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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY AS2 FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

KEEGAN J

Introduction

[1] This application follows a previous case and a judgment of Treacy J of 21 November 2016. That case concerned the lawfulness of a certified copy of an entry in marriage registration records dated 6 March 2014 which related to the applicant's marriage. The applicant was previously in a civil partnership prior to him obtaining a gender recognition certificate recognising his true identity as a male. The issue arose because in the portion of the entry entitled "status" both bridegroom and bride were reported as "civil partnership dissolved". Because a civil partnership can only be between two people of the same gender it was argued that the disclosure of this information on the copy of the entry in the marriage registration records would risk disclosure that either one of the parties to the marriage had a previous gender history which was amended by way of a gender recognition certificate. The applicant argued that the keeping of this information on a public register which is required to be used by the applicant for a number of public functions was unnecessary and in breach of Article 8 of the European Convention on Human Rights (ECHR) and/or ultra vires and/or irrational.

[2] The applicant sought two declarations before Treacy J. One of these was granted namely a declaration that "those provisions of the Marriage (Northern Ireland) Order 2003 and the Marriage (Northern Ireland) Regulations 2003 which require the General Register Office (GRO) to keep a public record which might reveal the applicant's previous gender history are unlawful." A further declaration was sought that those portions were incompatible with the applicant's rights pursuant to Article 8 of the European Convention on Human Rights ("ECHR"). That declaration was not granted.

[3] It is fair to say that the outworking of this judgment caused some confusion between the parties. The matter returned to the judge for clarification of the declaratory relief and a hearing was convened on 27 September 2019. On that date I note that the judge referred to the fact that he had not received argument about the application of Section 4 of the Human Rights Act and the issues in relation to primary and secondary legislation. However, no change was made to the ruling of the court, presumably because of the ongoing proceedings.

[4] The current proceedings with which I am concerned began in May 2018. The original Order 53 Statement was based upon "the alleged failure of the respondent to take the necessary steps to form an effective and functioning administration in Northern Ireland including the reinstatement of Direct Rule if necessary in order to remedy the continuing breach of the applicant's rights pursuant to Article 8."

[5] The affidavit grounding the application of 4 May 2018 refers at paragraph 10 to the fact that the marriage register had not been remedied causing enormous stress and worry to the applicant and his wife. At paragraph 11 the applicant states that "for example, I have still been unable to resolve the ongoing issue surrounding life cover for my mortgage as a copy of my marriage certificate is required. I am not willing to share my current marriage certificate as it reveals or has the potential to reveal my previous gender history. This has been determined by this court to be a breach of my privacy."

[6] This case was directed against the Secretary of State for Northern Ireland and The Department of Finance ("The Department") for failing to enact the necessary legislative change. The matter was listed on a number of occasions before the previous judicial review judge. Ultimately, it was set for a contested leave hearing on 6 December 2019. On that date the case was adjourned until January 2020. This was on the basis of a letter from the Departmental Solicitors Office dated 5 December 2018. Contained within that letter the Department pointed out that as a result of the Northern Ireland (Executive Formation etc) Act 2019 and the provisions thereof the Secretary of State had a duty to bring regulations to come into force by 13 January 2020 that will make same sex couples eligible to marry and opposite sex couples eligible to form civil partnerships in Northern Ireland. The correspondence also pointed out that the Secretary of State has a discretionary power under Section 8(4) of the said legislation to make appropriate provision in view of the extension of eligibility in other areas including matters relating to gender recognition certificates.

[7] The case was therefore adjourned by consent for the anticipated legislative changes to be made. The draft regulations were made pursuant to Section 8 of the Northern Ireland (Executive Formation etc) Act 2019. The Secretary of State made the Marriage (Same Sex Couples) and Civil Partnership (Opposite Sex Couples) Northern Ireland Regulations 2019 on 19 December 2019 and they came into force on 13 January 2020. Pursuant to Regulation 50, the Register General now has power to make amendments to the Marriage Register regarding the status of parties who have obtained a gender recognition certificate, following consultation with the parties in

question. Regulation 48 also confers upon the Department power to make further regulations for cases in which one member of a married couple of civil partnership obtains a gender recognition certificate without dissolving the relationship.

