Neutral Citation No: [2019] NIQB 1	*Ref:* McC10837
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered: 11/01/19*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY JR80 FOR JUDICIAL REVIEW

-v-

1. THE SECRETARY OF STATE FOR NORTHERN IRELAND AND 2. THE EXECUTIVE OFFICE

_____

McCLOSKEY J

[1] By this ruling the court determines the applicant's quest to amend further the Order 53 pleading with a view to pursuing additional forms of relief based on new grounds.

[2] The court, by its judgment delivered *ex tempore* on 12 April 2018, acceded to the applicant's application for leave to apply for judicial review. This decision was based on the second iteration of the Order 53 pleading, the first having been amended in response to the court's initial case management order. The court further ruled that the applicant had standing and that he be granted the protection of anonymity.

[3] The subject matter of his challenge is the failure of the responsible agencies to give effect to the recommendations of the Northern Ireland Historical Institutional Abuse ("HIA") report, published in January 2017, that certain redress mechanisms, including the payment of monetary reparation to victims on a scale of £7,500 to £100,000, be established. The report urged speedy implementation, exhorting that the first payments be made before the end of 2017. At this stage, upon the second anniversary of Sir Anthony Hart's report, nothing has been done by those elected to govern Northern Ireland society.

[4] By its Notice dated 16 May 2018, the court certified that the applicant's challenge raises devolution issues under the Northern Ireland Act 1998. By a letter

dated 03 July 2018 the court was informed of the intention of the Attorney General for Northern Ireland to enter a Notice of Appearance.

[5] The substantive hearing was due to proceed on 11 September 2018. By its ruling of 10 September 2018 the court vacated the hearing date, with some reluctance. This ruling was stimulated by a well - publicised statement of the Secretary of State for Northern Ireland ("SOSNI") that new legislation which would have important implications for the arrangements for government in Northern Ireland was imminent. Given the uncertainty thereby generated, coupled with the apparent potential for certain aspects of the applicant's challenge to be rendered nugatory, the court acceded to SOSNI's application to vacate the hearing date.

[6] The promise of SOSNI was duly fulfilled, with the advent of the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 (the "2018 Act"), which came into operation on 01 November 2018. This was followed by the SOSNI's statutory guidance, an obligatory measure under section 3(2).

[7] These proceedings have now entered a further phase. On 15 November 2018 a third version of the Order 53 pleading, in draft, was proposed on behalf of the applicant. The amendments which this enshrines are opposed by both respondents. Section 3 of the 2018 Act features prominently in the proposed amendments. It is necessary to reproduce this in full:

> *"(1) The absence of Northern Ireland Ministers does not prevent a senior officer of a Northern Ireland department from exercising a 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.*
>
> *(2) The Secretary of State must publish guidance about the exercise of functions in reliance on subsection (1), including guidance as to the principles to be taken into account in deciding whether or not to exercise a function.*
>
> *(3) Senior officers of Northern Ireland departments must have regard to that guidance.*
>
> *(4) The absence of Northern Ireland Ministers is not to be treated as having prevented any senior officer of a Northern Ireland department from exercising functions of the department during the period beginning with 2 March 2017 and ending when this Act is passed.*
>
> *(5) The fact that a matter connected with the exercise of a function by a Northern Ireland department has not been discussed and agreed by the Executive Committee of the*

Northern Ireland Assembly is not to be treated as having prevented the exercise of that function as mentioned in subsection (1) or (4).

(6) Subsections (4) and (5) do not apply in relation to the exercise of a function before this Act is passed if –

(a) proceedings begun, but not finally decided, before this Act is passed involve a challenge to the validity of that exercise of the function, and

(b) the application of those subsections would affect the outcome of the proceedings,

but nothing in this subsection prevents the re-exercise of the function in the same way in reliance on subsection (1).

(7) Subsections (1) to (6) have effect despite anything in the Northern Ireland Act 1998, the Departments (Northern Ireland) Order 1999 (S.I. 1999/283 (N.I. 1)) or any other enactment or rule of law that would prevent a senior officer of a Northern Ireland department from exercising departmental functions in the absence of Northern Ireland Ministers.

(8) No inference is to be drawn from subsections (1) to (7) as to whether or not a senior officer of a Northern Ireland department would otherwise have been prevented from exercising departmental functions.

(9) Before publishing guidance under subsection (2) the Secretary of State must have regard to any representations made by members of the Northern Ireland Assembly.

(10) In this section –

'enactment' includes any provision of, or of any instrument made under, Northern Ireland legislation (within the meaning given by section 98 of the Northern Ireland Act 1998);

'Northern Ireland Minister' includes the First Minister and the deputy First Minister;

'the period for forming an Executive' has the meaning given by section 1(5);

'senior officer of a Northern Ireland department' has the same meaning as in the Departments (Northern Ireland) Order 1999 (see Article 2(3) of that Order)."

