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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **24/06/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF APPLICATIONS BY BARRY CAHILL, DARREN WILLIAMS AND PATRICK DILLON FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE DEPARTMENT OF HEALTH FOR NOTHERN IRELAND

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Ronan Lavery KC and Michael Halleron (instructed by Finucane Toner, Solicitors) for the first applicant
Ronan Lavery KC and Conan Fegan (instructed by McIvor Farrell, Solicitors) for the second applicant
Ronan Lavery KC and Richard McLean (instructed by Brentnall Legal Ltd) for the third applicant
Tony McGleenan KC and Philip McAteer (instructed by the Departmental Solicitor's Office) for the respondent in each case

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SCOFFIELD J

Introduction

[1] In each of these cases – filed separately but raising essentially the same issue such that they were dealt with together and case-managed as a group – the applicant challenges the legality of the Coronavirus Act 2020 (Extension of Powers to Act for the Protection of Public Health) (No 2) Order (Northern Ireland) 2022 ("the 2022 Order"). The question for the court at this point is whether, notwithstanding developments since the making of the 2022 Order which render the issue academic, the applications should be permitted to proceed to a full hearing on the substance of the challenge.

[2] Mr Lavery KC appeared for each applicant, leading Messrs Halleron, Fegan and McLean respectively. Mr McAteer (led by Mr McGleenan KC) appeared for the

respondent in each case. I am grateful to all counsel for their focused written and oral submissions in relation to the issue identified at paragraph 1 above.

Factual background

[3] The Coronavirus Act 2020 ("the 2020 Act") was passed "to enable the Government to respond to an emergency situation and manage the effects of the COVID-19 pandemic" (see paragraph 1 of the Explanatory Notes to the 2020 Act). It provided a range of emergency powers. Section 89(1) of the 2020 Act provided that it would expire at the end of the period of two years beginning with the day on which it was passed; but this was subject to section 89(2), which set out a number of provisions exempted from the general expiry, and to section 90.

[4] Section 90(1) and (2) provided relevant national authorities with the power, by regulations (or, in Northern Ireland, by statutory order), to alter the expiry date of any provision of the Act so that that provision "does not expire at the time when it would otherwise expire (whether by virtue of section 89 or previous regulations under [section 90(1) or (2)]." Accordingly, a relevant national authority – which included a Northern Ireland Department in the case of provisions extending to Northern Ireland and covering devolved matters – could bring forward or postpone the expiry of relevant provisions of the 2020 Act. The power to extend the expiry date was limited by section 90(3): the time specified in regulations extending the expiry date "must not be later than the end of the period of 6 months beginning with the time when the provision would otherwise have expired."

[5] The 2022 Order was made by the Department of Health in Northern Ireland ("the Department") on 22 September 2022. It was laid before the Northern Ireland Assembly the same day and came into operation two days later on 24 September 2022. It contained one provision of substance, namely article 2 which was in the following terms:

> "Section 48 of, and Schedule 18 to, the Coronavirus Act 2020 do not expire at the time when they would otherwise expire and expire instead on 24 March 2023."

[6] This had the effect of extending, for a further period of six months, certain powers to act for the protection of public health in Northern Ireland which were contained within the Public Health Act (Northern Ireland) 1967 ("the 1967 Act"), as temporarily modified by Schedule 18 to the 2020 Act. In turn, those powers allowed the Department of Health to make wide-ranging regulations for the purpose of the protection of public health relating to coronavirus, including by restricting international travel and imposing domestic prohibitions or requirements commonly referred to as 'lockdown' measures.

[7] Each applicant was aggrieved at the making of the 2022 Order and contended that the decision to make the Order was cross-cutting, significant and/or

controversial, such that – in accordance with the rules relating to Ministerial authority and Executive decision-making set out in sections 20 and 28A of the Northern Ireland Act and the Northern Ireland Ministerial Code – the decision could not have been lawfully taken by the Department alone and in the absence of an Executive Committee. As a further ground, in the alternative, the applicants challenged the respondent's decision to automatically extend the relevant powers for a period of six months when, in their submission, there was no reasonable justification for doing so.

