

Neutral Citation No. [2016] NIQB 2

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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Boyle's (Charles) Application [2016] NIQB 2

**IN THE MATTER OF AN APPLICATION BY CHARLES BOYLE FOR
JUDICIAL REVIEW**

and

**IN THE MATTER OF A DECISION OF THE DEPARTMENT OF JUSTICE
FOR NORTHERN IRELAND TO WITHDRAW FUNDING FROM THE
RAILWAY STREET ADDICTION SERVICE**

TREACY J

Introduction

[1] By this application the Applicant challenges the decision of the Department of Justice ("DoJ") to withdraw funding from the Railway Street Addiction Service on the ground that it was unlawful for the Department to reach its decision without prior consultation with him and other users of the service.

Background

[2] The Applicant, now a 38 year old man, describes in his affidavit how he started using drugs at the age of 12 or 13 and progressed through various illegal substances until he left school at age 18. After leaving school he began using heroin and quickly became addicted. For three years or so he did various jobs, but by age 22 he was no longer working and was funding his addiction by committing crime in the Ballymena area. At 24 he moved to Glasgow where he continued his criminal activity and his drug taking. Then, after the death of his mother and a remand in custody in Glasgow, he decided to 'get clean'. This first attempt failed, he believes, due to the lack of

counselling support in Glasgow. In 2005 he returned home and went to the Railway Street Addiction Service which was run by the Northern Health and Social Care Trust ("the Trust"). Here he received monthly counselling sessions and a daily methadone prescription to help with his addiction. He avers:

"Since becoming involved with Railway Street I have not been in any further trouble with police or courts".

He attributes this change to the support he received from the service, and especially from the counsellors who worked with him there. As a person with experience of three addiction services he views the Railway Street Addiction Service as a 'shining example' of what such a service should be.

[3] In relation to the withdrawal of DoJ funding he states that he received a letter from the Trust in November 2014 advising him that the DoJ had served notice of its intention to stop its funding for the service (two thirds of the costs involved) and that, as a result, the service would have to close from the end of February 2015. The letter advising him of these changes stated: "Your key worker will be in contact with you over the next 4-6 weeks to advise you on the changes to the service you receive', however, no such contact was ever made and the Applicant avers that from the date of the letter to the date of signing his affidavit he received little information about the future of the service upon which he relied.

The Applicant's Arguments

[4] The sole ground upon which this challenge rests is an alleged breach of the Applicant's alleged 'secondary case procedural legitimate expectation' to have been consulted by the Respondent before it took the impugned decision.

[5] The concept of a 'secondary case procedural legitimate expectation' is derived from the decision of Laws LJ in the case of R (on the application of Bhatt Murphy (A firm) v Independent Assessor (2008) EWCA 755 where he asked at para 47:

"What are the conditions under which a public decision-maker will be required, before effecting a change of policy, to afford potentially affected persons an opportunity to comment on the proposed change ...?..."

and replied at para 49 (following detailed consideration of a number of authorities):

“For this secondary case of procedural expectation to run, the impact of the authority’s past conduct on potentially affected persons must ... be pressing and focussed.”

[6] Based on these comments the Applicant submits that his case falls squarely within the secondary procedural category, insofar as he is an individual, one of a relatively small number of readily identifiable individuals, who will be directly affected by the decision to withdraw funding for the Railway Street Addiction Service. The issue is ‘pressing’ for the reasons set out in the affidavits lodged in support of the application and is ‘focussed’ insofar as the decision relates to a relatively small, specific group of persons’.

[7] For these reasons it was submitted that the decision of the Respondent to withdraw the funding was unlawful because of the failure to consult with the affected persons including the Applicant.

The Respondent’s Arguments

[8] The Respondent states that it provided part funding to the Trust to run the Railway Street Addiction Service under a series of time limited Service Level Agreements (“SLAs”). Each SLA anticipated the possibility of a future cessation of funding and set out the procedure through which this would be done. In these circumstances it asserts that there is no reasonable basis upon which anyone could form or hold any legitimate expectation that the service would continue beyond the termination date in the SLA. The Respondent asserts that:

“The Applicant could ... never sustain a substantive legitimate expectation claim in the circumstances of this case.” It further asserts that the Respondent never gave any promise or raised any expectation that there would be consultation prior to the termination of any SLA and therefore ‘there can be no case based on what is sometimes called the paradigm procedural legitimate expectation.”

