IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

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IN THE MATTER OF AN APPLICATION BY THE DIRECTOR OF PUBLIC PROSECUTIONS FOR NORTHERN IRELAND FOR JUDICIAL REVIEW

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CARSWELL LCJ

In this application Ballyedmond Castle Farms Limited (Ballyedmond) seeks to set aside the order of Kerr J made on 6 January 2000, whereby he granted leave to the Director of Public Prosecutions for Northern Ireland (the DPP) to apply for judicial review of a decision of a resident magistrate Mr Paul McRandal, made on 19 November 1999, ordering the DPP to pay costs totalling £14,919.00 plus VAT to Ballyedmond following the dismissal of a summary prosecution brought against it under the Water Act (Northern Ireland) 1972 for discharging polluting matter into a waterway.

It is not necessary for us in this judgment to examine the circumstances of the dismissal of the prosecutor's complaint against Ballyedmond or the correctness of the magistrate's order for costs. The sole issue before the court is whether the grant of leave should be set aside on the ground that the DPP could have tested the magistrate's order by requesting him to state a case for the opinion of the Court of Appeal on a question or questions of law, under Article 146 of the Magistrates' Courts (Northern Ireland) Order 1981 (the 1981 Order).

It has been clearly established in a series of cases that the court has power, either under RSC (NI) Order 32, rule 8 or its inherent jurisdiction, to set aside a grant of leave to apply for judicial review: see the cases discussed in *Re Savage's Application* [1991] NI 102 at 106-7. It has consistently been held, however, that it requires a very clear case and that the power should be exercised very sparingly. We respectfully agree with the observations of Bingham LJ in *R v Secretary of State for the Home Department, ex parte Chinoy* (1991) 4 Admin LR 457 at 462, where he said:

> "I would, however, wish to emphasize that the procedure to set

> aside is one that should be invoked very sparingly. It would be an entirely unfortunate development if the grant of leave *ex parte* were to be followed by applications to set aside *inter partes* which would then be followed, if the leave were not set aside, by a full hearing. The only purpose of such a procedure would be to increase costs and lengthen delays, both of which would be regrettable results. I stress therefore that the procedure is one to be invoked very sparingly and it is an order which the court will only grant in a very plain case."

Simon Brown J followed this statement in *R v Secretary of State for the Home Department, ex parte Sholola* [1992] Imm AR136, in which he said:

> "It is not sufficient to show merely that the judicial review application is distinctly unpromising and most likely to fail. It is not sufficient merely to persuade the judge hearing the setting aside application that he personally would not have been disposed to grant leave and certainly would not have been disposed to do so had he heard the respondent's argument and perhaps had the advantage of seeing their evidence. Rather it is necessary to deliver some clean knockout blow to justify invoking this procedure."

In *R v Environment Agency, ex parte Leam* (1997, unreported) Laws J expressed the principle succinctly when he said that –

> "such an application is not to be brought merely on the footing that a respondent has a very powerful, even an overwhelming, case."

A magistrates' court may order the prosecutor to pay the costs of a defendant who has been acquitted, in exercise of the power conferred by section 3 of the Costs in Criminal Cases Act (Northern Ireland) 1968. The amount payable under such an order is governed by the Magistrates' Courts (Costs in Criminal Cases) Rules (Northern Ireland) 1988, as amended by the 1994 Rules. The application of those rules by a magistrates' court may involve questions of law in respect of which an application for judicial review may be entertained in this court -- see our recent decision in *Re Caffrey's Application* (2000, unreported). There is no provision either in the 1968 Act or in the 1981 Order for an appeal by either party against the making of such an award or against the amount ordered. An appeal against an order for the payment of costs by a defendant does not lie to the county court, being excepted from appeals against sentence by virtue of Article 140(2)(*b*) of the 1981 Order. If the matter is to be tested, it has to be either by judicial review or by invoking the case stated procedure contained in Article 146(1) of the 1981 Order, which provides:

> "Any party to a summary proceeding dissatisfied with any decision of the court upon any point of law involved in the determination of the proceeding or of any issue as to its jurisdiction may apply to the court to state a case setting forth the relevant facts and the grounds of such determination for the opinion of the Court of Appeal."

It has not been settled whether an award of costs is capable of giving rise to a point of law "involved in the determination of the proceeding", but for the purposes of the present application we are prepared to assume that it would be so capable.

On this assumption we must examine the proposition advanced by Mr Larkin on behalf of Ballyedmond that the court must exercise its discretion to refuse to entertain the DPP's application for judicial review because of his failure to avail himself of that alternative remedy by way of case stated. Ballyedmond must establish that the prospect of the court granting the application for judicial review is in the circumstances of the case so small that the only right and proper course is to stop the judicial review proceedings now by setting aside the grant of leave. It tends to be assumed that an applicant's failure to resort to an alternative remedy open to him will almost inevitably result in the rejection of an application for judicial review. On examination, however, it may be found that the principles governing the exercise of the court's discretion are less rigid and draconian and that a degree of flexibility exists which allows the court to take into account a number of factors in its decision.

