Judicial Communications Office

4 November 2019

COURT FINDS THAT THE EXECUTIVE OFFICE CAN SET UP AN EX GRATIA REDRESS SCHEME FOR HISTORICAL INSTITUTIONAL ABUSE VICTIMS

Summary of Judgment

The Court of Appeal today found that the Executive Office can exercise the prerogative power to set up an ex gratia redress scheme for victims of Historical Institutional Abuse. It also found that the Secretary of State has no power to do this.

The Report of the Historical Institutional Abuse Inquiry ("HIAI"), published on 20 January 2017, found that between 1922 and 1995 many children were abused in institutions in Northern Ireland and included a recommendation that the victims of abuse should receive compensation from a Government funded redress scheme to be established by the Northern Ireland Executive and to be administered by a newly created Historical Institutional Abuse Redress Board which would determine eligibility ("the recommendation"). The Report urged speedy implementation regardless as to whether the Redress Board was put on a statutory footing or on an ex gratia basis and suggested that priority should be given to those applicants who were over 70 or in poor health. The absence of an Executive, Assembly and Ministers in Northern Ireland since 2017 has meant that there is no capacity for any devolved legislation and the recommendation, despite being universally supported by the political parties, has not been implemented and no compensation has been paid.

The appellant, anonymised as JR80, states he was physically, psychologically and sexually abused as a child in one of these institutions in Northern Ireland. He considered the constitutional upheaval in devolved government in Northern Ireland has led to delay in implementing the recommendation and brought judicial review proceedings seeking amongst other matters an order requiring the Secretary of State or the Executive Office to take the steps necessary to establish a redress mechanism. The application was dismissed on all grounds in the High Court and JR80 appealed that decision to the Court of Appeal.

The prerogative power to make ex gratia payments

The parties agreed that the redress scheme as contained in the Historical Institutional Abuse (NI) Bill ("the Bill") presently before the UK Parliament is a redress scheme that requires legislation and cannot be introduced on an ex gratia basis even if there was UK Parliamentary or Assembly authority for the disbursements. The Court agreed with this stating that the redress scheme in the Bill envisages the Redress Board compelling the giving of evidence and the establishment of an offence if there is a failure to give evidence. The appellant, while acknowledging that legislation is required for the scheme in the Bill, is fearful that it could be lost with the forthcoming general election and submits that there should be an alternative simpler redress scheme on an ex gratia basis which would not require legislation except to authorise the disbursements.

The prerogative powers to make ex gratia payments are a matter of common law. The powers, although vested in Her Majesty, can only be exercised through and on the advice of Ministers of the Crown who are responsible to the UK Parliament. However, the exercise of the prerogative powers

may be devolved by statute and in Northern Ireland's devolved model of government those Ministers who exercise the prerogative in relation to transferred matters are responsible to the Assembly. It was agreed that the HIAI and the implementation of the recommendation are transferred matters and devolved to the Northern Ireland institutions. The Court said it was therefore common case that Northern Ireland Ministers have prerogative power to make ex gratia payments from public funds and that the making of such payments is lawful unless it is curtailed or abrogated by statute. The question was whether the prerogative power could be exercised by either the Secretary of State or by a Northern Ireland Department or whether in the present constitutional upheaval this prerogative power is not capable of being exercised by virtue of being curtailed by the Bill.

In the absence of NI Ministers, does the Secretary of State have residual prerogative and executive powers in respect of transferred matters?

Section 23(1) of the Northern Ireland Act 1998 ("the NIA 1998") provides that the executive power in Northern Ireland "shall continue to be vested in Her Majesty". Section 23(2) provides that as respects transferred matters, the prerogative and other executive powers of Her Majesty in relation to Northern Ireland shall, subject to subsections (2A) and (3)[1], be exercisable on Her Majesty's behalf by any Minister or Northern Ireland Department. The HIAI and the implementation of the recommendation are transferred matters so prerogative and other executive powers in respect of those matters shall be exercisable on behalf of Her Majesty by any Minister or Northern Ireland Department (section 7(3) of the NIA 1998 provides that "Minister" means the First Minister, the deputy First Minister or a Northern Ireland Minister).

