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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 MID-ULSTER DISTRICT COUNCIL FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE DEPARTMENT FOR COMMUNITIES

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RULING ON RELIEF AND COSTS

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Peter Oldham KC and John Maxwell (instructed by PA Duffy & Co, Solicitors) for the applicant
Peter Hopkins KC (instructed by the Departmental Solicitor's Office) for the respondent

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SCOFFIELD J

Introduction

[1] This ruling follows the judgment on the substance of the applicant's judicial review application: [2025] NIKB 20 ("the substantive judgment"). The applicant succeeded in its challenge to the setting, by the Department for Communities, of its 2022/23 rate support grant (RSG) budget at £8.924m in December 2022. It did so on the single ground that the Department had failed in its duty under section 1 of the Rural Needs Act (Northern Ireland) 2016 to have due regard to rural needs in taking its decision. This judgment should be read in conjunction with the substantive judgment; and the same terminology and abbreviations are used in each.

[2] This judgment addresses the issue of consequential orders, dealing with relief and costs, which has been the subject of written argument further to the substantive judgment in the case. I am again grateful to counsel for both parties for their helpful submissions.

The parties' submissions on relief

[3] The applicant contends that it is entitled to both declaratory relief and an order of *certiorari* quashing the Department's decision. The form of the declaration proposed by the applicant is in the following terms:

> "The respondent unlawfully failed to have due regard to rural needs, as required by section 1 of the Rural Needs Act (Northern Ireland) 2016, in taking its decision of, or of about, 22 December 2022 to set its rate support grant budget for 2022/23 at £8.924m ("the Decision")."

[4] The Council further seeks an order quashing the Department's decision on the basis that the starting point, and general approach, is that if a decision is unlawfully taken it should be quashed so that the decision-maker may lawfully redetermine the matter. Justice usually so requires: see, by way of example, *R (Edwards) v Environment Agency* [2008] UKHL 22, per Lord Hoffman, at para [63].

[5] Noting that, in the substantive judgment, the court said (at para [145]) that the submissions on relief should bear in mind "the respondent's point that, even by the time of the hearing in this case, the relevant financial year had ended, with final budget allocations to all departments having been made and all money spent", the applicant makes a number of further submissions. These can be briefly summarised as follows:

(a) The passage of time is no reason in itself to refuse relief, particularly where the application for judicial review was made timeously and where any delay thereafter is in large measure outwith the applicant's control. If delay in itself could thwart relief, this would be unprincipled and would present a perverse incentive for respondents to 'string out' judicial review proceedings.

(b) The fact of the relevant financial year having ended and the question of whether or not the relevant funds have been spent should also not weigh against the grant of intrusive relief, for the further reasons discussed below.

(c) Certiorari should be granted given the seriousness of the breach of duty, in light of the purpose of the 2016 Act (which is aimed at requiring special duty of consideration for those whom the legislature regards as disadvantaged); and in view of the Department's "resistance to proper participation in the legal process" (by reference to the court's comments on the duty of candour at paras [139]-[145] of the substantive judgment) demonstrating a lack of cognizance of the seriousness of acting unlawfully. In the words of the Council's further written submissions: "A quashing order is a necessary and proper discipline for it [the Department]."

[6] In advancing the second of the arguments identified above, the Council relies on the case of *R (Hunt) v North Somerset Council* [2015] UKSC 51. That was a claim against an English local authority. Such authorities are required by section 31A of the Local Government Finance Act 1992 to set an annual budget (or, in the statutory language, make a council tax calculation) for every financial year; and to do so before the proceeding 11 March. The claimant challenged an aspect of the setting of the authority's budget for 2012/13. The Court of Appeal considered that an order quashing the particular budget allocation in question would require the quashing of the council's entire revenue budget for that financial year and, since that year was over, would amount to relief which was drastic and close to absurd. Reference was made to the Court of Appeal's decision not to grant a quashing order in the judgment of Lord Toulson in the Supreme Court (see para [10]); albeit that particular outcome was not appealed to the Supreme Court. The appeal focused on the issues of whether declaratory relief should be granted and costs.

