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Judgment: approved by the Court for handing down | *Delivered:* **14/2/11**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Carter's (Charles) Application [2011] NIQB 15

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

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Before: Girvan LJ, Coghlin LJ and the Rt Hon Sir Anthony Campbell

COGHLIN LJ (delivering the judgment of the court)

[1] This case commenced as an appeal by Christopher Charles Carter ("the applicant") from a decision of Treacy J delivered on 7 June 2010 refusing to grant leave to the applicant to issue proceedings for judicial review of a decision of His Honour Judge Grant sitting at Newtownards County Court on 14 November 2009. However during the course of the hearing before this court it became apparent that there had been an oversight insofar as the application relates to the criminal conviction of the applicant at North Down Magistrate's Court. Since that was a criminal matter the hearing before a single judge was contrary to the provisions of Order 53 rule 2 of the Rules of the Supreme Court (Northern Ireland) 1980 ("RSC") which requires a Divisional Court of three judges or, at the direction of the Lord Chief Justice, two judges. The consent of the parties to proceed before a single judge had not been obtained in accordance with rule 2(6). Accordingly, with the consent of the parties, this court reconstituted itself as a Divisional Court and treated the hearing before Treacey J as a nullity in the circumstances. As he has done throughout, the applicant conducted his own case while Mr Holmes appeared on behalf North Down Borough Council and Mr McMillan represented the Department of Justice. In the event Mr Holmes adopted the submissions advanced by Mr McMillan.

Background Facts

[2] At approximately 11.00 am on 9 October 2007 the applicant was smoking a cigarette in the porch area at the front of Bangor Town Hall when he was encountered by security staff. The applicant's attention was drawn to signs in the porch proclaiming that the Town Hall was a "no smoking" building and that it was against the law to smoke on the premises. The applicant refused to extinguish his cigarette when asked to do so by the Council Environmental Health and Tobacco Control officers who accordingly offered the applicant the option of a fixed penalty and provided him with a fixed penalty notice. The applicant refused to accept the fixed penalty and indicated that he wished the matter to be heard in court by signing part 4A of the fixed penalty notice. It is common case that this was a deliberate act on the part of the applicant who is the Campaign Manager (North) of "The Smokers Rights Movement in Ireland".

[3] The applicant was duly charged with being in possession of a lit tobacco product, namely, a cigarette in a designated place contrary to Article 8 of the Smoking (Northern Ireland) Order 2006 ("the 2006 Order"). He appeared before District Judge Bates at North Down Magistrates' Court on 6 August 2008. During the course of the hearing the applicant applied to the court for the issue of summonses compelling the attendance of a number of witnesses. The learned District Judge refused such applications expressing himself not to be satisfied that such persons could give "material evidence" on behalf of the applicant as required by Article 118 of the Magistrates Courts (Northern Ireland) Order 1981. The learned District Judge took into account the submissions of the parties and, after carefully reviewing the evidence, delivered a written judgment at the conclusion of which he convicted the applicant.

[4] The applicant then appealed the decision of the District Judge to Newtownards County Court. For the purpose of that hearing the applicant accepted the truth and accuracy of the statements of the various Council officers and agreed that he had acted as described. The applicant advanced two defences before His Honour Judge Grant, namely, that the legislation under which he had been prosecuted was invalid and should not be enforced and, secondly, that the legislation was incompatible with the European Convention on Human Rights ("ECHR"). The applicant again applied to the court to issue witness summonses in respect of the Secretary of State for Northern Ireland, the Chief Medical Officer for Northern Ireland, the Chief Executive of the Health Promotion Agency and the Health Minister for Northern Ireland. The applicant submitted that the attendance of those witnesses was necessary since they could confirm that the information upon the basis of which the legislation had been passed by both Houses of

Parliament was inaccurate and misleading. The learned County Court judge rejected such applications upon the ground that the Order in Council had been approved by resolution of both Houses of Parliament and received the Royal Assent in accordance with the powers conferred by paragraph 1(1) of the Schedule to the Northern Ireland Act 2000. In such circumstances, the learned judge was not persuaded that any of the witnesses sought to be called by the applicant could give material evidence.

