Neutral Citation No: [2018] NIQB 8 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **McC10547** **JR 2017/088419** **Delivered** ***ex tempore*** **on 25/01/18**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JOSEPH KELLY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

v

SECRETARY OF STATE FOR NORTHERN IRELAND

McCLOSKEY J

[1] Lying at the heart of this application for leave to apply for judicial review is a much publicised political deal, namely the so-called "Confidence and Supply Agreement in the UK Parliament" (the "*Agreement*"), a formal bipartite instrument the subscribing parties whereto are the Conservative Party and the Democratic Unionist Party ("DUP"). The essence of the Applicant's challenge is that the effect of this agreement is to cast a shadow over the impartiality of the Secretary of State for Northern Ireland (the "*Secretary of State NI*").

[2] The Applicant, Joseph Kelly, avers that his father was shot and killed on 08 December 1972 when travelling on a bus from work to his home. The perpetrators were two gunmen who boarded the vehicle. An inquest held on 08 June 1973 generated an "open" verdict. More recently, a report of the Historical Enquiries Team of the Police Service of Northern Ireland identified many serious investigatory failings on the part of the Royal Ulster Constabulary. Mr Kelly's dissatisfaction with certain aspects of this report culminated in an application to the Attorney General for Northern Ireland to direct a fresh inquest. This stimulated a negative response. Very properly there is no challenge to Mr Kelly's standing to bring these proceedings.

[3] The Applicant's case, as pleaded, entails an application for the permission of the court to challenge the following:

> "*… the continuing failure by the* [Secretary of State] *….. to put in place any or proper safeguards and/or mechanisms to ensure the independence and neutrality of*

the [Secretary of State] *in light of the* [Agreement] ……"

I have adjusted slightly the phraseology of the passage reproduced above to reflect the fact that, following some probing on the part of the court, it was confirmed unequivocally that the other public authorities formally identified in the pleading, namely the "First Secretary of State", the "Attorney General" and the "UK Government", are not proposed respondents. The sole target of the Applicant's challenge is the Secretary of State NI.

[4] The two primary forms of relief pursued are:

(a) A declaration that the continuing failure by the Secretary of State NI to put in place any or any proper and adequate safeguards and/or mechanisms to ensure the independence and neutrality of the Secretary of State NI in light of the Agreement and the possibility of further future formal or informal understandings between the two parties is unlawful and in breach of the Good Friday Agreement [and] the Northern Ireland Act 1998.

(While other grounds of asserted illegality were formally pleaded, none of these was, in the event, pursued.)

(b) An order of mandamus requiring the Secretary of State NI to take all necessary steps to put in place proper and adequate safeguards and/or mechanisms capable of ensuring such independence and neutrality.

The grounds of challenge are littered with the words "impartiality", "independence" and "neutrality".

[5] It is appropriate at this stage to identify the centrepiece of the Applicant's case, in both written form and oral presentation. It is that the Secretary of State NI is subject to the public law duty of independence and impartiality and must exercise her statutory powers accordingly. The statutory powers which feature in the Applicant's challenge are certain provisions of the Northern Ireland Act 1998 (the "*1998 Act*") which endow the Secretary of State with a range of functions, responsibilities and discretions. Pausing here, the legal foundation of the Applicant's case is not in dispute. It is established particularly by the decision of the House of Lords in R (Al-Hasan) v Secretary of State [2005] 1 WLR 688, the doctrinal foundation whereof is the familiar common law test of apparent bias, namely whether the fair-minded observer, apprised of all the relevant facts, would conclude that there was a real possibility of bias. See in particular the opinion of Lord Brown at [37].

[6] Mr Southey QC on behalf of the Applicant, developed his case in the following way. The Agreement, read in conjunction with the DUP Election

Manifesto, commits the DUP to certain policies and priorities of a political nature. He highlights the following as an example of a highly contentious political policy:

> "*It is only natural that the public are outraged to see former soldiers who stood against brutal terrorism of the early 70s, instigated by the IRA now being hounded while many of those who hid behind balaclavas avoid justice.*"

Pursuant to this policy, the DUP has actively supported the introduction of a statute of limitations for prosecutions which would confer temporal immunity on former members of the police and security forces.

[7] Mr Southey points out that the DUP is formally committed to supporting the Conservative Government on all motions of confidence and other specified matters, while support on other subjects "*will be agreed on a case by case basis*". Some of the provisions of the 1998 Act highlighted by Mr Southey are section 1(2) and Schedule 1, paragraph 1: border poll; section 4(2): conversion of reserved matters to transferred matters and vice – versa; sections 30 and 30B: exclusion of Northern Irish Ministers from Ministerial office and the Assembly; sections 68 and 73: appointment of members of the Human Rights Commission and the Equality Commission; section 7A(1): altering the Assembly's size - cross-community support; and sections 16A(9) and 18(8): the Ministerial pledge of Office.

