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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 20/12/2017

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPPLICATION BY BEATRICE WORTON FOR JUDICIAL REVIEW

v

NEWRY AND MOURNE DISTRICT COUNCIL
and
THE EQUALITY COMMISSION FOR NORTHERN IRELAND

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ORDER

McCLOSKEY J

[1] The Applicant brings this challenge against Newry and Mourne District Council ("NMDC") and the Equality Commission for Northern Ireland ("ECNI"). The first remedy pursued by the Applicant is:

> "*A declaration that* [NMDC] *remains and continues to remain in breach of its equality scheme of March 2012 and section 75 of the Northern Ireland Act 1998 with respect to its authorisation, affirmation and endorsement of the naming of the public civic amenity, Patrick Street Play Park, Newry after Raymond McCreesh*".

There is a free standing challenge to the decision of ECNI dated 27 May 2015 to the effect that the impugned conduct of NMDC was not in breach of its statutory equality scheme.

[2] In very brief compass:

(a) On 09 April 2014, having conducted a statutory investigation, ECNI concluded in its report that NMDC had acted in breach of its equality scheme (which was then an unapproved instrument) and, in substance, had failed to have due regard to the need to promote equality of opportunity and good relations. ECNI recommended that NMDC undertake a review.

(b) On 02 October 2014 NMDC resolved to carry out the recommended review.

(c) On 11 February 2015 NMDC resolved to retain the offending name of the play facility and a further report was submitted to ECNI.

(d) Having considered the report, by letter dated 18 May 2015, ECNI advised NMDC:

> *"… I wish to inform you that the Commission accepts the report in completion of the Commission's recommendation to review the decision, noting the work undertaken in this regard and outlined in the report ….*
>
> *In accepting the report, the Commission expressed disappointment that opportunity was not taken to find a name for the play park that would have positive resonances with all those in the Council area and that would be more conducive to promoting good relations between communities."*

[3] These proceedings were initiated on 04 September 2015. On 08 April 2016 leave to apply for judicial review was granted. The proceedings have stagnated since then.

[4] It is apparent that an amended Order 53 Statement was directed and the further version of this is dated 22 April 2016, which expresses the following grounds of challenge:

(a) As regards NMDC – irrationality, unlawful predetermination and actual or apparent bias.

(b) As regards ECNI, the grounds are properly described as profuse and in places opaque.

[5] ECNI reacted swiftly to the grant of leave to apply for judicial review, in the following way. By letter dated 30 June 2016 it informed NMDC:

> *"….. the Commission …. has rescinded the decision it took in March 2015 …. the Commission has concluded that the Council has not fully complied with the recommendation, specifically around transparency ….*
>
> *The Commission recommends that to ensure transparency the Council debate and vote on this issue is conducted in public and properly recorded and Councillors are provided with a qualitative analysis of the consultation responses prior to that debate and vote …*
>
> *When we communicated our previous decision, the Commission expressed its disappointment that the opportunity had not been taken to find a name for the play park that would have more positive resonances with all those in the Council area and that would be more conducive to good relations between the communities and that remains the Commission's view."*

This gave rise to a consent order of the Court dismissing the case against ECNI and awarding the Applicant 50% of her costs incurred to the date of the grant of leave.

[7] On 15 September 2016, representatives of the ECNI attended a meeting of the NMDC Equality and Good Relations Reference Group and provided oral advice upon how the Council should proceed with its review of the original decision. Representatives of the ECNI attended a special meeting of the full Council on 20 October 2016 to discuss the issue. The new recommendation of the ECNI was adopted by the Council and the Council resolved (i) to commission an independent consultant to undertake a qualitative analysis of the consultation responses and development of an options paper, (ii) that the qualitative analysis would be considered by the Council's Equality and Good Relations Reference Group for discussion and development of options papers, and (iii) that the qualitative analysis and options papers be provided to all councillors and debated in public by the Council for decision.

[8] On 9 May 2017 the Council's Equality and Good Relations Reference Group decided to instruct an independent consultant to undertake qualitative analysis of the consultation responses. His analysis was ultimately presented to the Group on 13 December 2017 and identified three options:

(i) Retain the name of the park.

(ii) Change the name to a neutral one.

(iii) Review the use and management of the land occupied by McCreesh park.

On 27 October 2017, the ECNI wrote to the Council seeking an update on its review of the decision to retain the name of the park. On 09 November 2017 the Council responded to ECNI with an update.