[5] His Honour Judge Grant then proceeded to give careful consideration to the applicant's submissions that the 2006 Order was incompatible with Articles 3, 8 and 14 of the ECHR. He rejected the argument based upon Article 3 and then proceeded to consider Articles 8 and 14 together. After referring to the case of R (G) v. Nottingham Health Care Trust [2008] EHWC 1096 he concluded that:

> "The appellant in this appeal unlike G does not suffer an effective total ban or prohibition from smoking. He has a wide range of opportunities to smoke both privately and publicly. The only limited restriction upon him is in designated public places. He is prevented from smoking in a defined and limited set of public circumstances and may enjoy an unfettered freedom to smoke in the privacy of his home or elsewhere. It is clear that there is no unfettered right to smoke provided by the Convention and the limited prohibition on Mr Carter imposed by this Order does not infringe his rights under either Article 8 or 14."

The learned County Court judge refused the appeal and affirmed the conviction and penalty.

[6] The applicant then applied to Treacy J for leave to judicially review the decision taken by His Honour Judge Grant. In relation to the applicant's criticism of the failure by the lower courts to issue witness summonses Treacy J observed at paragraph 7 of his judgment:

> "[7] As HH Judge Grant pointed out it is a clear and settled principle that Parliament is sovereign and that the courts are not entitled to look behind legislation enacted by Parliament. The court's function is to interpret the legislation as enacted. Accordingly the judge was entirely correct in refusing to compel the attendance of the witnesses and to refuse the witness summonses sought by the applicant."

Treacy J also rejected the applicant's claims that the 2006 Order was incompatible with his rights under Articles 3, 8 and 14 of the ECHR and approved the relevant observations made by the learned County Court judge. After referring to passages from the judgment in R (G) v. Nottingham Health Care Trust Treacy J concluded his written judgment in the following terms:

> "[14] I agree with the analysis of the Court of Appeal in England. Insofar as the present challenge represents a challenge to the smoking ban contained in the 2006 Order it is quite clear that the challenge is and was devoid of any merit whatsoever. The applicant has no arguable case for challenging the decision of the Learned County Court Judge which was, as a matter of law, and for the reasons he has given, unimpeachable.
>
> [15] The attack on the judgment of HH Judge Grant and on the 2006 Order was misconceived. The squandering of solicited public funds on an application so utterly devoid of legal merit is to be deprecated. The application for leave to apply for judicial review is dismissed."

The proceedings before this Divisional Court

[7] The applicant's notice of appeal focused upon criticism of Treacy J's conclusion as to the sovereignty of Parliament and a further application to "verify misinformation which took place in Parliament to obtain this law, Smoking Order 2006". In addition, while not specifically mentioned in the notice of appeal, the applicant also sought to argue that the 2006 Order was incompatible with his rights under Articles 3, 8 and 14 of the ECHR. During the course of argument Mr McMillan raised the issue of delay, specifically between November 2009 and the issue of the ex-parte docket on 26 March 2010. That was not an issue relied upon in the Respondent's skeleton argument nor does it appear to have featured in the debate before Treacey J. The applicant is a personal litigant and has undoubtedly suffered a number of personal difficulties in recent times. In the circumstances the court permitted the case to proceed.

[8] The applicant submitted that, contrary to the views expressed in the course of the earlier judgments, the witnesses that he sought to call must be relevant since they had been involved in the passage of the 2006 Order and the development of the policy upon which it had been based. The essence of his case appears to be that the policy which the government ought to have adopted should have been based upon control of smoking in public buildings rather than by imposing a ban. He sought to adduce evidence in support of the former

policy. By way of example, he contended that it would be possible to prove through such witnesses that the purported public consultation had been totally inadequate, that Parliament had been misled into believing that the passive inhalation of cigarette smoke by non smokers could produce serious illnesses, including cancer, and that no adequate air filter treatment system was available. The applicant did not seek to challenge the formal Parliamentary stages through which the Order had passed or that it had received the Royal Assent. In short, to use the words employed by Treacy J at first instance, the applicant's:

> ". . . attack sought to impeach the quality and accuracy of the information laid before each House and upon which the resolutions were based."

It is to be noted that, during the course of his submissions, the applicant informed the court that, during the early stages of the Bill, he had tried to negotiate with the "litigation team" and that he had made "several well written suggestions to the Minister concerned." No doubt such suggestions were based upon the form of control for which he currently campaigns.

