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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 DOLORES McGUIGAN FOR JUDICIAL REVIEW

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

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Mr Hugh Southey KC and Ms L McMahon KC (instructed by Phoenix Law) for the Applicant
Dr Tony McGleenan KC and Mr Terence McCleave (instructed by Departmental Solicitor's Office) for the Respondent

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ROONEY J

Introduction

[1] The background to this application for judicial review is as detailed in my leave decision (see [2022] NIQB 38). The applicant seeks to challenge a decision of the Department for Communities ("the Department") dated 18 August 2021, in which it determined that consent should be refused under regulation 12 of the Burial Grounds Regulations (Northern Ireland) 1992 ("the 1992 Regulations") for the exhumation of the body of the applicant's deceased husband.

[2] The applicant also challenges the Department's policy entitled, "Revised Policy Guidance on Exhumations" ('2021 policy') upon which the impugned decision was based and submits that the decision and the 2021 policy are contrary to the applicant's rights as protected by article 8 of the European Convention on Human Rights ("ECHR").

[3] The applicant wishes for the remains of her husband to be exhumed so that he may be interred in the same grave as their daughter. The applicant's mother-in-law, who owns the exclusive rights of burial in the plot in which the deceased is buried,

has refused her consent to exhumation. Belfast City Council ("BCC") who is the owner of the relevant cemetery, has indicated that consent to exhumation is required from the Department, the deceased's nearest surviving relative and the owner of the rights of burial. It is also emphasised that pursuant to regulations 12 and 16 of the 1992 Regulations, a person causing or permitting the remains of a body to be exhumed, without first having obtained the written consent of the Department, is guilty of an offence.

[4] The application for leave to apply for judicial review was initially formulated on the basis that the exclusive rights of burial in the plot in which the deceased was buried were owned by the applicant's mother-in-law (the deceased's mother) who, as stated above, refused to permit exhumation. The applicant argued that in reaching its decision to refuse the applicant permission to exhume, the Department gave excessive weight to the property rights of the applicant's mother-in-law and, by applying an exceptional circumstances test, failed to properly engage and apply the balancing exercise as required by article 8 ECHR.

[5] The applicant issued judicial review proceedings on 17 November 2021. A contested leave hearing was convened on 31 March 2022. As stated, the court subsequently granted leave on 20 May 2022.

[6] Following the conclusion of the leave hearing and pursuant to my directions dated 20 May 2022, the parties agreed to a litigation timetable on 23 May 2022 in the following terms:

- A Devolution Notice was to be served by 6 June 2022;
- The applicant's solicitors were to serve BCC and Margaret McGuigan (the deceased's mother) with the relevant papers as notice parties by 6 June 2022;
- The respondent was to serve any affidavit evidence by 15 July 2022;
- The notice parties were to serve any evidence by 5 August 2022;
- The applicant was to serve any evidence in response by 26 August 2022;
- The applicant's skeleton argument was to be served by 9 September 2022;
- Agreed trial bundles were to be served by 9 September 2022;
- The respondent's skeleton argument was to be served by 23 September 2022; and
- An agreed bundle of authorities was to be served by 30 September 2022.

[7] Each of the aforementioned issues was to be addressed in advance of the proposed hearing date on 6 October 2022. The applicant, on receipt of the notice party's affidavit, lodged her second affidavit of the proceedings dated 30 August 2022. At the same time affidavit evidence was also served by the applicant's son. Thereafter both the applicant and her son served additional affidavit evidence on 15 September 2022 in response to a second affidavit which had been lodged on behalf of the Department. On receipt of the further evidence, the Department proceeded to serve its written submissions on 30 September 2022.

[8] For reasons beyond the control of the parties, the hearing date of 6 October 2022 was vacated. The matter was relisted for hearing on 21-22 March 2023 with a review to be scheduled on 20 February 2023. It is evident from the agreed timetable dated 23 May 2022 that the applicant was only given permission to serve rejoinder evidence in response to the affidavits of the respondent and the notice party. Such rejoinder evidence was served on 30 August 2022 and 15 September 2022. This adhered to the structured litigation timetable directed by the court.

[9] Notwithstanding the timetable, the applicant sought to serve two further affidavits from the applicant and her son, Pearse McGuigan. The proposed affidavits were sent to the Department and to the court office in an approved draft form via email on 19 February 2023. Sworn affidavits were then filed with the court on 21 February 2023. Importantly, the applicant took these steps without putting either the court or the parties on notice (aside from an email at 23:25hrs on the evening of 19 February 2023) and without seeking leave from the court.

[10] The said affidavits from the applicant (fourth affidavit) and Pearse McGuigan (third affidavit) were dated 20 February 2023 and sought to introduce further evidence relating to the disputed issues of fact which formed the basis of the judicial review proceedings.

[11] Following the applicant's attempt to file the said further affidavit evidence, the court invited the parties to submit position papers. In a position paper dated 7 March 2023, the Department submitted that the filing of the additional affidavit evidence amounted to a breach of Order 53 of the Rules of the Court of Judicature (Northern Ireland) 1980 ('RCJ') and the said litigation timetable as directed by the court. The Department emphasised that, without seeking the consent of the court, the applicant had sought to adduce additional affidavit evidence some six months after the last date set by the litigation timetable and 11 months after the contested leave hearing. Significantly, the attempt to adduce the additional evidence was made after the parties had settled their respective written submissions.

