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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **30/04/2025**

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 AN APPLICATION BY TIMOTHY GAMBLE AND RAFFAELLA ZURLO FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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The Applicants appeared in person
Gordon Anthony (instructed by Legal Services, Belfast City Council) for the Proposed Respondent
The Notice Party appeared in person

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HUMPHREYS J

Introduction

[1] The applicants are the owners and occupiers of a property at 130 Drumnaconagher Road, Ballynahinch, Co Down. The Notice Party, Alan Marks, is their neighbour and he resides at 128 Drumnaconagher Road.

[2] The applicants seek leave to challenge two decisions of the proposed respondent, Newry Mourne and Down District Council ('the council'):

(i) A decision dated 9 October 2024 to issue a remedial notice under section 5 of the High Hedges Act (Northern Ireland) 2011 ('the 2011 Act'); and

(ii) A decision of 19 December 2024 whereby the council determined that it had not failed to properly apply law, procedure or guidance when making the decision of 9 October 2024.

The complaint

[3] On 24 May 2023 Mr Marks wrote to the applicants, advising them that the trees which front their property were preventing him from seeing traffic approaching on the road and needed to be trimmed back to permit this. Furthermore, he stated that

the trees which align the length of the applicants' back garden had grown to such an extent that they were preventing light from reaching his kitchen, dining room, tv room and conservatory. It was also alleged that these trees were encroaching onto Mr Marks' back garden and had become dangerously tall in times of high winds. A request was made that steps be taken to rectify these matters.

[4] On 10 June 2023 Mr Marks wrote again, thanking the applicants for trimming the hedge at the front of the property. He also asked if they had made any decision about the trees to the rear of the property which border his back garden.

[5] On 22 June 2023 he wrote again, referring to his two previous letters and indicating that no response had been received. Mr Marks asked the applicants to respond as soon as possible with their proposals.

[6] Over a year later, on 1 July 2024, Mr Marks wrote again, referring to his three previous unanswered pieces of correspondence. He stated:

> "I am now suggesting that we approach the Citizens Advice Bureau or some other independent mediator to see if we can come to an outcome which suits us both. Please let me have your response asap so we can bring this to a closure."

[7] On 9 July 2024 Mr Marks wrote for a fifth time, advising the applicants that he was now referring the matter to the council under the High Hedges Act and enclosing a copy of his application.

[8] The notice party submitted his complaint to the council on 9 July 2024 and paid the requisite fee of £360. Attached to the complaint were photographs of the trees in question. He described the following:

> "Significant barrier to light in my dining room and TV room but also to my kitchen and conservatory to a slightly lesser extent. Rear garden is also deprived of light from early evening."

[9] The applicants responded to the council on 10 July 2024, stating a belief that the claim advanced by Mr Marks was vexatious and making the following points:

(i) The trees were already there when Mr Marks purchased his property in 1999;

(ii) Even before his house was built the trees were present and were approximately six metres tall;

(iii) The trees do not affect the reasonable enjoyment of the property;

(iv) The complaint has been made as a result of personal issue which Mr Marks has with the applicants, following a claim of adverse possession of a piece of land in the summer of 2020;

(v) Mr Marks has his own trees along the boundary which are even taller than the subject trees;

(vi) To destroy the subject trees would cause harm to wildlife and to the applicants' property.

[10] On 16 July 2024 Ms McKinley, Senior Environmental Health Officer with the council, wrote to the applicants enclosing a questionnaire for completion and inviting comments on the complaint. This letter explained that the council is required to determine:

(i) Whether the hedge is adversely affecting the complainant's reasonable enjoyment of his property by acting as a barrier to light; and

(ii) If so, what remedial action, if any, should be taken.

[11] On 30 July 2024 the applicants replied to the council stating that, in their opinion, Mr Marks had not taken all reasonable steps to resolve the matter, including by the provision of a mediator, and repeated the points made in previous correspondence.

[12] The applicants raised a query as to whether the council had accepted the complaint and it was confirmed, by an email dated 23 August 2024, that it had been accepted.

[13] The council carried out a site visit on 29 August. Shortly thereafter, on 6 September 2024, the applicants wrote confirming that, having considered the "High Hedges Act (Northern Ireland) 2011 – Technical Guidance", they had decided to cut some of the trees to the height they were when first topped.

