind of the Prime Minister when the Prime Minister signed the Withdrawal Agreement in January 2020 and in the weeks thereafter, the concerns only became manifestly obvious when the Internal Market Bill was published and introduced in the House of Commons. The approach adopted by the applicant in this case can be viewed as a cautious approach; having concerns, having genuine deep seated concerns, but not rushing to the court with those concerns until a substantial evidential base to justify those concerns was available. The court takes the view that in an important issue of this nature, leave should not be refused on the basis of delay and, therefore, if there is delay in this case the court will certainly exercise its discretion and consider this leave application even though this leave application is brought some number of months after the actions which are the subject of challenge.

[6] This brings me then to the core issue in the case which is the applicant's challenge to the actions of the Prime Minister when he signed the Withdrawal Agreement in January 2020. In essence, the applicant makes the case that the Prime Minister signed the Withdrawal Agreement in January 2020 having no intention of bringing that Agreement to fruition and having no intention to honour the various provisions of the Withdrawal Agreement, including the provisions known as the Northern Ireland Protocol.

[7] In support of that claim, the applicant has adduced a body of evidence which the applicant alleges clearly demonstrates that the Prime Minister had no intention of the UK being bound by the terms of the Withdrawal Agreement and had no intention of implementing the Northern Ireland Protocol but had every intention as events progressed of basically deviating from the treaty requirements and treaty obligations that the United Kingdom had signed up to. The case being made and the relief sought by the applicant is a declaration that when the Prime Minister signed the Withdrawal Agreement in January 2020, he did so in bad faith; he did so for collateral and unlawful reasons and, as such, his actions in signing the Withdrawal Agreement in January 2020 were unlawful. That is the extent of the remedy which the applicant seeks in this case. She does not in any way, shape or form challenge the Withdrawal Agreement; that is for another day. She simply seeks a declaration that the Prime Minister acted unlawfully in signing the Agreement because he had no intention at that time of effecting the sovereign will of Parliament which was that the United Kingdom should depart from the European Union in accordance with the provisions of the Withdrawal Agreement and in accordance with the provisions of the Northern Ireland Protocol which is part of that Withdrawal Agreement.

[8] The issue that the court has to determine is whether that issue is an arguable issue and whether the case that is being made out has reasonable prospects of

success. The subsidiary issue that the court has had to address today relates to whether the challenge is an academic challenge or not. This arises out of the recent developments, as recent as yesterday, when the United Kingdom government announced that the proposed clauses set out in the Internal Market Bill relating to Northern Ireland will not be enacted, nor will similar provisions be enacted in any future finance bill. In essence, the United Kingdom government has indicated publicly that it intends to comply with the terms of the Northern Ireland Protocol which is part of the Withdrawal Agreement and one must remember that the affidavit evidence submitted by the applicant in this case in relation to her reasons for bringing this litigation really focus in on her concerns that the United Kingdom government would not honour the terms of the Northern Ireland Protocol and would not comply with the Withdrawal Agreement insofar as it involved the implementation and adoption of the Northern Ireland Protocol.

[9] In that the UK government has made a clear declaration as recently as yesterday that it intends to be bound by the Northern Ireland Protocol to the Withdrawal Agreement, it could be argued that this litigation really serves no purpose in that the concerns raised by the applicant, the material concerns that directly affected her, or allegedly affected her, have been addressed. However, Mr Macdonald's argument in response to that is that there is only one key issue that the court is required to look at. If there is an allegation, a claim, that the Prime Minister in effecting a decision and in signing a Treaty, which Mr Macdonald QC argues is one of the most important acts performed by a Prime Minister in peace time, that such an act was vitiated by improper motive, and if that act was vitiated by bad faith, then the subsequent reaffirmation by the UK government as to its intention to be bound by the terms of the Northern Ireland Protocol is really irrelevant. The court still has a duty in relation to the fundamental issue of the primacy of the rule of law to examine allegations of this nature where they are supported by a body of evidence and to require the Prime Minister to explain and justify and elucidate his thinking when he signed the Withdrawal Agreement in January 2020. The primacy of the rule of law demands that the court should take that action and require the Prime Minister to provide that explanation to the court so that the court can examine and determine whether he was acting in bad faith at the time that he signed the Treaty in January 2020. That is the crux of the case, according to the applicant, and the more recent machinations of the UK government and the more recent declarations of the UK government to be bound by the Northern Ireland Protocol are neither here nor there.

