

Judicial Communications Office

03 February 2023

COURT DELIVERS JUDGMENT ON PROVISIONS FOR CREMATORIA IN NORTHERN IRELAND

Summary of Judgment

Mr Justice Colton, sitting today in the High Court in Belfast, dismissed an application for judicial review by Oliver Hughes who has been interested in establishing a crematorium in the Carrickmore area of County Tyrone.

Oliver Hughes (“the applicant”) has carried out preliminary research into purchasing equipment potentially for both a fixed crematorium and a mobile crematorium. He believes that there is a need for such a service and that it would be a profitable business. His evidence is that his intentions have been well received by a number of local councillors. Article 17 of the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1985 (“the 1985 Order”) and in particular Articles 17(1) and (8), which, when read together prohibit him from providing and maintaining a crematorium, and make it a criminal offence for him to do so.

The applicant argued that the legislation in question is unreasonable and irrational and sought the following relief:

- (i) An order of certiorari quashing Article 17(1) of the 1985 Order;
- (ii) A declaration of that the Department for the Communities’ (“the respondent”) decision to maintain that the impugned provision is lawful and its refusal to amend or repeal that provision is unlawful.

The court refused leave on the grounds of an alleged failure to comply with section 1 of the Rural Needs Act (Northern Ireland) 2016 and an alleged breach of the applicant’s Convention rights namely article 14 in conjunction with article 8 and/or A1P1 ECHR. In refusing leave on the rural needs issue, the court determined that the duty under section 1 was not engaged in respect of the respondent. In relation to the ECHR ground the court determined that the applicant had not demonstrated that he was the victim of an unlawful act or that it was arguable that there had been any interference with his human rights.

However, the court recognised that the applicant has raised an important issue which is of public interest and an issue of concern to several councils and the respondent. The court commented that, not for the first time, it was confronted with a situation where it is acknowledged by a government department that change is required but despite this little progress appears to be made, whatever the intention of the relevant minister or department.

The respondent submitted that Orders in Council made under foundational statutes for devolved legislators are properly to be considered as equivalent to Acts of those devolved legislators and should not be subject to judicial review on the common law grounds of irrationality. The court considered the procedure by which the 1985 Order was approved by Parliament which it said was not subject to the usual scrutiny applicable to primary legislation as there was no committee stage. There was therefore no opportunity to amend the provisions of Article 17 which was one of several sweeping changes introduced by the legislation. The court said that whilst the matter was by no

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means straightforward it seemed that, as a matter of principle, it should treat the 1985 Order as subordinate legislation amenable to judicial review under common law:

“It does not enjoy the status of a primary Act of Parliament nor has it gone through the procedures which would be required by an order of the local Assembly.”

The court therefore determined that the legislation is amenable to judicial review on common law grounds and noted that the real issue was the scope and standard of review that is applicable in determining whether the applicant can establish irrationality.

The legislative history in relation to crematoria in Northern Ireland

The only crematorium currently operating in Northern Ireland is at Roselawn, run by Belfast City Council. It is governed by the Cremation (Belfast) Regulations (Northern Ireland) 1961 (“the 1961 Regulations”). Those Regulations were made under the Cremations Act 1902 (“the 1902 Act”).

At the time the 1902 Act was passed, it applied to England, Wales and Scotland but not to Northern Ireland. Its provisions were later applied to the Belfast Local Government District by section 26 of the Belfast Corporation (General Powers) Act (Northern Ireland) 1948 (“the 1948 Act”), providing that the then Belfast Corporation (now Belfast City Council) should be treated as a “burial authority” within the meaning of the 1902 Act. This enabled the council to build Roselawn Crematorium. It also enabled the then Department of Health and Local Government to make the 1961 Regulations under which Roselawn Cemetery currently operates. Those Regulations only apply to crematoria maintained and run by Belfast City Council. There have been no amendments in relation to crematoria for over 25 years and no regulations have been made under the 1985 Order.

Applications for new crematoria

There have been a number of planning applications for new crematoria:

- The former Omagh District Council was originally granted outline planning permission in November 2012 with a Chapel of Rest at the Greenhill Cemetery, Gortin Road, Omagh. This permission has been renewed by Fermanagh and Omagh District Council, initially in 2015 and again in 2020. There is much uncertainty about whether such a crematorium will ever be developed;
- Antrim and Newtownabbey Borough Council was granted full planning permission on 24 August 2018 for a proposed crematorium at a site on the Doagh Road, Newtownabbey; and
- Lisburn Crematorium and Cemetery Ltd was granted full planning permission for a proposed cemetery and crematorium in October 2013, at lands in Moira. The court has no further detail about this development although there is no indication that it is likely to be operational in the near future.

The court said it is probable that these applications for planning permission demonstrate an increasing demand by the public for access to crematoria in their local areas. The 1985 Order clearly envisaged the provision of crematoria by councils in Northern Ireland. In 2016 the respondent initiated dialogue with other Northern Ireland departments to establish which department would be best placed to take forward a review of cremation legislation, which would include the possibility of regulation of private sector crematoria. On 20 December 2017 at a meeting to discuss local

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government issues officials briefed the Permanent Secretary in relation to the issue of crematoria provision in Northern Ireland. It was recognised at that stage that a ministerial decision was required in order to make further progress. The issue was further addressed in departmental updates during the period of Assembly suspension from 2017 to 2020. The proposed way forward again returns to the issue of the requirement for subordinate legislation to update the regulations for both the current council run crematorium at Roselawn and to apply those regulations to all council run crematoria.