The decision of 9 October 2024

[14] On 9 October 2024 the council issued a letter, its case report and a remedial notice under the 2011 Act. Having considered the representations of the parties, and the evidence, it concluded that the hedge was causing significant obstruction of daylight and sunlight to several rooms within the notice party's property. Applying the Technical Guidance, the hedge was taller than the recommended height and was having a significant impact on the property, a finding that was reinforced by the site visit. It was determined that the first five evergreen trees closest to the road were having the most significant impact and would have to be reduced in height to rectify the problem.

[15] The remedial notice required that that portion of the hedge be reduced to a height not exceeding four metres above ground level within six months of the operative date of the notice, being 14 November 2024. Following this, it was required that the hedge be maintained so it did not exceed 4.5 metres in height.

[16] The parties were informed of their right to appeal to the Northern Ireland Valuation Tribunal ('NIVT') in respect of the remedial notice.

[17] The detailed case report provided both the applicants and the notice party with the council's analysis and findings in relation to the height of the trees in question and their impact on the light to the windows of the notice party's property.

[18] The trees were cut by contractors appointed by the applicants on 8 November 2024.

The applicants' complaint

[19] On 15 October 2024 the applicants complained that the remedial notice ought never to have been issued since the council ought not to have accepted the complaint. Specifically, it was alleged that the complainant had failed to take all reasonable steps resolve the matter, including by the appointment of a mediator.

[20] The applicants were dissatisfied with the council's response and proceeded to stage two of the council's complaints policy. On 19 December 2024, Sinead Murphy, Director of Sustainability and Environment, reviewed the complaint and replied, noting that the notice party had sought to inform the applicants on four occasions of his concerns and that he took reasonable steps to have the matter resolved before pursuing the statutory complaint to the council.

[21] Ms Murphy concluded that the remedial notice was lawfully issued and any issue relating to the height of the hedge could be dealt with through the appeal process.

[22] The applicants referred the matter to the Northern Ireland Public Services Ombudsman ('NIPSO') and appealed against the remedial notice to the NIVT. Prior to the hearing of the leave application, the court was informed that the appeal to the NIVT had been withdrawn.

The grounds for judicial review

[23] The applicants seek to impugn the decisions of the council on the following grounds:

(i) Illegality

It is argued that the council unlawfully exercised its discretion to accept the notice party's complaint in circumstances where he had not taken all reasonable steps to resolve the matter.

(ii) Irrationality

It is similarly contended that the decision to accept the complaint was not one which any reasonable council could have taken.

(iii) Procedural unfairness

The applicants say that the procedure adopted by the council is unfair as it is biased in favour of high hedge complainants.

(iv) Proportionality

The applicants argue that their rights under article 1 of the First Protocol and under article 8 of the ECHR have been breached by reason of a disproportionate interference with their right to enjoy their property and family life.

(v) Bad faith

The allegation of bad faith is made against the notice party, rather than the proposed respondent, and is grounded on his alleged failure to take all reasonable steps and also on the timing of his making of a complaint.

The test for leave

[24] It is incumbent upon an applicant, at the leave stage, to establish an arguable case with realistic prospects of success which is not subject to a discretionary bar such as a delay or alternative remedy.

The statutory framework

[25] The 2011 Act applies to a complaint made by the owners or occupiers of domestic property which:

> "alleges that the complainant's reasonable enjoyment of that property is being adversely affected by the height of a high hedge situated on land owned or occupied by another person." (section 1(1)(b))

[26] Section 2(1) of the 2011 Act defines "high hedge" as meaning:

"so much of a barrier to light as—

(a) is formed wholly or predominantly by a line of two or more evergreens; and

(b) rises to a height of more than two metres above ground level."

[27] Section 3 of the 2011 Act provides:

"(1) This section has effect where a complaint to which this Act applies—

(a) is made to the council; and

(b) is accompanied by such fee (if any) as the council may determine.

(2) If the council considers—

(a) that the complainant has not taken all reasonable steps to resolve the matters complained of without proceeding by way of such a complaint to the council, or

(b) that the complaint is frivolous or vexatious,

the council may decide that the complaint should not be proceeded with.

(3) If the council does not so decide, it must decide—

(a) whether the height of the high hedge specified in the complaint is adversely affecting the complainant's reasonable enjoyment of the domestic property so specified; and

(b) if so, what action (if any) should be taken in relation to that hedge, in pursuance of a remedial notice under section 5, with a view to remedying the adverse effect or preventing its recurrence.

