Neutral Citation No: [2018] NIQB 65	*Ref:* **McC10733**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered: ex tempore 10/09/18*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY JR80
FOR JUDICIAL REVIEW

-v-

SECRETARY OF STATE FOR NORTHERN IRELAND

and

THE EXECUTIVE OFFICE

_____

McCLOSKEY J

[1] By this ruling the Court determines the application of the Secretary of State for Northern Ireland (the "Secretary of State") to adjourn the substantive hearing of this application for judicial review, scheduled to proceed on 11 September 2018. Leave to apply for judicial review was granted by Order of this Court dated 12 April 2018.

[2] I take this opportunity to reiterate that the Applicant has established sufficient grounds to warrant the protection of anonymity. Thus, I repeat, there must be no publication of his identity or of anything which could lead to him being identified.

[3] The Applicant avers that in his childhood he was subjected to sexual, physical and psychological abuse at a named institution. In his affidavit he discloses details relating to his family and life circumstances. It is unnecessary to reproduce this. He further avers that he did not participate in the Northern Ireland Historical Institutional Abuse Inquiry ("HIA").

[4] The Respondents are the "Secretary of State" and the Executive Office (the "EO"). The latter is the entity which, in the absence of a functioning devolved Executive in Northern Ireland, substitutes in some ways for the First Minister and

Deputy First Minister. The thrust of the Applicant's challenge is evident from the primary remedies pursued:

> "*An order of mandamus directing the Secretary of State for Northern Ireland to take the steps necessary to establish a redress mechanism for survivors of historical institutional abuse…*
>
> *An order of mandamus compelling the Secretary of State to propose an early date for the poll for the election of the next Assembly ….*
>
> *An order of mandamus directing the Executive Office to take the steps necessary to establish a redress scheme.*"

The other forms of pleaded relief are declaratory in nature. In essence, the Applicant's case is that the Secretary of State and/or the EO are both legally empowered and legally obliged to take one or more of the steps identified in the mandatory orders claimed. The Applicant's challenge raises issues of construction of the Northern Ireland Act 1998, in particular sections 23 and 63. It further ventilates questions of constitutional law, including the availability of prerogative powers in a context where the Northern Ireland Executive (the "NIE") and Northern Ireland Assembly ("NIA") are suspended and the implementation of the HIA recommendations entails action belonging to the realm of a devolved (or, more technically, transferred) matter.

[5] At this juncture brief mention of the HIA report is appropriate. The report was the culmination of an independent inquiry into physical, emotional and sexual childhood abuse and childhood neglect occurring in residential institutions in Northern Ireland between 1922 and 1995. It was published in January 2017. It was addressed to the NIE, which had established the Inquiry. It contains a series of recommendations on the subject of redress. One such recommendation is that there should be financial redress to victims in accordance with a specified scheme to be established by the Executive. The report proposed minimum and maximum payments of £7,500 and £100,000 respectively. These would be paid in the form of non-taxable lump sums following the processing of claims by the "HIA Redress Board". The report urged that this recommendation, and others, be speedily implemented. It exhorted that the first payments be made before the end of 2017.

[6] The Applicant asserts that he would qualify for compensation in accordance with the terms of the HIA report's recommendations. None of the recommendations of the HIA report has been activated.

[7] The affidavit evidence filed on behalf of the Secretary of State elaborates on the stance previously outlined in pre-proceedings correspondence. I highlight its main features:

(a) The HIA inquiry was at all times a matter for the devolved administration of Northern Ireland. It was established pursuant to legislation adopted by the Northern Ireland Assembly – the Historical Institutional Abuse Act (NI) 2013 – and a statutory Order made thereunder by the First Minister ("FM") and Deputy First Minister ("DFM"). All material arrangements of substance were made by FM and DFM. The Secretary of State's role was at most peripheral.

(b) Decisions relating to the HIA report's proposals and recommendations are, therefore, to be made by the NIE and, if appropriate, the NIA.

(c) By virtue of the resignation of the DFM on 9 January 2017 and the consequential extinguishment of the tenure of the Office of FM, Northern Ireland has had no functioning devolved administration since that date. The Secretary of State's efforts to rectify this have been both strenuous and unyielding.

(d) The possibility of primary legislation to address this void has been under consideration since the ensuing NIA elections on 2 March 2017 and the first meeting of the new NIA on 13 March 2017.

(e) The absence of any Budget Act of the NIA was addressed by a measure of the Westminster Parliament, namely the Northern Ireland Budget Act 2017 which received Royal Ascent on 16 November 2017. This enabled the Department of Finance to draw monies from the Northern Ireland Consolidated Fund for the financial year 2017/2018.