Rationality/Scope of Review

Whilst the court accepted that it has the power to review an Order in Council of the type in this case it said the threshold for establishing any illegality must be high. The scope of judicial intervention is limited having regard to the fact that the impugned provision has the imprimatur of Parliament.

The respondent suggested by reference to the House of Commons debate that the 1985 Order would “update the law on cremation to provide simpler procedures.” Similarly, in the House of Lords, it was stated that Article 17 would “modernise and extend the legislation on cremation.” The applicant suggested the purpose of Article 17 was therefore to provide procedures to allow for additional crematoria to be developed outside of Belfast.

The court commented that when the legislation was enacted it was clearly envisaged that crematoria would be the sole responsibility of councils. It said the 1985 Order made it possible for other councils in Northern Ireland to provide crematoria, either alone, or in conjunction with other councils:

“The failure of the department to make regulations to provide for councils to provide crematoria may well be the subject matter of criticism. A local council seeking to establish a crematorium might well have a strong case for judicial review against the respondent. Nonetheless, it is clear that in response to the increasing demand for crematoria, as evidenced by the planning permission provided to a number of councils, the process of developing the necessary regulations is advanced. That said, the court is disappointed to note that it does not appear that the regulations anticipated for December 2022 have materialised, presumably because of the absence of any minister.”

The court said the real complaint by the applicant was that there is no provision for bodies other than councils providing crematorium facilities. This was the real issue to be determined by the court rather than an attempt to engage in an interpretative exercise of the intention of the policy behind the 1985 Order.

The applicant referred to five matters which supported his conclusion as follows:

- (i) The experience of neighbouring jurisdictions demonstrates that it is not reasonable or rational to conclude that the public interest requires that the provision and maintenance of crematoria be restricted to councils, as many private companies successfully operate facilities in England, Scotland, Wales and the Republic of Ireland and the law permits this.

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(ii) Many of the private companies identified at (i) above provide cremations outside this jurisdiction for individuals who die in this jurisdiction.

(iii) (i) and (ii) operate to demonstrate that councils in this jurisdiction do not have particular expertise in providing and maintaining a crematorium, as only Belfast City Council, in fact, does this.

(iv) The impugned provision therefore restricts both the applicant's ability (and the ability of any other non-council entity) to provide and maintain a crematorium and does so for no good reason.

(v) The detrimental consequences this legislation has for ensuring the population's access to a crematorium also suggests that the prohibition is lacking in comprehensive justification. The prohibition has resulted in only one crematorium operating physically within the jurisdiction, in Belfast, which severely restricts those from outside the area in accessing a crematorium, and places significant demand on that facility, again, for no good reason.

The court said it was important to look again at what the "decision" under challenge actually is.:

"The focus here is an Order of Council that was proposed by a minister and approved by both Houses of Parliament, albeit not with the same protections as primary legislation. It does, therefore, have a democratic foundation. It is difficult to see how it can be said that in 1985 it was somehow irrational to provide that only councils would be responsible for the provision of crematoria, subject to regulation by the relevant department. There are complex procedures which must be complied with in undertaking cremation. This involves close co-operation and co-ordination with a range of other public sector bodies. In Northern Ireland, councils are the authority through which many public services are delivered which are undertaken by private companies in other jurisdictions, such as waste management and recycling. The challenged provision must have been well within the ambit of decisions open to the minister and legislature and well within the latitude afforded to it in law."

The court commented that it can be reasonably argued that the situation has changed, given the demand for crematoria and the views of at least one council that a public private partnership is the appropriate way to deliver the facility. It said the fact that the legislation may well be out of date has been recognised by the relevant minister and that steps are in place to review and consider this matter. In the court's view that was the appropriate forum for this issue to be addressed:

"The court is dealing with political and social issues, not well suited to judicial intervention. The fact that the provision for crematoria in this jurisdiction is now under active review and consideration is important. That is the proper way to deal with the important issues raised by the applicant in this application. Any reforms or changes arising will enjoy democratic legitimacy."

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The court noted that the applicant was seeking an order quashing Article 17(1) of the 1985 Order. It said this would simply remove the provision for a council to provide and maintain a crematorium. The impact of that would render the operation of the only currently operational crematorium in Northern Ireland unlawful. It would not resolve the applicant's concern around the inability of private companies to run crematoria, at the risk of committing a criminal offence. If Article 17(1) and 17(8) were quashed then Article 17(3) could not be logically interpreted as having reference to any crematoria whatsoever, so there would be no facility for the department to regulate in any way a private crematorium.

The court commented that the real difficulty with the application was illustrated by the second substantive relief sought by the applicant, namely a declaration that the respondent's decision that the provision is lawful, and refusal to amend or repeal that provision, is unlawful. It said it is not within the gift of the respondent to amend or repeal the provision:

“Government in this jurisdiction is complicated. Such amendment or repeal requires approval across a number of departments under the Northern Ireland Act 1998. The minister has decided to seek Executive consideration as to which department should be responsible for wider cremation and burial policy and for conducting a review of the legislation relating to crematoria. In the meantime, the respondent has commenced the necessary steps to regulate crematoria to be operated by councils. The respondent is unable to take steps unilaterally to deal with the wider issues and, in particular, the issue raised by the applicant, in the absence of a minister or Executive.”

The court recognised that the applicant has raised an important issue but said that for the reasons set out above it had concluded that it could not be said that the provisions challenged in this application meet the high common law threshold required to be deemed irrational. The court was influenced by the evidence submitted by the respondent and was satisfied that this matter is under appropriate review by the appropriate authorities.

Conclusion

The application for judicial review was refused.

NOTES TO EDITORS

This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://judiciaryni.uk>).

ENDS

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