(4) If the council decides under subsection (3) that action should be taken as mentioned in paragraph (b) of that subsection, it must as soon as is reasonably practicable—

(a) issue a remedial notice under section 5 implementing its decision;

(b) send a copy of that notice to the following persons, namely—

(i) every complainant; and

(ii) every owner and every occupier of the neighbouring land; and

(c) notify each of those persons of the reasons for its decision.

(5) If the council—

(a) decides that the complaint should not be proceeded with, or

(b) decides either or both of the issues specified in subsection (3) otherwise than in the complainant's favour,

it must, as soon as is reasonably practicable, notify the appropriate person or persons of any such decision and of the council's reasons for it.

(6) For the purposes of subsection (5)—

(a) every complainant is an appropriate person in relation to a decision falling within paragraph (a) or (b) of that subsection; and

(b) every owner and every occupier of the neighbouring land is an appropriate person in relation to a decision falling within paragraph (b) of that subsection."

[28] Section 4 empowers the Department for Agriculture, Environment and Rural Affairs to make regulations to prescribe fees in respect of section 3 complaints. By section 4(2), any fee received must be refunded when a remedial notice is issued by the council and takes effect. Under section 4(4), regulations may be made making provision for the payment of a fee to the council by the owner of occupier of neighbouring land when a remedial notice is issued. The fees regime is to be found

in the High Hedges (Fee) Regulations (Northern Ireland) 2012 and the High Hedges (Fee Transfer) Regulations (Northern Ireland) 2012.

[29] Section 5 is concerned with remedial notices:

> "(1) For the purposes of this Act a remedial notice is a notice—
>
> (a) issued by the council in respect of a complaint to which this Act applies; and
>
> (b) stating the matters mentioned in subsection (2).
>
> (2) Those matters are—
>
> (a) that a complaint has been made to the council under this Act about a high hedge specified in the notice which is situated on land so specified;
>
> (b) that the council has decided that the height of that hedge is adversely affecting the complainant's reasonable enjoyment of the domestic property specified in the notice;
>
> (c) the initial action that must be taken in relation to that hedge before the end of the compliance period;
>
> (d) any preventative action that the council considers must be taken in relation to that hedge at times following the end of that period while the hedge remains on the land; and
>
> (e) the consequences under sections 10 and 12 of a failure to comply with the notice.
>
> (3) The action specified in a remedial notice is not to require or involve—
>
> (a) a reduction in the height of the hedge to less than two metres above ground level; or
>
> (b) the removal of the hedge.
>
> (4) A remedial notice shall take effect on its operative date.

(5) "The operative date" of a remedial notice is such date (falling at least 28 days after that on which the notice is issued) as is specified in the notice as the date on which it is to take effect.

(6) "The compliance period" in the case of a remedial notice is such reasonable period as is specified in the notice for the purposes of subsection (2)(c) as the period within which the action so specified is to be taken; and that period shall begin with the operative date of the notice.

(7) Subsections (4) to (6) have effect in relation to a remedial notice subject to—

(a) the exercise of any power of the council under section 6; and

(b) the operation of sections 7 to 8 in relation to the notice.

(8) While a remedial notice has effect, the notice—

(a) shall be a statutory charge; and

(b) shall be binding on every person who is for the time being an owner or occupier of the land specified in the notice as the land where the hedge in question is situated.

(9) In this Act—

"initial action" means remedial action or preventative action, or both;

"remedial action" means action to remedy the adverse effect of the height of the hedge on the complainant's reasonable enjoyment of the domestic property in respect of which the complaint was made; and

"preventative action" means action to prevent the recurrence of the adverse effect."

[30] Section 7 gives a right of appeal to the NIVT to either a complainant or the owner or occupier of neighbouring land in respect of the issue of a remedial notice. Regulation 5B of the Valuation Tribunal Rules (Northern Ireland) 2007 provides that an appeal can be brought of any of the following grounds:

(i) The height of the high hedge specified in the remedial notice is not adversely affecting the complainant's reasonable enjoyment of the property;

(ii) The initial action in the remedial notice is insufficient to remedy the adverse effect;

(iii) The initial action in the remedial notice exceeds what is necessary or appropriate to remedy the adverse effect; and

(iv) The period specified in the remedial notice for taking the initial action is not what should reasonably be allowed.

[31] Section 15 of the 2011 Act adds a new paragraph 49 to Schedule 1 to the Land Registration Act (Northern Ireland) 1970 to add a remedial notice and any liability to pay fees under the 2011 Act to the list of statutory charges.