[7] The meat of the applicant's submissions in the present case is that there is a strong *contrast* to be drawn between the circumstances in *Hunt* and here. In this case, the applicant contends that an order of certiorari "would not require the unravelling of anything" or taking a decision after the time when it may be taken as a matter of either law or fact. That is because, unlike in *Hunt*, the Department here had no statutory obligation to create a budget for RSG for 2022/23 *by a particular date*. Under section 27 of the 2011 Act it was and is only an obligation to "make a grant" (which may be nil) "for each financial year" (see para [18] of the substantive judgment). This need not necessarily be *during* that financial year; and nothing in the 2011 Act or 2011 Regulations provides otherwise.

[8] As to the facts, the Council argues that in this case the RSG allocation was "a tiny proportion" of the Department's entire budget (in the order of 1%) and, even if this were to double, it would still be a very small proportion of the overall amount. The Department has not provided evidence to the effect that its budgeted funds for 2022/23 have all been spent (and, if unspent, what became of them). Nor has it made the case that the outcome of any reconsideration would inevitably be the same in light of a lack of funds. Moreover, the applicant says that it is wrong to focus on the funding provided for the Department's 2022/23 budget, when the right question is whether *as matters stand now* there is any financial issue which would preclude proper reconsideration.

[9] The respondent does not oppose the grant of declaratory relief in the terms proposed by the applicant (see para [3] above). It does, however, strongly oppose the application for an order of certiorari. It draws attention to the fact that the grant of any remedy in judicial review is discretionary and that the court can take into account matters including the needs of good administration and the relative utility of granting any particular form of relief. It also contends that the situation in the present case is not materially distinguishable from that in the *Hunt* litigation, discussed above. Whether or not the respondent had any statutory obligation to create a budget allocation for RSG at a particular time, the impugned decision relates

to a budget for a financial year which is now long past. In its submission, this is a case where, like in the *Edwards* case, discretion should be exercised against quashing the impugned decision because to do so now would be a waste of time and resources.

[10] The respondent further disputes that detailed additional evidence is required in this regard because it is well known, and the court can take judicial notice of, "the reality" around the setting of departmental budgets. During the period when the devolved administration was in stasis, Parliament passed successive annual Budget Acts and the Northern Ireland Assembly has since done likewise, each making provision for budgets for particular, discrete financial years.

[11] In response, the Council maintains that there is nothing in legal terms, or even as a matter of fact, which means that a new RSG allocation could not now be made in respect of 2022/23. It contends that there must be flexibility in the budget for the current financial year (which has only recently begun) and that, if it truly be the case that the Department has no spare funding at this point, this could be part of the respondent's reasoning in the course of reconsidering the matter.

Determination on relief

[12] I will grant a declaration in the terms proposed by the applicant. I do so on the basis that this is not opposed by the respondent but, in any event, in view of the observations in para [12] of the judgment of Lord Toulson in the *Hunt* case, as follows:

> "The judgment of the Court of Appeal itself ruled that the respondent acted unlawfully, and the authority of the judgment would be no greater or less by making or not making a declaration in the form of the order to the same effect. *However, in circumstances where a public body has acted unlawfully but where it is not appropriate to make a mandatory, prohibitory or quashing order, it will usually be appropriate to make some form of declaratory order to reflect the court's finding*. In some cases it may be sufficient to make no order except as to costs; but simply to dismiss the claim when there has been a finding of illegality is likely to convey a misleading impression and to leave the claimant with an understandable sense of injustice. That said, there is no "must" about making a declaratory order, and if a party who has the benefit of experienced legal representation does not seek a declaratory order, the court is under no obligation to make or suggest it."
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> [italicised emphasis added]

[13] The declaration may add little to the terms of the court's substantive judgment but it is right that the applicant is granted such relief to mark the court's finding and in circumstances where, for the reasons given below, I have determined not to accede to the application for an order of certiorari.

[14] There is force in the applicant's argument summarised at paragraph [5](a) above. The passage of time is of itself no reason to withhold the grant of any particular relief in this case. The more important issue is the practicality of requiring a redetermination at this remove by reason of successive budgetary developments in the meantime.