[12] On 21 March 2023 the matter was listed for hearing. During the hearing the court raised concerns about the continued viability of the judicial review proceedings. In particular, the court highlighted concerns about its ability to consider the application in light of the claimed breaches of the applicant's duty of candour, the alleged associated material non-disclosure/misrepresentation by the

applicant and the unclear factual position. Focus was also placed on the relevance of the changing nature of the applicant's case. The court did not give permission for the February affidavits to be formally admitted into evidence. Considering the difficulties associated with the applicant's challenge, the court explored the viability of alternative options with the parties. Ultimately, the court suggested that the parties should engage in mediation and listed the matter for a further review on 31 May 2023.

[13] Following correspondence between the applicant and the notice party, it became clear that the process of mediation was no longer a viable option. On the morning of the review hearing on 31 May 2023, the applicant served a further position paper which stated that, without a finding by the court that approval for exhumation had been unlawfully denied, exhumation would not be possible under the terms of regulation 12 of the 1992 Regulations unless consent had been granted by the owner of the exclusive rights of burial. The applicant also submitted that judicial review was the appropriate forum to resolve the issues, since public law relief had been sought, relying upon the decision of Treacy J in *Re Mullan's Application* [2016] NIQB 42. The applicant also argued that a fact-finding process was not required. In any event, in Convention cases, the applicant contended that the court could carry out a fact-finding process if necessary, citing *R(WA (Palestinian Territories)) v Secretary of State for the Home Department* [2021] 1WLR 2117 at [36].

Summary of the respondent's submissions

[14] The Department submits that the grant of leave was improperly obtained as a result of material non-disclosure and misrepresentation by the applicant. As stated by the Court of Appeal in *Taylor v Department for Communities* [2022] NICA 8, every judicial review applicant owes a duty of candour to the court from the commencement of the proceedings until their ultimate conclusion. This continuing duty includes an obligation to make full disclosure to the court of material facts and known impediments to the claim (Fordham, Judicial Review Handbook, 7th Edition, 2020 at para 10.3).

[15] Notwithstanding this duty of candour, the Department submits that, for the reasons considered in detail below, the factual premise as presented by the applicant to obtain the grant of leave, has fundamentally changed. The Department considers that the court is now faced with a "factual morass" to include conflicting, misleading and unreliable information which cannot properly be resolved in the forum of a judicial review hearing and, as such, this should lead the court in its discretion to set aside leave and dismiss the application.

[16] Secondly, the Department submits that the applicant has an appropriate alternative remedy in the form of private law proceedings. The applicant claims that an offer was made to her by the notice party, that she accepted the offer and that she acted to her detriment in reliance thereof. It is submitted that the available remedy provides a mechanism for the applicant to obtain relief and that the applicant should

take steps to pursue this remedy. Furthermore, the Department submits that following a proper review of the circumstances of this case, the decision of the Supreme Court in *McAleenon* [2024] UKSC 31 provides no assistance to the applicant.

[17] Thirdly, as stated by the Department, following a detailed analysis of the legal arguments, the substantive grounds of challenge advanced by the applicant are unsustainable and the application for judicial review should be dismissed accordingly. It is submitted that the 2021 Policy adheres to fundamental public law principles concerning the promulgation of policies and expressly preserves the Department's statutory discretion pursuant to regulation 12 of the 1992 Regulations. In the circumstances, the 2021 Policy displays no public law illegality. In relation to the decision of 18 August, when analysed in light of the circumstances of the case and the applicable principles, it is also proportionate and gives rise to no public law illegality. The Department also emphasises that any consent given pursuant to regulation 12 of the 1992 Regulations is permissive in nature and cannot override the legal entitlements of either the notice party or the BCC.

Summary of the applicant's submissions

[18] The applicant submits that the third affidavit of the applicant's son, Pearse McGuigan dated 20 February 2023, and the fourth affidavit of the applicant dated 20 February 2023 were filed in compliance with the applicant's duty of candour and should be admitted into evidence. The reason for the delay in filing the affidavits is explained within the affidavits. Also, it is argued that the Department and the notice party have had ample time and opportunity to respond to the contents of the affidavits.

[19] Although the applicant submits that the affidavit evidence in question should be admitted, it is proposed that the court may wish to consider the issue de bene esse. In effect, it is submitted that the submissions detailed below demonstrate that the applicant does not need to rely on the additional evidence in question.

[20] The applicant's current position is that the exclusive rights of burial are owned by the applicant's mother-in-law who has refused to permit the exhumation. The applicant therefore reverts to her original argument that the Department gave excessive weight to the property rights of the applicant's mother-in-law and, by applying an exceptional circumstances test, failed to apply the necessary balancing exercise as required by article 8 ECHR.

[21] The applicant further submits that, for the avoidance of doubt, she does not seek the exclusive rights of burial. She simply wishes to exhume and rebury her husband. It is obvious, according to the applicant, that to require her to seek such rights will more than likely worsen the relationship with her mother-in-law. The fact that the applicant does not seek the exclusive rights of burial does not exclude a proportionality assessment pursuant to article 8 ECHR. To the contrary, by applying

a balancing exercise as required by article 8, it is submitted that the body of the deceased should be exhumed and buried in the grave of their daughter.

[22] The applicant reaffirms the stated grounds of challenge. Firstly, the decision of the Department dated 18 August 2021 was based on a misdirection that the consent of the owner of the exclusive rights of burial was required for exhumation, save in exceptional circumstances. Article 8 of the Convention is plainly engaged. In making its decision, the Department failed to consider and assess whether the interference with the applicant's Convention rights was proportionate. The rights of the owner of the exclusive rights of burial, which are rights governed by contract, cannot disapply or otherwise avoid the obligations imposed by article 8.

[23] Secondly, it is claimed by the applicant that the 2021 Policy, by applying an exceptional circumstances test, limits the discretion of the Department in a manner which is not mandated by regulation 12 of the 1992 Regulations, and which is inconsistent with article 8. The effect is that both the 2021 policy and the impugned decision are unlawful.

