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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY PATRICIA BURNS AND DANIEL McCREADY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Barry MacDonald QC with Malachy McGowan BL (instructed by Harte Coyle Collins Solicitors) for the applicants
Tony McGleenan QC with Philip McAteer BL (instructed by the Crown Solicitor's Office) for the respondent

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COLTON J

Introduction

[1] I propose to give an ex tempore judgment in this matter. I thank counsel for their written and oral submissions. In particular, Mr MacDonald and Dr McGleenan presented this case with their customary skill and elucidation.

[2] The applicants are Patricia Burns and Daniel McCready. Patricia Burns is the daughter of Thomas Aquinas Burns who was shot dead by a member of the British Army as he attempted to leave Glenpark Social Club at approximately 1am on 13 July 1972. For many years she has attempted to secure legal redress and accountability for those responsible for her father's death. Currently she is awaiting the outcome of an investigation by the Legacy Branch of the PSNI into the death of her father. She has also issued judicial review proceedings challenging the refusal by the Attorney General to direct a fresh inquest into his death.

[3] Daniel McCready is the nephew and next of kin of James (otherwise known as Jim) McCann, one of six people killed in the New Lodge, Belfast, on the night of 3/4 February 1973. He was shot along with James Sloan as they stood outside Lynch's Bar at the junction of the New Lodge Road and Antrim Road. The circumstances of his killing are controversial and contested. In the immediate

aftermath of the killing, the British Army claimed that six men killed in the New Lodge area that night were all IRA gunmen shot by the Army in the course of a gun battle. Eyewitness evidence indicates that James McCann and James Sloan were shot from a passing car as they stood outside the bar. Like Ms Burns, Mr McCready has campaigned for a proper investigation into his uncle's death and for legal redress and accountability for those responsible for his death. On 21 February 2021, the Attorney General directed a fresh inquest into that death.

[4] The bona fides and constancy of both applicants in their campaigns is beyond question.

[5] This application for judicial review has been triggered by a Command Paper published by the Secretary of State on 15 July 2021. The paper announces proposals to bring forward legislation to address the legacy of the past in Northern Ireland. One of the key passages is paragraph 6 of the Executive summary which includes the following:

> *"6. The Government is therefore setting out proposals which, if implemented, would:*
>
> - *Establish a new independent body to enable individuals and family members to seek and receive information about Troubles-related deaths and injuries;*
>
> - *Establish a major oral history initiative - to be delivered via new physical and online resources and through empowerment of the museums sector in NI - supported by rigorous academic research projects, to further mutual understanding and reconciliation in both the short and long term while realising ideas put forward at Stormont House;*
>
> - *Introduce a statute of limitations to apply equally to all Troubles-related incidents, bringing an immediate end to the divisive cycle of criminal investigations and prosecutions, which is not working for anyone and has kept Northern Ireland hamstrung by its past."*

[6] The paper then sets out proposals for a new information recovery body, oral history and memorialisation project and a statute of limitations. Paragraph 34 in relation to a statute of limitations says:

> *"That is why the UK Government is considering a proposed way forward that would remove criminal prosecutions through the application of a statute of limitations to Troubles-related offences. Under such a proposal, the PSNI and Police*

> *Ombudsman Northern Ireland would be statutorily barred from investigating Troubles-related incidents. This would bring an immediate end to criminal investigations into Troubles-related offences and remove the prospect of prosecutions."*

[7] At paragraphs 37 and 38 the paper deals with its proposals in relation to inquests in civil cases. At paragraph 37 it says:

> *"37. The Government is committed to providing greater certainty for all those directly affected by the Troubles and to enable all communities in Northern Ireland to move forward. This involves looking holistically at all forms of investigations - including civil and coronial processes relating to the Troubles, which like criminal processes, involve an approach that can create obstacles to achieving wider reconciliation."*

At paragraph 38 the paper says:

> *"38. We are therefore considering a proposed way forward that would end judicial activity in relation to Troubles-related conduct across the spectrum of criminal cases, and current and future civil cases and inquests. We recognise that these are challenging proposals. However, ongoing litigation processes often fail to deliver for families and victims, and their continued presence in a society which is trying to heal from the wounds of its past risks preventing it being able to move forward. The time and effort used in these cases is demonstrated in some of the statistics set out below."*

It then refers to statistics in relation to civil cases, judicial reviews and inquests and says:

> *"This could be better focussed towards supporting and facilitating information recovery in a process which is meaningful, rigorous and which offers families and victims timely access to as much information as possible."*

[8] Should these proposals become law they would obviously have a detrimental impact on the ongoing investigations and legal proceedings relating to the deaths of Thomas Burns and James McCann. Apart from the impact on these applicants, it is trite to say that the proposals have been greeted with wide ranging opposition from elected representatives, victims groups and various organisations including CAJ, the Pat Finucane Centre, Relatives for Justice and Amnesty International. The court has received short written submissions from each of the latter four groups.