[15] I do not consider the factors relied upon by the applicant which are summarised at paragraph [5](c) above to warrant any significant weight. The seriousness of the breach is underscored by the judgement of the court and the declaration to be granted. A quashing order is not to be granted on a punitive basis, where it would otherwise not be granted in the interests of justice or good administration. In particular, the court's disapprobation of a party's conduct in the course of the litigation is a matter more appropriately dealt with by way of penalisation in costs rather than the grant of a prerogative order which may have much wider effects on the public interest.

[16] The real issue therefore is whether matters have moved on to such a degree that it would not be appropriate for the court to require the Department to revisit a funding allocation in respect of a financial year which concluded some time ago. The applicant's attempts to distinguish the *Hunt* case are impressive but, in my view, ultimately unpersuasive. There is arguably an implied legal obligation on the Department to make any RSG funding grant before, or in the course of, the financial year to which that grant relates (and therefore to allocate the budget before, or at least during, that financial year). It would be odd if it was legally open to the Department to determine and provide funding in respect of a financial year only well after that year had expired. (I recognise, of course, that this is not the position in the present case where at least the majority of the allocation was determined and paid in the course of the relevant financial year.) However, even if it is not the case that there is a legal obligation to determine the allocation before or during the relevant year under the 2011 Act or 2011 Regulations, the practical reality is that that is how the system has operated. Indeed, the applicant argued that fairness required the decision to be taken in advance of it striking its rate for the relevant year.

[17] There has been some argument in the latest submissions about whether and how it would be possible for an additional payment to be made by the Department now in respect of the 2022/23 year. Assuming that nothing in the 2011 Act or Regulations precludes this, there is still the question of appropriate authorisation for such payment in order to comply with statutory and government spending requirements. There has been insufficient argument to determine this conclusively; and I do not consider it would be proportionate to invite further detailed argument on the matter. However, it appears to me on an initial analysis that, if the

Department required additional funds, this would have to be authorised by Budget Act to be issued out of the Consolidated Fund and applied to the service of the specified financial year: see section 5 of the Government Resources and Accounts Act (Northern Ireland) 2001 ("the 2001 Act"). RSG is not a standing service which is directly payable out of the Consolidated Fund under a statutory provision for the purposes of section 3 of the 2001 Act.

[18] Alternatively, if the Department had available resources which were free to be used for such a purpose, this would likely still require to be authorised for use by Budget Act: see section 6(1) of the 2001 Act. Again, RSG is not simply payable out of the Consolidated Fund under a statutory provision for the purposes of section 6(2)-(3). The circumstances under which resources may be used without a Budget Act under section 7 do not arise; although it may be possible, subject to complying with the statutory requirements, to use accruing resources for this purpose under section 8 if such resources were available. It is unlikely that there is sufficient flexibility within the presently allocated and approved budget to redirect significant funds for this purpose. I proceed on the basis that, if there was available money and sufficient political will, the relevant authorisation could somehow be achieved; but that this may not necessarily be straightforward and would be more complex and time-consuming than the Council's submissions assume.

[19] The evidence is to the effect that the Department was at all material times operating under very significant funding constraints in circumstances where it did not have sufficient funds to meet all of the calls upon its resources in the way it would otherwise have wished, nor did it expect to have sufficient funds at any time in the foreseeable future. That was the entire context of this case. I proceed on the basis that it is highly unlikely that the Department had remaining funds available at the end of the 2022/23 year; and that, even if that were so, it is even more unlikely that these have not been reallocated and spent in the meantime (whether internally or through reallocation by DoF). The court is aware from other litigation in relation to DfC funding that this is not an isolated issue; and there remains general pressure on public spending.

[20] In my view, a reasonably strong analogy can be drawn between the situation in this case and the approach of the Court of Appeal in the *Hunt* case (which, as noted above, was not appealed on the issue of the non-grant of a quashing order). Rimer LJ, giving the judgment of the court, said (see [2013] EWCA Civ 1320, at paras [92]-[94]):

> "92. Mr Wolfe is no doubt right that in theory a quashing order could follow, but we are far from convinced that it should. What is being sought is the quashing of a decision to reduce part of the Council's revenue budget in relation to its youth services provision for a financial year that, at the date of the hearing of the appeal, had expired nearly three months before. For

ourselves, we cannot see how that decision can be quashed without also quashing the Council's decision to approve the entire revenue budget for 2012/2013, of which it formed part. To make an order of that nature in relation to a year that has now expired, and in respect of which Council Tax has been demanded and levied, would be to make a drastic order.