[24] The applicant submits that a crucial element relating to whether the interference with the applicant's article 8 rights was justified (and hence whether there was violation) is that a proportionality assessment must be carried out, taking account of the all of the circumstances of the case including the likely wishes of the applicant's husband and the rights and wishes of relevant family members who may wish to be buried with him (see *Drašković v Montenegro* app 40597/17; *Dodšbo v Sweden* app 61564/00). Further, the balancing exercise must assess whether there is a less damaging alternative (*Sabanchiyeva v Russia app 38450/05*). Lastly, it is argued that the application of an exceptional circumstances test is not the same as the application of a proportionality test (*Huang v Secretary of State for the Home Department* [2007] 2 AC 167 at [20]).

[25] According to the applicant, the property rights of the notice party cannot assume priority over the applicant's article 8 rights. Both rights must be considered in the required balancing exercise, particularly when the property rights can only be claimed to the rights of burial in the grave and not ownership of the body of the applicant's husband. The notice party does not own the grave. Exhumation will not prevent the notice party from burying others in the grave. Also, exhumation can take place in a manner that protects the state of the grave, leaving it in an appropriate state after removal of the body. The public interest is therefore protected by preserving the sanctity of the grave and ensuring the buried human remains are treated with dignity and respect.

[26] The applicant acknowledges that there are factual issues in dispute between the applicant and her mother-in-law, Margaret McGuigan. However, the applicant maintains that there is no need for the court to resolve the facts in dispute. It is argued that the focus should be on what was known by the respondent at the date of its decision dated 18 August 2021. According to the applicant, the key matters

which are not in dispute are that the deceased is not buried with his daughter and that the assessment of all the relevant circumstances must inevitably lead to the conclusion that it would be disproportionate to refuse exhumation.

[27] Alternatively, if this submission is wrong, the applicant maintains that the court should conduct a fact-finding process to determine the article 8 claim.

[28] In relation to the respondent's argument that there is an alternative remedy available to the applicant, relying on *Re McAleenon's Application for Judicial Review* [2024] UKSC 31, the applicant argues that such proceedings would be of a different nature, would involve different issues and would be directed against another party. In essence, the applicant would be required to make a claim for the rights to burial, which she does not wish to pursue. In addition, any proceedings would not resolve the applicant's claim for breach of her article 8 rights and the unlawfulness of the Department's decision and the 2021 Policy.

[29] I will consider this application under the following headings:

(a) Set Aside Applications: The Legal Principles;

(b) Duty of candour and disputed issues of fact; and

(c) Substantive grounds of challenge;

(a) Set Aside Applications: The Legal Principles

[30] As detailed in the chronology above, during the course of these protracted proceedings, the Department brought an application to have the grant of leave set aside pursuant to Order 32 rule 8 RCJ and/or to the inherent jurisdiction of the High Court. In summary, it is submitted by the Department that the factual circumstances claimed by the applicant prior to the impugned decision have now changed significantly. The change in circumstances have arisen *after* the grant of leave and which, according to the Department, resulted from the material non-disclosure and misrepresentation on the part of the applicant.

[31] The respondent submits that on the basis of authorities such as *R v Secretary of State for the Home Department ex parte Al-Nafeesi* [1990] 2 WLUK 364 and *Re Savage and others' Applications* [1991] NI 153, material non-disclosure and misrepresentation represents a sufficient basis to set aside the grant of leave, if it is clear that the actions of the applicant, deliberately or otherwise, obscured a variety of issues that were central to the issue of leave. The Department submits that the material non-disclosure and misrepresentation of the applicant as detailed below therefore prevented the court from considering the grant of leave in its full context.

[32] In *Re Savage*, Carswell J recognised that the grant of leave could be set aside in cases involving either fraud or non-disclosure on the part of the applicant, stating at page 106 (d)-(f):

> "The first decision to which I have found any reference is that of Otton J in *R v Westminster City Council, ex parte Zestfair Ltd* (1987, unreported), where he was prepared to accept for the purposes of the application that the court has an inherent jurisdiction to set aside a grant of leave. He added the caveat:
>
> > 'However, it should be exercised only in very special circumstances such as fundamentally misconceived proceedings, or where leave has been granted where there has been either fraud on the part of the applicant … or non-disclosure of a material fact or facts, or where there is any misconception of law …'"

[33] Similarly, in *Al-Nafeesi*, the English Court of Appeal recognised that the grant of leave could be set aside on the basis of fraud, misrepresentation, or non-disclosure. To that end, Lord Donaldson MR noted:

> "This court has said before, and I repeat, that it is only in a rare and exceptional case that anyone should seek to set aside leave granted ex parte to move for judicial review. An obvious example, which happily is rare and exceptional, is where there has been fraud or misrepresentation or non-disclosure ..."

(b) Duty of candour and disputed issues of fact

[34] The alleged breaches by the applicant of a duty of candour and the alleged evidence of material non-disclosure and misrepresentation have been comprehensively summarised by the Department in its written skeleton argument dated 30 September 2022 at paras [23]-[31]:

> "[23] Notwithstanding this duty, it is evident that since the conclusion of the leave hearing the factual premise presented by the applicant to obtain the grant of leave requires to be closely scrutinised. In that regard, the court will recall that in the applicant's original affidavit it was asserted that:

- the applicant's mother-in-law had "organised" the deceased's burial and "arranged" for him to be buried in her family plot.

- that the applicant's mother-in-law had refused to allow the applicant's daughter to be buried with her father.

- that the applicant's mother-in-law had removed the deceased's headstone.

