Neutral Citation No: [2023] NICA 82 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **TRE12349** *ICOS No:* **18/079171** *Delivered:* **11/12/2023**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

NORMA MITCHELL

Plaintiff/Appellant

v

THE DEFENCE COUNCIL

Defendant/Respondent

and

SECRETARY OF STATE FOR DEFENCE

Defendant/Respondent

_____

Before: Treacy LJ and Huddleston J

_____

Nick Hanna KC with Donal Sayers KC (instructed by the Northern Ireland Human Rights Commission) for the Plaintiff/Appellant
Dr Tony McGleenan KC with Mr Michael Egan (instructed by the Crown Solicitor's Office) for the Defendants/Respondents

_____

TREACY LJ ***(delivering the judgment of the court)***

Introduction

[1] The appellant appeals against the decision of McAlinden J in which he held that her private law proceedings commenced by writ were an abuse of process, in breach of the exclusivity principle enunciated by the House of Lords in *O'Reilly v Mackman* [1983] 2 AC 237, and that her public law challenge ought to be bought by way of judicial review.

[2] Having considered the detailed written and oral submissions we indicated at the conclusion of the hearing our finding that the primary focus or the dominant issue inherent in the plaintiff's claim was a public law challenge which should have been brought by way of judicial review. Accordingly, we refused leave, dismissed the appeal, affirmed the order of the court below, ordered the appellant to pay the respondents costs, gave brief reasons and reserved our written judgment.

Background

[3] The respondents applied to strike out the statement of claim relying on the exclusivity principle established in *O'Reilly v Mackman* [1983] 2 AC 237. It was contended these proceedings ought to have been brought by way of an application for judicial review (or that obtaining a remedy in judicial review proceedings was an essential precondition to obtaining an award of damages). On that basis it is argued that her claim should be struck out, either because it failed to disclose any reasonable cause of action against the second defendant, and/or because it was an abuse of the process of the court. The appellant's primary contention is that the exclusivity principle does not arise for consideration. Her fallback position is that even if the exclusivity principle requires to be considered, it is a flexible principle, and her case falls within an exception to that principle.

[4] Master Bell declined to strike out the statement of claim and the defendants appealed to the High Court. McAlinden J allowed the appeal in part, holding that the proceedings were an abuse of process. He did not make any finding that the statement of claim failed to disclose any reasonable cause of action. He stayed all further proceedings in the action pending review by the Court, either at the conclusion of any judicial review application, or in 12 months' time, if no application for leave to apply for judicial review is made within that time. The appellant appeals against the decision of McAlinden J.

[5] This court has the benefit of two detailed judgments one from the Master and one from McAlinden J. The Master rejected the plaintiff's argument that the *O'Reilly v Mackman* exclusivity principle was no longer good law; held that the defendants had not clearly identified the exceptions to the exclusivity principle nor persuaded the court that the plaintiff's action did not fall within those exceptions. Accordingly, he refused the defendant's application that the claim be struck out as unarguable or incontestably bad.

[6] The respondents appealed this decision to the High Court. McAlinden J in summary concluded that:

- the proceedings challenge an asserted failure of a public body to exercise a public function to make subordinate legislation for the purpose of amending and/or supplementing a statutory scheme which creates the only source of entitlement to a financial benefit for specified categories of bereaved individuals;

- to bring such a public law challenge by way of private law proceedings is an abuse of the process of the court;

- the defendants' application for a stay of the proceedings should succeed and the Order of the Master should be reversed;

- the proceedings be stayed pending the outcome of any application for leave to apply for judicial review with liberty to apply;

- costs are reserved pending further review of the stay at the conclusion of any judicial review application or in 12 months' time.

[7] The appellant did not bring judicial review proceedings and instead lodged a notice of appeal containing twenty-five grounds of appeal. At a review of the *ex parte* application for leave to appeal the defendants proposed that the issue of leave to appeal be "rolled-up" and dealt with at a hearing of the substantive issues. The Court acceded to this proposal. For the sake of convenience we shall refer to the Plaintiff as the 'appellant' and the defendants as the 'respondents'

The exclusivity principle

[8] The exclusivity principle articulated in *O'Reilly & Mackman* [1983] 2 AC 237 derived from the creation of the detailed specialist procedure for judicial review in the Supreme Court Act 1980 and the Judicature Act (Northern Ireland) 1978. Lord Diplock, with whom the rest of their Lordships agreed, held that the amendments to the RSC Ord 53 had ameliorated the procedural disadvantages to which a claimant seeking a prerogative order was subject and, could therefore no longer be said that it was justified for claimants to sidestep the important protections for public bodies that were inherent in the new judicial review procedure and thereby undermine the public policy underpinning those protections. He stated the exclusivity rule as follows:

> "it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed the rights to which he was entitled to under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities."