Guidance

[32] The Department has issued non-statutory Guidance for Councils setting out its policy advice on the administration of complaints under the 2011 Act. It indicates that potential complainants are required to attempt to resolve such a problem with their neighbour prior to asking the council to investigate. The use of the legislation is described as a "last resort."

[33] The Guidance states:

> "What steps people should have taken before approaching the council will vary from case to case, depending on the circumstances. However it will not be sufficient for people to claim that their neighbour is unapproachable. In some cases the people concerned might wish to consider trying mediation. To facilitate mediation, a mutual acquaintance or locally respected person may be able to act as mediator or a voluntary or commercial mediation provider may be approached. This is a quick and informal means of resolving disputes – with a high rate of success, but it works best where people willingly participate. For this reason, it is not a compulsory part of the process.
>
> In other cases, where communication has completely broken down, a couple of exchanges of letters might be all the council can reasonably expect, but evidence should be provided that at least one letter has been received by the hedge owner"

[34] In a case where a complaint has been made the Guidance advises:

> "The owner and occupier of the land in question should have been forewarned that failure to negotiate a solution would lead to the matter being referred to the council and so the complaint should not come as a surprise."

[35] The councils have issued Guidance for Complainants which also references the need to take reasonable steps to resolve the problem. It states that "you may wish to consider the use of mediation."

Alternative remedy

[36] In *Re McAleenon's Application* [2024] UKSC 31, the Supreme Court stated:

> "A court may refuse to grant leave to apply for judicial review or refuse a remedy at the substantive hearing if a suitable alternative remedy exists but the claimant has failed to use it. As stated in *R (Glencore Energy UK Ltd) v Revenue and Customs Comrs* [2017] EWCA Civ 1716; [2017] 4 WLR 213, para 55, "judicial review in the High Court is ordinarily a remedy of last resort, to ensure that the rule of law is respected where no other procedure is suitable to achieve that objective." If other means of redress are conveniently and effectively available, they ought ordinarily to be used before resort to judicial review: *Kay v Lambeth London Borough Council* [2006] UKHL 10; [2006] 2 AC 465, para 30; *R (Watch Tower Bible & Tract Society of Britain) v Charity Commission* [2016] EWCA Civ 154; [2016] 1 WLR 2625, para 19." (para [50])

[37] In relation to statutory appeal procedures, the court continued:

> "an appeal will in ordinary circumstances be regarded as a suitable alternative remedy in relation to such decisions which ought to be pursued rather than having resort to judicial review" (para [51])

[38] In this case, the proposed respondent accepts that the NIVT does not have jurisdiction to determine whether a remedial notice was lawfully issued but contends that, in part, the applicants' case represents a challenge to the merits of the notice which ought to be pursued by way of an appeal under section 7 of the 2011 Act.

An academic challenge?

[39] The proposed respondent points to the fact that the applicants have carried out works to the hedge in compliance with the terms of the remedial notice and therefore any judicial review challenge is rendered academic in light of the principle in *R v Home Secretary ex p Salem* [1999] 1 AC 450.

Consideration

[40] The argument that the applicants' case is academic is not well-founded. The remedial notice takes effect as a statutory charge and therefore constitutes a restriction on the use of the premises. This restriction will pertain and bind future owners and it cannot therefore be said that the challenge to the notice is purely academic in nature.

[41] Section 3(2) of the 2011 Act gives the council a discretion whether or not to accept a complaint. It may decide not to proceed with such a complaint in certain circumstances, including when it considers that the complainant has not taken all reasonable steps to resolve the matters complained of. It is a matter for the council to determine, acting lawfully and rationally.

[42] A judicial review court, exercising its supervisory jurisdiction, will only intervene in relation to the exercise of such a discretion where the decision is infected by an error of law or when the decision maker has acted irrationally in the *Wednesbury* sense.

[43] In this case, the exercise of the section 3(2) discretion by the council must be seen in light of the four unanswered pieces of correspondence sent by the notice party to the applicants. In each of these, the issue of the height of the hedge and the impact caused thereby is raised by Mr Marks. No response is sent by the applicants. The correspondence of 1 July 2024 raises the possibility of a mediator being appointed and, despite the importance which the applicants now seek to place on this potential means of dispute resolution, no response was made to this invitation. The applicants now seek to argue that the notice party ought to have 'provided' a mediator which makes no sense in the context of a process which can only be entered into consensually.