Discussion

[9] The applicant appears to ground much of his argument upon a misconception as to the concept of sovereignty in United Kingdom constitutional law. He maintained that it is HM the Queen who is sovereign and not Parliament and illustrated this argument by asserting that the Queen could "dissolve Parliament tomorrow". Such an assertion confuses the formal office of the sovereign with the legal concept of Parliamentary sovereignty. The sovereign legal power in the United Kingdom lies in the Queen in Parliament, acting by an Act of Parliament. An Act of Parliament requires the assent of the Queen, the House of Lords and the House of Commons with the assent of each House given upon a simple majority of the votes of the Members present.

[10] The concept of Parliamentary sovereignty in the constitution of the United Kingdom results in the inability of the courts to review lawfully promulgated primary Acts of Parliament unless such Acts conflict with the provisions of the European Communities Act 1972 or are subject to challenge upon the ground that they give rise to a breach of one or more of the relevant provisions of the Human Rights Act 1998. In such circumstances an Act of Parliament is immune from challenge by the courts upon the ground that it was obtained by improper motives, bad faith, misleading Parliament or even fraud (<u>Pickin v. British Railways Board</u> [1974] AC 765). In <u>Madzimbamuto v. Lardner Burke</u> [1969] 1 AC 645 at 723 Lord Reid said:

> "It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid.

The words of Lord Campbell in Edinburgh and Dalkeith Railway v Wauchope (1842) 8 Cl. & F. 710 as approved by Lord Reid in Pickin at p 787 remain apposite:

> "…all that a court of justice can do is to look at the parliamentary roll; they see that an Act has passed both Houses of Parliament, and that it has received the royal assent, and no court of justice can enquire into the manner in which it was introduced into Parliament, what was done previously to its being introduced, or what passed in parliament during the various stages of its progress through both Houses of Parliament."

[11] That general principle persists in relation to primary legislation although, in more recent times, some doubt has been expressed as to whether it is absolute as previously thought. In Jackson v. Attorney General [2006] 1 AC 262, a decision concerned with a challenge to the validity of the 1949 Parliament Act, Lord Steyn, referring to the European Communities Act 1972 and the Human Rights Act 1998, noted that the United Kingdom did not have an uncontrolled constitution. He then went on to say at paragraph [102]:

> "The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created the principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider

> whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish. It is not necessary to explore the ramifications of this question in this opinion. No such issues arise on the present appeal."

[12] However, the 2006 Order is secondary or delegated legislation being an Order in Council passed during a period of suspension of the Northern Ireland Assembly in accordance with Section 1 and paragraph 1(1) of the schedule to the Northern Ireland Act 2000. At paragraph [5.24] in his work "Judicial Review in Northern Ireland" Gordon Anthony made the following comments with regard to the status of this type of legislation:

> "[5.24] The key constitutional question about illegality and Acts of the Assembly or Orders in Council is whether they are to be regarded merely as a form of subordinate legislation or whether they are a form of primary legislation demanding a modified judicial approach when their validity is challenged. On the one hand, use of the term 'subordinate legislation' might be justified by the fact that the power to legislate has been devolved by the Westminster Parliament which remains sovereign; and there is, in addition, the fact that Acts or Orders are defined as subordinate legislation for the purposes of the Human Rights Act 1998 and may be deemed unlawful where they are incompatible with the ECHR and incapable of being interpreted in a manner that is ECHR-compliant . . . however, on the other hand it can be argued, certainly in relation to acts of the Assembly, that these are primary legislative measures enacted by a democratically elected body that is accountable to its own locally defined political community (the point is perhaps less forceful in respects of Orders in Council, as these were made when the elected body was suspended).

[13] In Northern Ireland Commission for Children and Young Peoples Application [2009] NICA 10 this court had to consider an application by the Commissioner for a declaration that the Secretary of State had no power to decide to introduce and the relevant Minister had no power to make, confirm, approve or to otherwise bring into law Article 2 of the Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2006. In the course of delivering the judgment of the court Girvan LJ said at paragraph 5:

> "[5] The application for the declaration set out in paragraphs *(i)(a) to (d)* cannot succeed because the 2006 Order was enacted in accordance with the statutory procedures established by the Northern Ireland Act 2000 (which include submitting the draft Order to Parliamentary scrutiny). It came into operation by virtue of Article 1(3) two months later. Any prior decision making on the part of the Secretary of State was duly overtaken by the legislation itself which was sanctioned in accordance with the statutory procedure."