- that had the applicant been able to arrange the deceased's burial he would have been buried in a grave and site of her choosing.

[24] The court will also recall that the applicant sought to explain her erroneous reference in the application "form" whereby she asserted that she was the grave owner. The applicant sought to explain this in the context of a misunderstanding as to who was the next of kin. It is noted that this error occurred on two separate forms submitted by the applicant.

[25] In that affidavit the applicant also detailed how a fresh application was made on 6 December 2020. In referencing that fresh application, the applicant highlighted how "new information" had been provided to the Department. The court will recall that the fresh application was made in response to a request from the Department which was generated inter alia by the fact that the two previous applications did not contain the same information.

[26] In the application of 6 December 2020 it was again reiterated that:

- the applicant's mother-in-law had organised the burial;
- the applicant's mother-in-law had refused a request from her granddaughter to be buried with her father;
- the applicant's mother-in-law had refused to consent to the exhumation;
- the applicant's mother-in-law had removed the deceased's headstone;
- that the refusal to consent to the exhumation was a deeply disturbing act and the facts (as presented)

pointed to the irrational and erratic nature of the grave owner when approaching the instant decision.

[27] Having received the notice party's affidavit, the applicant lodged a further affidavit dated 30 August 2022. In that affidavit the applicant indicated:

- She accepted that the notice party had not removed the headstone in question;
- She had placed the headstone "on what I thought was my property." The court will note that this appears to be the first time the applicant has alluded in sworn evidence to any potential or suggested ownership interest in the grave in question;
- She was working from the outset "on the basis that this was a separate plot being offered to me." The court will note that this is the first time that any agreement between the applicant and the notice party has been alluded to;
- A discussion had taken place between the applicant and the notice party in respect of the grave in question;
- As a result of that discussion the applicant had been induced into thinking that the grave would be "our family plot" and had it not been for that inducement the applicant would not have agreed to her husband being buried in the grave in question.

[28] The court will note that the applicant's latest skeleton argument dated 9 September 2022 is predicated upon this version of events. In particular the Court will note that at [11] reference is made to an "offer" having been made to the applicant.

[29] In addition further affidavit evidence was also filed on behalf of the applicant's son on 15 September 2022 in response to a second affidavit which had been lodged on behalf of the Department. In that affidavit the applicant's son asserts that that there was an agreement between the applicant and notice party to the effect that the deceased would be buried in the City Cemetery. This is to be read together with an email, predating the proceedings, which was also sent by the applicant's son to Anthony Carleton on 15 September 2021. In that email the applicant's son also alludes to the applicant having been induced into burying the deceased in the grave in

> question, an issue not addressed by the applicant until August 2022. Once again, the presence of an agreement was not alluded to in the applicant's earlier affidavit.
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> [30] These issues are to be considered alongside the contents of the initial applications made by the applicant on 22 May 2019 and 19 June 2019. In the application dated 22 May 2019 the conjoined reasons for the application are stated to be "anti-social behaviour, burnt cars, drinking, drugs, fighting … my daughter is dying and I want her to be buried in Roselawn with her father." In contrast in the application submitted on 19 June 2019 the reasons for the application are stated as "to be closer to the family home."
>
> [31] These issues arise independently of the further disputed issues of fact which currently exist between the applicant and the notice party. Those issues by themselves add another level of factual complexity to the current application. In particular the notice party has asserted that no request was made to her by her granddaughter. In addition, the discrepancies identified above are separate to any consideration of contents of the Belfast Telegraph article referenced in the affidavit of Anthony Carleton dated 7 September 2022."

[35] Without obtaining the leave of the court, the applicant sought to introduce a further affidavit from the applicant and her son. The information contained in the affidavits related to discussions that are alleged to have taken place between the applicant, the applicant's son and the notice party. As submitted by the Department, the information refers directly to disputed issues of fact which are central to the judicial review proceedings. The said affidavits allege, inter alia, that the notice party expressly gifted the grave to the applicant and had handed the applicant the deeds to the grave. At a later date, it was alleged the notice party took possession of the deeds again and that it became apparent the notice party did not intend to return the deeds to the applicant.

[36] It is abundantly clear, as submitted by the Department, that the factual premise underlining the applicant's challenge to the impugned decision has changed. Furthermore, the version of events has undergone a fundamental reformulation since the grant of leave.

[37] If the updated affidavit evidence is to be accepted, the applicant's position is that the notice party offered the grave to the applicant as a family plot and also that the deeds to the plot had been given to her. Accordingly, the applicant was induced into burying the deceased in the grave in question and that she acted to her

detriment on foot of the express representation made by the notice party. As emphasised by the Department, this stands in clear contrast to the position advanced by the applicant prior to the grant of leave, namely that the notice party arranged the burial and if the applicant had been able to play a part in that process, the deceased would have been buried in a different grave.

[38] It is relevant that the position was maintained by the applicant immediately following the conclusion of the leave hearing and whilst the court was actively considering whether leave should be granted. After the leave hearing had concluded on 31 March 2022, the applicant's legal representatives wrote directly to the court on 1 April 2022 to address the relevance of the authority of *Vosonakis* on the issue as to whether an effective alternative remedy existed. The letter stated, inter alia, that:

> "… In *Arfaras*, existing domestic law claims based on contract and estoppel were at issue. There is no basis for believing such a claim is available in this case. There is no suggestion in *Arfaras* (or any other case identified), of a wider discretion where a convention property claim is not available."