[9] Although the courts now adopt a more flexible approach to the question of the appropriate procedure in cases involving a public law challenge the exclusivity principle endures.

The appropriate test

[10] Following the approach of the court in *Jones* [2008] EWHC 2562 and *Bloomsbury* [2010] ICHLR 12 the parties agreed that the appropriate test was whether:

> "(1) The claimants were 'asserting an entitlement to a subsisting right in private law' which 'may incidentally involve the examination of a public law issue' [28]; or
>
> (2) The 'primary focus' or 'dominant issue' is to challenge a public law act or decision.' [see para 37 of *Bloomsbury* at p359]"

Submissions

[11] The respondents contend that in breach of the exclusivity principle the appellant has issued and persisted with private law proceedings seeking to establish that the operation of the Reserve Forces Non-Regular Permanent Staff (Pensions and Attributed Benefits Schemes) Regulations 2011 discriminates against her contrary to article 14 ECHR read with article 1 First Protocol and/or article 8 ECHR. The underlying issue is the decision of the defendants of 20 July 2017 to decline to a pay a survivor's pension to her following the death of her co-habiting partner on 3 March 2016 because the Regulations made no provision for such payments to co-habiting partners who were not a spouse or civil partner at the date of death. The respondents contend that it is beyond question that this is in substance a public law claim. She can only succeed if the court accepts that the relevant Regulations are unlawful by virtue of a breach of Convention rights.

[12] The appellant's case is that she is the victim of an act of discrimination which is rendered unlawful by section 6 of the Human Rights Act; that section 7 confers upon her a right to bring, in a court with the power to award damages, civil proceedings against the respondents for that unlawful act. The unlawful act in question is described as a failure to act, namely the first respondent's continuing failure to make regulations under sections 4 and 8 of the Reserve Forces Act 1996 making provision for a survivor's pension for surviving cohabiting partners in circumstances where the first respondent has made such provision for surviving spouses and surviving civil partners. She asserts and emphasises that *those circumstances* have unlawfully discriminated against her under article 14 ECHR taken in conjunction with article 1 of the first protocol and/or article 8 ECHR. On that basis she seeks damages.

[13] The appellant underlines that the only remedy she seeks is damages, that no other remedy is sought and that she cannot be compelled to seek a remedy which she doesn't want.

[14] The appellant claims that it is impossible for her to bring a claim for judicial review, because she is not seeking, and cannot be compelled to seek, any judicial review remedy. She asserts that the 'fundamental proposition' that a freestanding

claim for damages cannot be brought by judicial review is incontrovertible and refers the court to Order 53 rule 1 of the Rules of the Court of Judicature (1980).

[15] The appellant contends that the respondents' argument necessarily depends upon establishing that she as plaintiff would not be entitled to recover a remedy in damages unless she first (or simultaneously) obtains a remedy in judicial review proceedings. She asserts that there is nothing in any legislation which so requires and further that there are examples in case law, of individuals recovering damages for unlawful conduct under sections 6-8 of the HRA including in respect of alleged breaches of article 14 read with A1P1 without obtaining any judicial review remedy or bringing any application for judicial review.

[16] The appellant says that McAlinden J erred in characterising her claim as "a public law challenge". On the contrary she maintains that her claim is "wholly or predominantly a private law claim"; that the judge was wrong to apply the exclusivity principle and that in applying that principle he erred in failing to recognise that, if the principle applied at all, her case fell within the exceptions.

[17] The respondents remind the court that the orthodox approach to such claims in respect of survivor benefits, of which there have been a significant number in this jurisdiction, is to bring an application by way of judicial review pursuant to sections 18-21 of the Judicature (NI) Act 1978 and Order 53 of the Rules of the Court of Judicature. Order 53 provides the bespoke procedure for such claims with specific time limits and procedural safeguards which are not applicable to an action begun by writ.

[18] The respondents drew our attention to the way in which the civil action was presented and developed which we set out below.