This provision attempts to address the mischief flowing from the moratorium in central government which has blighted Northern Ireland for almost two years, since March 2017.

[8] By the proposed amendments the applicant seeks to pursue two new forms of relief:

> (i) "*An order of mandamus directing SOSNI to take the steps necessary to establish a redress mechanism for survivors of historic institutional abuse, including in particular provision for compensation (hereinafter 'a redress scheme'),* ***either by issuing guidance to that effect under section 3(2) of the*** [2018 Act] ***or otherwise.***"

[The words in bold are new]

> (ii) "*In the alternative, a declaration that section 3 of the* [2018 Act] *is unlawful insofar as it permits senior departmental officials to make significant and/or controversial decisions in the absence of Ministerial direction and control.*"

[9] The applicant seeks to introduce six new grounds of challenge:

Paragraph 3(a)(vii)

> "*In the absence of an Executive, decisions taken by departmental officers would lack democratic accountability.*"

Paragraph 3(d)(ii)

> "*The continuing failure to propose a date for a fresh election has* [resulted] *and will result in departmental officers taking significant and/or controversial decisions without Ministerial oversight and democratic accountability. That … operates to ensure that the failure to propose such a date is constitutional, contrary to the rule of law and in any event is Wednesbury unreasonable.*"

Paragraph 3(d)(iii)

> "*To the extent that the 2018 Act permits civil servants to make important executive decisions in the absence of Ministerial direction and control, and without any democratic accountability, this is contrary to the rule of law and unconstitutional.*"

Paragraph 3(d)(iv)

> "*Further, or in the alternative, the failure of the Secretary of State to propose an early date for a fresh Assembly election in these circumstances is contrary to the rule of law and is unconstitutional.*"

Paragraph 3(e)

> "*Notwithstanding the factors set out … above, the Secretary of State has failed to issue guidance under section 3(2) of the 2018 Act to the effect that the Executive Office should establish a redress scheme. That failure is Wednesbury unreasonable.*"

Paragraph 3(l)

> "*By virtue of sections 3, 4 and 5 of the 2018 Act the Executive Office* [is] *entitled to exercise the power to establish a redress scheme and … ought to have done so.*"

[10] The most striking novelty of the proposed reorientation of the applicant's case is the frontal challenge to parts of the 2018 Act, a measure of primary legislation of the Westminster Parliament, namely section 3. The applicant's primary case, in respect whereof leave to apply for judicial review has been granted, is that the two extant respondents, SOSNI and the Executive Office, are legally empowered to establish a redress scheme and have acted (and are acting) unlawfully by their failure to do so. The alternative challenge now mooted is based upon a premise: *if and insofar as* the 2018 Act permits senior departmental officials to make significant and/or controversial decisions in the absence of Ministerial direction and control, section 3 of the 2018 Act is unlawful (whether in whole or in specified part is not a matter for now). The question of whether senior departmental officials are thus empowered is moot, this issue not having been the subject of judicial adjudication to date.

[11] The applicant's case, duly analysed, evidently is that only one of three Northern Ireland agencies can lawfully devise the redress scheme recommended by the HIA enquiry: SOSNI, the Executive Office or the Northern Ireland Executive. One peculiar consequence of this is that if senior departmental officials were to

devise a redress scheme in broadly satisfactory terms, the applicant would (it seems) challenge this as *ultra vires* their powers and/or unconstitutional.

[12] Constitutionally, Northern Ireland forms part of the United Kingdom. It enjoys, however, a limited form of self-government, delineated by those powers and functions which have been devolved by the UK Government under Westminster legislation, namely the Northern Ireland Act 1998. This is conveniently explained in Robinson v SOSNI and Others [2002] UKHL 32 at [3], per Lord Bingham:

> *"The Northern Ireland Act 1998 was enacted to implement the Belfast Agreement, as the long title to the Act and section 3(1) make clear. The purpose of the Act (so far as relevant to this appeal) is to provide for the restoration of devolved government in Northern Ireland but on a basis significantly different from that provided under the 1920 Act. There is to be a new Northern Ireland Assembly. There are also to be a First Minister and Deputy First Minister ('FM' and 'DFM')."*

The 1998 Act is, in effect, a statutory constitution: per Lord Bingham at [11].

[13] The statement of Lord Bingham at [12] of Robinson has particular resonance in the political impasse which, sadly, has dominated in this jurisdiction since March 2017:

> *"It would no doubt be possible, in theory at least, to devise a constitution in which all political contingencies would be the subject of predetermined mechanistic rules to be applied as and when the particular contingency arose. But such an approach would not be consistent with ordinary constitutional practice in Britain. There are of course certain fixed rules, such as those governing the maximum duration of parliaments or the period for which the House of Lords may delay the passage of legislation. But matters of potentially great importance are left to the judgment either of political leaders (whether and when to seek a dissolution, for instance) or, even if to a diminished extent, of the crown (whether to grant a dissolution). Where constitutional arrangements retain scope for the exercise of political judgment they permit a flexible response to differing and unpredictable events in a way which the application of strict rules would preclude."*

On one view, it may be said that the enactment of the 2018 Act, on the initiative of and promoted by SOSNI, is a reflection of Lord Bingham's observations.