[39] The Department submits that it is now clear from the latest formulation of the applicant's challenge, that a "*Vosonakis*" based cause of action was and continues to be available to the applicant. In *Vosonakis* [2015] NSWSC 625 and [2016] NSWCA 65, both the High Court and the Court of Appeal accepted that inducements claimed by the applicant provide a basis for an estoppel claim. As submitted by the Department, such proceedings would offer a much more effective means for the applicant to achieve her desired goal, namely the transfer of ownership of the exclusive rights of burial which would ultimately enhance the application for exhumation of the deceased.

[40] For the reasons comprehensively detailed above by the Department, I agree that the applicant has failed to discharge her duty of candour. The failure by the applicant to disclose relevant information and thereafter to apparently misrepresent the factual basis which promoted the impugned decision, have necessarily prevented the court and the Department from properly and fairly considering the merits of the judicial review proceedings and, inter alia, whether the Department was justified in refusing consent and also whether an effective alternative remedy existed.

[41] The parties have engaged in considerable legal debate in both written and oral submissions as to whether the applicant has an effective alternative remedy. In relation to this issue, it is not necessary for me to reach a conclusion. Judicial review proceedings are wholly unsuited to resolving disputed issues of fact and inconsistencies. Quite simply, it is not possible for this court to consider whether

there is a suitable alternative remedy in a situation where the factual issues are not agreed.

[42] The applicant contends it is for the court to assess the proportionality of the Department's decision, which in turn requires it to conduct a balancing exercise of all the competing rights and interests based upon "an individual assessment of the circumstances of the case." I agree with the argument advanced by the Department that it is difficult to envisage how such an assessment could be carried out in circumstances in which there has been material non-disclosure and misrepresentation on the part of the applicant in respect of key aspects of her challenge and where fundamental disagreement remains between the applicant and the notice party as to the relevant factual matrix. The Department was entitled to take a decision based upon a clear understanding of the facts. Even if there was a dispute between the family members about both the facts and their competing legal rights, the Department was entitled to reach its decision based upon a fair understanding of the nature and extent of the issues in dispute. For the applicant to withhold key information of this nature until after the grant of leave represents not only a lack of candour in these proceedings but fundamentally changes both the legal and factual basis upon which the impugned decision was taken and upon which leave was granted. In substance, the applicant now invites the court to sit in the shoes of the Department as a primary decision maker and/or a tribunal of fact, rather than as a review court of last resort.

[43] In various written submissions, the applicant claims that the disputed issues of fact and identified discrepancies do not need to be resolved by the court. I reject this submission. It is noted that the revised position advocated by the applicant stands in stark contrast to the position originally adopted in her application of 6 December 2020, which stated:

> "Such facts, in our view, respectfully evidence the irrational and erratic nature to which the grave owner appears to be approaching the instant decision. These factors cannot be ignored when conducting the balancing exercise between the grave owner's right to property against our client's right to family life, which includes the right to dignity and a bestowed right to grieve. Indeed, these factors and the conduct by the grave owner must be taken into consideration when conducting the balancing exercise in this case."

[44] The Department submits, and I agree, that the uncertainty in relation to the relevant factual circumstances is a direct result of the applicant's non-disclosure, misrepresentation and breach of her duty of candour. The central thrust of the applicant's challenge to the impugned decision has fundamentally changed since leave was granted. It is difficult to see how a court can conduct an assessment of the

relevant circumstances when the underlying factual matrix is the subject of conflicting affidavit evidence.

[45] As stated above, judicial review proceedings are wholly unsuited to resolving disputed issues of fact associated with material non-disclosure and misrepresentation of the applicant (see *Re Kirkpatrick's Application* [2004] NIJB 15 at paras [39]-[41]). The applicant maintains that the court could conduct a fact-finding exercise. In this regard, I agree with the Department that the disputed issues of fact raised in the current proceedings are not comparable to the "hard edge" issues referenced in authorities such as *R (WA (Palestinian Territories)) v Secretary of State for the Home Department* [2021] 1 WLR 2117 at para [36].

[46] The applicant argues, in the alternative, that the disputed issues of fact are 'irrelevant' and that the court should focus on the facts that were known to the respondent at the time the impugned decision was made. I reject this argument. The applicant cannot be permitted to utilise breaches of their duty of candour to secure relief. It cannot be correct that a party can fail to discharge its duty of candour in respect of the non-disclosure of material facts and thereafter rely upon that breach to argue that the misrepresentation and the non-disclosure is irrelevant.

[47] Accordingly, for the reasons given, I am persuaded by the Department's submission that the grant of leave should be set aside.

[48] However, if I am wrong in coming to this conclusion, due to the lengthy and protracted nature of these proceedings, I consider it necessary to further analyse the merits of the applicant's substantive grounds of challenge on the basis of the factual circumstances as presented to the decision-maker.

(c) Substantive grounds of challenge

[49] As stated above, the applicant seeks to impugn/challenge two discrete matters, namely:

(a) The Department's decision dated 18 August 2021 in which it refused to provide consent under regulation 12 of the 1992 Regulations for the exhumation of the body of the applicant's deceased husband; and

(b) The 2021 Policy upon which the decision of 18 August 2021 is based.

[50] In summary, in relation to (a) above, the applicant argues that the Department's decision dated 18 August 2021 was based on a misdirection that the consent of the owner of the exclusive rights of burial is required for exhumation save in exceptional circumstances. It is argued that the exclusive rights of burial, which are matters of contract, cannot disapply or otherwise avoid the obligations imposed by article 8 ECHR.

[51] In relation to (b) above, the applicant argues that the 2021 Policy is unlawful since it concludes that the consent of the owner of the exclusive rights of burial is required for exhumation, save in exceptional circumstances. The applicant submits that in its consideration of regulation 12 of the 1992 Regulations and the application of the 2021 Policy, the Department failed to consider the applicant's article 8 rights and to determine whether the interference with the rights of the applicant was proportionate in all the circumstances. Accordingly, it is argued that the decision was unlawful as it applied an unlawful policy.

