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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Neeson's (Martin) Application [2016] NIQB 58

IN THE MATTER OF AN APPLICATION BY MARTIN NEESON FOR JUDICIAL REVIEW

And

IN THE MATTER OF A DECISION OF THE DEPARTMENT OF FINANCE AND PERSONNEL

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MAGUIRE J

Introduction

[1] The applicant in this case is Martin Neeson. He is now aged 58. On various dates in 1975 and 1976 he was convicted of a number of terrorist offences. On 20 September 1975 he was convicted of belonging to a proscribed organisation, common assault and carrying a firearm with intent. Later on 22 September 1976 he was convicted of murder and two counts of attempted murder. The seriousness of these offences is accepted on all sides. At the time when the offences were committed the applicant was 16 years old. As a result of these convictions the applicant spent some 11½ years in prison. He was then released on life licence in 1987. He has not come under police notice since.

[2] In June 1995 the applicant began work with a charity called the Conservation Volunteers. At the time of doing so his employer was made aware of his convictions. The work for which he was employed involved the maintenance and improvement of green areas. Up until the events shortly to be described the applicant has been acting as a team leader within the Conservation Volunteers. His work, over a period of some 19 years, has always been satisfactory. It is clear that his employer regards him as a valued member of staff and wishes to retain his services.

[3] The work of the Conservation Volunteers which the applicant has been doing until recently had been financed by grant aid from government but in 2013 there was a change to this with work for government for the future being done on a supply of services contract. This made no difference to the applicant's job on the ground but did bring the applicant within the suitability for employment requirements of the Northern Ireland Civil Service ("NICS"). The consequence of this was that the applicant became subject to a "baseline security check" which involved a process by which his employer submitted his details, including criminal record details, to the relevant Department, the Department for Finance and Personnel ("the Department"). The Department then had to consider whether he had unspent convictions. As the applicant had unspent convictions he was provided with the opportunity to make a disclosure statement which is a personal statement setting out the context in which his convictions occurred, including any mitigating factors. A decision was then to be made about his suitability by a panel within the Department's Appointment and Marketing Branch.

[4] In the applicant's case he did not provide a disclosure statement. A decision was issued to his employer by the Appointment and Marketing Branch on 12 December 2014. It stated that following the baseline security standard check the applicant was considered to be "unsuitable" to work on the Conservation Volunteers project he had been working on.

[5] In the aftermath of this decision a number of events occurred. Firstly, at the prompting of his employer, there was a request by an official in the Office of the First Minister and Deputy Minister to the relevant officials responsible asking whether the decision on the check could be done again giving the applicant another opportunity to make a statement of disclosure as he, the applicant, had been confused before about the information required. This request received a positive response and, on the foot of it, the applicant then submitted a statement of disclosure which explained the background, for example, that he had been 16 at the time he committed the offences; that these had arisen from the conflict and the political situation in Ireland at the time; and that since his release he had had no issues with the police; and that he had worked for the Conservation Volunteers for nearly 20 years without incident. In particular, the statement disclosed the applicant's view that he was "in no way a threat or danger to anyone".

[6] Secondly, the applicant's employer wrote a letter to the Appointment and Marketing Branch in support of the applicant's clearance. This noted that the employer had been surprised by the unsuitability decision and did not agree with it.

[7] In the light of the above, a fresh decision was made about the applicant by the Appointment and Marketing Branch. This decision was made on 9 February 2015 and affirmed the original decision *viz* that the applicant was unsuitable.

[8] In the affidavit evidence before the court, the decision making process in respect of the above decision is described in the following passages from the affidavit of Mr Lewis who was the Director of Corporate HR in the Department of Finance and Personnel. He said:

> "20. The original AMB Panel … referred the decision to senior management for consideration as a result of the additional information received. I consulted with colleagues within Corporate HR and the matter was given very careful consideration. In particular the following matters were considered:
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> - the relevance of the convictions to the post;
> - the severity of the convictions and penalty imposed by the court;
> - the mitigation put forward in the revised statement of disclosure;
> - the applicant's career record since the convictions which were over 38 years old;
> - precedent from other similar cases; and
> - potential reputational damage and a wider duty of care to NICS employees.
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> …
>
> 22. Having thoroughly considered all the information and having consulted with my colleagues within Corporate HR, I was satisfied that the original decision to reject the applicant should stand and that the proper process had been followed.
>
> 23. The convictions for murder and attempted murder were offences of the most serious nature, they could never be unspent, and remained relevant. In my view, they did demonstrate that Mr Neeson had a propensity to commit acts of very serious violence, despite the fact that they had taken place 38 years ago. Having weighed up all of the factors set out above, the decision was made that he was not a suitable person to work either in the Northern Ireland Civil Service or on Northern Ireland Civil Service

> contracts. I was also of the view that clearing him for suitability would undermine the wider duty of care that the NICS had to all of its staff. On 9 February 2015 a letter was issued to TCV which confirmed that the decision remained unchanged."

