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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY 'E' FOR JUDICIAL REVIEW

KERR J

[1] This is an application by the mother of one of the children affected by what has become known as 'the Holy Cross dispute'. The applicant seeks judicial review in the form of a declaration that the Chief Constable of the Royal Ulster Constabulary and the Secretary of State for Northern Ireland failed to secure the effective implementation of the criminal law and to ensure safe passage for her and her daughter to the Holy Cross primary school for girls on Ardoyne Road, Belfast.

[2] From September 2001 until mid-November 2001 children and their parents and relatives who walked along Ardoyne Road to and from the school were the target of attacks and intimidation from individuals some of whom were local residents; others have been described as loyalists. This campaign is said to have been prompted by the avowed failure of the government to provide proper services to the local community. It was claimed that the protest was designed to secure better provision for the area. The judicial review application challenges the manner in which the protest was policed.

[3] The respondents have raised a preliminary point about the viability of the application. They say that the protest no longer takes place; that a change in the policing strategy was introduced in November 2001. This, the respondents claim, is more acceptable to the applicant and others affected by the protest. It is therefore argued that the issues raised in the application are entirely academic. Any incidents related to the protest that have occurred latterly are, the respondents contend, sporadic. The manner in which these incidents have been dealt with is entirely unrelated to any examination of what occurred previously. They suggest that the application for judicial review should not be allowed to continue.

[4] In *R v Secretary of State ex parte Salem* [1999] AC 450 the House of Lords considered an appeal by a claimant for asylum whose benefit had been discontinued after the Home Office, without informing the appellant, told the Benefits Agency that he had been refused asylum. The appellant had sought judicial review of the decision of the Home Office to communicate with the Benefits Agency without notifying him. By the time the case came before the House of Lords, following an appeal to a special adjudicator, the appellant had been granted refugee status and his benefit had been restored. The question arose whether the appeal should be allowed to continue. The House of Lords decided that it should not. At page 456/7, Lord Slynn of Hadley said: -

> "My Lords, I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se. …
>
> The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

Perhaps the most significant statement in this passage (in relation to the present case) is that academic disputes should not be heard *unless there is a good reason in the public interest to do so.*

[5] For the applicant Mr Treacy QC has submitted strongly that there is a compelling public interest in allowing the case to proceed. He suggested that this protest campaign had excited intense attention and that controversy continues to rage about the manner in which it was handled. He contended that if the police actions were amenable to judicial review it must be right that they should be subject to the scrutiny that the continuation of these proceedings will provide even though the dispute is no longer active.

[6] In *Salem* Lord Slynn cited two examples of cases which the courts continued to deal with although the issues that arose had been rendered academic. In *Reg. v. Board of Visitors of Dartmoor Prison, Ex parte Smith* [1987] QB 106 a prisoner was charged with an offence under prison rules of doing gross personal violence to a prison officer. It was found by the board of visitors that there was no case to answer, but it was directed that a lesser offence of assault be preferred. On judicial review, the judge held that that direction was made without jurisdiction and prohibited the board from inquiring into the assault charge. The prisoner was no longer at risk from further disciplinary proceedings. Despite opposition from the prisoner, the Court of Appeal ruled, at p. 115:

> "It seemed to all the members of this court that the fact that the prisoner was no longer at risk of further disciplinary proceedings did not deprive the court of jurisdiction to hear this appeal; that there were in it questions of general public interest; and that, even if the prisoner is rightly to be regarded as having no interest in the outcome, the court should, in the exercise of its discretion, hear the appeal on the merits."

In *Reg. v. Secretary of State for the Home Department, Ex parte Abdi* [1996] 1 W.L.R. 298 two Somalian nationals were refused asylum when they sought to challenge a decision rejecting their claim that to be sent to Spain would be contrary to the United Kingdom's obligations under the Convention relating to the Status of Refugees. Following applications for judicial review the Secretary of State agreed to review their cases on the merits so that by the time the matter came before the House of Lords, the outcome of the appeals would not directly affect the applicants. The House of Lords nevertheless heard the appeals because they raised "a question of fundamental importance".