[14] Similarly, in this case the Smoking (Northern Ireland) Order 2006 was passed by Order in Council made in accordance with Article 1 and paragraph 1(1) of the schedule to the 2000 Act. Paragraph 2 of that schedule is headed "*Parliamentary Control of Orders in Council.*" Paragraph 2(1) then provides:

> "2-(1) An Order in Council may not be made under paragraph 1(1) unless –
>
> *(a)* a draft of the Order has been approved by resolution of each House of Parliament . . ."

As the evidence submitted by the appellant confirmed, prior to its passage, there was a period of consultation with regard to the proposed draft of the 2006 Order and consideration was given to a wide range of evidence and submissions. Indeed, the applicant himself took the opportunity to make a series of detailed representations. Ultimately, the draft was approved by both Houses of Parliament and it received the Royal Assent. We have not been persuaded by the applicant's submissions that he has raised a case of bad faith, improper motive or manifest absurdity amounting to a flagrant and unconstitutional abuse of power. In such circumstances we do not consider that this court has any power to reopen the policy debates that led to the passage of the Order.

The Human Rights Act 1998

[15] The applicant relied primarily upon alleged breaches of three Articles of ECHR, namely, Article 3, Article 8 and Article 14.

Article 3

[16] Article 3 of the ECHR prohibits torture and provides that:

> "No one shall be subjected to torture or inhuman or degrading treatment or punishment."

The Strasbourg Court has defined torture as "deliberate inhuman treatment causing very serious and cruel suffering" (Ireland v. UK 2 EHRR 23) and stated that ill treatment "must attain a minimum level of severity" if it is to fall within Article 3 (Kudla v. Poland 35 EHRR 198).

[17] In Kudla the court observed that, in particular, the ill treatment in question must "cause either actual bodily harm or intense physical or mental suffering" [para 92 GC]. In the same case the Strasbourg Court described treatment as degrading if it "is such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them." The only concrete example put forward by the applicant was that of an old lady who had been compelled to leave a building on a wet day in order to smoke.

[18] For the purposes of Section 7 of the Human Rights Act 1998 the applicant candidly disavowed the status of a victim for himself but maintained that he was acting on behalf of other smokers in his representative capacity. Section 7(7) of the 1998 Act requires domestic courts to give effect to the Strasbourg case law on who enjoys the status of a "victim". Article 34 of the ECHR confers the right to pursue alleged violations upon, inter alia, "…. any person, non-governmental organisation or group of individuals claiming to be the victim …" The Strasbourg jurisprudence insists that a person has standing as a victim only if actually and directly affected by the act or omission that is the subject of the complaint and in Klass v. Germany [1978] 2 EHRR 214 the court held that there was no role for individual "public defenders" of human rights to be recognised. In Burden v U.K. 2008 47 EHRR 38 the court noted:

> "The Convention does not … envisage the bringing of an *actio popularis* for the interpretation of the rights set out therein or permit individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention."

In our view the applicant does not have the status of a victim in respect of this Article and, in any event, he has not produced any evidence that the 2006 Order begins to approach the threshold required by Article 3 of the ECHR.

Article 8 and Article 14

[19] Article 8 provides:

"Article 8 – right to respect for private life and family life

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

[20] Article 14 provides:

"Article 14 – Prohibition of Discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinions national or social origin associated with a national minority, property, birth or other status."

When applying Articles 8 and 14 of the ECHR effect has to be given to Section 2, 3 and 4 of the Human Rights Act 1998. Section 2 requires the court to take into account the decisions of the European Court of Human Rights: Section 3 requires the court, so far as is possible, to interpret legislation in a way which is compatible with the ECHR and Section 4 requires the court, provided it is satisfied that legislation is incompatible, to consider making a declaration to that effect.

[21] In Pretty v. United Kingdom [2002] 35 EHRR 1 the Strasbourg Court when considering the argument that Article 8 included a right to self determination and the right to choose when and how to die made the following observations at paragraph 61:

"61. As the court has had previous occasion to remark, the concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It

> can sometimes embrace aspects of an individual's physical and social identity . Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8. Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world."

At paragraph 62 of the judgment in the same case the court said that:

> "….the ability to conduct ones life in manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned."