[52] The applicant also advances further grounds of challenge based upon immaterial facts/considerations and a breach of section 6 of the Human Rights Act 1998 and/or section 24 of the Northern Ireland Act 1998. As stated by the respondent, which I agree, those arguments represent alternative formulations of the arguments detailed above.

[53] I will consider the 2021 Policy, and the impugned decision dated 18 August 2021 seriatim.

The 2021 Policy

[54] In the Department's skeleton argument dated 17 April 2025 at para 73 et seq, it sets out a detailed analysis of the 2021 Policy, and the decision dated 18 August 2021. The following is a summary of the analysis contained in the skeleton argument.

[55] The Department submits that it is important to highlight that the 2021 Policy makes no reference to the issue of exceptionality. Rather, the 2021 Policy seeks to provide general guidance as to the circumstances in which the broad discretionary power contained within regulation 12 of the 1992 Regulations will normally be exercised. As stated in the affidavit of Anthony Carleton dated 10 August 2022, filed on behalf of the Department, the Policy is designed to recognise and give effect to a wide range of interests which may be engendered by such exhumation applications. Thus, it is argued, the 2021 Policy recognises the potential for co-existing rights both of a public and private nature and wider public interest considerations concerning the protection of buried human remains.

[56] The Policy recognises that there may be instances where either the owner of the rights of burial and the nearest surviving relative of the deceased do not consent to exhumation. Notwithstanding the general policy position, the discretionary power conferred by regulation 12 of the 1992 Regulations is expressly retained. Thus, as was recognised in the court's CMD of 11 December 2021 and consistent with the broad scope of the regulation 12 discretion, the 2021 Policy acknowledges the possibility of consent to exhumation being granted even in the absence of consent on the part of the owner of the exclusive rights of burial.

[57] Therefore, according to the Department, the focus of the 2021 Policy is not based on exceptional circumstances but on the general circumstances in which its broad discretionary power will normally be exercised. The 2021 Policy does not inhibit any consideration or balancing of Convention rights should they arise in the context of any particular application. Similarly, the express recognition of the scope of the Department's discretion demonstrates that the 2021 policy does not constrain or otherwise narrow impermissibly the Department's discretionary power to provide consent to exhumation under regulation 12.

[58] In adopting this position, the Department submits that the 2021 Policy adheres to fundamental public law principles concerning the promulgation of policies. Thus, whilst it has been recognised by the Supreme Court in *R(BF (Eritrea)) v Secretary of State for the Home Department* [2021] UKSC 38 at para [64]) that there is no common law obligation requiring the formulation of policy, it has also been acknowledged that general policy statements may be desirable in certain instances. In *R (on the application of Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, Lord Dyson recognised the propriety and desirability of published policy statements at [34] when he said that "the rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised."

[59] The Department submits that, in addition, it is clear from the Supreme Court's decision in *BF (Eritrea)* and in particular the court's comments at [51]-[52], that there is no common law duty to promulgate a policy that eliminates uncertainty in relation to the application of a stipulated legal rule. Thus, the court noted at [52] that:

> "… Save in specific contexts of a kind discussed below and in our judgment in the *A* case, there is no obligation for a Minister or anyone else to issue policy guidance in an attempt to eliminate uncertainty in relation to the application of a stipulated legal rule. Any such obligation would be extremely far-reaching and difficult (if not impossible in many cases) to comply with. It would also conflict with fundamental features of the separation of powers. It would require Ministers to take action to amplify and to some degree restate rules laid down in legislation, whereas it is for Parliament to choose the rules which it wishes to have applied. And it would inevitably involve the courts in assessing whether Ministers had done so sufficiently, thereby requiring courts to intervene to an unprecedented degree in the area of legislative choice and to an unprecedented degree in the area of executive decision-making in terms of control of the administrative apparatus through the promulgation of policy." [emphasis added]

[60] Similarly, in *R(A) v Secretary of State for the Home Department* [2021] UKSC 37, which was delivered on the same day as the *BF (Eritrea)*, the Supreme Court noted at [39] that:

> "The approach to be derived from Gillick is further supported by consideration of the role which policies are intended to play in the law. They constitute guidance issued as a matter of discretion by a public authority to assist in the performance of public duties. They are issued to promote practical objectives thought appropriate by the public authority. They come in many forms and may be more or less detailed and directive depending on what a public authority is seeking to achieve by issuing one. There is often no obligation in public law for an authority to promulgate any policy and there is no obligation, when it does promulgate a policy, for it to take the form of a detailed and comprehensive statement of the law in a particular area, equivalent to a textbook or the judgment of a court. Since there is no such obligation, there is no basis on which a court can strike down a policy which fails to meet that standard. The principled basis for intervention by a court is much narrower, as we have set out above."

[61] In summary, the Department submits that, following a consideration of the above principles and the express reservation of the Department's residual discretion, the 2021 Policy does not give rise to a public law illegality.

[62] A synopsis of the applicant's submissions is as detailed in paras [18]-[28] above. I have carefully considered these submissions in arriving at my decision.

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[63] At para [24] of my leave decision [2022] NIQB 38, I stated as follows:

> "[24] It is the view of this court that Convention rights are engaged in exhumation decisions on the basis that such decisions may legitimately raise issues regarding rights to private and family life under article 8 ECHR, particularly regarding the determination of the resting place of the remains of a loved one. Indeed, although not applicable in this case, exhumation decisions can also raise issues of freedom of religion under article 9 ECHR. Depending on the circumstances of each case, a refusal of permission to exhume may interfere with the applicant's

> article 8(1) ECHR rights and, even if does, *the question will be whether (sic)* such interference may be justified under Article 8(2)."