The Court considered whether there is any Northern Ireland Department capable of exercising the prerogative power in relation to the recommendation as there had been no Ministers since 2017. It referred to the case of *Buick*[2], where the majority judgment of the Court of Appeal held that cross cutting decisions cannot be dealt with by Departments in the absence of Northern Ireland Ministers. Parliament, however, introduced the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 ("the 2018 Act") following the Buick decision. Section 3(1) of the 2018 Act provides that the absence of Northern Ireland Ministers does not prevent a senior officer of a Northern Ireland Department from exercising the function of the Department during the period for forming an Executive if the officer is satisfied that it is in the public interest to exercise the function during that period. The Court considered this means that the exercise of the prerogative power in relation to the recommendation is a function of any Department but most appropriately is a function of the Executive Office ("EO") despite the fact that it is a cross-cutting matter (as validated by section 3(5)). The Court concluded that the 2018 Act if valid permits the EO to exercise the prerogative in relation to the recommendation for example by establishing an ex gratia redress scheme.

The next question for the Court was whether, in the absence of any Northern Ireland Minister or Department, the prerogative power in respect of the recommendation is capable of being exercised by the Secretary of State. It was claimed that section 23 of the NIA 1998 was drafted in such a way as to make it clear that the Secretary of State was not intended to have, and did not have, any ability to exercise prerogative powers even if the devolved institutions were incapable of doing do. Further it was suggested that if the Secretary of State did have residual prerogative powers then this would amount to direct rule by the exercise of those powers and that direct rule was an option that

---

[1] Section 23(2A) relates to the Royal prerogative of mercy and section 23(3) relates to the prerogative in respect of the Civil Service and Commissioner of for Public Appointments for Northern Ireland.

[2] *In an application by Colin Buick for Judicial Review* [2018] NICA 26.

Parliament had not taken when it had passed the 2018 and 2019[3] Acts. The Court cited the decisions in *Buick* and in *the Application by Brigid Hughes for Judicial Review*[4] which held that the Secretary of State did not have residual prerogative and executive powers as respects transferred matters. The judge in *Hughes* expressed concern that there should not be a lengthy vacuum of power in Northern Ireland and said that Parliament can ultimately legislate to ensure the proper and lawful government of Northern Ireland if devolved government is not being provided in a way which is compatible with the principles of democratic and accountable government. The Court echoed those concerns as it considered that government by civil servants is neither democratic nor appropriately accountable. The Court also agreed that section 23 NIA 1998 is to be read in the context of section 1 of that Act which underlines that the UK Parliament has a power and a duty to ensure the lawful proper democratic and accountable governance of Northern Ireland.

The Court said a literal construction of section 23 is that it does not allow for the exercise of the prerogative by the Secretary of State. It then considered whether a purposeful interpretation could lead to any other conclusion. It said the vacuum in governance is an aid to the construction of section 23 pointing in the direction of a residual power to exercise the prerogative in the Secretary of State, however, the value in the NIA 1998 of "participation by the unionist and nationalist communities in shared political institutions" aids a generous and purposeful interpretation so as to prevent any residual power to exercise the prerogative in the Secretary of State. Further, the Court said the principle of Parliamentary sovereignty points firmly towards there being no residual prerogative power in the Secretary of State given that the UK Parliament in passing the 2018 and 2019 Acts decided not to impose direct rule:

> "Any other construction of section 23 to the effect that there was a residual power in the Secretary of State would amount to the imposition of a form of direct rule by virtue of residual prerogative power which is exactly what the UK Parliament has declined to introduce by passing those Acts. We consider that under the scheme contained in section 23 NIA 1998 the exercise of the powers of Her Majesty are handed over to be exercised on her behalf by operation of statute and cannot be recalled otherwise than by statute."

Are sections 1, 2 and 3 of the 2018 valid enactments?

The appellant submitted that section 1 of the 2018 Act is invalid as it extends the period of time for Executive formation and therefore "perpetuates undemocratic and unaccountable rule by civil servants and also that it perpetuates a continuing vacuum in governance". It was further submitted that section 2 was invalid on the same basis as it permits a limited power to further extend the period for Executive formation. Finally, the appellant submitted that section 3, which enables senior officers of a Northern Ireland Department to exercise functions of the Department in the absence of a Minister and the Executive Committee, was the antithesis of the role of civil servants who are not elected or accountable and means that certain decisions cannot be taken in Northern Ireland.

