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*Judgment: approved by the Court for handing down* | *Delivered:* **19/01/11**

*(subject to editorial corrections)**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

**United Dairy Farmers Ltd's Application (Leave Stage) [2011] NIQB 3**

**IN THE MATTER OF AN APPLICATION BY UNITED DAIRY FARMERS LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**McCLOSKEY J**

**[1]** The Applicant is United Dairy Farmers Limited, a co-operative society (hereinafter "*the Society*"). The proposed Respondent is the Department of the Environment ("*the Department*"). The impugned determination is formulated as:

> "*The decision of the Department … to introduce Regulations 33 - 37 of the Local Government Pensions Scheme (Amendment No. 2) Regulations (NI) 2010 ("the 2010 Regulations").*"

The Order 53 Statement identifies a single alleged legal infirmity in the impugned decision viz. the Department's asserted failure to carry out a "Regulatory Impact Assessment" ("*RIA*"). This discrete failure is attacked on the grounds of (a) irrationality and (b) the denial of a legitimate expectation. The thrust of the Applicant's case, as pleaded, is to attack the Department's assessment that the impugned decision would have no impact on the private and voluntary sectors. Thus there are three links in the litigation chain: the impugned statutory measure, the failure to precede this by a RIA and the ensuing grounds of challenge.

**[2]** The grounding affidavit explains that there are currently pending before the Chancery Court related proceedings, listed for hearing on 28th February 2011, seeking declaratory relief, wherein the main task of the court will be to construe the Local Government Pension Scheme (Administration) Regulations (NI) 2009, in particular Regulation 33. In those proceedings, the Society is seeking to limit its legal liability to contribute to the Northern Ireland Local Government Pension Scheme ("NILGPS") and, further, to determine whether it will be liable to make a termination (or "cessation") payment in the event that it ceases to employ "*active*

*members*". It is appropriate to observe, at this juncture, that the Society is a private enterprise said to have a membership comprising a broad cross-section of dairy farmers throughout Northern Ireland. In NILGPS terms, the court was informed that the Society has 77 active members – who are, presumably, current beneficiaries of the pension scheme.

**[3]** It is contended – without challenge, at this stage - that the effect of Regulation 35 of the 2010 Regulations will be to amend Regulation 33 of the 2009 Regulations in a manner which will subject the Co-Operative Society to a major financial liability in the event of leaving the LGP Scheme. The parties' respective estimates, in this respect, are £33,000,000 and circa £37,000,000 respectively. The heart of the Society's legal challenge seems to be encapsulated in paragraph 17 of the grounding affidavit sworn by its Group Financial Director:

> "*The Applicant challenges the legality of the process by which it is proposed to bring the [2010] Regulations into effect. The principal objection to the introduction of the [2010] Regulations is that the Respondent* ***has not properly or effectively weighed up and assessed the impact of the new Regulations on, inter alia, the Applicant.***"

[My emphasis].

This telescopes into a specific contention to the effect that the 2010 Regulations are vitiated by the Department's failure to precede their introduction by the execution of a RIA. This contention is built upon certain Government protocols:

(a) The July 2008 Code of Practice.

(b) The Department for Business, Innovation and Skills Guidance on Impact Assessment.

(c) The specific Northern Ireland Guidance, published by DETI, entitled "Better Policy Making and Regulatory Impact Assessment: A Guide for Northern Ireland" ("*the DETI Guidance*").

These publications have the status of policy guidance and, in contemporary public law terms, constitute representations, or promises, made by the Government to the public about the conduct of policy making and law making processes.

**[4]** The execution of exercises such as public consultation and RIAs has progressively become a notable feature of government in the United Kingdom in recent years. Such exercises illustrate how the processes of policy making and law making have changed from around the late 20th century, to the extent that they differ markedly from their predecessors. In the present case, the Society relies particularly on the DETI Guidance, in paragraph 1.1 whereof it is stated:

> "*A … RIA is a tool which informs policy decisions. All NI Government Departments must comply with the* [RIA] *process when considering any new, or amendments to, existing policy proposals …*
>
> *The RIA is an assessment of the impact of policy options in terms of the costs, benefits and risks of a proposal. New regulations should only be introduced when other alternatives have first been considered and rejected and where the benefit justifies the costs.*"

Per paragraph 1.3, it is stated that since December 2001 it has been the policy of the Northern Ireland Executive –

> "*… that no proposal for regulation, which has an impact on business, charities, social economy enterprises or voluntary bodies, should be considered by Ministers without a* [RIA] *being carried out. An RIA is an integral part of the policy development process and advice that goes to Ministers.*"

In paragraph 1.5, it is explained that the RIA process has the merits of identifying the full impact of [policy/legislative] proposals; ascertaining alternative ways of introducing the desired policy change; assessing options; ensuring that there is meaningful and wide ranging consultation with stakeholders; and determining whether the supposed benefit justifies the costs. Per paragraph 1.6:

> "*All Government Departments and agencies where they exercise statutory powers and rules with a general effect on others are required by Ministers to produce an RIA.*"

Notably, paragraph 1.9 states:

> "*You do not need to do an RIA for*
>
> - *Proposals which impose* ***no costs or no savings,*** *or negligible costs or savings on business, charities, social economy enterprises or the voluntary sector;*
> - *Increases in statutory fees by a predetermined formula such as the rate of inflation; or*
> - *Road closure orders.*"

Notwithstanding, per paragraph 1.10:

> "*However, even if you think that the effects of your proposals are likely to be negligible, it is still good practice to produce an RIA.*"

As the ensuing passages highlight, in cases of doubt an "*initial*" RIA should be adopted and, if appropriate, this can mature into a full blown RIA.

**[5]** It is averred that even if the Society remains within the NILGPS, its financial liability in consequence of the impugned measure could be as much as £15,000,000, representing more than two-thirds of its net worth and giving rise to a crippling financial burden. The affidavit asserts that the now crystallised amendment of the 2009 Regulations was first signalled by the Department in October 2009, when a preliminary notice of consultation was published and this was followed by a consultation exercise initiated in April 2010. The Department's position appears to be that the dispute being litigated in the Chancery Division has been rendered academic by the introduction of the 2010 Regulations. It may be that this will become common case. In this respect, the letter dated 9th October 2009 from the Department's London solicitors is noteworthy:

> "*Amendments to the 2009 Regulations are currently being considered by the Department … which will impose a liability on bodies which no longer employ active members to contribute to the Scheme in certain circumstances …*
>
> *As UDF assert that it will have an ongoing relationship with the Scheme after it ceases to employ active members, it must also accept that it will be bound by any such future amendments, including any ongoing contribution liability …*
>
> *Amendments are also being prepared by the Department … which will clarify for the avoidance of any doubt that Regulation 33 applies where an employing authority ceases to employ active members. The Department … has told NILGOSC that it intends these amendments to take retrospective effect from 1st April 2009, so that any employer that ceases to employ active members after that date will be subject to the amended Regulations …*
>
> ***For the reasons outlined above, we suggest that argument as to the true construction of the current wording of Regulation 33 is academic, as there are a number of routes which the Committee may choose to follow in order to protect the Scheme and ensure that UDF does not evade all liability to contribute to the***

> ***Scheme in respect of liabilities accrued and attributable to it.***"

[My emphasis].

I have highlighted the above letter, for two reasons. The first is that, in the context of the fuller evidential picture likely to materialise if the court grants leave to apply for judicial review, this may provide some insight into the reasons why a RIA was not conducted. The second is that while (according to the present evidence) a consultation exercise was being initiated at this stage, the letter seems to suggest that the outcome thereof was preordained, thereby raising the possibility that the Department did not then proceed to consult with a truly open mind and unfettered discretion. I acknowledge that these are, unavoidably, merely preliminary observations at this stage.

**[6]** An application for judicial review is viable in the present context by virtue of the status of the impugned statutory measure. A measure of primary legislation (properly defined) cannot be challenged in this way. This is a reflection of the doctrine of parliamentary sovereignty and was the stimulus for a statement by Lord Hoffmann in ***R –v- Home Secretary, ex parte Simms*** [2000] 2 AC 115, at p. 131 described by the authors of Administrative Law (Wade and Forsyth, 10th Edition, p. 22) as "*canonical*":

> "*Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal*."

Save in ECHR cases, where a declaration that a measure of primary legislation is incompatible with a protected Convention right is possible (per Section 4 of the Human Rights Act 1998), the courts exercise no control over primary legislation. However, where *subordinate* legislation is concerned, the High Court, through an application for judicial review, exercises well established powers of superintendence. In this particular sphere, the most active principles, or standards, are those of *ultra vires*, unreasonableness, improper purpose and procedural impropriety. Notably, it is suggested in Wade and Forsyth (in terms) that a sufficiently grave procedural impropriety will invalidate the ensuing measure of subordinate legislation (*op. cit., p. 755).* While the brief treatise of remedies by the authors of the same work might be considered moderately conservative (see p. 758), it seems to me that, in principle, an order of certiorari quashing a procedurally invalid measure of subordinate legislation is available as a remedy, its propriety depending on the particular context.