(f) Since January 2017 the main priority of the Secretary of State has been the restoration of functioning devolved Government in Northern Ireland. Strenuous efforts have been made to bring this about. While the possibility of the Westminster Parliament legislating in respect of Northern Ireland has been recognised this was in essence viewed as an undesirable measure of last resort. If unavoidable, this would be confined to measures essential for the continuity of public services. A limited number of statutory measures followed. Throughout this period the Secretary of State adhered to the view that –

> "*The prospect of a resumption in political talks and achievement of a political agreement remains real ..* [so that] *… it is reasonable to facilitate the achievement of a political agreement and that proposing a date for a further Assembly election is more likely to be divisive and therefore damaging to the prospects of achieving political agreement and the restoration of devolved Government … there has been nothing to suggest that the outcome*

> [of a new election] *would be significantly different than those of the two previous Assembly elections or the recent general election.*"

[9] It is further is averred on behalf of the Secretary of State that her approach and that of the UK Government since January 2017 have been driven by four principles, namely commitment to the Belfast Agreement; implementation of the UK Government's obligations under the Agreement, for the good of the entire community; continuing and sustained interaction with the Northern Ireland political parties and the Irish Government to achieve the restoration of devolved Government; and a willingness to take decisions considered necessary for good governance and political stability in Northern Ireland, consistent with the restoration of an Executive at the earliest possible opportunity.

[10] As regards the EO, it is contended that the HIA report and recommendations are directed exclusively to the Executive and the EO has no legal power or duty to activate same. It is also represented on behalf of the EO that work on what are considered to be the administrative arrangements and draft legislation necessary to implement the HIA redress recommendations has been initiated and is continuing, in a context wherein it is suggested that the requisite legislation could be made in either Westminster or Northern Ireland. In written argument it is suggested, in terms, that at this stage the Applicant's continuing challenge to the EO is half hearted at best and it is contended emphatically that the EO is not legally competent to take any of the steps which the Applicant pursues via these proceedings.

[11] The affidavit on behalf of the Secretary of State was sworn on 23 August 2018. On 6 September 2018 the Secretary of State made a statement in Parliament. This reiterated the UK Government's continuing assessment of the vital importance of restoring functioning devolved Government in Northern Ireland. This is encapsulated in the words:

> "*The only sustainable way forward lies in stable, fully functioning and inclusive devolved Government.*"

The statement continues:

> "*In the absence of an Executive, I have kept my duty to set a date for a fresh election under review. I have not believed and do not now believe that holding an election during this time of significant change and political uncertainty would be helpful or would increase the prospects of restoring the Executive. But I am aware of the current legislative position …*
>
> *In order to ensure certainty and clarity on this issue I intend, therefore, to introduce primary legislation in*

> *October to provide for a limited and prescribed period in which there will be no legal requirement to set a date for a further election and, importantly, during which time an Executive may be formed at any point without the requirement for further legislation. This will provide a further opportunity to re-establish political dialogue with the aim of restoring the Executive as soon as possible.*"

The Secretary of State further stated:

> "*Following the recent decision of the Northern Ireland Court of Appeal in the Buick case, I recognise that there is a need to provide reassurance and clarity to both the NICS* [Northern Ireland Civil Service] *and the people of Northern Ireland on the mechanisms for the continued delivery of public services …*
>
> *So, the legislation I intend to introduce after the conference recess will also include provisions to give greater clarity and certainty to enable NI Departments to continue to take decisions in Northern Ireland in the public interest and to ensure the continued delivery of public services ….*
>
> *I intend to consult parties in Northern Ireland over how this might best be done.*"

[12] The Secretary of State's Parliamentary statement is the catalyst for an application to adjourn the substantive hearing of the Applicant's legal challenge. The argument advanced is outlined in a letter dated 6 September 2018 from the Crown Solicitor's Office in the following terms:

> "*The announcement today of an intention to introduce primary legislation is of fundamental significance to the case made by the Applicant and it is the view of the SOSNI that the legislation will have the effect of rendering the proceedings academic on* [the Section 32(3)] *issue. It will be unsatisfactory from the perspective of all parties for the Court to be invited to give a ruling on a statutory provision which is subject to proposed amendment in Parliament. On behalf of the Secretary of State I would propose therefore, that the application be adjourned until the draft Bill has been introduced in Parliament.*"

[13] In granting leave to apply for judicial review some five months ago this court stated the following:

> "*The indefinite moratorium applicable to the Executive and legislature of Northern Ireland featuring in the present case arises in other judicial review cases. One of the consequences of this moratorium is that members of the Northern Ireland population are driven to seek redress from the High Court in an attempt to address aspects of the void brought about by the absence of a functioning Government and legislature. This, as in the large cohort of "legacy" cases, in effect involves the High Court in disputes in cases which would not otherwise arise and entails a significant diversion of judicial and administrative resources. While this does not involve judges encroaching upon the impermissible territory of political and legislative decision making, it skews the constitutional arrangements. While the spotlight on the implementation of the HIA redress proposals should be firmly on the Northern Ireland Executive and Assembly it is, rather, on the courts.*"

[14] To this I would add that the constitutional imbalance noted in the foregoing passage is further highlighted by the distortion of the conventional role of the High Court in judicial review litigation which the above noted void has brought about. That role entails the Court carrying out an exercise of review – supervisory superintendence – of concrete acts and decisions of Government Ministers, Government Departments and other public authorities. The High Court is the arbiter of whether the impugned act or decision is compatible with the applicable legal rules and principles. Where a judicial review challenge succeeds, it is unusual for the Court to order the Respondent public authority to do something concrete or specific. Rather, the conventional remedy is one quashing the impugned act or decision, leaving the authority concerned to reconsider and make a fresh decision duly guided by the judgment of the Court. This is nothing more than a reflection of the separation of powers and the distinctive constitutional roles of the Judiciary and the Executive.