The traditional rule is that although the court may retain its jurisdiction to grant an application for judicial review, where a statutory machinery or other alternative remedy is available the alternative should be pursued, save in exceptional circumstances. In *R v Epping and Harlow General Commissioners, ex parte Goldstraw* [1983] 3 All ER 257 at 262 Sir John Donaldson MR expressed the rule in strong terms:

> " … it is a cardinal principle that, save in the most exceptional circumstances, that jurisdiction [in judicial review] will not be exercised where other remedies were available and have not been used."

In *Preston v Inland Revenue Commissioners* [1985] AC 835 at 852 Lord Scarman said in a well-known passage:

> "Judicial review is a collateral challenge; it is not an appeal. Where Parliament has provided by statute appeal procedures, as in the

> taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision."

It is to be noted, however, that at page 862 Lord Templeman stated the rule in a more qualified form, saying that it applied "in most cases".

Both of these decisions were in tax cases, where the most appropriate method of appeal in the great majority of cases is to the General or Special Commissioners, who have specialist knowledge and experience of taxation law and practice. The same approach may be found in other areas where the same considerations apply, eg in the field of immigration (*R v Secretary of State for the Home Department, ex parte Swati* [1986] 1 All ER 717).

There also has to be a real alternative open to the applicant. So if it is not clear whether the suggested alternative route is indeed available to him, the court would be likely to decline to exercise its discretion against him if he has elected to invoke the clearly established jurisdiction in judicial review.

The trend of modern authority is to be more ready to look at the balance of cost and convenience between an application by judicial review and resort to an alternative remedy: see, eg, *R v Huntingdon District Council, ex parte Cowan* [1984] 1 All ER 59 at 63, per Glidewell J. That approach was expressed in paragraphs 14 and 15 of a valuable article by Beloff and Mountfield in [1999] JR 143, in which the learned authors attempted the same type of principled analysis (the general dearth of which is lamented in *Supperstone and Goudie*, *Judicial Review*, 2nd ed, p. 15.27) as was made in the context of immigration cases by Laws J in *R v Secretary of State for the Home Department, ex parte Capti-Mehmet* [1997] COD 61. They considered the case-law and referred to the effect of the new Civil Procedure Rules:

> "14. On the one hand, the 'overriding objective' is to enable the court to deal justly with the cases before it. This would suggest that technical questions of whether some other avenue ought to have been pursued will not be viewed favourably if there is little detriment to the respondent in the case proceeding along the existing route, there is a public interest in the matter being determined by way of judicial view, and pursuit of the alternative route would cause further cost and delay.
>
> 15. On the other hand, what is the most efficient and convenient remedy will be determined having regard to the

> interests of other litigants and the overall administration of justice, not just the interests of the applicant and respondent before the court. Thus, convenience to instant litigants should not be permitted to disrupt the apt distribution of cases."

The authors summarise their conclusions in paragraph 18 of the same article, in a passage with which we fully agree:

> "(a) The existence of an alternative statutory machinery will mean that courts will look for 'special circumstances' before granting an alternative remedy.
>
> (b) There are, however, a number of factors which may amount to 'special circumstances', and the court should be astute not to abdicate its supervisory role.
>
> (c) What is the most efficient and convenient method of resolving a dispute should be determined having regard not only to the interests of the applicant and respondent before the court, but also the wider public interest.
>
> (d) Whether the allegedly alternative remedy can, in reality, be equally efficacious to solve the problem before the court, having regard both to the interests of the parties before the court, the public interest and the overall working of the legal system.
>
> (e) In determining the most efficacious procedure, the scope of enquiry should be considered. It may be that fact-finding is better carried out by an alternative tribunal. However, if an individual case challenges a general policy, the relevant evidence may be more readily admissible if the challenge is brought as a judicial review: an allegation that a prosecution is unlawful because brought in pursuit of an over-rigid policy can scarcely be made out on the facts of one case.
>
> (f) Expense of the alternative remedy or delay may constitute special circumstances …"

We do not propose to rule finally on how the discretion should be exercised in the present application for judicial review, because the facts can always appear in a different light at a later stage of a case, and we do not wish to fetter the discretion of the court when it hears the substantive application. It is sufficient for us to say at this stage that it is far from being clearly established that the court must exercise its discretion against the DPP because he did not seek to proceed by way of case stated. He was unable to assume with confidence that that remedy would have been open to

him, and if it had transpired that it was not he would then have been out of time to apply for judicial review. By the same token, if his application for judicial review is dismissed in the exercise of the court's discretion, he will be out of time to seek a case stated, a factor which cannot be disregarded where there is any uncertainty as to the proper method of proceeding. There is no particular advantage in respect of costs in the case stated procedure and a certain amount of unavoidable delay and expense is involved in the process of obtaining a case stated. There is no apparent detriment to Ballyedmond in having the issue determined in this court rather than by way of case stated in the Court of Appeal, and there is a considerable public interest in dealing with it promptly and without further cost and delay.

For these reasons we consider that there is a substantial case to be made on behalf of the DPP that the court should not dismiss the substantive application for judicial review on the ground that the DPP elected not to seek a case stated. In these circumstances Ballyedmond has in our view fallen very far short of establishing a case of the requisite strength for setting aside a grant of leave to apply for judicial review. Its application will therefore be dismissed.

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