[64] Applying the test for leave as stated by Scoffield J in *Re Chuinneagain's Application* [2021] NIQB 79, I indicated at para [32] of my leave decision that it was arguable that the Department's decision dated 18 August 2021 was not reflective of a balancing exercise undertaken by the Department, but rather a test of exceptionality. Plainly, I left open a possibility of a review of this preliminary analysis based on a further consideration of the evidence. In terms of any review of an administrative decision-maker's treatment of article 8 ECHR, the correct focus is on the substance of the decision and the outcome as opposed to the terminology used.

[65] Such an approach accords with, and is reflective of, the principles identified by the House of Lords in *Regina (SB) v Governors of Denbigh High School* [2006] UKHL 15 (see [28]-[31]). In that case Lord Bingham at [31] cautioned against excessive formalism or judicialisation in the context of decisions by administrative bodies. Rather, Lord Bingham noted at [31] that:

> "If, in such a case, it appears that such a body has conscientiously paid attention to all human rights considerations, no doubt a challenger's task will be the harder. But what matters in any case is the practical outcome, not the quality of the decision-making process that led to it."

[66] Similarly, in *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, the House of Lords affirmed that the question of whether there has been a breach of Convention rights is a matter of substance and not procedure, which a court must decide for itself, having due regard to the views of the relevant public authority about compliance. The speeches record the following:

> "[15] … the question is still whether there has actually been a violation of the applicant's Convention rights and not whether the decision-maker properly considered the question of whether his rights would be violated or not." (per Lord Hoffman).
> …
>
> [25] … but the court must always keep in mind that it is not concerned with generalities about the legislation in question, but with whether the effect of the council's exercise of its statutory powers in the particular circumstances was in fact compatible with the Convention rights of the applicant for a licence." (per Lord Roger).

[67] Most recently, in *Shvidler v Secretary of State Foreign and Commonwealth Affairs* [2025] UKSC 30; [2025] 3 WLR 346, the Supreme Court confirmed that on a claim for breach of Convention rights on proportionality grounds, a court of first instance must conduct a proportionality assessment for itself, having regard to the views of the decision maker.

> "[121] … The court's role is to assess the lawfulness of the authority's action against the substantive legal criteria which are inherent in the Convention rights, including the criterion of proportionality. The public authority decides on the action it will take, and hence is the primary decision-maker; but the court makes its own assessment whether such action is proportionate, and hence lawful, or not.
>
> [122] Accordingly, although the court will have regard to and may afford a measure of respect to the balance of rights and interests struck by the public authority in assessing whether the test at stage (iv) is satisfied, it will not treat itself as bound by the decision of the public authority subject only to review according to the rationality standard …"

[68] In his affidavit dated 10 August 2022, Anthony Carleton details the reasons for the decision in the following paragraphs:

> "29. In reaching my decision I note that I approached the application on the basis that the Department retained full discretion to consent to the exhumation. I was conscious of the general policy position of the Department concerning co-existent consent on behalf of both the grave owner and owner of the Exclusive Rights of Burial, but I was aware that this could be departed from depending on the particular circumstances of the case. I was also conscious that the Department's general policy was underpinned by a public interest in both preserving the sanctity of graves and ensuring that buried human remains are treated with dignity and respect. I was equally aware that any consent issued by the Department would be permissive in nature only and thus by itself would not result in exhumation.
>
> 30. In considering the exhumation application I was aware of the full circumstances in relation to the applicant and her family. In particular, I was alert to the

background detailed in the application of 6 December 2020. In that regard I was conscious of the disturbing circumstances of the applicant's husband's death, the tragic circumstances of the applicant's daughter's death and the reasons why the exhumation application was being made. In addition, I was aware of the family relationship that existed between the applicant, her husband, and their family. I therefore approached the application on the basis that Article 8 ECHR was engaged.

31. I was, however, conscious that Article 8 ECHR is not an absolute right and that its application may be qualified depending on the rights and interests engaged. In particular, and bearing in mind the nature of exhumation applications, I was aware of the fact that such rights may be curtailed in circumstances in which it was necessary to protect the health or morals or for the protection of the rights and freedoms of other persons. It was also my understanding that as Regulation 12 of the 1992 Regulations provided a statutory underpinning for the exercise of the Department's discretion in respective of exhumation applications, and as it was supported by policy guidance, any interference with any qualified Convention right would be in accordance with law. It is my understanding that the applicant does not in any event seek to question whether any interference was "in accordance with law."

32. Notwithstanding this, I was also aware that the owner of the Exclusive Rights of Burial did not consent to the application. This necessarily gave rise to issues concerning an interference with Article 1 Protocol 1 ("A1P1") should consent be given. Having said that it was also clear to me that "A1P1" is also a qualified right and thus its application may be restricted in certain circumstances. More importantly, however, it was also evident that the owner of the Exclusive Rights of Burial was the mother of the applicant's deceased husband. As such her Article 8 ECHR were also engaged.

33. Finally, it was also evident from the existing paperwork that Belfast City Council, the ultimate owner of the graveyard in question had not consented to the application.

> 34. Having identified these interests and entitlements, I then engaged in a balancing exercise in respect of each. Whilst I was conscious of the Article 8 ECHR rights of the applicant and the nexus that existed between her various family members and the deceased, I was of the view that the Article 8 ECHR rights of the owner of the Exclusive Rights of Burial were also engaged. In addition, the owner of the Exclusive Rights of Burial was also able to rely upon her rights arising pursuant to "A1P1." In those circumstances I was conscious that the Department was dealing with qualified Convention rights which could be restricted so as to give effect to the protection of the rights and freedoms of other persons. Having attributed weight to each of these factors, and to various ancillary considerations such as the position of BCC, the public interest in protecting graves and the permissive nature of Departmental consent, I determined that this was not a case in which the Department should accede to the application."