[9] In relation to the alleged secondary case procedural legitimate expectation the Respondent asserts that this case fails on its facts to give rise to any such expectation. It points out that such an expectation can only arise in very exceptional circumstances where, despite the absence of any promise to consult or any established practice of consultation prior to the making of a decision, the lack of consultation in the particular fact situation would be so conspicuously unfair as to amount to an abuse of power by that authority in

relation to a party affected by its decision. The Respondent points out that it had no interface or nexus of any kind with this Applicant that could have given rise to any public law expectations or obligations on its part. For all these reasons it asserts that no sustainable case has been made out against it by the Applicant, and therefore his application must fail.

Discussion

[10] This case seeks to utilise and expand a very exceptional ground of challenge to an administrative decision namely the “secondary case of procedural legitimate expectation” which was identified as a new category by Laws LJ in the case of Bhatt Murphy.

[11] In that case the judge first reviewed the two established categories of legitimate expectation - procedural legitimate expectation and substantive legitimate expectation. He reviewed the circumstances in which procedural legitimate expectation can arise: generally where the decision maker has given an unequivocal assurance, by means of either an express promise or a long-established practice, that it will use a particular procedure when considering any change to a given policy. Such a promise can generate a legitimate expectation in stakeholders that the promised procedure will be used whenever that policy area comes to be reviewed. Because that legitimate expectation has been induced in them, the stakeholders will be entitled to challenge the decision should it be made without implementing the promised procedure. This exception only relates to the *procedures* governing proposed changes to policies and is generally used to ensure that stakeholders with such an expectation are duly consulted about such proposals before any decisions are made in relation to them. The enforcement of such procedural legitimate expectations is an exception to the usual rule that decision makers are also masters of their own procedures.

[12] Substantive legitimate expectation relates to the substantive benefits which a policy confers rather than the procedural mechanisms governing change to that policy. No such substantive expectation is contended for in the present case.

[13] The new form of legitimate expectation enunciated by Laws LJ is based on several decisions two of which he discusses in some detail. The first is the case of Ex parte Schemet (1993) 91 LGR 425, [1994] ELR 89 of which he says:

“The Claimants were the parents of two children who went to a school outside the local authority’s district. The local authority had paid for the elder child’s travel costs, but then changed their policy. They stopped paying for the elder child’s travel, and never paid for the younger’s. There had been

no promise or practice of notice or consultation. Roch J as he then was nevertheless held (324 C-D) that the Claimants enjoyed a legitimate expectation that the benefit would continue in relation to the elder child until there had been communicated to them some rational ground for withdrawing it on which they had been given the opportunity to comment." Laws LJ, para 47.

[14] The second example is the case of Ex parte Unilever (1996) STC 681 which he summarises as follows:

"The case concerned the Inland Revenue's treatment of a taxpayer's claims for loss relief against corporation tax. A time limit for making such claims was stipulated in the legislation, but (as was common ground) the Revenue enjoyed a discretion to entertain late claims. On thirty occasions over a period of more than twenty years the taxpayer submitted late claims and the Revenue accepted them. But then for the accounting years 1986, 1987 and 1988, with no prior notice, warning or consultation, they refused the taxpayer's claims on the ground that they were not made within the statutory time limit. Sir Thomas Bingham MR as he then was said (691g) "On the history here, I consider that to reject Unilever's claims in reliance on the time-limit, without clear and general advance notice, is so unfair as to amount to an abuse of power." Laws LJ para 48

[15] These cases, he says, are examples of another form of restraint on administrative action, which is designed to prevent gross unfairness amounting to an abuse of power, Laws LJ calls this 'the secondary case of procedural legitimate expectation' para 39. In a postscript to his analysis he describes its effect on a public authority as follows:

"If, without any promise, it has established a policy distinctly and substantially affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any change (the secondary case of procedural expectation). To do otherwise, in any

of these instances, would be to act so unfairly as to perpetrate an abuse of power.” Laws LJ para 50.

