Judicial Communications Office

12 April 2019

COURT DELIVERS JUDGMENT ON HIA REDRESS MECHANISM

Summary of Judgment

IN THE MATTER OF AN APPLICATION BY JR80
FOR JUDICIAL REVIEW

-v-

SECRETARY OF STATE FOR NORTHERN IRELAND
and
THE EXECUTIVE OFFICE

_____

McCloskey J

Anonymity

[1] The court reiterates that the Applicant was granted the protection of anonymity from the outset of these proceedings. There must be no publication of his identity or of anything which could lead to him being identified.

General

[2] This judicial review challenge concerns the report of the Historical Institutional Abuse Inquiry (the "HIA Report") published on 20 January 2017. The substantive phase of the proceedings having been completed, three considerations in particular stand out. First, the devolution arrangements devised for Northern Ireland following the political settlement in 1998 involved the creation of a unique, bespoke model of government and law making inextricably linked with and motivated by the strife torn history of this jurisdiction. Second, neither the United Kingdom nor Northern Ireland, which is constitutionally part of the United Kingdom, has a conventional written constitution.

[3] Third, the indefinite moratorium applicable to the Executive and Assembly of Northern Ireland featuring in the present case arises in other judicial review cases. One of the consequences of this vacuum 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.

The Applicant

[4] 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 HIA. He 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

The Respondents

[5] The Respondents are the Secretary of State for Northern Ireland (the "Secretary of State") and the Executive Office (the "EO"). The thrust of the Applicant's challenge to these two public authorities 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 HIA Inquiry

[6] The HIA 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 Northern Ireland Executive, which had established the Inquiry. It contains a series of recommendations on the subject of redress. One such recommendation was 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 its redress recommendations be speedily implemented. It exhorted that the first payments to victims be made before the end of 2017. These urgings and exhortations remain unfulfilled.

[7] The substantive hearing of the judicial review took place from 01 – 03 April 2019. Both at the last pre-hearing case management review and upon completion of the substantive hearing the court identified the possibility of either, or both, Respondents applying subsequently for leave to adduce additional affidavit evidence to reflect further anticipated material developments. The Head of the Northern Ireland Civil Service ("HOCS") having committed himself unambiguously and unconditionally to formally requesting the Secretary of State for Northern Ireland to "take" the new legislation through Westminster, the main *incognito* prevailing upon completion of the substantive hearing was the Secretary of State's response to such request.

The Governance Vacuum Ground

[8] The court's conclusions on this aspect of the Applicant's challenge are the following:

(i) The *dicta* in the speeches of Lord Bingham and Lord Millett in Robinson fall markedly short of purporting to formulate a principle of constitutional law, whether in the context of the Northern Ireland Act 1998 ("NIA 1998") constitutional arrangements or more widely, that any vacuum in governance should be of short duration. The language which their lordships used is not the language of legal or constitutional principle. In particular, a statement that something is "*in general desirable*" is most unlikely to have been intended to operate as a pronouncement of legal or constitutional principle.

(ii) Similarly, the language of "*a very early date*", "*a date further in the future*" [Lord Bingham], "*promptly*" and "*a little time*" [Lord Millett] is not, in my view, the language one would expect to encounter in high level judicial formulation of legal or constitutional principle.

(iii) The context of everything said by the majority in Robinson was that of construing specific statutory provisions. Furthermore, this exercise was carried out by the majority without reference to either existing or novel principles of constitutional law.

(iv) The constitutional principle for which the Applicant contends is further undermined by its intrinsic imprecision and uncertain boundaries.

(v) Properly analysed, the relevant passages in the speeches of Lord Bingham and Lord Millett, in tandem with that of Lord Hoffman, resonate with the factor of Ministerial political judgement. This stands in marked contrast to constraint on Ministerial choices or action imposed by the superior medium of constitutional principle.

[9] To summarise, where a vacuum in governance, even a protracted one and no matter how regrettable, occurs in Northern Ireland, I consider that this is to be viewed through the interrelated prisms of political reality and consequential prejudice and disadvantage to the population, rather than infringement of any constitutional principle. Absent legislative intervention by the United Kingdom Government, by appropriate amendments of NIA 1998 or revocation or suspension of devolved powers, the prevailing constitutional arrangements in Northern Ireland, however defective or inadequate they may be viewed in some quarters, permit the moratorium which has afflicted this State for some two years. The plight of the victims and survivors of historical institutional abuse in Northern Ireland illustrates graphically just how damaging this is for certain sections of society.

The Sections 1 & 3, 2018 Act Challenge

[10] It follows, necessarily and logically, that any other aspect of the Applicant's challenge contingent or consequential upon the first main element succeeding must fail. This applies, firstly, to the Applicant's quest for a declaration that section 1 of the Northern Ireland Executive Formation and Exercise of Functions Act 2018 ("the 2018 Act") is unlawful as it infringes the constitutional principle advocated on behalf of the Applicant, which the court has rejected.