[9] This judicial review application was initiated on 16 July 2015. Leave in respect of the application was granted by Colton J on 8 October 2015.

The Evolution of Policy

[10] The reintegration of former prisoners into society, and in particular, into the world of employment, has been an issue in all parts of the United Kingdom. In Northern Ireland though, it has assumed a more general importance. This can be evidenced by the terms of the Good Friday Agreement (1998) where in Annex B under the heading "Prisoners" there is a direct reference to the subject. Paragraph 5 indicates that:

> "The governments continued to recognise the importance of measures to facilitate the reintegration of prisoners into the community by providing support both prior to and after release, including assistance directed towards availing of employment opportunities, retraining and/or reskilling and further education."

[11] Similarly, in the St Andrew's Agreement (2006), there was reference at Annex B to the position of former prisoners. It is there noted that:

> "The government will work with business, trade unions and ex-prisoner groups to produce guidance for employers which will reduce barriers to employment and enhance reintegration with former prisoners."

[12] The initiative last referred to produced guidance which is dated 2007. Its official title was "Employers Guidance on Recruiting People with Conflict Related Convictions". This was issued on 1 May 2007. The document had been developed by a working group co-chaired by Sir George Quigley and Nigel Hamilton. The group comprised representatives of government departments, the Irish Congress of Trade Unions, Confederation of British Industry and a representative group of ex-prisoners. The object was "to assist employers [to] follow best practice in recruiting people with conflict related convictions". The basic principle espoused in the guidance was that "any conviction for a conflict related offence that pre-dates the Good Friday Agreement (April 1998) should not be taken into account unless it is materially relevant to the employment being sought". In other words, a conviction

arising from the conflict should not bar an applicant from obtaining employment unless that conviction was manifestly incompatible with the job: see paragraph 2.6. The onus of demonstrating incompatibility was to rest with whoever was alleging it and the seriousness of the offence would not, *per se*, constitute adequate grounds (*ibid*).

[13] While there was some dispute about this at the hearing, it seems clear to the court that the guidance was brought into operation and applied to the Northern Ireland Civil Service as of 1 May 2007. At this stage the governance of Northern Ireland was under direct rule. The responsible minister under direct rule was the Right Honourable David Hanson MP. There is correspondence in the papers from him which refers to the guidance coming into operation on 1 May 2007. It, in particular, referred to the Minister having asked Nigel Hamilton (the Head of the Northern Ireland Civil Service at the time) "to ensure that Northern Ireland departments similarly play their full part in the successful implementation of the guidance" (the court's emphasis). The court will refer hereafter to the guidance as being "the Hanson guidance".

[14] Direct rule, however, ended within days after the introduction of the guidance. Devolution was restored and with it the operation of the Northern Ireland Executive. Peter Robinson MP MLA became the minister in charge of the Department of Finance and Personnel. Within a short time it appears that the Minister took a decision to dis-apply the guidance. This has been evidenced by correspondence and by an answer to a question in the Assembly. The change appears to date from September 2007. In a letter to an MEP, Mr Robinson stated:

> "Thank you for your letter of 7 August regarding guidance produced by OFMDFM for employers in recruiting people with conflict related convictions.
>
> At the outset I should like to say that this guidance has not been applied by the DFP, which is the department responsible for recruitment policy for the Northern Ireland Civil Service (NICS). To date no case has arisen which would have required consideration of the guidance's provisions.
>
> As the minister responsible for recruitment policy in the NICS it is not my intention to apply the guidance as I believe that existing recruitment policies and procedures provide appropriate arrangements for dealing with candidates with criminal records."