[19] The appellant issued pre-action correspondence on 16 March 2018 indicating an intention to apply for a public law remedy in the form of a declaration that the statutory provisions were unlawful as a consequence of a breach of article 14 ECHR in that they resulted in a failure to make a payment to her under the 2011 regulations. The appellant now accepts that this pre-action correspondence was in contemplation of a proposed judicial review application.

[20] The appellant maintains that she did not lodge judicial review proceedings because she accepted the respondents' position that she was not entitled to a survivor's pension under the Regulations. A writ issued on 23 August 2018 five months following the respondents' response to the appellant's PAP. The endorsement claimed:

> "a declaration that the failure of the defendants to make provision for the payment of a survivor's pension under the Regulations discriminates against her, and continues to discriminate against her, under article 14 of the European

> Convention on Human Rights taken in conjunction with article 1 of the first protocol to the ECHR and/or article 8 of the ECHR.

The writ also included a claim for damages pursuant to section 8 of the Human Rights Act 1998.

[21] A statement of claim was served on 11 October 2018. At para 8(a) the plaintiff contended that the failure of the respondents to make provision for a survivor's pension unlawfully discriminated against her "and others in similar circumstances." The respondents state that the scope of the claim extends beyond the individual interests of the plaintiff to include all those who are, or would be, subject to refusal of a survivor's pension under the Regulations because they were in the same, or similar, circumstances. This, it is said, underscores the public law nature of the claim.

[22] The statement of claim included a claim for declaratory relief and a claim for damages for the alleged continuing unlawful act of failing to make provision for a survivor's pension under the Regulations in breach of her article 14 ECHR rights. In the amended defence dated 13 May 2019, the respondents contended that the presentation of a public law claim of this nature by way of private law action was an abuse of the process of the court. This proposition was grounded on the exclusivity principle which the appellant contended did not survive the enactment of the Human Rights Act 1998.

[23] The appellant served a reply to the Amended Defence on 5 March 2020, characterising the appellant's "primary case" as a contention that the unlawful discrimination:

> "is a consequence of the Regulations being made and in force at a time when no corresponding Regulations making survivor's pension provision for the benefit of surviving cohabiting partners are made and simultaneously in force."

Her "alternative" case is that the Regulations are:

> "inherently unlawful, in that the Regulations, which do not make provision for the payment of a survivor's pension to or for a surviving partner but make such provision in respect of a surviving spouse or civil partner, unlawfully discriminate against her contrary to article 14 of the ECHR."

[24] She continued to seek damages and a declaration on the basis of this alternative case. The respondents contended that this carefully constructed presentation of a primary and alternative case is a device designed to conceal the public law nature of the challenge. The alternative case is, the respondents contend, indisputably a public

law claim. The primary case is a public law claim in disguise. The true target of the proceedings is the Regulations and that attempts to frame the claim as a challenge to the consequence of the Regulations or to the absence of other Regulations (but not the actual Regulations) is a contrivance to evade the application of the exclusivity principle which McAlinden J rejected as:

> "uncontestably bad and to mount such a challenge by means of private law proceedings is clearly and plainly an abuse of the process of the court." [52]

[25] The appellant served an amended Statement of Claim dated 14 May 2021 and following conclusion of the hearing on appeal, and with the respondents' consent, served a further amendment to the Statement of Claim. The appellant deleted the claim for a declaration and amended the claim for damages so that it was no longer based on a failure to make provision for the payment of a survivor's pension but for alleged unlawful discrimination:

> "by failing to make provision for the payment of a survivor's pension to her similar to that payable to surviving spouses and surviving civil partners under the Regulations."

The respondents submitted that this amendment of the case is a further manoeuvre designed to evade the application of the exclusivity principle. They further submitted that, to the extent that this claim seeks, damages for continuing or future loss, it is defective.

[26] The appellant then contends that it is impossible for her to proceed by way of judicial review because she seeks only damages by way of relief. In response the respondents submit that (i) damages can be obtained in judicial review proceedings (ii) the recent amendment of the claim to abandon a declaration but to seek only damages based on a "state of affairs" is a further attempt to evade the application of the rule which reflects Parliament's intention by an artificial reconstruction of a claim that will, still, require consideration of whether discrimination arises as a result of the operation of the Regulations. The respondents invite the court to consider the substance of the claim rather than the form into which it has metamorphosed.

