Neutral Citation No: [2024] NIKB 86	*Ref:* **HUM12622**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **18/10/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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

The Applicant appeared in person
Philip McAteer (instructed by Cleaver Fulton Rankin) for the Proposed Respondent

---

HUMPHREYS J

Introduction

[1] The applicant is a resident of the Ards and North Down Borough Council ('ANDBC') area who describes himself as being passionate about the expression of British identity in Northern Ireland, particularly with regard to events and aspects of commemoration of those who died in the World Wars.

[2] On 20 December 2023 ANDBC approved a motion to fly the Union flag 365 days per year from war memorials in the borough. This motion was passed by simple majority of elected councillors.

[3] Thereafter a call-in requisition, pursuant to section 41(1) of the Local Government Act (Northern Ireland) 2014 ('the 2014 Act') was submitted by a number of councillors. This was deemed admissible by the Chief Executive of ANDBC and triggered a process which culminated in a vote taking place on 24 April 2024. The proposal failed to reach the necessary qualified majority of 80% and therefore the original motion was vacated.

[4] The applicant seeks to challenge this process and outcome, variously described in his Order 53 statement as the decision to "give effect to the call-in requisition" and the decision "to declare the call-in admissible."

[5] At this stage, the applicant need only satisfy the court that he has established an arguable case with realistic prospects of success which is not subject to a discretionary bar such as delay.

The applicant's evidence

[6] At the time of the swearing of his grounding affidavit in July 2024, the applicant had not had sight of the call-in requisition which commenced the process under challenge. He had become aware of the council vote in late April, but this only derived from media reports.

[7] On 25 April the applicant submitted a request under the Freedom of Information Act ('FOIA') for a copy of the call-in requisition. On 28 May 2024 ANDBC replied:

> "While our aim is to provide information whenever possible, in this instance the information requested is absolutely exempt under section 41 of the Freedom of Information Act, as disclosure would constitute an actionable breach of confidence."

[8] On 12 June the applicant requested a review of this decision on the basis there could be no duty of confidence in respect of a requisition submitted as part of the democratic process by elected representatives and debated in public session.

[9] On 28 June the original decision not to disclose the requisition was upheld by an internal review panel of ANDBC.

[10] On 9 July the applicant referred the matter to the Information Commissioner's Office and a determination is still awaited.

[11] The applicant sent a pre-action protocol letter on 23 July and commenced these judicial review proceedings the following day. The proposed respondent replied substantively on 22 August, enclosing a copy of the call-in requisition.

The call-in requisition

[12] The document bears the date 2 January 2024 and refers to the ANDBC decision of 20 December 2023. The signatories, whose names have been redacted, require that the decision be called in for reconsideration pursuant to both section 41(1) (a) and (b) of the 2014 Act.

[13] Firstly, the councillors concerned state that "the decision was not arrived at after a proper consideration of the relevant facts and issues", contrary to section 41(1)(a) on the basis that the Council had failed to apply the requirements of the Fair

Employment and Equal Treatment (NI) Order 1998 and section 75 of the Northern Ireland Act 1998, alongside relevant policy and best practice guidance.

[14] Secondly, it stated that "the decision would disproportionately affect adversely any section of the inhabitants of the district." The community affected was identified as those from a Roman Catholic, Nationalist or Republican background and those who identify as "others." In relation to the nature and extent of the disproportionate impact, the requisition says:

> "Implementation of the proposed policy, which we contend serves to make the Council's flag policy much more expansive and extensive policy has the real potential to make a less inclusive, welcoming and harmonious place to work, live or visit. We argue the proposed change is contrary to Section 75 of the Northern Ireland Act 1998 in terms of both Equality and Good Relations and Fair Employment and Equal Treatment (NI) Order 1998."

[15] The document goes on to state:

> "Flying the Union Flag permanently in the Borough, in areas which are shared spaces, risks having an adverse impact on residents, visitors and employees from a Roman Catholic and/or Nationalist and/or Republican community background … For example, if this decision concerning flying of Union flag permanently at every War Memorial were to be ratified, there would be three Union Flags being flown 365 days a year in Holywood, including two in close proximity at the War Memorial and at Queen's Leisure Complex."

[16] The Chief Executive of ANDBC accepted the call-in as valid on 3 January 2024. This set in train a process which is prescribed by section 41 of the 2014 Act and the standing orders made thereunder.

The statutory provisions

[17] Section 41 of the 2014 Act provides:

> "(1) Standing orders must make provision requiring reconsideration of a decision if 15 per cent. of the members of the council (rounded up to the next highest whole number if necessary) present to the clerk of the council a requisition on either or both of the following grounds—

(a) that the decision was not arrived at after a proper consideration of the relevant facts and issues;

(b) that the decision would disproportionately affect adversely any section of the inhabitants of the district.