[15] It therefore appears to be the case that since September 2007 the Hanson guidance has not been applied and the arrangements described above at paragraphs [3] to [8] have been used. Under those arrangements the basic principle referred to

in the Hanson guidance has no application. Instead the position is governed by the risk assessment provisions of the Northern Ireland Civil Service Recruitment Policy and Procedures Manual. These are set out in an annex referring to risk assessment. In cases where convictions cannot be spent, as in this case, it is stated that applicants with convictions which cannot be "spent" should not be automatically rejected. All information will be considered. At paragraph 9.1.2 under the heading "Criminal record Check" the following is stated:

> "Appointment and Marketing Branch will consider all of the information received prior to making a decision on whether offences should preclude candidates from appointment. In deciding if a candidate can be appointed, Appointment and Marketing Branch will consider the following criteria:
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> - relevance of conviction to post;
> - severity of penalty imposed by court;
> - circumstances surrounding conviction;
> - mitigating circumstances;
> - rehabilitation and contribution to society;
> - statements of character; and
> - any other information provided by the candidate which tends to suggest that convictions are not representative of the overall character of the candidate."

[16] It is thus clear that the Hanson guidance and the NICS Recruitment Policy and Procedures Manual reflect broadly different approaches to the position of a person in the applicant's position. In the light of the contemporaneous correspondence referred to above the court does not accept the case made by deponents on behalf of the respondent that the Hansen guidance was at no time the operative standard within the NICS.

The Applicant's Case

[17] The principal points raised by Mr Macdonald QC and Mr Toal BL, on behalf of the applicant, focus on two central submissions.

[18] Firstly, it is submitted that the policy which ought legally to have applied to this case is that contained in what the court has described as the Hanson guidance. In simple terms, that guidance has, counsel argued, not been legally dis-applied and the attempt to dis-apply it made by Mr Robinson, it is contended, was unlawful. This point became known to the applicant only at a late stage in the litigation and necessitated a pre-final hearing application on his behalf to the court to grant leave for an amendment to the Order 53 statement to include this ground in the challenge. This was contested by the respondent largely on the basis that the matter

complained of occurred in 2007 and it was now too late to challenge it. The court provided a written decision on this application in which it sought to assess the arguments presented to it. In the end it reserved a final decision on the grant of leave to the full hearing and invited the respondent to file any evidence it wished to adduce on the point. Such evidence was filed and the court now has a more complete picture. Having considered the matter further, on balance, the court is of the view that it should give leave for this ground of challenge to be included in these proceedings and should extend the time as necessary for the purpose of Order 53 Rule 4.

[19] When Mr Robinson made his decision to dis-apply the policy, counsel argued, he was dealing with a matter which in accordance with the Ministerial Code had to be brought to the Executive Committee. This was because the subject matter was "cross-cutting" or alternatively "significant or controversial". Despite this, he failed to bring the matter before the Executive Committee which, in the applicant's case, has the legal consequence that he made a decision he had no power to make.

[20] It follows from this state of affairs that the applicant's case was subjected to consideration under the wrong guidance and the decision made therefore should be quashed by the court.

[21] Secondly, the applicant argued that if the above analysis is wrong, and the applicant's case was lawfully considered under the Recruitment Policy and Procedures Manual, the decision arrived at, as explained in the passage from the affidavit evidence of Mr Lewis already cited, was *Wednesbury* unreasonable and should be quashed as a decision which no reasonable decision maker could have lawfully made.

[22] It is right to record that, apart from these principal submissions, the applicant relied also on a number of other grounds, which while not resiled from at the hearing, were not developed orally.

The Respondent's Submissions

[23] Mr McGleenan QC and Mr Sands BL appeared for the respondent. Their submissions, unsurprisingly, focussed on the principal elements in the applicant's challenge.

[24] As regards the first ground, the central submission was that Mr Robinson's decision to dis-apply the Hanson guidance, if it could be rightly characterised in this way which they argued it should not be, was lawful. The issue he was deciding, counsel argued, neither fell within the category of a "cross-cutting" decision nor into the category of a "significant or controversial" matter. Thus, it did not need to be brought before the Executive Committee and infringed no aspect of the arrangements for ministerial decision making. Counsel therefore submitted that the right decision making framework had been applied in this case.

[25] In respect of the applicant's second main ground, the respondent argued that the process adopted by the department was properly followed and that the decision made was one well within the width of the discretion of the decision maker. The convictions in this case, the court was reminded, were extremely serious and in any assessment of this sort substantial weight should be given to them. The merits of the decision were forbidden ground which the court should not interfere with.

[26] Finally, as regards the other grounds of judicial review, it was submitted that none of these had been made out on the evidence before the court.

