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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **02/10/2018**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY HELEN McMAHON

AND IN THE MATTER OF THE EXERCISE OF THE SECRETARY OF STATE'S PURPORTED POWERS UNDER ARTICLE 3(1) OF THE FLAGS REGULATIONS (NORTHERN IRELAND) ORDER 2000

KEEGAN J

Introduction

[1] This case relates to the flying of the union flag at Omagh Courthouse pursuant to The Flags Regulations (Northern Ireland) 2000. Leave was granted by McCloskey J on 8 December 2017. By virtue of an amended Order 53 Statement the applicant seeks the following relief:

(a) A declaration that The Flags Regulations (Northern Ireland) 2000 are unlawful and in breach of a guarantee of parity of esteem of the unionist and nationalist communities in Northern Ireland within the terms of the Belfast/Good Friday Agreement 1998 and enacted in the Northern Ireland Act 1998.

(b) A declaration that the Secretary of State for Northern Ireland acted ultra vires by introducing The Flags Regulations (Northern Ireland) 2000 pursuant to Article 3 of the Flags (Northern Ireland) Order 2000, in that he failed to have regard to the Belfast Agreement and, in particular, its guarantee of parity of esteem to the unionist and nationalist communities in Northern Ireland.

[2] The applicant was represented by Mr O'Rourke QC and Mr Rafferty BL. The respondent was represented by Mr McGleenan QC and Mr Sands BL. I am indebted to both sets of counsel for their helpful written and oral submissions.

Background

[3] This issue was brought before the courts in 2001 when Kerr J (as he then was) determined that the 2000 Regulations did not offend the Good Friday/Belfast Agreement ("the Agreement"). That was a case brought by an elected representative Mr Conor Murphy and it is reported as *Re Murphy's Application for Judicial Review* [2001] NIQB 34. The decision was not appealed. Seventeen years on the applicant argues that this case does not deal with Article 1(v) of the 1998 Agreement and that the 2000 Regulations offend the principle of "parity of esteem". That is the discrete point at issue in this case.

[4] The applicant's case is contained in an affidavit sworn on 29 August 2017. In that affidavit the applicant explains that she is a member of the nationalist community in Northern Ireland. She states that she is aware of the lawful arrangements in relation to the flying of flags on government buildings and courthouses in Northern Ireland, particularly that provision is made for the flying of the union flag on specified days. She states that she recognises and acknowledges the Irish national flag as her national flag. She states that she does not recognise the union flag as her national flag and nor does she believe it represents her beliefs or the beliefs of the nationalist community generally. As such the applicant avers that "the flying of flags in Northern Ireland does not reflect me as a member of the nationalist community on any level". As a result of this the applicant states that she instructed her solicitor to write to the proper authorities regarding the flying of flags in Northern Ireland.

[5] This case was initially taken against a number of different respondents including the Northern Ireland Courts and Tribunals Service which is the body responsible for flying the flag from Omagh Courthouse. However, the case has simply proceeded as a challenge to the relevant legislation and is therefore only brought against the Secretary of State.

[6] The progression of pre-action protocol correspondence is set out in the affidavit of Mr Patrick Fahy the applicant's solicitor dated 29 August 2017. In particular in this affidavit reference is made to the fact that the case began by way of letter to the Northern Ireland Courts and Tribunals Service dated 27 May 2016. A pre-action protocol letter was then sent on 11 July 2016 to the Secretary of State.

[7] The respondent's case is contained in the affidavit of Balal Zahid sworn on 1 March 2018. Mr Zahid is a senior civil servant. In his affidavit Mr Zahid refers to the fact that this application bears many similarities to the judicial review which was brought by Conor Murphy MLA in 2001 and which challenged the introduction of the 2000 Order and the 2000 Regulations. Mr Zahid therefore relies upon the following evidence filed in the previous proceedings:

(a) The first affidavit of Robert Crawford sworn on 20 November 2000 together with exhibits.

(b) The second affidavit of Robert Crawford unsworn and undated.

(c) The third affidavit of Robert Crawford unsworn and undated.