[8] By virtue of these legislative developments, the applicant effectively obtained the relief sought before the determination of leave. However, a number of matters continue to be debated between the parties. The Order 53 has been amended five times and on foot of the latest iteration of it a number of matters have been put before the court by Mr Lavery QC on behalf of the applicant. He appeared with Ms McDowell BL. Mr McLaughlin BL appeared for the Secretary of State and Mr McGleenan QC and Mr McAteer BL for the Department.

The Points raised by the Applicant

[9] The applicant now seeks declaratory relief, damages and costs. The declaration proposed is in the following terms;

> "A declaration that the failure of the respondents to take any necessary steps to remedy the breach identified in the judgment of Treacy J on 21 November 2016, namely that the Marriage (Northern Ireland) Order 2003 and the Marriage (Northern Ireland) Regulations 2003 requiring the General Registers Office to keep a public record which contains information which creates a risk that the applicant's previous gender history may be revealed is unlawful. "

[10] Mr Lavery contends that the applicant was entitled to a declaration at this stage and a recognition from the court that there was a breach of his Article 8 rights which extended from the time of the last judgment until the implementation of the relevant legislation. Reliance was placed upon correspondence from the Department which seemed to suggest change other than by legislative means. The applicant makes the case that whether or not legislation was needed to remedy the breach, there was still a breach of the applicant's Article 8 rights upon which the court is entitled to declare. Mr Lavery accepted the court could not have compelled the respondents to amend any legislation. In support of the arguments the applicant relied on one case of *Scordino v Italy [2007] 45 EHRR 7* which is the decision of the Grand Chamber. The applicant also raises a case for damages for breach of his human rights and maintains that this should be heard within the framework of this judicial review. Finally the applicant makes a case that costs should be awarded in these proceedings.

The Proposed Respondents views

[11] The position of the relevant proposed respondents are set out in helpful position papers. First, on behalf of the Secretary of State for Northern Ireland

Mr McLaughlin makes the point that there is no substantive issue against the Secretary of State. He also raises the question whether any breach of the applicant's Convention rights has occurred in the light of the provisions of Section 6(2) provisions of the Human Rights Act. In his position paper Mr McLaughlin reminds the court that the pre-action response dated 28 March 2018 made clear that the issue of concern to the applicant was amendment to the marriage register and that issues of gender recognition and marriage registration were devolved matters upon which the Secretary of State had no power to legislate. Similarly, Mr McLaughlin highlights the fact that the obligation to secure compliance with Convention obligations in relation to devolved matters lay with the devolved administration. As such, Mr McLaughlin argues that there is no valid claim made against the Secretary of State and he relies on the dicta from *JR80's Application 2019 NICA 58* in relation to that. He also makes the point that as the Secretary of State did not commit any unlawful act and had no power to provide a remedy in relation to a devolved matter that there is no basis for a damages claim against him. In any event Mr McLaughlin stresses the fact that damages could not be permitted to proceed against the Secretary of State without a precise factual and legal basis for the claim, including identifying the acts or omissions alleged against the Secretary of State the powers that were available to the Secretary of State which could have been exercised.

[12] Mr McGleenan QC on behalf of the Department makes the following points in his position papers augmented by Mr McAteer's helpful oral submissions. First, the point is raised that the matter is now rendered academic by the recent legislative developments. Further, the point is made that the costs that would be incurred by continuing with these claims in the Judicial Review Court are disproportionate to those that would be incurred by dealing with the same issues in the County Court or in the general list of the Queen's Bench Division of the High Court. The Department contends that persisting with the claims in the Judicial Review would be contrary to the overriding objective. The Department therefore claims that the application for judicial review should be struck out and that the applicant can if there is a basis to do so issue proceedings in a more appropriate forum whether by way of civil bill to the County Court or writ to the High Court.

[13] In the written arguments the point is made that the Department provided a response to the pre-action protocol correspondence in this case on 29 March 2018 wherein it noted that various options were being considered in response to the judgment and order of Treacy J. The Department indicated that if the option selected by the Department involved an amendment to legislation then this would require legislative action by the Assembly. There was no Assembly in place at that time or indeed at any time during the active lifespan of this case. The Department also highlights the fact that the pre-action response stated that mitigating measures had been put in place at an administrative level to prevent disclosure of the applicant's relevant entry in the register. The correspondence also requested full details of any particular issue that had arisen in relation to disclosure of the information on the register as, otherwise, it is claimed the question of any interference with Article 8 rights was hypothetical. If there was any real prejudice to

the applicant or interference with his Convention rights then particulars would also have allowed consideration to be given of possible practical steps.