[22] It is well settled that a violation of a Convention right is not an essential prerequisite to reliance on Article 14. It is sufficient if the facts in issue "fall within the ambit" of the rights and freedoms guaranteed by the Convention, in this case, Article 8. In Botta v. Italy [1998] 26 EHRR 241 the Strasbourg court said at paragraph 39:

> "According to the court's case law, Article 14 compliments the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to the enjoyment of the rights and freedoms safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts of the case fall within the ambit of one or more of the latter."

[23] While recognising that the circumstances of an institution, such as a secure mental hospital, might give rise to different considerations from that of the home of a private individual, Pill LJ in delivering the judgment of the Divisional Court in R (G) v. Nottingham Health Care Trust [2008] EWHC 1096 (Admin) rejected the submission that the respect required by Article 8 was coextensive with a right of absolute independence and made the following general remarks at paragraph 101:

> "101. Preventing a person smoking does not, at any rate in the culture of the United Kingdom, generally involve such adverse effect upon the persons 'physical or moral integrity', or the other concepts

> cited above, as would amount to interference with the right to respect for private or home life within the meaning of Article 8. We do not accept the notion of an absolute right (subject to Article 8(2)) to smoke wherever one is living. Nor, following the analysis of Lord Hope in Countryside Alliance, do references to the 'ambit' or 'scope' of Article 8 introduce, via Article 14, an application of Article 8."

[24] We respectfully agree with the observations of Pill LJ in R (G) v. Nottinghamshire Health Trust. In that case the ban on smoking at Rampton Secure Hospital was total whereas the ban under challenge by the applicant in this case applies only to public places. The applicant in that case had no choice but to live within the confines of the hospital having been legally compelled to do so. By contrast the applicant in this case objects to the imposition of a smoking ban in public places, a circumstance which does not easily fall within the personal, private or home life protected by Article 8. In Adams v Scottish Ministers 2004 SC 665 the Lord Justice Clerk (Gill) observed, at paragraph 63, that it was fallacious to argue that, because a certain activity established and developed relationships with others, it was, on that account, within the scope of private life. In this case the applicant's original conviction relates to his activities in an indisputably public building in indisputably public circumstances.

[25] Even if the evidence relating to damage to health, which he disputes, is set to one side, the applicant himself accepts that non-smokers are likely to be significantly annoyed and irritated by atmospheres polluted by cigarette smoke. Article 8 is a qualified right and subject to such exceptions as are "in accordance with the law and necessary in a democratic society . . . for the protection of health or morals or for the protection of the rights and freedoms of others". It is not necessary to establish an adverse affect upon health in order to adversely affect Article 8 rights (Lopez Ostra v. Spain [1994] 20 EHRR 277) and the Grand Chamber of the Strasbourg Court has held that the authorities are entitled to a margin of appreciation when striking a balance between competing interests (Hatton v. United Kingdom (App No 36022/97 8 July 2003 ECtHR). In Ostrovar v. Moldova [2006] (App No 35207/03) the "cumulative effects" of conditions in the prison cell, which included "exposure to cigarette smoke" were held to go beyond the "threshold of severity under Article 3 of the Convention."

[26] So far as Article 14 is concerned it is to be noted that in Inze v. Austria [1988] 10 EHRR 394 the Strasbourg Court dealt with the ingredients of discrimination under Article 14 as follows:

> "41. For the purposes of Article 14, a difference of treatment is discriminatory if it: 'has no objective and

> reasonable justification', that is if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised.' (See, *inter alia*, the *Lithgow & Others* judgment of 8 July 1986, series A No 102, pp 66-67, para 177). The Contracting State enjoys a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law; the scope of this margin will vary according to the circumstances, the subject matter and its background."

[27] In summary, for the reasons set out above, we do not consider that the plaintiff has established a breach of his Article 8 rights. Furthermore, if such a breach had been established, we are satisfied that the ban on smoking restricted to public places falls within the margin of appreciation of the State being lawful and necessary in a democratic society. In the event that no breach of Article 8 has been established but that the impugned ban comes within the "ambit" of Article 8 we are satisfied that the ban has been implemented in pursuit of a legitimate aim and that the means employed bear a reasonable relationship of proportionality to that aim.

[28] Accordingly, this application will be dismissed.