(d) Affidavit of William Jeffrey sworn on 15 February 2001.

[8] At paragraph 6 of his affidavit he avers *inter alia*:

- In fact the affidavits of Mr Crawford do contain references to the then Secretary of State's consideration of parity of esteem.

- At paragraphs 16(iii), 18 and 21 of his first affidavit Mr Crawford noted that the Secretary of State had regard to the Belfast Agreement (also referred to as the Good Friday Agreement) in exercising the power to make regulations. He (the Secretary of State) described the regulations as "striking an appropriate balance between differing traditions and encourages tolerance".

- At paragraphs 9 and 10 Mr Zahid refers to Robert Crawford's first affidavit whereby he exhibited an extract from a speech made in the House of Commons on 25 October 2000 by the Secretary of State when moving the draft regulations in which the Secretary of State said at columns 335-336:

> "Northern Ireland … is to maintain the union and accordingly, that Northern Ireland status as part of the United Kingdom reflects and relies upon that wish. The meaning of that is unambiguous. It is that while there are – legitimately – two traditions, two national aspirations and two cultural identities in Northern Ireland, Northern Ireland remains part of the United Kingdom, and where a national flag is flown, it therefore follows that the flag should be the flag of the United Kingdom.
>
> It follows that the principle of consent which governs this process should receive more than lip service in Northern Ireland, as, to, must another cornerstone of the Good Friday Agreement – the principle of equality; there must be just and equal treatment for the identity, ethos and aspirations of both traditions.
>
> There can be no second class citizens in Northern Ireland, and there will not be. That is why we are doing what we are doing, reflecting parity of esteem between the traditions across the board in relation to the range of

> government activity, the policing reforms, the criminal justice reforms and every other aspect of society in which identity becomes important. It is why, too, the regulations that I am introducing tonight have been drawn up in a sensitive way, and why, since May, I have consulted all the parties and offered every opportunity to the Executive and then to the Assembly to reach a consensus of their own on flag flying that remove the need for me to make any regulations at all."

- Similarly, in the affidavit filed in the 2001 proceedings by Mr Crawford in the House of Lords the Minister of State Lord Faulkner is quoted as making the following remarks during the passing of the regulations debate:

> "The Secretary of State also had regard to another foundation stone of the agreement, the principle of equality. The principle of equality requires that there be just and equal treatment for the identity, ethos and aspirations of both traditions in Northern Ireland. The agreement recognises the legitimacy of both political aspirations and the right of both traditions to participate in the devolved institution so long as they are committed to peaceful and democratic means."

[9] In summary Mr Zahid's affidavit avers that it is plain from the Hansard extracts that the concept of parity of esteem was actively addressed by the Secretary of State in making the regulations and the views of all of the political parties were taken into account. He states that in 2001 the High Court concluded that the approach of the Secretary of State exemplified "a proper regard for partnership, equality and mutual respect" and was fully compliant with the terms of the Agreement. Mr Zahid also avers that there has been no material change since the date of that judgment and so the Secretary of State remains of the view that the 2000 Order and Regulations achieve parity of esteem for the reasons given in the judgment of Kerr J.

The Statutory Framework

[10] The Flags Regulations (Northern Ireland) Order 2000 (hereinafter referred to as "the 2000 Order") provides at Article 3:

> "3.-(1) The Secretary of State may make regulations regulating the flying of flags at government buildings (and courthouses added by the Justice (Northern Ireland) Act 2002).

> (2) For the purposes of paragraph (1) `government building' means a building wholly or mainly occupied by members of the Northern Ireland Civil Service."

The words "and courthouses" were added to Section 3 of the 2000 Order by the Justice (Northern Ireland) Act 2002 ("the 2002 Act").

[11] The provisions in Section 67 came into operation by Commencement Order on 12 April 2010. So from April 2010, the 2000 Regulations applied to courthouses. Article 4(4) of the 2000 Order provides:

> "In exercising his powers under Article 3 the Secretary of State shall have regard to the Belfast Agreement."