The Court's Assessment

Issue 1 – Failure to bring the decision to dis-apply the Hanson guidance to the Executive Committee

[27] The law relating to the issue of when a Minister is legally required to bring an issue before the Executive Committee has been the subject of consideration in a growing number of cases before this court: see, for examples, Re Solinas Application [2009] NIQB 43; Re Central Craigavon Limited's Application [2010] NIQB 43; and Re JR65's Application [2013] NIQB 101. It would be reasonable to say that the law in this area may be viewed as settled, at least at first instance level. In these circumstances the court considers that there would be little purpose in it engaging in a lengthy exposition of the law in this judgment especially as Treacy J in the case of Minister of Enterprise, Trade and Investment's Application for Judicial Review [2016] NIQB 26 has fully dealt with it at paragraphs [22]–[49] of his recent judgment.

[28] It will suffice for this court to say that in this case it is satisfied that:

(i) The Hanson guidance had been applied to the NICS as of May 1 2007. The court rejects the respondent's interpretation to the contrary as indicated at paragraphs [13] – [16] *supra*.

(ii) Later Minister Robinson made a decision to dis-apply it.

(iii) The decision to dis-apply, in the court's view, clearly related to a controversial and/or significant matter *viz* the reintegration of former prisoners with conflict related convictions into the world of employment. Mr McGleenan argued that the matter did not fall within either of these descriptions but the court is unable to accept this argument in view of the history of the evolution of policy (described above) and as a matter of common sense. The controversy of a matter of this type can be gauged by reference to the proceedings before the Committee for Finance and Personnel in respect of the Civil Service (Special Advisers) Bill on 28 November 2012. A transcript of these proceedings was before the court and while the issue under discussion

was not exactly the same as the matter now under consideration the court considers that they tend to demonstrate that an issue of this type is likely to be significant and/or controversial in this society. The court, moreover, does not think that in 2007 there would have been any less controversy than in 2012. No party before the court argued that the matter fell within the scope of the agreed programme for government. In these circumstances the court finds that it was outside such scope. The applicant argued that the matter was also a cross-cutting issue. However the court does not consider that it has been proved that this was so.

(iv) The matter therefore should have been brought before the Executive Committee but this did not occur.

(v) In these circumstances Minister Robinson breached the Ministerial Code and his decision to dis-apply the Hanson Guidance is caught by section 28A of the Northern Ireland Act 1998 ("the 1998 Act").

[29] The court will return to the issue of the consequence of this failure below.

Issue 2 – The reasonableness of the substantive decision

[30] The court has set out the reasoning included in Mr Lewis's affidavit in support of the impugned decision which is challenged on standard *Wednesbury* grounds. Notably Mr Lewis has not explained to the court the precise way in which the decision was arrived at. The court knows that he gave substantial weight to the issue of the seriousness of the convictions but it is not apparent to the court what weight he gave to what might be described as the obvious factors in the applicant's favour on the other side of the scales.

[31] It appears to the court that a logical starting point would be the seriousness of the convictions and the penalty imposed by the court. The court doubts if anyone would disagree with this. These, however, are only a starting point. In the court's view, a very important consideration would the relevance of the convictions to the post. This is not dealt with in Mr Lewis's affidavit in a satisfactory way. For the court's part this is troubling. In this case the court is unaware of any suggestion that the job which the applicant had been doing and was proposing to continue doing had any substantial relationship to any sensitive security or other similar issue. Indeed he had been doing the job without any sign of a problem and to the satisfaction of his employers for many years. The court is left unaware from Mr Lewis's affidavit how this aspect was evaluated and what weight was given to it. If it be the case, as the court considers it is, that the convictions have no, or at most only a very limited relevance to the post in question this must weigh strongly in the balance in the applicant's favour. The next factor which the court considers arises relates to the mitigation put forward by the applicant. Mr Lewis says this matter was considered and the court accepts that but it is not made clear in his affidavit what

weight, if any, was given to this factor. In the court's view, it is difficult to see how this factor would not be one which should have weighed significantly in the applicant's favour. The court adopts this view not only because of the expiry of time since the offending (38 years at the time of the decision) but also because of the applicant's youth at the time of it, just 16. When these factors are married with the complete absence of the applicant coming under any adverse notice since his release from prison, it seems to the court that on any view a substantial quantum of mitigation is available which rationally must be weighty in the applicant's favour.

[32] Mr Lewis has referred to what appear to be factors which he considered to be weighty against the applicant's suitability for employment apart from his offending history. Reference is made in his affidavit to his offences demonstrating that the applicant "had a propensity to commit acts of very serious violence, despite the fact they had taken place 38 years before". He also indicated that "clearing him for suitability would undermine the wider duty of care that the NICS had to all of its staff".