[10] In my view that argument, although attractive superficially, really has to be the subject of more intensive scrutiny and the court in essence should not be dragged into sterile arid arguments in terms of constitutional propriety when the meat of the complaint made by the applicant has clearly been addressed and, therefore, the court is of the view that there is significant merit in the arguments raised by the proposed respondent in this case that in light of the recent announcements by the UK government in relation to its intention to be bound by and comply with the

Northern Ireland Protocol, there really is no cause of action here that the court has to examine and determine.

[11] This is a matter that I obviously have to take into account and it is a matter that does have to be weighed in the balance but it is certainly not determinative of the outcome of this leave application. The issue that determines this leave application is the issue of the court's role in examining the state of mind of the Prime Minister at the time that he signed the Withdrawal Agreement and brought the Withdrawal Agreement into binding effect as such. Mr Macdonald's compelling argument is that the sovereign will of Parliament as expressed in the 2020 Withdrawal Act was that the UK should withdraw from the European Union in accordance with the terms of the Withdrawal Agreement that had been negotiated between the UK government and the EU with the Northern Ireland Protocol as part of that Agreement. He argues that in light of the evidence base that has been provided to the court following the enactment of the 2020 Act, the Prime Minister clearly was flouting the will of Parliament when he signed that Treaty with the EU in the sense that he had no intention of ensuring that the UK left the EU in accordance with the terms of the Withdrawal Agreement and the Northern Ireland Protocol.

[12] The issue that the court really has to grapple with is as follows: is the state of mind of the Prime Minister at the time of signing the Treaty a matter which is justiciable before this court? Or is it the case that, irrespective of the state of mind of the Prime Minister, the fact that he signed that Treaty and brought it into effect as such following the enactment of the 2020 Act, is as far as the court is entitled to go in terms of analysing whether the Prime Minister followed the sovereign will of Parliament? Having given the matter careful consideration and having regard to the nature of the actions which the Prime Minister was engaging in at the time when he signed the Treaty, the court comes to the conclusion that there may be arguments in terms of the Prime Minister's actual state of mind at that particular time or his desires for the future conduct of relations between the EU and the UK at the particular time that he signed it but, in essence, the court has no jurisdiction or has no role in the analysis of the Prime Minister's state of mind when he signed that Withdrawal Agreement. He gave effect to the sovereign will of Parliament by signing that Agreement and that is as far as the court is entitled to examine the motivation or mind-set of the Prime Minister at that time. The court really has no constitutional role or function in delving into the mind-set of the Prime Minister at the time that he signed the Withdrawal Agreement. His subsequent actions could be open to interpretation in terms of whether at that time he was fully aware of the requirements set out in the Withdrawal Agreement and was unhappy with those requirements and intended at that stage to bring about a situation whereby the UK would not be required to comply with those requirements in domestic law. It could be the case that such a state of knowledge only occurred to the Prime Minister and the Prime Minister's team thereafter, and it was in light of subsequent developments that the UK government took the view that it would not be in a position to comply with the international treaty obligation set out in the Withdrawal Agreement and, as a result of that, decided to enact the Internal Market Bill. But these issues are really

not issues for this court to adjudicate upon or to determine. The sovereign will of Parliament, it is clear at the time, was that the Withdrawal Agreement should be signed and the Withdrawal Agreement was signed and that is as far as this court is able to address the issue of the Prime Minister's mind-set at that time.

[13] So, in light of those views and in light of those findings, the court concludes that there is no arguable case with a reasonable prospect of success in this application and, as a result of that conclusion, determines that leave should be refused. The court, when making this determination takes into account the fact that the issues that are at the core of the applicant's Order 53 Statement, as set out in her affidavit, are those issues relating to the implementation of the Protocol in respect of the relations between the Republic of Ireland and Northern Ireland and the absence of a hard border. The court takes into account that those issues appear to have been addressed as recently as yesterday by the UK government and, therefore, in terms of the issues to be adjudicated upon, the core complaint of the applicant has been apparently met by the UK government and, therefore, this argument or this claim for judicial review is to a large extent academic. However, the key issue and the key fundamental reason why the court refuses leave in this case is that the court does not consider that there is an arguable case with reasonable prospect of success because the court does not consider that the actual mind-set of the Prime Minister when signing that Agreement is a matter that this court can and should examine.

[14] So in those circumstances leave is refused.