[16] Applying this approach to the present case it is clear that there is no question of a ‘paradigm case’ of procedural legitimate expectation arising as no express promise that this Applicant would be consulted was ever made, and there was no established practice of consultation which might have given rise to a procedural legitimate expectation. Similarly, it is common ground that no substantive legitimate expectation arises in the present case and the Applicant does not seek to assert one.

[17] The basis upon which the case is brought is the contention that the secondary case of procedural legitimate expectation applies and confers on this Applicant a right to be consulted before a change is made to a policy from which he has received significant benefit for some years. The contention is that this change in policy will have ‘pressing and focussed’ effects on a small identifiable group of people of which this Applicant is one. In these circumstances it is asserted that the Respondent cannot change this policy without notifying affected persons, including the Applicant, and allowing them an opportunity to comment on the proposed changes before they are implemented.

[18] The number of cases in which an Applicant could successfully advance a claim based on the secondary case of procedural legitimate expectation is vanishingly small. The general principle is that public authorities and administrative decision makers have a duty to review policies and to change them in response to a range of circumstances some of which may well necessitate an urgent change of tack. It is essential to good, responsive administration that decision makers should retain their wide discretion - subject to those public law restraints which have been developed. The restraint based on the secondary case of procedural legitimate expectation is designed as an avenue of last resort to prevent discontinuance of policies without consultation with those affected where to do so would amount to conspicuous unfairness in the sense of “...act(ing) so unfairly as to perpetrate an abuse of power” and which is not caught by the paradigm case of procedural legitimate expectation. The conduct targeted by this exception must be so outrageous as to amount to an abuse of power in relation to the target of that conduct. The cases where such conduct will arise between a Respondent and an Applicant with whom it has had no direct relationship must be very few and far between, and I do not consider that the present case approaches satisfaction of that test.

[19] The fact is that *every* policy change will affect an identifiable group of people and some of these groups may be very small, focussed groups. Satisfying the condition that an Applicant belongs to such a group is not of itself sufficient to establish that an administrative action disavouring it is

'outrageous' or an 'abuse of power' in relation to that group or any member of it. Every change in policy has the potential to cause 'pressing and focussed' adverse effects on some members of some groups, but that of itself is not sufficient to make these policy changes reviewable on the basis of the secondary case of procedural legitimate expectation. There must be something much more precise and individual - as in the Unilever case - which makes that particular change of policy unconscionable on the facts of the case.

[20] The present case has no such special features. Its facts disclose a history of the Respondent making funding grants to the Trust's addiction service on several occasions. Each such grant was based on a time limited SLA and each SLA was expressly subject to review and to *termination* by a specified procedure. The Respondent followed the procedure, which did not involve consultation with any service user. How strange would it be if an Applicant with no previous relationship at all to the Respondent and no basis for any claim based on the usual legitimate expectation grounds could somehow use the secondary case of procedural legitimate expectation to secure consultation rights that were never promised or offered by the authority at the time its policy was activated? Indeed, these would be consultation rights which would fly in the face of the express intention of the authority as expressed in its SLA.

[21] Any such interpretation of the scope of the secondary case of procedural legitimate expectation would facilitate a wholesale shredding of the autonomy normally accorded to administrative decision makers. It would risk overburdening public authorities with consultation obligations and could seriously undermine their capacity to discharge their functions efficiently.

[22] It is notable that Laws LJ, having identified the new category of 'secondary case procedural legitimate expectation,' did not then apply it for the benefit of the small group of identifiable individuals involved in the case before him. Rather, he immediately stressed how rare and exceptional the category is:

"I apprehend that the secondary case procedural legitimate expectation will not often be established."

He also quotes Lord Woolf's view on the limited scope for this form of challenge as expressed in his judgement in ex parte Coughlan:

"In the ordinary case there is no space for intervention on grounds of abuse of power once a rational decision directed to a proper purpose has been reached by lawful process."

As quoted by Laws LJ, para 49.

[23] The present case is an example of an 'ordinary case' where a rational decision has been reached by a lawful process. I do not consider that any basis exists to impugn the decision and for these reasons this application must fail.