93. Even, however, if the quashing order might be confined to the youth services element of the budget, the logic of such an order, if made, is presumably that the Council must re-take the decision as to the proposed budget reduction, having first carried out an appropriate consultation and also having had fresh due regard for the PSED. To re-take the decision the Council must, therefore, presumably wind itself back in time to a world that no longer is and then consult appropriately, and consider the equality impact, about proposed changes which have in the meantime, at least in part, already been carried out. If the outcome were to be, for example, that the proposed budget reduction should not be made, the Council might then be faced with a question as to the raising of finance for the expired year 2012/13, whereas there can now be no question of raising any Council tax to that end.

94. Any suggestion that the Council should go through such an artificial process appears to us to be close to absurd. It is now too late to unwind what has been done. Mr Wilkinson makes telling points in the passage from his witness statement that we have quoted as to why this is not a case in which the clock can now be turned back and we accept their force. Judicial review is a discretionary remedy and, even though we have accepted the substantive points that Mr Hunt has advanced, we are of the firm view that he ought not to be granted the quashing order for which he asks. To do so would be detrimental to good administration."

[21] The present cases is obviously not on all fours with the situation in *Hunt*, not least since any additional money now required would not be raised through local government taxation but would have to be found elsewhere from the Department's current budget or (more realistically) through further allocation from DoF. However, the central thrust of the Court of Appeal's concerns apply *mutatis mutandis* in this case. The relevant financial year has now passed. Given that the RSG allocation was made from a finite pot, it also seems to me unrealistic to expect that that allocation could be quashed without some knock-on effects on the Department's

budget for the 2022/23 year, even if the RSG funding was only a small proportion of that budget.

[22] Even if that is not correct, the Department would be required to retake a decision 'winding itself back in time to a world that no longer exists.' This would involve consulting about proposed changes which have in the meantime occurred and which have also no doubt led to a range of further actions on the part of others (including the Council) which may have mitigated or exacerbated any adverse effects on rural dwellers. I do not consider that it is necessary or would be an efficient use of court time and resources, to insist on further evidence in relation to all of these matters. Assuming that the RSG allocation complained of did have adverse effects on rural dwellers which might have been influential in the decision-making if considered at the appropriate time, those effects should have been taken into account in further successive RSG budget allocations (or, if they have not already, in future such allocations) in light of the judgment of the court. To require these also to be taken into account 'prospectively', in an artificial exercise as described above, may result in their being double counted.

[23] In view of the foregoing, as did the Court of Appeal in *Hunt*, in the exercise of my discretion I decline to grant an order of certiorari on the basis that, in practical terms (even if not legally impossible), it is now too late to unwind what has been done and that to require the Department to seek to do so would be detrimental to good administration.

[24] For the avoidance of doubt, I also make clear that I too consider that it is correct in theory that a quashing order could be made; and that this may be the proper remedy in an appropriate case even where the funding period to which the decision relates has expired. It should also go without saying that the courts will be astute to identify and deal with any attempt on the part of public authorities to 'play for time' in the conduct of litigation as a result of such considerations.

The parties' submissions on costs

[25] On the issue of costs, the applicant relies upon the normal position being that costs follow the event (see RCJ Order 62, rule 3(3)). Where an applicant has obtained relief in judicial review proceedings, even if some of the grounds of claim do not succeed, "the burden of showing the full costs were in their favour should not be made with fall on respondent": see *Re Glass's Application* [2023] NIJB 454, at para [10]. It submits that it should recover its costs in full from the respondent.