[8] It is now accepted by the applicants that each of their cases is academic, since the relevant powers (even as extended) have now expired. The respondent had previously argued that the proceedings were academic in any event, even when the regulation-making powers were extant, unless and until it became clear that the Department was minded *in fact* to exercise those powers. The respondent also argued that merely extending the underlying power to make emergency regulations was not significant or controversial; rather, it would be the exercise of those powers, if that arose, when further emergency regulations were actually made when referral to the Executive Committee may be required.

[9] The situation has now moved on further, both as a result of the powers having expired completely and by virtue of the fact that Ministers are now back in place (following the restoration of the Northern Ireland devolved administration and the re-establishment of the Executive Committee of the Assembly earlier this year). In short, quashing the impugned Order at this remove would have no practical effect as between the parties or at all.

[10] The first of these developments arose as follows. As noted above, the 2022 Order provided for the expiry of the relevant powers in March 2023. However, in March 2023 and September 2023, similar orders were made extending the powers again on six-monthly cycles (albeit the emergency powers were not used again throughout any of this period). When the powers were due to expire again in March 2024, the Minister for Health determined that he would not seek to further extend them and, once they lapsed, the section 90 mechanism could no longer be used. In reaching this decision, the Minister was informed by a debate in the Assembly (which was by then functioning again) on 11 March 2024, in which the Assembly declined to retrospectively approve the extension of the powers from September 2023 to March 2024. The regulation-making power has not therefore been extant from March 2024 and is not capable of being revived using the powers under section 90 of the 2020 Act.

Summary of the parties' positions

[11] Notwithstanding that the claims for judicial review are now academic in the sense that they would yield no practical result, the applicants nonetheless argue that the court should proceed to hear and determine the claims in the exercise of its discretion to do so. They submit that the case is "not academic in the sense that it is

of arid academic curiosity only." Rather, they submit, there is a clear public interest in determining the claims. They rely on a number of bases for this – several of which are discussed below – but, primarily, the suggestion that the Minister's actions set a dangerous precedent in relation to constitutional safeguards and concern that this should not re-occur in a future similar situation.

[12] The respondent relies upon the fact that there have been significant factual developments since the grant of leave in the case. In particular, it relies upon the fact that there has been no regression to the emergency situation that was presented by the Covid-19 pandemic; that political agreement has seen the return of Ministers and a functioning Assembly and Executive Committee; and that, although the relevant powers were extended at six-month intervals for a period of time, the powers lapsed in March 2024 (the Assembly having voted against their function extension), meaning that they have now lapsed and cannot be revived under section 90 of the 2020 Act. For these reasons the respondent submitted that the cases were "triply academic."

Relevant authorities

[13] The authorities on this issue are by now well-known; but that did not stop the parties treating me to a (welcome) refresher course. The starting point is frequently the dictum of Lord Steyn in *R v Secretary of State for Home Department, ex parte Salem* [1999] 1 AC 450 Lord Steyn:

> "The discretion to hear disputes even in the area of public law must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) where a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

[14] The discretion to hear and determine public law disputes even when they are academic has been considered by the courts in this jurisdiction on many occasions. For example, in *Re McConnell's Application* [2000] NIJB 116, at 120, Carswell LCJ explained that:

> "It is not the function of the courts to give advisory opinions of public bodies, but if it appeared that the same situation was likely to recur frequently and the body concerned had acted incorrectly, they might be prepared to make a declaration, to give guidance which would

> prevent the bodies from acting unlawfully and avoid the need for further litigation in the future."