[12] The Regulations were made by the Secretary of State for Northern Ireland on 8 November 2000. Regulation 2 of the 2000 Regulations provides:

> "2. Flying of flags at government buildings on specified days.
>
> 2(1) The union flag should be flown at the government buildings specified in Part 1 of the Schedule to these regulations on the days specified in Part 2 of the Schedule.
>
> (4) Where a government building specified in Part 1 of the Schedule has more than one flagpole, the European flag should be flown in addition to the union flag on Europe day."

Various other provisions are made in the Regulations in relation to the flags. Regulation 9 of the 2000 Regulations prohibits the flying of any other flag as follows:

> "9. Except as provided by these regulations no flag should be flown at any government building at any time."

The specified days are listed in Part 2 of the Schedule to the 2000 Regulations. At the present time, there are 15 such days in the year (formerly 17, but now reduced to 15 following the deaths of Princess Margaret and the Queen Mother). On the 350 other days of the year, no flag is flown on Omagh Courthouse.

The Murphy Decision

[13] The context of this decision is set out by Kerr J in his judgment. From this judgment I gratefully draw the following facts. On 11 February 2000 the devolved

institutions in Northern Ireland were suspended by the Secretary of State under powers conferred by the Northern Ireland Act 2000. During the period of suspension the Secretary of State was empowered by that Act to carry out the functions of the Assembly, including its law-making function. The Assembly had power to make laws in relation to the flying of flags and that power also passed to the Secretary of State. No resolution on the flags issue having emerged between locally elected representatives the Secretary of State wrote to the party leaders to explain how he proposed to handle the matter. Thereafter, the Flags Regulations (Northern Ireland) Order 2000 was approved by both Houses of Parliament on 16 May 2000.

[14] On 30 May 2000 the devolved institutions in Northern Ireland became operative again. There was further discussion in relation to the flags issue. The Secretary of State then laid the draft regulations before Parliament on 23 October 2000. The House of Commons debated the draft Regulations on 25 October 2000. The House of Lords also debated the proposals. Following the debate the Regulations were made by the Secretary of State on 8 November 2000 and came into effect on 11 November 2000.

[15] Kerr J then refers to the arguments that were made before him as follows. Some of these are not apposite to this case and so I have extracted the relevant points as follows. Firstly, in that case the applicant claimed that the requirements in the Regulations that the union flag be flown on government buildings discriminated against those people who are opposed to the flying of the flag. In particular, he claimed that it was inconsistent with Section 75 of the Northern Ireland Act 1998 as it promotes inequality between persons of different political opinions and therefore places at an advantage those who favour the flying of the flag over those who oppose it. The applicant also claimed that the flags Regulations were inconsistent with Section 76 of the Act in that they discriminated against those of nationalist/republican political opinions.

[16] Kerr J reached the following conclusion:

> "I do not consider that, in making the Regulations, the Secretary of State acted in breach of Section 75. As Mr Mandelson stated, in introducing the Flags Order to the House of Commons, the flying of the union flag is not designed to favour one tradition over another; it merely reflects Northern Ireland's constitutional position as part of the United Kingdom.
>
> The making of the Regulations on the requirement that the union flag be flown on government buildings do not treat those who oppose this any less favourably. The position of the regulations is, as I have said, to reflect

> Northern Ireland's constitutional position, not to discriminate against any section of the population."

[17] The other argument which has a bearing on this case relates to the Agreement. The applicant claimed that the Regulations were inconsistent with the Good Friday Agreement in that they failed to have regard for "partnership, equality and mutual respect" between opposing political parties and are contrary to the undertakings given in the agreement that the government's jurisdiction in Northern Ireland "shall be exercised with rigorous impartiality on behalf of all of the people in the diversity of their identities and traditions" and that they failed to recognise the birth right of those who wish to be accepted as Irish. Kerr J refers to Mr Crawford's affidavits in relation to this argument in reaching his conclusion as follows:

> "These paragraphs set out the political considerations that informed the Secretary of State's approach to the regulations. The union flag is the flag of the United Kingdom of which Northern Ireland is a part. It is the judgment of the Secretary of State that it should be flown on government buildings only on those days on which it is flown in Great Britain. By thus confining the days on which the flag is to appear, the Secretary of State sought to strike the correct balance between, on the one hand, acknowledging Northern Ireland's constitutional position, and, on the other, not giving offence to those who oppose it.
>
> That approach seems to me to exemplify a proper regard for 'partnership, equality and mutual respect' and to fulfil the government's undertaking that its jurisdiction in Northern Ireland `shall be exercised with rigorous impartiality on behalf of all of the people and the diversity of their identities and traditions'. I do not consider, therefore, that the regulations have been shown to be in conflict with the Belfast Agreement."

Kerr J therefore dismissed the judicial review.

The arguments made by the parties

[18] On behalf of the applicant Mr O'Rourke made a number of points which I summarise as follows:

(i) Firstly, he contended that there were two principles contained within Article 1(v) of the Belfast Agreement. He referred to the principle of full respect for

an equality of civil, political, social and cultural rights, freedom from discrimination for all citizens.

(ii) Secondly, he referred to the principle of parity of esteem of just and equal treatment for the identity, ethos and aspirations of both communities. Mr O'Rourke submitted that the right to equality of civil, political, social and cultural rights and freedom from discrimination pertained to the citizen whereas the principles of parity of esteem and of just and equal treatment for the identity ethos and aspirations apply as between the two communities in Northern Ireland, those being the nationalist and loyalist communities.

(iii) Mr O'Rourke relied upon the House of Lords decision in *Robinson* particularly paragraphs 11 and 25 and he made the case that the Agreement was effectively of constitutional standing and should be applied as such.

(iv) Mr O'Rourke submitted that the concept of parity of esteem was a legal requirement and not just a political aspiration.

(v) Mr O'Rourke contended that parity of esteem applies to communities and not just individuals. He made the case that the decision of Kerr J does not deal with this concept at all and as such the point is not *res judicata*.

(vi) Mr O'Rourke stated that the discrimination provisions contained in Sections 75 and 76 of the Northern Ireland Act also dealt with individual rights and not community rights.

(vii) Finally, in his supplementary written submissions, Mr O'Rourke argued there was an ongoing breach in terms of the lawfulness of the Regulations and as such the case should not be dismissed due to the delay in bringing proceedings.

[19] On behalf of the respondent Mr McGleenan made the following submissions:

(i) Firstly he submitted that there had been gross delay in bringing this case. Mr McGleenan argued that no explanation has been given by the applicant as to why the case was not brought for 7 years. In this regard he referred to the fact that courthouses were included within the flag flying provisions from April 2010 with the devolution of policing and justice.

(ii) Mr McGleenan also argued there was an evidential defect in the applicant's case because there is no averment as to how the applicant has been directly affected by this or when the applicant became directly affected by the flying of the flag.

(iii) Mr McGleenan contended that the criticism of the evidence filed on behalf of the respondent is unfair. He submitted that it was perfectly proper for the

respondent to refer to the evidence provided in the previous proceedings given the passage of time for the making of these Regulations.

(iv) Mr McGleenan pointed out that the Agreement is not a constitution rather it is an intercountry treaty which is not justiciable in domestic law. However, he accepted that the Northern Ireland Act had the characteristics of a constitutional statute.

(v) In applying the principles from the Northern Ireland Act and looking at the issue of parity of esteem Mr McGleenan submitted that this is not a principle with legal force.

(vi) Mr McGleenan relied upon the statutory language in Article 1(v) of the Agreement which he argued does not disaggregate two principles and he said there was effectively one principle.

(vii) Mr McGleenan referred to the requirement under the legislation to have regard to the Belfast Agreement as a broad requirement which he said had been satisfied in any event by virtue of the reference to Hansard extracts whereby both the Secretary of State and the Minister of State both referred to the relevant requirements.

(viii) Mr McGleenan submitted that this issue was *res judicata* because it had been determined comprehensively by Kerr J in the *Murphy* case.