[7] Unsurprisingly, no attempt is made in the authorities to state definitively what might qualify as a matter of general public interest or a question of fundamental importance. This is something that must be decided according to the particular facts of the individual case. It seems to me, however, that the mere engagement of the public's interest will not of itself warrant the continued litigation of an academic dispute. One may perhaps draw an analogy with the question whether an issue is one of public law. An issue may be considered to be one of public law where it involves a matter of public interest in the sense that it has an impact on the public generally and where the outcome of the particular dispute is one in which the public has a legitimate interest. It does not become one of public law simply because it generates media interest or controversy – see, for instance *Re McBride's application* [1999] NI 299, 310.

[8] Adopting this approach to the question whether a matter of general public interest arises in the present case, it appears to me that one must conclude that the issue of whether police action in relation to the Holy Cross dispute is amenable to judicial review is one which, even if it is academic, should be decided by the courts. This is not because of the wide coverage that the episode received in the media or because of the intense controversy that it generated but because the reviewability of police actions in these circumstances and the propriety of such actions are matters in which the public has a legitimate interest.

[9] An anterior question requires to be addressed, however. Is the dispute between the parties academic? In this context, 'academic' must mean of purely theoretical or speculative interest. It appears to me that the onus of establishing that the dispute is now of academic interest must rest with the party who asserts it – in this case the respondents. It is therefore for the respondents to persuade the court that a decision on the application will carry no practical benefit.

[10] It is true that the protest has been quiescent since November 2001. The protesters have not stated that it has ended, however; merely that it is suspended. From time to time incidents have occurred which are clearly related to the dispute although they do not amount to a resumption of the protest on anything like the scale that previously existed. On the available evidence I have concluded that the possibility of a further flare-up of the protest is by no means remote. In that event, the debate about the manner in which a full-blooded protest is policed would once again become pertinent. I do not consider, therefore, that the respondents have established that the litigation of the issues that arise in this judicial review are bereft of practical benefit. I have concluded that the application should be allowed to proceed.

[11] Mr Treacy criticised the application of the principles outlined in *Salem* by courts in this jurisdiction in the cases of *Re McConnell's application* [2000] NIJB 116 and *Re Nicholson's application* [2003] NIJB 30. In view of my conclusion about the exceptional nature of the present case it is strictly speaking unnecessary for me to deal with these criticisms. But this case provides the opportunity to say something further about both cases. In *McConnell* Carswell LCJ said: -

> "It is not the function of the courts to give advisory opinions to public bodies, but if it appeared that the same situation was likely to recur frequently and the body concerned had acted incorrectly they might be prepared to make a declaration, to give guidance which would prevent the body from

> acting unlawfully and avoid the need for further litigation."

Mr Treacy suggested that the test propounded in this passage was "a material move from the *Salem* test". The reference to the 'body concerned' acting incorrectly could not, he said, be right, for this would require a review of the merits of any case at a time when the correctness of the decision-maker's actions was still in dispute. I do not consider that there is any substance in this criticism. In my judgment, where a dispute is plainly academic, it is entirely appropriate for a court, where it is invited to entertain the application, to examine the merits of the claim (insofar as they can be determined) before deciding whether to allow the application to proceed. If it is possible to conclude that there is no merit in the claim even if it were allowed to proceed, this must be a potent factor in deciding to halt the proceedings *in limine*.

[12] In *Nicholson* I said: -

> "Generally, it will be necessary to demonstrate that such a ruling [on an academic issue] would not require a detailed consideration of facts; it should also be shown that a large number of cases are likely to arise (or already exist) on which guidance can be given; that there is at least a substantial possibility that the decision-maker had acted unlawfully and that such guidance as the court can give is likely to prevent the decision maker from acting in an unlawful manner."

Mr Treacy suggested that nothing in the *Salem* decision justified "the assertion that generally the consideration of facts, or the number of cases or the possibility of unlawfulness was a requirement".

[13] It should be made clear that *Nicholson* does not prescribe that where a detailed examination of facts is required or where it cannot be shown that a large number of cases depend on the outcome of the application, it will automatically not be allowed to proceed. Equally, it is not invariably incumbent on the applicant to show (at the interlocutory stage where an application to stay the proceedings is made) that the decision-maker has plainly acted unlawfully. If a detailed examination of the facts is required or if the outcome of the application is clear, these are considerations to be taken into account. Their presence will tend to militate against allowing the application to proceed. Even if these factors are present, however, in appropriate cases (of which the instant case is an example) an application for judicial review may be allowed to proceed provided the case raises a point of general public interest.

[14] For the reasons given above I consider that this is an exceptional case and one that should be adjudicated upon by the courts. I therefore refuse the respondents' application.