[9] On 13 December 2017 NMDC, at a public meeting, resolved to "*review the use and management of the land occupied by Raymond McCreesh Park in line with the Council-wide strategic review of play areas*". The practical effect of this is twofold. There is a choice between retaining this play area and retaining another similar facility which has been accorded a "*much higher play value*". This decision will be made following consultation. The Council aspires to make a final decision at its monthly meeting scheduled for 09 April 2018.

[10] The court's assessment is that there is a clear nexus between the revised ECNI decision dated 30 June 2016 and the most recent decision of NMDC dated 13 December 2017. The intervening chain is an unbroken one.

[11] In this newly altered framework the Court acceded to NMDC's application to vacate the scheduled hearing date of 15 December 2017. It did so on the basis that the parties would formulate their respective submissions on the appropriate course to be taken in the significantly altered circumstances which had materialised. On behalf of NMDC Mr McLaughlin (of Counsel) submits that the case against his client should be dismissed at this stage. On behalf of the Applicant, the retort of Mr Scoffield QC (with Mr Smith, of Counsel) is that a dismissal is inappropriate given that there is no guarantee that the Applicant's goal, which is the removal of the offending name, will be achieved. Thus it is argued that the case has not been rendered academic. Mr Scoffield's alternative submission is that even if the case has become academic, there is good reason in the public interest for substantive judicial adjudication, applying the test in R v Secretary of State for the Home Department, ex parte Salem [1999] 1 AC 450. This kernel of this argument is that "naming" issues of this kind may foreseeably arise in other cases and adjudication by the Court on both the relevant procedural and substantive issues will provide guidance to NMDC and all other district councils, thereby furthering the public interest.

[12] Issue is, therefore, joined between the parties by reference to the two options outlined above. The options menu, in my view, is somewhat greater. A third option would be to stay the proceedings pending NMDC's fresh decision. Implicit in this option is that the Court would, in principle, be amenable to such reconfiguration of the Applicant's challenge as may be necessary in the wake thereof. Realistically, significant amendment would be inevitable since the fresh decision would supersede and extinguish the impugned decision and could give rise to arguments about public law misdemeanours other than those canvassed in the challenge as currently formulated. This reconfiguration would be followed by a detailed case management

programme and, eventually, a substantive hearing. If this option were adopted it would be highly unlikely to give rise to litigation finality until the final quarter of 2018 at the earliest. This would mean the ultimate resolution of these proceedings some 2½ years following their initiation. In the jurisdiction of Northern Ireland a delay of these dimensions is an egregious one.

[13] The second objection to the third option discussed above is that it would involve the Court in so-called "rolling" review. While this is not invariably inappropriate, it is unsatisfactory in the majority of cases. This topic is considered at some length in R (HN and others) IJR [2015] UKUT 437 (IAC). In that case an application to amend was refused mid-proceedings. The reasons for this refusal are illustrative of objections to this course which could arise in a broad array of judicial review proceedings. See [16]:

> *"1. The application to amend was opposed on behalf of the Secretary of State. Having considered the submissions of both parties' Counsel, we pronounced our ruling, refusing the application. Our reasons for doing so were, in summary:*
>
> *(a) The application was based on fresh evidence which had not been considered by the Secretary of State. It would be undesirable for the Tribunal to conduct any review of something which had not been the subject of consideration and decision by the Secretary of State, the primary decision maker.*
>
> *(b) It was difficult to see how new evidence of the kind in question could properly found a challenge to a decision under paragraph 353 of the Immigration Rules.*
>
> *(c) The Applicant in question was seeking to advance a discrete judicial review challenge without having first exhausted the alternative remedy of making his case to the Secretary of State.*
>
> *(d) The application to amend was unacceptably delayed: the evidence established that the Applicant's solicitors were in possession of much of the relevant evidence by 23 April 2015 at latest and the failure to give advance notice appeared tactical.*
>
> *(e) To permit the application would be to prejudice the Secretary of State, given its nature and lateness.*
>
> *(f) To permit the application could jeopardise the*

> *orderly and expeditious continuation and completion of the proceedings. "*

The Upper Tribunal returned to this topic in R (Spahiu) v Secretary of State for the Home Department IJR [2016] UKUT 230 (IAC) at [8] – [9]:

> *"2. There is a sharp distinction between an application to amend a ground or grounds of challenge and an application to amend the respondent's decision under challenge. The most detailed treatment of this issue is found in R (Rathakrishnan) v Secretary of State for the Home Department [2011] EWHC 1406 (Admin). The substance of what Ouseley J decided is that where the respondent has agreed to reconsider the decision under challenge it is not appropriate, save in exceptional circumstances, to stay proceedings for judicial review of the original decision rather than conclude them.*
>
> *3. I consider that this applies a fortiori in circumstances where the respondent has agreed to the quashing of the impugned decision: see R v Secretary of State for the Home Department, ex parte Al Abi [Unreported, 1997/WL/1105932]. This is akin to what has become known as the "Salem" principle, considered by this Tribunal recently in R (Raza) v Secretary of State for the Home Department (Bail - Conditions – Variation – Article 9 ECHR) IJR [2016] UKUT 132 (IAC), at [3] – [4] especially."*

It repeated its statement in HN that there is a strong general prohibition against "*rolling review*" in contemporary public law litigation: see [10](ii).