Standing orders must require the clerk of the council to obtain an opinion from a practising barrister or solicitor before reconsideration of a decision on a requisition made wholly or partly on the ground mentioned in subsection (1)(b).

[18] The standing orders of ANDBC, made pursuant to section 41, state:

"23.2 Initiating the call-in process

(1) A decision to which Standing Order 23.1(1) applies must be reconsidered if a requisition is presented to the Chief Executive of the Council signed by at least 15 % of the Members of the Council. This process is known as a 'call-in' of the decision.

(2) A requisition for a call-in may only be presented on either or both of the following grounds:

(a) That the decision was not arrived at after a proper consideration of the relevant facts and issues (as per section 41(1)(a) of the 2014 Act); and/or

(b) That the decision would disproportionately affect adversely any section of the inhabitants of the district (as per section 41(1)(b) of the 2014 Act).

(3) A requisition for a call-in must be submitted in writing to the Chief Executive by 5pm on the fifth working day following the issuing of the Council or Committee decision log that records the decision to which the call-in relates. If the requisition is received after this date, it shall be deemed inadmissible.

(4) A requisition for a call-in shall:

(a) specify the reasons why a decision should be reconsidered; and

(b) subject to Standing Order 23.2(7), be deemed to be inadmissible if the reasons are not specified.

(5) In the case of a call-in submitted under section 41(1)(b) of the 2014 Act, Members must in the reasons specified under Standing Order 23.2(4)(a) specify—

(a) the section of the inhabitants of the district that would be affected by the decision; and

(b) the nature and extent of the disproportionate adverse impact.

(6) Within one working day of receipt of a valid requisition for a call-in, the Chief Executive must confirm that:

(a) the call-in has the support of 15 per cent of the Members of Council; and

(b) the reasons for the call-in have been specified on the requisition.

(7) Where the reasons have not been specified on the requisition, the Chief Executive must notify the Members making the requisition that it shall be considered inadmissible if reasons are not specified in writing within the timeframe provided for by Standing Order 23.2(3).

(8) Where the Chief Executive is of the view that a call-in is not valid, the Chief Executive must notify the Members making the requisition why he/she considers it inadmissible and must report this decision to the next meeting of the Council. In reaching any such view, the Chief Executive may seek legal advice from a practising solicitor or barrister. If legal advice is received, a copy of the advice must be furnished to the Members making the requisition and tabled at the next meeting of the Council."

[19] Standing order 21.3(e) and 23.3(2) require a decision called-in under section 41(1)(b) of the 2014 Act to be voted on at the next available council meeting and it can only be passed by a qualified majority. Section 40(2) of the 2014 Act defines 'qualified majority' as 80 per cent of the votes of the members present and voting on the decision.

[20] In the event of a call-in under the procedural grounds of section 40(1)(a), the matter is reconsidered by an ad-hoc committee under standing order 23.4 and by the

council under 23.5. A simple majority only is required in respect of a reconsidered council decision.

The grounds of challenge

[21] The applicant advances the following grounds to impugn the decision:

(i) The call-in requisition was not delivered to the Chief Executive by 5pm on the fifth working day following the publication of the council decision log, contrary to standing order 23.2(3) and ought therefore to have been deemed inadmissible;

(ii) The Chief Executive ought to have considered the requisition inadmissible as it failed to comply with section 41(1)(b) and standing orders 23.2(4)(a) and 23.2(5)(b) in relation to the provision of reasons specifying the nature and extent of the disproportionate adverse impact; and

(iii) It could not rationally be found that flying the Union flag on war memorials satisfied the legal test for disproportionate adverse impact on one section of the community.

[22] The applicant had pleaded a case based on the Windsor Framework and the EU Charter of Fundamental Rights but in light of the recent caselaw including *Re Dillon's Application* [2024] NICA 59 and *Re Esmail's Application* [2024] NIKB 64 these arguments were not pursued.

[23] In argument, the applicant also raised an issue around section 41 of the 2014 Act and legislative competence. He accepted, however, that the matter was not pleaded, and he did not enjoy victim status for the purpose of seeking to raise the issue. I do not therefore propose to say any more on that question.

Delay

[24] The proposed respondent contended that the application for leave was out of time and no good reason had been established to extend time.

[25] Order 53 rule 4 of the Rules of the Court of Judicature (NI) 1980 provides:

> "An application for leave to apply for judicial review shall be made within three months of the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made."