[11] Furthermore, if and insofar as there is any freestanding challenge in the alternative to the Secretary of State's failure to date to propose a date for new Assembly elections to be held sooner than 25 August 2019, the critical feature of the amended incarnation of section 32(3) of the NIA 1998 is that it now invests the Secretary of State with a discretionary power, whereas previously it imposed a duty. The Secretary of State has determined not to exercise this power to date. The Applicant contends that this is Wednesbury irrational. This contention, in common with any Wednesbury challenge, confronts a high hurdle, particularly in a context imbued with matters of political judgement and political parties' manoeuvring in a governance vacuum which elected politicians have repeatedly failed and refused to rectify. The extensive exposition of the Secretary of State's consideration, reasoning, aims and aspirations in the affidavits filed on her behalf make abundantly clear that rationality has prevailed throughout the period under scrutiny. Controversy is not to be equated with irrationality. This analysis is unaffected by resort to arguments based upon democracy in a context where there is not a scintilla of evidence before the court that new Assembly elections in Northern Ireland would make the slightest difference to the long standing vacuum in governance. The Secretary of State's preferred mechanism for restoring a normally functioning democracy in Northern Ireland, which does not involve instigating Assembly elections at this point in time, is a perfectly rational one.

[12] The court further rejects the contention that it is competent to adjudicate on the legal validity of any provision of the 2018 Act, a measure of primary legislation. The court considers, in the alternative, that this challenge is not made out in any event.

The Section 23 NIA 1998 Ground

[13] The court decides:

(a) The exercise of legislative power in Northern Ireland matters by the Westminster Parliament is carried out under Section 5(6) of NIA 1998. This would be the vehicle for the introduction of the draft legislation implementing the HIAI Report redress recommendations which the EO has now prepared

(b) Section 23 of NIA 1998 does not empower the Secretary of State to implement the HIA Inquiry Report recommendations by executive act, there having been no revocation or suspension of devolution in Northern Ireland.

(c) In the alternative to (b), the evidence establishes clearly that the statutory mode of implementation, in which so much time and effort have been invested, is preferable. As a minimum, this implementation is so far advanced that it would make no sense whatsoever, in public law terms, for the Secretary of State to interfere at this stage. If Section 23 does empower the Secretary of State to implement the HIA Report by executive act, this engages a discretionary power rather than a duty. Irrespective of whether this function is characterised by a power or a duty, no unlawful failure to act has been established.

The Section 26 NIA 1998 Ground

[14] The court decides:

(a) The "international obligations" to which Section 26 is directed must be those of the United Kingdom as no treaty making powers have been devolved to the Northern Ireland Institutions.

(b) Section 26(1) is plainly inapplicable: no Northern Ireland Minister or Northern Ireland Department is proposing to take any action incompatible with any of the UK's international obligations.

(c) The Applicant's argument does not identify any "Minister" to whom Section 26(2) could conceivably apply in the present circumstances of a non-functioning Assembly and a non-functioning Executive.

(d) In contrast, the Northern Ireland Departments continue to function and the EO is one such Department.

(e) The only action of any kind which the EO is legally competent to undertake must be something falling with the ambit of its legal powers. There is no suggestion that the EO has been acting other than within the limits of its legal powers.

(f) The action which is "capable of being taken by" the EO is virtually complete. The consideration that the EO may have been sub-consciously or inadvertently taking steps to comply with certain international obligations of the UK is irrelevant. The role of the EO will be complete when the promised interaction between the HOCS and the Secretary of State, which is imminent, unfolds. No coercive public law remedy against the EO is appropriate, at this stage.

Summary of Conclusions

[15] The conclusions of the court are summarised thus:

(a) The governance vacuum in Northern Ireland does not infringe any principle of constitutional law and is compatible with the arrangements established by NIA 1998.

(b) This court is not competent to adjudicate on whether the Northern Ireland Executive Formation and Exercise of Functions Act 2018 is lawful.

(c) In the alternative to (b), the court considers that the 2018 Act is lawful.

(d) There has been no unlawful failure by the Secretary of State to exercise the power vested in her by Section 32(3) of the Northern Ireland Act 1998, as amended, to propose a date for the poll for the election of a new Northern Ireland Assembly.

(e) The EO is not legally competent to give effect to the redress recommendations of the HIA Inquiry report by executive or legislative or other act whatsoever.

(f) The measures of primary legislation relating to Northern Ireland enacted by the UK Parliament since 2 March 2017 have been made acting under Section 5(6) of NIA 1998. This statutory provision applies to the draft legislation which the HOCS will, imminently, ask the Secretary of State to advance in the Westminster Parliament.

(g) In the absence of any revocation or suspension of the powers devolved to the Northern Ireland administration, the Secretary of State is not competent to exercise prerogative or executive power under Section 23(2) of NIA 1998.

(h) Alternatively, no duty to act or unlawful failure to act under s 23(2) on the part of the Secretary of State has been established.

(i) Section 26(2) of NIA 1998 applies as the UK government is subject to international treaty obligations to provide redress to the Applicant and other victims of the torture or inhuman or degrading treatment or punishment identified in the HIA Inquiry Report. Given that the preparation of implementing legislation is now complete, no unlawful failure to act by either Respondent is established at this point.

[16] The intervention of the court in this case has occurred at a fixed point in time. Certain imminent events of unmistakable significance, involving the Secretary of State in particular, are awaited. It would be preferable that any further challenge which may thereby materialise should be immersed within these proceedings, via appropriate extension and amendment if necessary. The parties will have an opportunity to address the court on this issue and to consider a suitable draft case management order. If a further listing proves appropriate this will be arranged. Equally important, the parties' proposals on the Order consequential upon this judgment will be provided.

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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