Consideration

[14] The legislative provisions now in place from 13 January 2020 deal with the position of the applicant. There is therefore no necessity to adjudicate on the issues, bearing in mind this resolution and the overriding objective to save costs and court time. It is important to remember that the court adjourned this case prior to leave to facilitate a resolution with the consent of the parties. I am sympathetic to the proposed respondents' arguments that the applicant has now raised a range of other issues. Notwithstanding this procedural point which has some merit given the shifting sands of this case, I will focus on the issues before the court. These are ancillary matters in relation to whether or not relief should be granted by this court way of a declaration and damages.

[15] In determining this matter I make two preliminary observations. First, it is clear that there is no valid case against the Secretary of State for Northern Ireland in relation to this matter. Mr Lavery effectively conceded this point in his oral submissions. I also dealt with this point in *McGuinness Application 2019 NIQB 92.* The only viable claim as regards responsibility relates to the departmental actions after the decision of Treacy J.

[16] My second observation relates to the application of the Human Rights Act 1998. There is no automatic right to relief under this Act. Claims must have a basis in law and fact and within the scheme of the Act. Section 3 contains the obligation to interpret legislation in a Convention complaint way, Section 4 deals with declarations of incompatibility, Section 6 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right unless the section 6(2) defence applies and Section 7 deals with the taking of proceedings. For Section 7 proceedings an applicant must be a victim of an unlawful act. It follows that in any case where relief for an alleged breach of human rights is claimed, the application needs to be clearly framed.

[17] I have found the pleaded basis for the application to be rather opaque. I understand that this has probably arisen because of the shifting sands of the case I have mentioned above. However, some sharper focus is required. It seems to me that the applicant's claim is twofold. First, the applicant is claiming relief due to alleged departmental delay and second, the applicant is claiming damages for breach of privacy rights whilst the register remained unaltered. That claim is based upon the effects of delay. I will deal with these matters in turn.

[18] In relation to the delay, the applicant claims that this was unlawful, and invites me to make a declaration. Such a remedy is discretionary. Much emphasis has being placed upon the pre-action correspondence of 29 March 2018 in which the Department intimated that" various options were being looked at." That seems to

have been the position at the time although ultimately legislative change was the only option found to be of any utility. I can well understand that outcome. It seems to me that there has been an overemphasis upon the wording of the aforementioned correspondence because realistically it is clear that a legislative amendment was required to make the necessary changes. That means that the Section 6(2) defence is available. It is also important to note that mitigating measures were put in place to prevent public dissemination of this record pending determination of the issue.

[19] I have read the substantial correspondence which passed between the applicant and the Department in relation to this case and from that it is clear to me that this matter was being considered on an ongoing basis. The reality of the situation is that the lack of a devolved government in Northern Ireland also hindered progress. In these circumstances, the application for declaratory relief is declined. I do not consider that I should exercise my discretion to grant a declaration of unlawfulness against the Department. The applicant has succeeded in substance because there has been a change in the law.

[20] The applicant also claims damages for breach of privacy pending the change in the law. There is clearly a factual dispute about the effects on the applicant. It is therefore quite clear to me that the applicant should, if he wishes, proceed on the basis of a separate claim for damages. That would have the advantage of bringing the case into a fact-finding arena which is preferable to this supervisory jurisdiction. I made a similar point in *Re Wright's Application* 2017 NIQB 29. I also entirely agree with the proposed respondents that any claim needs a much clearer focus as to what the breaches of human rights are and against whom the claims are levelled. The applicant is at liberty to take a case in either the County Court or High Court jurisdiction and so he is not left without a remedy. I do not consider that this course is inconsistent with the case of *Scordino v Italy 2007 45 EHRR 7* which the applicant relies on.

Conclusion

[21] That concludes this case before the Judicial Review Court. I dismiss the case on the basis that the applicant may mount a separate civil claim if he so wishes. I decline to issue any declaratory relief. I note that there is an outstanding issue in relation to the costs of these proceedings. I understand that there is an openness to discuss that matter and I encourage such a course in default of which the court will deal with the costs issue.