[26] In *Re Sheehy's Application* [2024] NIKB 5, I identified the following principles relevant to applications for an extension of time:

"(i) If there has been delay, an applicant must specifically seek an extension of time, and each period of delay should be explained;

(ii) The court will examine whether any good objective reason for the delay has been established;

(iii) Time may be extended for good reason consideration of which may include substantial hardship to any person, prejudice to any party or good administration, and the public interest in proceeding;

(iv) Delays in the processing of applications for public funding alone may not constitute 'good reason.'" (para [15])

[27] The proposed respondent says that the grounds for the application first arose when the Chief Executive accepted the call-in on 3 January 2024, albeit it accepts that the applicant was unlikely to know of the call-in requisition until, at the earliest, 19 April 2024 when the agenda for the relevant Council meeting was published.

[28] The date of an applicant's knowledge is always relevant to the question of an extension of time under Order 53 rule 4. In this case, I am satisfied on the evidence that the applicant did not know until around the time of the Council meeting on 24 April 2024. No issue could arise in relation to his entitlement to an extension of time to this date.

[29] The question for consideration is whether, and to what extent, the court should afford a further extension in all the circumstances of this case. I am satisfied that the applicant acted reasonably and appropriately in seeking disclosure of the call-in requisition via the FOIA request. Otherwise, he was obliged to rely on media reports in order to understand the rationale behind the Council's approach. Sight of the requisition would properly have informed the question of whether there were grounds to challenge any decision by way of judicial review.

[30] Given the fact that the Council resolution of 24 April 2024 effectively restores the position to that which pertained prior to December 2023, there is no ascertainable prejudice to the interests of good administration, save for the inevitable cost and inconvenience generated by having to meet judicial review proceedings.

[31] It is also apparent that there has been little judicial guidance on the principles underpinning the exercise of the call-in procedure contained in section 41 of the 2014 Act. This is an unusual process, with particular rules and requirements, and there is

an argument that it would generally be in the interests of councils, and the public at large, for the courts to consider the issues which arise in this application.

[32] In all these circumstances, I have determined that good reason has been established for the delay in bringing these proceedings and that it would be in the public interest to hear the issues, if the threshold for leave is otherwise met. Accordingly, I extend the time for the making of the application to 24 July 2024.

The merits of the application

[33] The contention that the requisition was out of time was not particularised in the Order 53 statement albeit that it could be encompassed in the generic allegation that the Chief Executive erred in law in accepting the call-in as valid.

[34] Breach of the mandatory requirement in standing order 23.2(3) results in a call-in being deemed inadmissible.

[35] In the standing orders glossary of terms, it states that "working days" excludes "public or bank holidays, a Saturday or a Sunday." In this case, it seems that the Council decision log was published on 21 December 2023, the day after the original resolution passed. 22 December 2023 was a working day, whilst 23 and 24 December were a Saturday and a Sunday. Christmas Day and Boxing Day followed and, on the applicant's analysis, 27, 28 and 29 December were working days. Another weekend and New Year's Day then intervened, and 2 January 2024 was the fifth working day after the publication of the log.

[36] The requisition is recorded as being received by the Chief Executive at 17:47 hours on 2 January 2024. The applicant's case is that this is 47 minutes past the cut off point and ought therefore to have resulted in it being inadmissible. The proposed respondent contends that 27 December 2023 was not a working day albeit it was not a public holiday, a bank holiday, a Saturday or a Sunday.

[37] This ground clearly meets the threshold for the grant of leave.

[38] The second ground focuses on the reasons put forward by the signatories to the call-in requisition. This is an unusual statutory procedure, by which the norms of democratic decision-making are subverted, and it is arguable that its provisions ought to be construed strictly as a result. In this context, it is arguable that the references to the "real potential" to make the district "less inclusive, welcoming and harmonious" and to the "risks having an adverse impact" do not meet the requirement in section 41(1)(b) and standing order 23.2(4) & (5). In particular, it can be argued that the reasons given do not specify "the nature and extent of the adverse impact" but rather call for speculation as to what the impact may be in the future.

[39] This is a far from conclusive interpretation. I am conscious that the court has not had the benefit of any sworn evidence from the proposed respondent, nor sight of

the legal opinion obtained pursuant to the section 41(2) obligation. For the purposes of the leave application, however, the applicant has established an arguable case with realistic prospects of success.

[40] The irrationality claim adds nothing to the illegality grounds which I have found to be arguable. Whether the flying of flags actually has a disproportionate adverse impact in any given scenario is properly a matter for political judgement rather than assessment by a court exercising its supervisory jurisdiction. I therefore refuse leave on this ground.

[41] It is recognised that insofar as the call-in requisition relied upon procedural grounds under section 41(1)(a), this did not require a qualified majority and would not therefore have resulted in any impact on the original December 2023 resolution.

Conclusion

[42] I, therefore, extend the time to make the application and grant leave to apply for judicial review on the ground set out in paragraph 5.1(a) of the Order 53 statement, limited to the claim based on section 41(1)(b). The statement will require to be amended accordingly.

[43] I will hear the parties on directions to be taken to the hearing of the substantive claim, including the application for a protective costs order.