[69] It is clear from the above paragraphs in Mr Carleton's affidavit that he had identified the nature and extent of the various Convention rights and the qualified nature of the rights involved. In addition, as highlighted at para [29] of the affidavit, he identified various public interests underpinning the statutory scheme and the 2021 policy which were relevant to any article 8(2) ECHR analysis. Having carefully considered the representations made by the applicant in relation to her Convention rights, in my view, Mr Carleton correctly sought to conduct a balancing exercise assessing the aforementioned rights within the framework of the applicable statutory discretion.

[70] Dr McGleenan KC, in his written submissions argues that the approach adopted by the Department and Mr Carleton, the decision-maker, accorded with the guidance provided in *R (L) v Commissioner of Police of the Metropolis* [2010] 1 AC 410 at [45] and *Regina (SB) v Governors of Denbigh High School* [2006] UKHL 15 at [28]-[31]. He claims that the decision-maker conscientiously paid attention to all human rights considerations engendered by the application in question. More significantly, it is submitted that when the practical outcome of that decision is analysed in accordance with the approach advocated in *(SB),* it is clear that the decision in question can in no way be characterised as disproportionate.

[71] Reflecting on the above highlighted paragraphs in Mr Carelton's affidavit, I am persuaded that the decision-maker, having carefully considered the representations made by the applicant and having identified the various Convention rights, correctly and thoughtfully engaged in an appropriate balancing exercise. Contrary to my initial view when leave was granted, the said evidence and analysis convince me that the decision-maker did not apply a strict exceptionality test. The

decision-maker proportionally attributed weight to the identified countervailing factors and also to the public interest in protecting graves and the permissive nature of the Department's consent.

[72] Of course, as stated by the Supreme Court in *Shvidler*, in a claim for breach of Convention rights on proportionality grounds, a court of first instance must conduct a proportionality assessment for itself, having regard to the views of the decision maker. The court is not bound by the decision of the public authority. In my judgement, based on the facts as presented and an assessment of the lawfulness of the exercise, I agree that the decision was proportionate and demonstrated no illegality and I would have reached the same conclusion.

[73] I also agree with the submission that the Department's decision reflects and is consistent with the approach advocated by the ECtHR in *Dodsbo v Sweden* [2007] 45 EHRR 22, which I considered at length at para [25] of my leave decision. As in *Dodsbo*, the Department considered the circumstances as presented to it by the various parties, took into consideration the countervailing and public interests, carried out a balancing exercise and gave reasons that were relevant and sufficient.

[74] The Department highlights the wide margin of appreciation afforded by the ECtHR in respect of sensitive social policy matters such as those concerning exhumation (see *Dodsbo* at [25] and *Drašković v Montenegro* app 40597/17 at [52]). As stated by the Department, whilst the concept of the margin of appreciation is not directly applicable in the domestic context, the domestic courts have repeatedly recognised that a margin of discretion or discretionary judgment will be afforded to domestic decision makers in similar contexts. Therefore, according to the Department, against the factual matrix of this case and the social policy concerning the protection of the sanctity of graves, the Department's position is that a wide margin of discretion should be afforded when reviewing the decision of 18 August 2021. I agree with this argument.

[75] In relation to the statutory interpretation of the relevant legislation, I pause momentarily to refer to the recent decision of McBride J in *McNair v Harper and Derry City and Strabane District Council* [2026] NICh 27 in which the learned judge carried out an extensive review of the Public Health (Ireland) Act 1878 ("the 1878 Act") and the Burial Grounds Regulations (Northern Ireland) 1992 ("the 1992 Regulations") together with the jurisprudence and concluded at para [41] that "if an exclusive right of burial is by its nature a contractual licence, the rights conferred on the grantee are gleaned from the contractual terms agreed by the parties. In this case the terms are contained within the Deed".

[76] In conclusion, leaving aside the issues raised above in relation to the applicant's duty of candour and alternative remedies, it is my view that the decision of 18 August 2021 was based on a careful and proportionate balance of the competing rights and interests of all of the family members and also of the wider public interest. I am satisfied that the decision did not give rise to any breach of the

applicant's Article 8 rights. As a matter of general principle, it appears to be both perfectly rational and fair that the Department would decline to exercise its broad discretionary statutory power to permit an intrusive and intensely personal process, such as an exhumation in circumstances where entrenched and competing views between the family members persist. While both parties have been able to point to their belief in the relative strength of their personal position and their rights, the applicant has not identified any overriding public interest consideration pointing one way or the other and which renders the failure to permit exhumation disproportionate. Accordingly, I do not accept that the Department's decision amounted to a breach of the applicant's article 8 rights or gave rise to any other public law illegality.

[77] Furthermore, following a consideration of the evidence and principles identified by the Department, I agree that the focus of the 2021 Policy is not based on exceptional circumstances but on the general circumstances in which the Department's broad discretionary power will normally be exercised. Consistent with the broad and unqualified nature of the Department's discretion under regulation 12 of the 1992 Rules, the 2021 Policy does not inhibit any consideration or balancing of the competing rights of family members, should they arise in the context of any particular application. Similarly, I agree that the express recognition of the Department's discretion within the 2021 policy itself demonstrates that no limitation has been applied to the power contained within regulation 12 of the 1992 Rules. Accordingly, in my judgement, the 2021 Policy does not give rise to a public law illegality.

[78] For the reasons given, I dismiss the substantive application.