[27] The respondents state that the appellant has not concealed the fact that she intends to issue repeated private law claims for damages in the event that the claimed ECHR breach arising from the operation of the Regulations (or failure to enact other Regulations) is not corrected. The appellant recognises that she cannot pursue claims for anticipated future loss, but she contends that she can issue a fresh claim every day that this allegedly discriminatory state of affairs persists. This stance is maintained in a context in which she disavows making a public law claim for the purposes of obtaining a pension under the Regulations.

[28] The respondents endorse the findings of McAlinden J, addressing the appellant's argument that the rule in *Henderson v Henderson* [1843] 3 Hare 100 (which provides that a claimant is barred by cause of action estoppel from pursing a claim which could have been litigated at the same time as a claim previously brought) would not bar her, in the event the defendants did not address the asserted discrimination, from issuing fresh proceedings to recover further damages by reference to notional pension benefits, when he stated:

> "[34] Whatever the merits of this particular argument, it is not determinative of the central issue before the court, which is whether it is an abuse of the process of the court to bring a claim for damages for past losses by reference to notional pension payments from the date on which the plaintiff/appellant applied for such payments under the 2011 scheme up to the date of assessment by way of proceedings commenced by means of ordinary writ of summons whilst deliberately deciding not to mount a specific challenge to the statutory scheme. However, the issues thrown up by the tentative and superficial consideration of how to deal with anticipated future loss resulting from a failure or refusal to supplement the existing statutory scheme just serves to illustrate the difficulties and complexities involved in the litigation which the plaintiff/appellant has embarked upon."

[29] The respondents submit that Parliament has made very clear and express provision for claims involving legislation in sections 3-5 of the Human Rights Act 1998. It is argued that the appellant sidesteps entirely these provisions notwithstanding the fact that in considering this claim a court must necessarily engage in an exercise of reading subordinate legislation and considering whether it can be given effect in a manner that is compatible with Convention rights.

[30] It is argued that the appellant's approach prevents the engaging of the bespoke (and expressly limited) powers to take remedial action in response to Convention incompatibility in section 10 of the Human Rights Act 1998; the appellant seeks to use some provisions of the Act (sections 6 and 7) but disavows those provisions which Parliament has enacted to make provision for challenges to Convention compatibility of legislation. The respondents contend that, read together, the clear intention of Parliament enshrined in the Judicature Act and the Human Rights Act 1998 is that claims of this nature should be advanced by the orthodox bespoke judicial route in accordance with the principle of the exclusivity rule.

[31] The respondents also argue that the appellant is wrong to criticise the trial judge for following the procedure set out in Order 53 of the Rules of the Court of Judicature when the Civil Procedure Rules in England and Wales suggest a different approach. They submit that the judge was correct in principle to apply the

requirements of Order 53 and, in any event, the statutory jurisdictional changes which underpin the CPR in England and Wales are not uniformly applicable in this jurisdiction.

[32] It is further contended that the appellant is also wrong to intimate that her claim is particularly strong on its merits and that the defendants will be unable to muster an appropriate defence of justification. The relevant jurisprudence on article 14 claims has developed significantly since the writ was issued in these proceedings. Recent Supreme Court authority has highlighted the need for greater judicial deference to the legislature in respect of claims based on article 14 ECHR. See, e.g., *Re SC* [2021] UKSC 26 paras [159]-[161]. Reference is made to the recent decision in *AGNI Reference* [2022] UKSC 32 which it is said indicates that the Supreme Court took an incorrect approach to the thresholds for establishing Convention incompatibility in *McLaughlin* (see paras [18]-[19]). This developing jurisprudence it is argued gives rise to fundamental issues on the merits of the claim that would, if the exclusivity principle were properly applied, require to be considered by a court at a judicial review leave application. It is argued that opportunity the has been denied to the respondents.

Discussion

[33] The exclusivity principle articulated in *O'Reilly & Mackman* [1983] 2 AC 237 resulted from the enactment of the specialist procedure for judicial review and the removal of procedural disadvantages to which a claimant seeking a prerogative order had previously been subject. As a result, it was recognised that it could no longer be said that it was justified for claimants to sidestep the important protections for public bodies that were inherent in the new judicial review procedure and thereby undermine the public policy underpinning those protections. For the sake of convenience, we set out again the statement by the House of Lords of what has come to be known as the 'exclusivity principle':

> "it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed the rights to which he was entitled to under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities"

[34] As we earlier observed the courts now adopt a more flexible approach to the question of the appropriate procedure in cases involving a public law challenge the exclusivity principle endures. Further, the test we apply is that set out earlier at para [10]. Applying that test we do not accept that the appellant is 'asserting an entitlement to a subsisting right in private law' which 'may incidentally involve the examination of a public law issue.' On the contrary, and in full agreement with the trial judge, the 'primary focus' or 'dominant issue' of the appellant's proceedings is plainly a challenge to a public law act or decision.'