[15] The respondent relies heavily upon *Re Bruce and Dogru's Application (Leave Stage)* [2011] NIQB 60, in which McCloskey J said (at para [10]) as follows:

> "The principles to be applied are familiar to practitioners. I consider the following approach to be generally correct. Fundamentally, the resolution of this issue involves an exercise of the court's discretion. The parties have no right to demand a substantive hearing. The rational of the discretion in play is that these are public law proceedings in which there is no *lis inter-partes*. A further doctrinal consideration of relevance is that public law remedies are discretionary in nature. The exercise of this discretion in any given case will be informed by *inter alia*, the overriding objective and, in particular, the allocation of the court's limited time and resources and the competing demands of other, more pressing cases in the system. The court will also take into account the Applicant's ability to pursue a remedy in an alternative forum and consideration will be given to the nature of such remedy and the question of whether such forum is preferable to that of the judicial review court in the particular circumstances of the individual case. The court may also form some view of the Applicant's prospects of securing any of the remedies sought. Finally, it will be appropriate for the court to reflect on the efficacy of the remedies sought by the Applicant and, in particular, whether they will truly serve a real and appropriate purpose, taking into account the significant change of circumstances which typically materialises in cases of this kind."

[16] In that case, the judge also went on to take into account what Munby J had observed in *R (Smeaton) v Secretary of State for Health* [2002] 2 FLR 146, namely that it is the constitutional function of the courts to "resolve real problems and not disputes of merely academic significance." McCloskey J felt that this pronouncement had added vigour given "the ever-increasing importance of the overriding objective, coupled with the contemporary culture of litigation." In a later decision of his in *Re JR47's Application* [2013] NIQB 7, McCloskey J identified "utility" as being the "main criterion" in reflecting upon the propriety of granting relief which would simply be declaratory in nature.

[17] In *Re Wright's Application* [2017] NIQB 29, Keegan J provided the following analysis at para [16]:

> "It seems to me, flowing from these cases, that the guiding principle is whether or not a case raises a point of general public interest. This will depend upon the facts of each case. The identified categories in *Salem* in relation to statutory construction and such like are by way of example and do not form an inflexible code. So in my view the court must look at the facts of each case to decide on an overall appraisal whether or not a case should proceed in the public interest taking into account that an appropriate measure of caution should be applied."

[18] Recently, the issue was addressed by the Northern Ireland Court of Appeal in *Re Bryson's Application* [2022] NICA 38. An important debate in that case was whether the claim was, in fact, academic (which is conceded in the present case). Having determined that it was, the Court of Appeal dealt with the residual discretion briefly at para [16] of the judgment of Horner J, giving judgment for the court:

> "The issue therefore is whether this is one of those exceptional cases which required a clear answer from the court to satisfy the public interest. We are quite certain that the public interest does not require a challenge to the decision of the Ministers which related to particular circumstances are unlikely to recur again. Certainly, the appellant was unable to put forward to this court any cogent reason(s) why such an exercise was exceptional and/or in the public interest."

[19] The court added in that case that, in light of the facts and circumstances relating to the challenge as originally brought having changed with the passage of time, it was "not in the public interest to have a judicial review that will have to be based on facts which are now of historic significance only."

[20] The applicants also referred me to a number of authorities from the courts of England and Wales. In *R (Heathrow Hub Ltd and Another) v The Secretary of State for Transport and Others* [2020] EWCA Civ 213, the Court of Appeal in England and Wales allowed academic points to be determined "because of their potentially wider implications" (at para [216]), albeit noting the dangers of courts opining on issues which were academic or hypothetical (see paras [208]-[210] of the judgment). In *Rhuppiah v Secretary of State for the Home Department* [2019] 1 All ER 1007 the Supreme Court held that it would proceed to determine an otherwise academic point on the basis "that it was of general importance for it to offer a definitive interpretation" of a word in a statute (see para [7]). These are merely illustrations of the appropriate principles being applied in practice.