[26] The respondent contends that there should be no order as to costs between the parties or, in the alternative, that any costs order in the applicant's favour should be in respect only of a modest percentage of the Council's costs, taking into account that the applicant succeeded only on one out of the four grounds advanced. It accepts that the burden falls upon it to satisfy the court that a full costs award should not be made in favour of the applicant. However, it also relies upon the *Glass* case -

which is broadly a case urging greater consideration of the use of split costs orders in this jurisdiction where significant time and costs are expended in pursuit of ultimately unsuccessful grounds – to suggest that, at most, the Council should recover only a proportion of its costs. In the respondent's submission, this should be less than the 50/50 apportionment in *Glass.*

[27] In support of this, the respondent draws attention to the factors that (a) the applicant lost on three of its four grounds of challenge; (b) most of the evidence and argument related to grounds on which the applicant lost (namely, irrationality and the section 75 challenge); and (c) the applicant's representatives were under an obligation to keep the strength and viability of all of the grounds under review (see *Glass*, at para [19]), including after the Court of Appeal decision in *McMinnis*, but they nonetheless continued to rely upon the section 75 ground (rather than abandoning it) after that judgment had been given.

Determination on costs

[28] The applicant has been successful in this case. Relief is being granted (see paras [12]-[13] above). The starting point is that costs should follow the event. There is force in the respondent's submission that the applicant has not been wholly successful and lost on three issues which took up a significant amount of the time and effort involved in the proceedings. However, that consideration is counterbalanced by following additional factors which are relevant in this case:

(i) First, it was reasonable for the applicant to pursue the unsuccessful grounds to full hearing. Leave was granted on each of the grounds, in the case of the section 75 ground after a contested hearing (see para [3] of the substantive judgment). Moreover, a small number of grounds were pursued. This was not an example of "over-enthusiastic" or "kitchen sink" pleading, such as was mentioned in para [16] in the *Glass* case.

(ii) Second, and very significantly, on the basis of the case-law as it stood at the time of the grant of leave and the oral hearing in this case, there was merit in the applicant's section 75 challenge (see paras [116], [121]-[122] and [126] of the substantive judgment).

(iii) Third, although the applicant persisted in maintaining the section 75 argument after the decision of the Court of Appeal in *McMinnis*, the vast majority of costs relating to this ground had already been incurred. There were some elements of the Court of Appeal judgment which were not entirely clear as to their effects (see paras [107]-[111] of the substantive judgment). In the circumstances, it was not unreasonable for the applicant to ask the court to rule on these matters, particularly in light of the second factor mentioned above.

(iv) Fourth, the respondent's case on the ground on which it lost was particularly weak and amounted to after-the-event justification (see para [89] of the substantive judgment). Although the respondent is critical of the applicant for pursuing (what it says were) weak grounds, had the respondent made an early concession on the rural needs issue, that may have obviated the need for argument on other issues, saved costs, and resulted in a reconsideration at a time when the relevant financial year was still in train.

(v) Fifth, another important consideration in the costs analysis is that additional costs were undoubtedly incurred by virtue of the unsatisfactory way in which the respondent placed its evidence before the court and the limited nature of the disclosure it initially made (see paras [118]-[119] and [139]-[141] of the substantive judgment). A significant amount of costs could have been saved if this had not occurred. The respondent's decision-making was only properly explained on affidavit after the hearing had concluded.

[29] Taking those matters into account, I have concluded that the limited nature of the applicant's success in this case should not displace the usual approach of costs following the event. I will order that the respondent therefore bear the applicant's costs of these proceedings up to the date of judgment.

[30] It is appropriate to consider separately the (hopefully relatively modest) additional costs which have arisen during this latest phase of the proceedings, namely the argument on the consequential issues of relief and costs. The respondent has broadly been successful on the first of these and the applicant has been successful on the second. Rather than seeking to apportion costs between the two issues, the appropriate approach appears to me to permit these costs to fall where they lie.

Conclusion

[31] For the reasons given above and in the substantive judgment, the application for judicial review will be allowed and the applicant will be granted a declaration in the terms already discussed. No further relief will be granted. The respondent will bear the applicant's reasonable costs of these proceedings up to the date of the substantive judgment, such costs to be taxed on the standard basis in default of agreement. There will be no order for costs between the parties in respect of costs arising consequent upon the substantive judgment.