[35] By these private law proceedings the appellant in substance challenges the failure of one or two public bodies to exercise a public function in failing to make subordinate legislation for the purpose of amending and/or supplementing a statutory scheme which creates the only source of entitlement to a specified financial benefit for specific categories of bereaved individuals. McAlinden J at para [51] of his judgment said that "to argue that this…is not a public law challenge is to mount an argument that is obviously and incontestably bad and to mount such a challenge by means of private law proceedings is clearly and plainly an abuse of the process of the court." Accordingly, he held that the defendants'/respondents' application should succeed, and that the Master's Order should be reversed. We agree with that assessment and conclusion.

[36] In coming to this conclusion we have borne in mind that there are specific protections incorporated into the judicial review procedure to protect the wider public interest. These include:

- the requirement of leave intended to filter out unmeritorious claims;
- the short time-limit for applying for judicial review;
- the duty of candour on all parties at all stages;
- the fact that evidence (including relevant disclosure) is almost always by affidavit;
- cross-examination is rare;
- the procedure is speedy.

[37] Further, "judicial review applications are heard by judges … who have experience and expertise in dealing with public law issues. A specialised procedure also emphasises the uniqueness of public law, in that it is quite unlike private litigation between parties. The courts have a more limited role in judicial review and need to ensure that the wider public interest, frequently present in such cases, is not overlooked." [see para 3-006 of Lewis, Judicial Remedies in Public Law, 5th Edition, 2015, Chapter 3]

[38] It is by the bespoke specialist judicial procedure with its myriad safeguards that challenges to the lawfulness of public law decisions are ordinarily intended, in the wider public interest, to be determined. In contrast ordinary civil litigation is not attended with such safeguards - leave is not required, the ordinary limitation period applies; pleadings, discovery, interlocutory applications, appeals, oral evidence, cross-examination, etc mean that ordinary civil litigation can be protracted.

[39] There are now no procedural disadvantages for applicants in bringing proceedings by judicial review. A claim for damages can be included in a judicial review claim and remitted if necessary to the appropriate court. Remittal does not arise if the substantive challenge were to fail. We consider that it will ordinarily be unjustifiable to circumvent the public interest protections afforded by the judicial review procedure by choosing to initiate an ordinary civil claim where the interests of justice do not require or override the wider public interest in adhering to the appropriate judicial review procedure.

[40] Devices designed to conceal the public law nature of a challenge or amendments to proceedings in an attempt to evade the application of the exclusivity principal are unlikely to fare well. Artificial reconstructions of a claim in order to avoid the application of the exclusivity principle, if successful, would defeat the wider public interest underlying the principle which itself derives from the specialised procedure statutory architecture heralded by the Judicature Act (NI) 1978.

[41] In the present case the appellant is seeking to establish that a decision of a public authority infringed rights to which she asserts she was entitled to under public law. Instead of proceeding by way of judicial review she has initiated an ordinary action. By this means she evades the protections for public authorities that the House of Lords spoke of in the passage from Lord Diplock set out above. In the present case no justification has been established for departing from the general rule and, accordingly, such a departure in the words of Lord Diplock would be "contrary to public policy…and, as such an abuse of the process of the court."

[42] We agree that the trial judge made an Order which carefully balances the interests of the parties. He stayed the proceedings pending the outcome of any application for judicial review. The judge sought to achieve an equitable outcome that would permit the appellant to advance her claim in the appropriate forum subject to overcoming the various procedural safeguards inherent in judicial review proceedings. In effect, the judge restored the position to that which prevailed in March 2018 when the appellant first sought to embark upon a public law challenge. The appellant, however, turned her face against the approach outlined by the court, eschewed the opportunity to bring an application for judicial review and has, instead, brought an unmeritorious appeal on a multiplicity of grounds.

Conclusion

[43] For the above reasons, we refuse leave, dismiss the appeal, affirm the Order of McAlinden J and order the appellant to pay the respondents' costs.