[21] The applicants placed most reliance on the case of *R (Dolan and Others) v Secretary of State for Health and Social Care and Another* [2021] 1 All ER 780 on the basis that this case was of the most relevance to the present factual context. In *Dolan* the Court of Appeal in England and Wales proceeded to determine a *vires* challenge to Covid-19 regulations even though the relevant regulations had been revoked by the time the appeal came before that court. It did so on the basis that it would serve the public interest if the court decided the *vires* issue at that point, rather than leaving it to be raised potentially by way of defence in criminal proceedings where individuals had been prosecuted for breach of the regulations and wished to collaterally challenge the legality of the provision they had been said to have contravened. Further, the question whether the Secretary of State had the power to make regulations of this type continued to be a live issue, even though the particular regulations under challenge had been repealed (see paras [39]-[42] of the judgment).

[22] From these cases, the following (non-exhaustive) set of principles can be gleaned:

(a) Judicial review cases which are academic as between the parties (where the court's finding will have no practical effect) should generally not be determined by the courts.

(b) The court retains a discretion to deal with such a case by way of exception to the general approach described above. It should only do so exceptionally where satisfied that there is a good reason in the public interest to do so.

(c) The public interest justifying the hearing and determination of an academic issue will focus upon how useful it would be for the court to do so. Such a public interest will generally arise where the point raised is of general public importance and/or significance to a wide range of other cases.

(d) The classic instance where the court will be justified in proceeding to hear and determine an academic case is where it raises a discrete question of statutory construction which should be determined because this is likely to impact a large number of other cases, either now or in the future.

(e) Public interest reasons for hearing academic cases are, however, not limited to the example given above. Each case should be assessed on its own facts.

(f) A factor pointing towards determining an academic issue is that this will avoid further litigation which is (almost) inevitable which will have to grapple with the same issue, where determining the matter now would be more satisfactory (for instance, because fuller argument can be had in the absence of acute time pressure or because the matter is already before a higher court).

(g) A factor pointing strongly against determining an academic issue is where the resolution depends on a detailed factual analysis.

Determination

[23] I have concluded that the appropriate way forward in the present cases is that they should be dismissed on the basis that they are clearly academic, by reason of changes in circumstances which have arisen since the proceedings were issued, and there is no public interest justifying departure from the general rule that the court should not proceed to hear and determine judicial review applications which are academic between the parties.

[24] In particular, I accept the respondent's submission that there is no specific point of statutory construction at issue in this case which requires to be clarified for similar cases in future. The question of whether a matter is significant or controversial such as to require Ministerial referral to the Executive Committee for discussion and agreement has now been addressed in a variety of cases before the courts in Northern Ireland. Most recently, it was discussed again, only last week, in a decision of the Court of Appeal in *No Gas Caverns Ltd and Friends of the Earth Ltd's Application* [2024] NICA 50. There is no need for further guidance in this area from the High Court, much less an exercise of statutory construction. On the contrary, the question whether a particular matter requires referral to the Executive is dependent upon the facts, circumstances and context which arise in the particular case.

[25] I also accept the respondent's submission that there are no similar cases pending or anticipated. Although there may be some force in the applicants' submission that it is likely to be only a matter of time before authorities here (and globally) are faced with another pandemic of some sort, such a development is presently remote and there is a complete absence of any ability to predict the circumstances which will pertain if another pandemic arises, what public health powers may be considered in order to meet the challenges then presented, and the statutory basis upon which any such proposed powers might be brought forward. All of these matters are so uncertain as to render it hopelessly speculative, in my view, to say that any decision in the present proceedings will be of utility in the future.

[26] The comparison with the *Dolan* case also does not assist. In that case – a challenge to regulations which had actually been made under similar emergency powers as were extended in this case – it was plainly foreseeable that the relevant legal issue would arise again and again as prosecutions proceeded before the courts based on the impugned measures.

[27] Mr Lavery was, of course, right to say that where a judicial review application is dismissed as academic, and the respondent has in fact acted unlawfully the net result is that the public authority 'gets away with' an act which was unlawful. However, there are two responses which are properly to be made to this objection.