Conclusion

[20] I have sympathy with Mr McGleenan's arguments as to the standing of the applicant and the delay in bringing these proceedings. However, given the context of this case, I am prepared to accept that any shortcomings are not fatal to the application proceeding.

[21] The substantive issue is whether or not the Secretary State fulfilled his obligation to have regard to the Agreement in enacting the regulations. In this regard I have quoted extensively from the *Murphy* decision given that Kerr J comprehensively examined the regulations in that case. Having examined that decision, I see substantial merit in the argument made by Mr McGleenan that the issue raised in this case is *res judicata* given the examination of it by Kerr J *Murphy's application*. In making this argument Mr McGleenan relied upon the recent dicta of Deeny LJ in *Re Jordan's application* 2018 NICA 23 and in particular:

> "Where a judge properly charged with an issue or cause of action has given judgment upon it, it is contrary to the public interest to have the matter reheard again unnecessarily. The Supreme Court has recently emphasised the importance of appellate courts not

> interfering too readily with decisions on an issue of fact by a judge at first instance: *DB v Chief Constable PSNI* [2017] UKSC 7. Consistent with that one judge should not lightly repeat the work done by another judge on a previous occasion."

[22] However, I have also considered the arguments as follows. The core point made by the applicant is that Article 1(v) should be separated into two distinct principles namely:

(a) an obligation to exercise "with rigorous impartiality on behalf of all people in their diversity and traditions"; and

(b) that the power being exercised shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos and aspirations of both communities."

The applicant makes the case that the first of these applies to individual citizens and the latter to communities. Particular reliance is placed upon the phrase "parity of esteem." His point is that the decision in *Murphy* examined only one aspect of article 1(v), namely individual rights but failed to address the wider aspirations of both communities.

[23] I am not convinced that Kerr J restricted his consideration of this issue to individual rights. In particular I rely upon his conclusion that the approach adopted by the Secretary of State exemplified a proper regard for "partnership, equality and mutual respect" and to fulfil the government's undertaking that its jurisdiction in Northern Ireland "shall be exercised with rigorous impartiality on behalf of all of the people and the diversity of their identities and traditions." In any event, I am not attracted to Mr O'Rourke's arguments for the following reasons:

(i) It is artificial to disaggregate parity of esteem as a separate consideration or principle from the overriding objective contained in Article 1(v) of the Agreement. This reads as one paragraph and in my view it is unhelpful to interpret it in any other way.

(ii) The principles contained in the Agreement ensure as Kerr J stated that there must be proper regard for "partnership, equality and mutual respect" of "all of the people and the diversity of their identities and traditions". This encompasses the rights of individuals and communities.

(iii) The concept of parity of esteem is not defined in the Agreement itself, nor is there any reference to it in the Northern Ireland Act. The academic arguments which have been provided illustrate the lack of political consensus

on this issue. In that context I favour Mr McGleenan's analysis that parity of esteem comes within the broad principles of equality, fairness and respect as applied to the two communities in Northern Ireland.

(iv) The commitment to equality must be framed by virtue of the fact that Northern Ireland would remain part of the United Kingdom pending a decision by the people in relation to this. There has been no change to this constitutional position. This part of the Agreement is enacted in Section 1 of the Northern Ireland Act which provides:

> "(1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1."

(v) The requirement in the Flags Order in Article 4(4) is broad; to *have regard to* the Belfast Agreement when making regulations. The manner in which this obligation is fulfilled is clearly within the discretion of the Secretary of State.

(vi) I have had the benefit of extracts from Parliament which set out the speeches made on the floor. I have considered this evidence in particular the evidence filed by the Secretary of State at the time and the Hansard extracts. In my view it is clear from all of this that the general principles of the Agreement were taken into account by the Secretary of State. This includes the concept of parity of esteem. No new facts have emerged. The result of that consideration may have led to a view being taken with which the applicant does not agree. However, that is not the issue. In my view it is abundantly clear that the Secretary of State fulfilled his obligation to have regard to the principles contained in the Agreement in conducting a balancing exercise and as such the Regulations cannot be said to be unlawful.

[24] Accordingly, the application must be dismissed.