[14] The fourth, and final, option is to make an order of dismiss incorporating a without prejudice provision which would, in effect, enable the Applicant to apply to have the judicial review application reinstated on a future date. In R (AM) v Secretary of State for the Home Department [2017] UKUT 372 (IAC) this issue was considered in a context where a mandatory order had been made; the order incorporated the conventional "liberty to apply" clause; the Respondent failed to comply with the mandatory order; and the Applicant sought to invoke the liberty to apply mechanism: see [36] – [40]. The Upper Tribunal stated, at [37]–[38]:

> *"(1) The mechanism of liberty to apply is a valuable adjunct to the court's powers. Unsurprisingly it has its origins in judge made law and, therefore, belongs to the inherent jurisdiction of the High Court. See Halsburys Laws of England, Vol 12A (2015), paragraph 1602. The authors of The White Book 2017, Volume 2, observe (at paragraph 3.1.13) that where an order makes provision for liberty to apply –*

'…. The court making the order does not lose seisin of the matter: the inclusion of a liberty to apply indicates that it is foreseen that further applications are likely in the course of implementing the decision'.

While, as I have noted, this would formerly have been viewed through the lens of the inherent jurisdiction of the High Court, the modern approach is to apply the court's general power of case management, giving effect to the primacy of the overriding objective.

(2) A survey of the relatively few reported cases which have considered the scope of "liberty to apply" reveals that bright line rules or principles do not abound. One of the clearest principles is that liberty to apply serves to "work out" the order of the court, rather than vary it (Halsbury, op cit). In the jurisprudence of the Commonwealth, there is a useful synopsis in Koh v Koh [2002] 3 SLR 643, per Choo JC:

'The 'liberty to apply' order is a judicial device intended to supplement the main orders in form and convenience only so that the main orders may be carried out. Within its ambit, errors and omissions which do not affect the substance of the main order may be corrected or augmented, but nothing must be done to vary or change the nature or substance of the main orders ….

What amounts to a variation depends on the context of the individual case.'

The Judge also spoke of "a further order to give effect to the original order". All of this is consonant with the leading United Kingdom cases, it being sufficient to refer to Cristel v Cristel [1951] 2 KB 725."

The judgment continues, at [39]:

"This being quintessentially a matter belonging to the realm of procedural law, in any case raising questions concerning the scope and limitations of liberty to apply in a given order I consider that regard should also be had to the applicable provisions enshrined in the overriding objective. These include, inexhaustively, expedition, finality, certainty and saving costs."

[15] NMDC will have learned from these proceedings that decisions relating to the naming of public facilities and buildings are subject to significant legal constraints. Councils are not free to act in a vacuum. Quite the contrary: they are subject to the rule of law and, in the particular context of "naming" decisions, their solemn legal duties, imposed by statute:

(f) To have due regard to the need to promote equality of opportunity between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; and

(g) To have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.

These duties, enshrined in section 75 of the Northern Ireland Act 1998, are of paramount importance in contemporary Northern Ireland society. They are also related to NMDC's complementary duty to faithfully and conscientiously serve and represent <u>all</u> sections of the community in their district. Finally, NMDC will have learned that ECNI is a statutory watchdog to be reckoned with.

[16] While I acknowledge the desirability of some form of lesson and guidance being derived from these proceedings, I consider that this is sufficiently achieved by what is stated above, in tandem with the terms of the Court's final order, which will incorporate suitable recitals. I take into account also the succession of ECNI decisions and the continuing supervisory and enforcement functions of this agency. Weighing all of the factors identified, I conclude that the appropriate exercise of the Court's discretion is to give effect to the fourth of the options examined.

[17] Thus I dismiss the judicial review application with liberty to apply to reinstate not later than four weeks following the Council's impending fresh decision. The Applicant's entitlement to recover the balance of her costs from NMDC is clearly established, given in particular the court's assessment of nexus in [10] above and the likelihood that her challenge would have succeeded substantively. The final order of the court is attached.