First, it merely begs the question whether the respondent *has* acted unlawfully. That has not yet been determined; and, in the present case, Mr McAteer was keen to emphasise that the Department's case on the substance is that it acted in a wholly lawful and appropriate manner throughout. Second, there are a variety of reasons why, in the public law sphere, an authority's act (even if objectively unlawful) may escape the High Court's supervisory jurisdiction and continue to enjoy the presumption of regularity. The operation of the time limit in RCJ Order 53, rule 4(1) and the standing requirement reflected in RCJ Order 53, rule 3(5) are but two examples. The principle of legal certainty requires that only certain challenges may proceed, and measures are generally presumed to be valid pending successful challenge before a competent court.

[28] As adverted to in a number of authorities referred to above, it is also a feature of the overriding objective expressed in RCJ Order 1, rule 1A, requiring that cases be dealt with justly, that cases are dealt with in ways which are proportionate to their importance and that they are allotted an appropriate share of the court's resources, taking into account the need to allot resources to other cases. Where a public law case is academic and there is insufficient public interest to warrant the court proceeding to hear it, that is a reflection of this principle and another instance where a public authority may happen to escape scrutiny which may otherwise be warranted. In some cases, of course, there will be other avenues of legal redress in which the same matters might conceivably be raised and adjudicated upon.

[29] I was not inclined to accept Mr Lavery's submission that these cases would not require any detailed consideration of the facts. As noted above, the challenge is about how the statutory tests in the Northern Ireland Act apply in the circumstances, not about how the words in that Act are to be construed. Certainly, as regards the second limb of the applicants' case (that there was no necessity in fact for an extension of the full six-month duration), that would require some consideration of the information and justification before the Minister at that time.

[30] I also do not consider there to be any significant force in the submission that allowing the Minister's actions in the present case to stand "would set a dangerous precedent and would tempt Ministers in a future Executive to simply ignore important constitutional safeguards." As a result of a variety of litigation in recent times, I consider that Northern Ireland Ministers are well aware of the requirements of Executive referral set out in Ministerial Code and the Northern Ireland Act 1998; and other Ministers are aware of the means by which they can seek to bring a matter before the Executive Committee for discussion and agreement.

[31] Penultimately, the applicants also submitted that the majority of public expense which would be occasioned by these cases had already been incurred since, at one point, the cases had been fully prepared for hearing. The progress of the cases to hearing was delayed on a number of occasions for a variety of reasons. More lately, the court was invited to adjourn the hearing given that similar issues were to be examined by the Court of Appeal in the *No Gas Caverns* case which, it was

common case, may be of assistance in determining this matter once the Court of Appeal's judgment had been given (as it now has). I accept Mr McAteer's point that this simply underscores the overlap between the issues – insofar as there is any question of principle to be considered – in this case and the more authoritative judgment of the Court of Appeal in *No Gas Caverns*.

[32] As to the level of time and costs already incurred, I do not consider this to be a factor which requires the present cases to be heard. Although this might in principle be a factor capable of consideration in the exercise of the court's discretion, it seems to me that it is one which is not likely to weigh heavily in favour of proceeding to hear an academic case unless the hearing has been, or is very nearly, concluded. To proceed to hear and determine the case now would undoubtedly use up further court time and give rise to additional costs which have not yet been incurred.

[33] Finally, the applicants also relied upon the fact that the decision-making under challenge in this case has not (yet) been the subject of any evidence or enquiry before the UK Covid-19 Public Inquiry. I do not consider that this point materially assists. It may well be that the Inquiry has simply not yet reached a module which considers this stage of decision-making (in September 2022). In any event, if the Inquiry is not intending to consider the extension of emergency powers at that stage, it rather points away from the issue being a matter of particular significance rather than being a matter which requires the court's attention. I place little store in the suggestion that a decision from this court would be of great assistance to the specialist inquiry which is steeped in these matters.

Conclusion

[34] For the reasons given above, I accept the respondent's submission that these cases should be dismissed on the basis that they are now academic and should not be heard and determined by the court. I will make an order to that effect.

[35] I will hear the parties on the issue of costs.