[33] As regards the first of these matters, the propensity assessment, it seems to the court that it is at the very least highly questionable. Mr Lewis, the court observes, does not explain what his reasoning in respect of this matter was. No-one, as noted above, doubts the seriousness of the applicant's convictions and the court accepts their significance as the starting point in the assessment being carried out. However the assessment being carried out in this case was in 2015 and had to be made against the factors already discussed. The question which arises is what evidence is there to support Mr Lewis's assessment that in 2015 the applicant had a propensity to commit acts of very serious violence? If the applicant had committed acts of violence since 1976 that might be one thing but what gives rise to unease on the court's part is that the applicant is being viewed as having an inclination to offending of a serious nature at present on the basis of his 1976 convictions and nothing else. This savours of a fixed and inflexible approach which fails to recognise that there can and often are changes in the outlook of an offender and in the prevailing circumstances over time.

[34] The second matter referred to by Mr Lewis is in the form of an unexplained conclusory statement. As the court understands the matter there is no evidence that the applicant's current employer has felt that employing him has in any way undermined their duty of care to their other staff. The contract for the work which has brought the applicant within the need for a baseline security check is one being performed for a government department by the applicant's current employer. It is unclear to the court that the applicant's day to day work will bring him, in any new way, into contact with NICS staff or how that contact gives rise to the apparent concern expressed by Mr Lewis.

[35] Standing back and being mindful of the limits to the court's superintendence by judicial review of public law decisions, the court asks itself the *Wednesbury* question *viz* is the decision here under question one which no reasonable authority

could lawfully have arrived at? The court has no hesitation in answering the *Wednesbury* question in this case in the affirmative. This is because the decision made on the facts of this case declaring the applicant unsuitable for employment flies in the face of being a rational decision.

Remedies

[36] As the court has concluded that the impugned decision is *Wednesbury* unreasonable it will make an order of *certiorari* to quash it.

[37] Ordinarily, the court would quash a decision which has been arrived at in breach of the ministerial code and which falls foul of section 28A of the 1998 Act. However all remedies in judicial review are discretionary. The court, in its discretion, has concluded that it should not make a quashing order in respect of the Ministerial Code issue. It arrives at this decision for the following reasons:

(i) The court takes account of the fact that this failure occurred in 2007, nearly 9 years ago, and the use of the Recruitment Policy and Procedures Manual to deal with this type of case has been continuous since that date.

(ii) There will therefore have been many decisions made under the Manual over recent years. In the evidence before the court there is reference to a substantial numbers of applications of this sort being processed by Appointment and Marketing Branch annually, albeit that it is only in a small percentage of cases that a finding of unsuitability is made. The precise reasoning in those cases where there has been a finding of unsuitability, the court has been told, is unavailable.

(iii) There is a risk that a decision by the court to quash the use of the Manual may be detrimental to the interests of good administration and might re-open old cases long closed.

(iv) If it is in the public interest that there should be a return to the Hanson guidance at this time it seems to the court that, given the passage of time, it would be better that this matter is addressed politically rather than determined by the outcome of this judicial review application.

[38] The court will simply make a declaration that the decision to dis-apply the Hanson guidance without bringing the matter to the Executive Committee was in breach of the Ministerial Code as the guidance was a significant or controversial matter outside the scope of the programme for government.

Other Matters

[38] In view of the court's conclusions on the central issues in this case it is unnecessary to seek to deal with the range of other matters found in the Order 53 statement at any length. However, as this decision may the subject of an appeal, the court will indicate that it does not consider that the procedure used by the decision maker in this case was unfair or that the failure to provide a right of appeal against the decision made has rendered the process unlawful. In the absence of any request for an oral hearing by the applicant, the court is unpersuaded that such a hearing was required. No reasons appear to have been given for the original decision though this was corrected to a degree in the context of the ultimate decision by way of a response to the applicant's employer's queries in a letter from the Department dated 9 February 2015. In the court's view, this response was not as forthright as might have been expected but the court does not consider that it can be said that its deficiencies are such as to render the decision unlawful. The applicant at the hearing did not pursue any issue relating to the breach of Article 8 of the Convention in this case.

Conclusion

[39] It will now be for the Department to consider this matter afresh. Unless it is impracticable to do so, it seems to the court that the decision should now be taken by a senior official who hitherto has had no involvement in this case.