**[7]** In considering the purview of the High Court's supervisory role in the context of a challenge such as the present, I was reminded by Mr. McGleenan (on

behalf of the Department) of the well known *dictum* of Megarry J in ***Bates –v- Lord Hailsham*** [1972] 1 WLR 1373, at p. 1378:

> "*Many of those affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy …*
>
> *I do not know of any implied right to be consulted or make objections, or any principle upon which the courts may enjoin the legislative process at the suit of those who contend that insufficient time for consultation and consideration has been given.*"

While the public law infirmity asserted in the present case is not defective consultation, rather a failure to conduct a RIA, I consider that there are certain parallels to be drawn, since each constitutes a species of procedural impropriety. Having thus acknowledged, I would add that the *dictum* of Megarry J must now be considered in its historical context. As I have already observed, the processes of policy making and law making are, at this remove, some four decades later, significantly different from their forefathers. In particular, solemn government publications, such as the DETI Guidance under consideration in this challenge, have the potential to generate not only procedural (or process) requirements but also ensuing legitimate expectations, normally (but not invariably) of the procedural *genre*. At this juncture, I would add only that where, as here, the centrepiece of the legal challenge is a complaint of procedural impropriety, the High Court is normally perfectly well equipped to adjudicate. As stated memorably by Lord Bingham:

> "'*Judicial Review' is an excellent description of this exercise because it emphasizes that the judges are reviewing the lawfulness of administrative action taken by others. This is an appropriate judicial function, since the law is the judge's stock in trade, the field in which they are professionally expert. But they are not independent decision makers and have no business to act as such. They have, in all probability, no expertise in the subject matter of the decision they are reviewing.* ***They are auditors of legality: no more, but no less.***"

[The Rule of Law, p. 61, emphasis added].

**[8]** Those aspects of the evidence before the court highlighted and quoted above demonstrate where the battle lines between the parties are drawn. Factually, the cornerstone of the Society's challenge is undisputed: the impugned statutory measure itself recites unequivocally that it was not preceded by a RIA. This failure, and the ensuing statutory measure, are challenged on the ground that a breach of the DETI guidance has occurred. This simple framework, it seems to me, has the

potential to throw up questions of irrationality, procedural impropriety and legitimate expectations, all well recognised constituents of public law . The task for the court is to determine whether the Society enjoys an arguable case, that is to say a case worthy of further in depth investigation and consideration by the court at a substantive hearing (see, for example, ***Re Morrow and Campbell's Application*** [2001] NI 261, at p. 270). The leave threshold has been repeatedly and consistently described as a modest and undemanding one. In the present context, the Department's failure to carry out a RIA in advance of devising and introducing the 2010 Regulations is an agreed fact. RIAs have a surrounding governmental policy and guidance framework. In my view, applying the governing test, the Society enjoys an arguable case that this failure vitiates the impugned measure of subordinate legislation on one or more of the grounds canvassed in the Order 53 Statement and elaborated above.

**[9]** At this juncture, it is appropriate to reflect on the legislative timetable:

(a) The 2010 Regulations were laid before the Northern Ireland Assembly on 10th December 2010.

(b) They are subject to negative resolution and, in this respect, the statutory period of three weeks commences on 17th January 2011: see Section 41 of the Interpretation Act (NI) 1954.

(c) The "negative resolution period" shall expire on 7th February 2011.

(d) The relevant Assembly Committee is meeting on 20th January 2011, when an opportunity to debate the impugned measure will arise.

One of the submissions on behalf of the Department was that the court should consider deferring the determination of this application until the latter date has passed. However, given the exigencies of the overall timetable and the constraints on the court's extant commitments during the next few weeks, which are substantial, I consider it appropriate to determine the leave application at this stage. Furthermore, this will have the virtue that the Assembly Committee is aware of this court's preliminary view of the issues and this, in my estimation, would be manifestly preferable to an uninformed and speculative debate about whether this litigation will overcome the initial threshold. For these reasons, I grant leave to apply for judicial review at this stage, rather than deferring the leave application.

**[10]** The full hearing will take place on 10th February 2011.

**[11]** Finally, I note the absence of any claim for interim relief at this stage. I consider it appropriate to address this issue briefly, since it could conceivably become a live one, taking into account the demanding and compressed timetable outlined above and bearing in mind the possibility of presently unforeseen complications. The court's powers in this respect are conferred by Section 19 of the

Judicature (NI) Act 1978 and RCC Order 53, Rule 3(13). The discretion to grant interim relief was declared to be one of broad dimensions by the House of Lords in ***M –v-Home Office*** [1994] 1 AC 377 and, as set out by the Northern Ireland Court of Appeal in ***Re Eurostock*** [1999] NI 13, the criteria applied by the court are the well known ***American Cyanamid*** tests of (a) good arguable case and (b) evaluation of the balance of convenience. One of the factors which the court must weigh is whether a failure to grant interim relief to an ultimately successful litigant will inflict an injustice, as emphasised by Lord Bridge. This is the principled structure within the issue of interim relief could conceivably arise herein.

**[12]** Costs will be reserved, in accordance with the established practice.