[44] Neither the statute nor any of the guidance issued suggest that mediation it itself a necessary or mandatory step. It is one potential means of dispute resolution which the parties may consider or seek to use, not a precondition to the making of complaint.

[45] The applicants also complain that they were not 'forewarned' of the notice party's intention to refer the matter to the council. Whilst it is true that Mr Marks did not allude to a complaint to the council until his fifth piece of correspondence, which included a copy of the complaint made, he did write four unanswered letters which made it clear that there was an issue which required to be addressed. It could scarcely have come as a surprise to the applicants that the notice party would take some further action since he had been writing, without response, for over a year. There is no statutory requirement to put the other party on notice of intention to make a

complaint. This may be a factor to take into account in considering how to exercise the section 3(2) discretion but it is by no means a condition precedent to the acceptance of a complaint. The Guidance document is merely that – it does not have the force of law. The council was entitled to arrive at the conclusion that "all reasonable steps" had been taken in light of the evidence presented to it.

[46] There is no arguable basis for the contention that the decision to accept the complaint was either unlawful or irrational. The council correctly directed itself in law, took into account all material considerations and made an entirely rational decision in so doing.

[47] The evidence in this case reveals that the council engaged with both parties, afforded an opportunity to make representations to each and attended at a site visit. It then provided a reasoned conclusion on 9 October 2024 by way of its letter and case report. There is no basis whatsoever to contend that the process was somehow infected by procedural unfairness.

[48] As a result, it will be apparent that the council's decision of 19 December 2024, rejecting the applicants' complaint, was also entirely lawful and rational.

[49] Any complaint that the primary legislation or the regulations made thereunder themselves give rise to unfairness cannot be levelled against the council. It is obliged, as a matter of law, to give effect to the rules which are contained within these pieces of legislation.

[50] The essence of the applicants' proportionality argument is set out as follows in their skeleton argument:

> "The decision of the proposed Respondent…is disproportionate as the restriction to the right of the Applicants to peacefully enjoy their possession (Art. 1 of the First Protocol of the ECHR) by forcing them to cut their trees down to 4 m and damage the countryside setting, is not in the public interest and was not an essential restriction."

[51] In support of this proposition, the applicants claim that the notice party is responsible for the reduction of the light into his property because he constructed an extension to his house without the requisite planning consent. Reliance is placed on Planning Policy Statement 21, policy CTY13 – Integration and Design of Buildings in the Countryside and, it is said, the council ought to have taken it into consideration in making its determination. The applicants make the case that the impact of the remedial notice is such as to unreasonably interfere with their enjoyment of their own property and is therefore disproportionate.

[52] The applicants' claim of proportionality falls squarely within the jurisdiction of the NIVT on an appeal under section 7 of the 2011 Act. Firstly, it concerns the issue of the complainant's reasonable enjoyment of his property and secondly, the question of whether the initial action set out in the remedial notice was necessary and appropriate to remedy the adverse effect. Whilst the NIVT does not have jurisdiction to consider whether the council's decision to accept the complaint was lawful, it does have jurisdiction to consider the issues which underlie the claim of want of proportionality. It must be noted that the NIVT is itself a "court or tribunal" within the meaning of section 6(3)(a) of the Human Rights Act 1998 and is therefore prohibited from acting in a way which is incompatible with a Convention right. The arguments which the applicants seek to make under this ground of challenge should properly be advanced by way of the statutory appeal route.

[53] The applicants enjoy an alternative and effective remedy in this regard. Whether or not they chose to pursue it was entirely a matter for them. In light of the decision in *McAleenon*, leave to apply for judicial review on this ground is refused.

[54] The applicants' claim of bad faith is untenable. Any claim of this nature would have to be advanced against the proposed respondent rather than the notice party. No such basis has been pleaded nor evidenced. This ground of challenge is unarguable.

Public interest

[55] In their written argument and at hearing, the applicants have dilated at length on the question of the public interest in the area of the high hedges legislation. This has included criticism of the consultation process and a claim that the legislation ought to be amended to reflect a better balance between neighbouring property owners. It is also suggested that the NIVT has failed to show sufficient concern for environmental harm in a number of its reported decisions.

[56] These points may or may not have any substance and are issues which the applicants may wish to raise with political representatives. What is clear, however, is that they form no part of this judicial review leave application as pleaded in the Order 53 statement.

Conclusion

[57] For the reasons set out, the application for leave to apply for judicial review is dismissed.