[8] Mr Southey also draws attention to the provisions of the St Andrew's Agreement relating to an Irish Language Act and the decision of the High Court in Conradh Na Gaeilge [2017] NIQB 27 which made a declaration that the Executive Committee had failed, in breach of its statutory duty under section 28D(1) of the 1998 Act, to adopt a strategy setting out how it proposes to enhance and protect the development of the Irish language. Finally, Mr Southey reminded the court that the 1998 Act must be construed in the light of the British/Irish Agreement of 10 April 1998, highlighting in particular Article 1(v) whereby the two Governments affirmed that –

> "….. *the power of the sovereign government with jurisdiction* [in Northern Ireland] *shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions ……*"

As Mr Southey submitted, one can readily trace certain provisions of the 1998 Act to Strand 1 of the related Good Friday Agreement. I add that this is made equally clear by the long title of the Act and features also in the decision of the House of Lords in Re Robinson's Application [2002] UKHL 32.

[9] In my judgement the fundamental flaw in this challenge is that it is brought in a legal and factual vacuum. It has no legal framework, since it is not concerned with

an actual decision of the Secretary of State, a proposed decision of the Secretary of State, an explicit refusal by the Secretary of State to exercise one of the powers, duties, functions or discretions conferred by the 1998 Act, a failure by the Secretary of State to do so or, finally, a failure to consider whether to do so. Consequential upon this analysis, the Applicant's challenge has no factual framework either. It is entirely devoid of context. Absent a concrete context, I consider that there is nothing to which the relevant common law principles fall to be applied. These principles are entirely dormant at the moment. They have no role in the setting of the Applicant's unavoidably vague and speculative case that a factual and legal context might conceivably arise in some unspecified circumstances on some unpredicted future date. In the event of such a context materialising, the application of the relevant principles will fall to be considered against a concrete framework, legal and factual and a series of legal effects and consequences will ensue. These will include the possibility of recourse to the court for supervisory relief.

[10] The second incurable infirmity in the Applicant's case is constituted by the principal remedies which he seeks from the Court: see [4] above. The Applicant's challenge does not formulate or particularise any "*proper and adequate safeguards and/or mechanisms ….*". Nor does he invite the Court to do so – a course which in the context of this challenge would be manifestly inappropriate in any event. Mr Southey had no answer to the question of how the Secretary of State would go about giving effect to the declaration and/or mandatory order which the Applicant seeks. In my judgement, the declaration sought is framed in diffuse and meaningless terms, while the order of mandamus claimed would violate the principle that the affected party must be left in no doubt about what is required in order to comply and must be framed in terms which are sufficiently clear and unambiguous to enable the court to supervise its enforcement in the instant case or, alternatively, to determine in a future legal challenge whether there has been compliance. As Lord Nicholls stated in Attorney General v Punch [2003] 1 AC 1046 at [35]:

> "*The court must ensure that the language of its order makes plain what is permitted and what is prohibited. This is a well-established, soundly based principle.*"

This principle applies with equal force to mandatory injunctions and other forms of mandatory order. Stated succinctly, there is no remote prospect of the court granting to the Applicant either of the principal forms of relief sought by him.

[11] In the event of a concrete future framework triggering the legal duty of impartiality and independence and the associated common law safeguards materialising, Mr Kelly, or any other person with standing, will be at liberty to pursue legal recourse which, depending on the context, could be initiated either before or in the wake of the impugned act or decision, refusal to act or decide or failure to give consideration to whether to act or decide: these being, in principle, the three broad possible scenarios attaching to the range of duties, functions, responsibilities and discretions conferred on the Secretary of State by the 1998 Act.

Re Duffy's Application [2008] UKHL 4 provides a paradigm illustration: there Mr Duffy successfully challenged the exercise by the Secretary of State of his statutory power to appoint members to the Parades Commission for Northern Ireland.

[12] The final limb of Mr Southey's submissions, invoking the principle of "*unacceptable risk of unfairness*" recognised with progressive frequency by the courts and illustrated in R (Howard League for Penal Reform) v Lord Chancellor [2017] EWCA Civ 244 at [48] – [50] especially, is amply defeated by the analysis and conclusions set forth above.

[13] While Mr McGleenan QC (with Mr McLaughlin) would seek to argue that the Applicant's case is further undermined by the recent decision of the English Divisional Court in R (McClean) v First Secretary of State and Attorney General [unreported, CO/3220/2017] it is unnecessary for the court to express any view on this. While I did not find it necessary to call on Mr McGleenan to reply, I had of course taken into account his skeleton argument and in this context I highlight the following passage:

> "*The Applicant's reliance on …… selected provisions of the Northern Ireland Act 1998 does not advance the case that the conclusion of the Confidence and Supply Agreement has resulted in any justiciable illegality on the part of the Secretary of State or any other public authority. The contention ….. that dissatisfaction with Government action may result in a withdrawal of support by the DUP has no evidential foundation. The Court should not be invited to adjudicate on the basis of such speculative assertions.*"

This passage expresses in admirably succinct terms the main tenets of the court's more elaborate analysis and conclusions above. Mr McGleenan also points out, correctly, that the Applicant's reliance on the British Irish Agreement is misconceived, this being an international treaty which is not justiciable in domestic law, albeit I do not overlook that it might legitimately inform the correct construction of certain provisions of the 1998 Act.

[14] On the grounds and for the reasons elaborated above I dismiss the application for leave to apply for judicial review.