[14] Irrespective, the new statute, mainly via section 3, the key provision, purports to empower senior departmental officers to exercise the functions of Northern Ireland ministers, subject to the requirement that they first consider the SOSNI's guidance; to retrospectively validate any exercise of departmental functions by a senior departmental officer during the period 02 March 2017 to 01 November 2018; again, retrospectively, to dispense with the requirement of Executive Committee consideration and agreement in those instances where this was necessary; and, finally, to – again retrospectively – remove any legal bar posed by the Departments (NI) Order 1999 or "*any other enactment or rule of law that would prevent a senior officer of a Northern Ireland Department from exercising departmental functions in the absence of Northern Ireland ministers*".

[15] As understood by the court, the first main tenet of the revised challenge which the Applicant seeks the court's permission to make is that section 3 of the 2018 Act represents an unlawful attempt to alter the statutory constitution of Northern Ireland. The Applicant seeks to make the case (as I understand it) that section 3 is at variance with the constitutional arrangements established by the 1998 Act, in particular the provisions relating to government of the population through the mechanisms of an Executive, an Executive Committee and Ministers. In this context the applicant relies upon SOSNI's "*constitutional obligation under the 1998 Act to address matters of public importance in order to prevent the development of a vacuum in governance ….*" The applicant further seeks to make the case that insofar as neither respondent is legally empowered to establish the redress scheme, the Secretary of State's failure to exercise her statutory power under section 32(3) of the 1998 Act is at variance with this constitutional statute and, further, as it has the effect of perpetuating a vacuum in governance in Northern Ireland is "*contrary to the rule of law and the principles of democratic governance, so is unconstitutional*".

[16] While both respondents, in opposing the applicant's quest to amend his challenge, have taken the opportunity to reiterate that neither is legally empowered to establish the redress scheme, the court has already ruled, at the outset of these proceedings, that there is an arguable case against each, observing further in its initial ruling, at [12], that –

> "*… some of the issues raised by this challenge are both novel and complex. It is at least arguable that no answer to them is to be found in either the statutory language* [of the 1998 Act] *or any precedent decision binding on this court. In passing, the constitutional role of the high court in a state system based on the separation of the distinct and differing portfolios and powers of the Executive, the legislature and the courts is unmistakable.*"

[17] A challenge to a measure of primary legislation (here, in the alternative), is, of course, a matter of extreme rarity. It engages a strong general principle that the supervisory jurisdiction of the High Court does not extend to impugning an Act of

Parliament. However, leaving to one side the very limited statutory exceptions to this rule, it is established that this power can be exercised exceptionally via the common law. This exceptional power was recognised by the House of Lords in Jackson v Attorney General [2005] UKHL 56. In this respect I have taken account particularly of the observations of Lord Bingham at [27] and those of Lord Steyn at [73] and [101] – [102], together with those of Lord Hope at [104] – [110] and, in doing so, I have been alert to the division between *ratio decidendi* and *obiter dicta*. I have also taken account of what was, and was not, decided in Re Buick's Application [2018] NICA 26.

[18] I conclude that there is sufficient merit in the novel issues raised by the applicant's proposed amendments to overcome the threshold for granting leave. There is an additional ingredient which is encapsulated in the decision of the Court of Appeal in R (Gentle) v The Prime Minister and Others [2006] EWCA Civ 1078, at [22]:

> *" These are questions of some general importance and it is, as stated earlier, for that reason that we have reached the conclusion that we should grant permission to appeal, not on the basis that we have concluded that the application for judicial review has a real prospect of success within the meaning of CPR 52.3(6) but on the basis that because of the importance of the issues and the uncertainty of the present position there is a compelling reason why an appeal should be heard. We stress that, although we have decided to grant permission, we see formidable hurdles in the way of the applicants and do not wish to encourage them to think that they will succeed."*

[19] Permission to make the proposed amendment is, therefore, granted, subject to the condition that the entirety of the Order 53 pleading is reconfigured. It has, at this point of its evolution, become unnecessarily unwieldy and unmanageable. In particular, all deleted passages should be eradicated completely and all underlining removed. Furthermore, with the use of headings, the applicant should segregate clearly the separate case made against the two respondents as regards both remedy pursued and the corresponding grounds. A smaller font size, together with pagination, would also represent significant improvements. Clarity and precision must be the hallmarks. This, together with the parties' proposed agreed litigation timetable, will be provided by 20 January 2019.

[20] Costs are reserved and there shall be liberty to apply.