Section 3 of the 2018 Act requires the Secretary of State to provide guidance to Northern Ireland Departments about the exercise of the permitted functions. The Court acknowledged that the published guidance contains an attenuated degree of accountability but said this has to be seen in the context that the Northern Ireland political parties who are the representatives of the electorate have no power in the absence of an Executive. It considered that in the absence of an Assembly there

[3] The Northern Ireland (Executive Formation etc) Act 2019
[4] In the application by Brigid Hughes for Judicial Review [2018] NIQB 30

is only an "attenuated degree of democratic accountability" and that this position is perpetuated by the 2018 and 2019 Acts. The Court said the normal Westminster convention that "civil servants do not make policy this being a matter for ministers who are accountable to Parliament" has been subverted by the 2018 and 2019 Acts and concluded that the present arrangements "do not provide good governance for Northern Ireland, they are not democratic and have led to government by civil servants with only an attenuated degree of accountability".

In considering whether the provisions of the 2018 Act are valid the Court said that the sovereignty of the Westminster Parliament in constitutional law means that courts in this country have no power to declare enacted law to be invalid. It noted that even if there was a limit to Parliamentary sovereignty, the extraordinarily high threshold for its operation had not been met in that "the 2018 Act is not in breach of such constitutional fundamentals and is not so absurd or so unacceptable leading to the populace at large refusing to recognise it as law". The Court noted that the aim of attempting to restore the Executive has to be seen in the context that no political party has refused to form an Executive come what may and the assessment as to whether there is a prospect of an Executive being formed is clearly not one that could be described as absurd. It commented that if there was a protracted period where there was not good governance in Northern Ireland so that the position was absurd then the primary responsibility would be on the Westminster Parliament to intervene.

The Court concluded that sections 1, 2 and 3 of the 2018 Act are valid.

Was it open to the Secretary of State to give a direction under s.26 of the NIA 1998 to a NI Department that they should establish a redress scheme as recommended by the HIAI Report and, if so, did the Secretary of State fail to exercise that discretion?

Section 26(2) of the NIA 1998 provides that if the Secretary of State considers that any action capable of being taken by a Minister or Northern Ireland Department is required for the purpose of giving effect to any international obligations he may by order direct that the action shall be taken. The trial judge found as a fact that the brutality and sexual abuse described by the appellant was embraced in the definition of "torture" in Article 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment and constituted, as a minimum, inhuman or degrading treatment or punishment within the embrace of Article 7 of the International Covenant on Civil and Political Rights. He concluded that section 26(2) of the NIA 1998 applied but that the Executive Office had accomplished all that could be legally expected or required of it in the post-Report scenario.

The Court said there was no evidence that the Secretary of State had considered exercising his powers under section 26 and held that he ought to have done so particularly given the finding of the trial judge that the abuse amounted to torture. It said it would make a declaration to that effect but that this would only require the Secretary of State to consider giving a direction but would not require him to do so.

Was the Secretary of State in breach of his duty to set a date for a fresh election prior to the coming into force of the 2018 Act? Has the Secretary of State properly exercised his direction under the 2018 Act in deciding not to set a date for a fresh election?

The Court said the first question is now academic given that since the 2018 Act there is a discretionary power as opposed to a duty to set a date for a fresh election. It said the second question should be formulated as to whether the Secretary of State has made a decision which is Wednesbury unreasonable. It concluded that there was no suggestion that an election would be

efficacious and it was not therefore tenable to suggest that the discretion had been exercised unlawfully.

Conclusion

- The Court of Appeal allowed the appeal in that:
    - the Executive Office can exercise the prerogative to set up an ex gratia redress scheme; and
    - the Secretary of State should consider giving a direction to the Executive Office under section 26 NIA 1998.

- The Court of Appeal disallowed the appeal in that:
    - the Secretary of State has no residual prerogative and executive powers as respects transferred matters;
    - the Secretary of State has no prerogative power to set up an ex gratia redress scheme;
    - the provisions of the 2018 Act as amended by the 2019 Act are valid; and
    - there will be no order directing the Secretary of State or the Executive Office to take steps necessary to establish a redress mechanism.

NOTES TO EDITORS

1. 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

If you have any further enquiries about this or other court related matters please contact:

Alison Houston
Judicial Communications Officer
Lord Chief Justice's Office
Royal Courts of Justice
Chichester Street
BELFAST
BT1 3JF

Telephone: 028 9072 5921
E-mail: Alison.Houston@courtsni.gov.uk