[15] However, one of the outstanding features of contemporary judicial review litigation in Northern Ireland is that the jurisdiction of the High Court is invoked in contexts where the Respondent public authority has made no decision or act. This has the consequence that the conventional role of the Court is altered significantly. In an increasingly high percentage of cases, of which the present one is an illustration, the High Court is not invited to adjudicate on the legality of Government conduct. Rather, the adjudication required is of the question of whether Government is legally obliged to do something. The focus is on a failure to act. Thus the remedy of a mandatory Order (*mandamus*) has emerged in the forefront of judicial review litigation in this jurisdiction. In this way the machinery of the High Court is triggered not at the conclusion of decision making processes and their outcome but in advance. There is no concrete decision or act to review.

[16] The problem of impotent and ineffective judicial orders also potentially arises. If the challenging litigant in a case such as the present successfully establishes the contention that the Respondent public authority is indeed under a legal duty to make a decision or undertake some other form of action then, insofar as a functioning devolved Government/legislature in Northern Ireland is essential for such purpose, the spectre of meaningless judicial Orders, issuing at the conclusion of complex and expensive litigation, could conceivably arise. This would plainly be inimical to the rule of law.

[17] The Lord Chief Justice of Northern Ireland, in a public statement promulgated just days ago, has (again) drawn attention in emphatic terms to the problems posed by the protracted prevailing void in governing and legislating in Northern Ireland.

[18] On behalf of the Applicant, Mr Macdonald QC suggested that the Secretary of State's statement in Parliament on 06 September 2018 was designed to "*stymie*" his client's judicial review challenge. Properly analysed, this appears to be a suggestion that the statement is in some way tainted by improper motive and/or an attempt to interfere illicitly with the judicial process. Having considered the statement in full and in its full context, I reject any such suggestion. There is, however, force in the complaint that the provision of the Secretary of State's affidavit evidence was inappropriately delayed. Mr Macdonald expressly acknowledged that in light of the Secretary of State's statement, any judgment of this Court "*may become academic*". He added that such judgment could, however, provide guidance to Parliament on the current state of the law.

[19] What is required of the Court is essentially a case management decision relating to the further timetabling of these proceedings. In making a decision of this kind, the Court has a relatively wide discretion, the exercise whereof must be guided and informed by the overriding objective. An evaluative assessment of a broad range of facts and factors is to be undertaken. In making this assessment, the Court does not have the assistance of a crystal ball.

[20] The main right to which the Applicant can legitimately lay claim is based in the expectation of reasonably expeditious judicial determination of his legal challenge, in a context of already accrued delay and the preceding history generally. Furthermore, Mr Macdonald's concession could well prove to be confined to the second of the mandatory orders outlined in [4] above. These factors are counter-balanced by (in summary) the imminent developments foreshadowed in the Secretary of State's public statement and the constitutional considerations highlighted above, together with the familiar last resort and alternative remedy principles.

[21] The Court has no reason to doubt the *bona fides* of the Secretary of State and takes particular cognisance of the unequivocal statement of intent that primary legislation will be introduced **next month**. Accordingly at that juncture should it be

appropriate for the Applicant's legal challenge to continue, in whole or in part, the delay arising out of an adjournment will be of comparatively brief dimensions. I take further into account that this case has been progressed on a relatively fast track to date. Furthermore, if, post-October, a relisting is appropriate, the Court will ensure that this case is accorded priority. Justice delayed invariably generates disappointment. I trust that the disappointment of the Applicant and others will be tempered by what I have just said and the further measures to which I now turn.

[22] Balancing all of the foregoing the outcome of a difficult balancing exercise is that I accede to the Secretary of State's application to vacate the substantive hearing date of 11 September 2018. I do so on the following terms:

(i) The costs thrown away by the adjournment of the substantive hearing will be borne by the Secretary of State.

(ii) The Secretary of State's legal representatives will provide an updating report to the Applicant and the Court by 22 October 2018 or sooner if appropriate.

(iii) The parties will agree and notify to the Judicial Review Office a relisting date, which will be not later than November 2018 and will be provisional in nature, by 16.00 tomorrow

(iv) The Court will review this case on 25 October 2018.

(v) The Secretary of State's skeleton argument will be deferred until further direction of the Court given the anticipated imminent material developments.

(vi) Further case management directions will be provided as and when appropriate.

(vii) There shall be liberty to apply.