[8] By these proceedings the applicants seek to challenge the following impugned decisions that is the decisions as announced in the Command Paper which propose to bring forward legislation designed to:

(i) Create a statute of limitations to apply to all Troubles related incidents.

(ii) To create a statutory bar preventing the PSNI and Police Ombudsman Northern Ireland from investigating Troubles related incidents thereby bringing an end to criminal investigations into Troubles related offences and removing the prospect for prosecutions.

(iii) Prevent the courts from hearing cases concerning Troubles related matters whether criminal cases, civil claims, judicial reviews or inquests or other proceedings and whether or not such cases are already before the courts or even at hearing.

[9] They also identify the proposed respondent's failure to confirm that should he introduce any of the above matters that that would be fundamentally unconstitutional and could not lawfully be enacted by Parliament.

[10] Having identified the impugned decisions the application seeks a number of declarations. The first is a declaration that any legislative provision which purports to introduce an amnesty protecting all those suspected of an offence during the Troubles from criminal investigation and prosecution would be:

(i) So fundamentally unconstitutional that it could not lawfully be enacted by Parliament or given affect by the courts.

(ii) Incompatible with important rights protected by the European Convention on Human Rights including Articles 2 and 3 which permit no derogation in peace time.

(iii) Incompatible with Article 2 of the Ireland/Northern Ireland Protocol which has primacy over any such legislative provision thereby rendering of no force and effect.

[11] The applicant seeks similar declarations in relation to the introduction of a statutory bar to terminate all investigations into offences on the same grounds as set out above and similarly a declaration that any legislative provision which purports to prohibit further civil claims or inquests or any other court proceedings would also be unlawful on the basis of the three grounds that I have set out already.

[12] There is also a challenge seeking a declaration that the refusal of the proposed respondent to agree or otherwise confirm his position in the meantime on propositions of law identified in pre-action correspondence as irrational. That refers

to the request to which I have referred already that the Secretary of State agree that taking any of the steps referred to above would be unlawful.

[13] In short form it is argued on behalf of the applicants that what is being proposed is so offensive and inimical to the rule of law and the constitutional role of the courts that the court should set out what the law is on these issues for the benefit of Parliament, if and when, it considers any draft Bill arising from the proposals.

[14] A preliminary issue for the court is whether these are decisions, which are amenable to judicial review, or, in more orthodox terminology whether they are justiciable. In this regard, it seems to the court that it is important to remember that the Command Paper is setting out proposals. That much is clear from the introduction to the paper which says that the purpose of the paper is to set out a series of proposed measures for addressing the past that will be considered as part of the ongoing engagement process with a view to informing discussion and subsequent legislation. The paper goes on to say, having set out the proposals, in relation to the next steps that:

> *"45. The Government is engaging with the Irish Government and the Northern Ireland parties on these issues and holding meetings on an inclusive basis with victims and survivors and all those most directly affected by the Troubles to ensure their interests and perspectives are central to the discussions."*

At paragraph 46:

> *"46. The aim of these talks is to establish a collective way forward on Northern Ireland legacy issues, allowing implementing legislation to be introduced as soon as possible in this parliamentary session. The shared objective of this engagement is to deal with these issues comprehensively and fairly, and in a way that supports information recovery and reconciliation, complies fully with international human rights obligations, and that responds to the needs of victims, survivors and society as a whole."*

[15] Of course the applicants and victim groups are part of that process which is ongoing.

[16] What the court is dealing with here are proposals. These proposals are under further consideration in an ongoing engagement with multiple parties. The proposals themselves have no legal force or effect and, of course, the court does not know the final outcome in terms of any legislation that may be proposed and does not have any draft legislation in any precise or draft form. So in those circumstances I consider that there is no justiciable decision that can properly be the subject of a judicial review application. To an extent, Mr MacDonald recognises this and says

that the court ought to issue what he describes as an "advisory judgment." He recognises such a course would be exceptional but, in my view, it would be more accurately said that such an approach is unprecedented in the context of proposals of this type which may end up with primary legislation.

[17] I consider there is an obvious and good reason for this. There can be no dispute that the courts do not have the constitutional power to prevent a Minister introducing a Bill to Parliament, see for example the case of *R(On the Application of Unison) v the Secretary of State of Health* [2010] EWHC and also the *Bank Mellat* [2014] AC 700 case.

[18] We are not even at the stage, as I have indicated, where a Bill has actually been drafted that the court can look at and consider. Mr McDonald argues that the applicants are not seeking to do that. They ask the court to provide an advisory judgment that should the Secretary of State decide to introduce a Bill in accordance with the Command Paper, which he has not yet done, then any such Bill, if enacted, would be unlawful and would not be enforced by the courts on the basis of the grounds set out in the Order 53 Statement to which I have already referred.

[19] The difficulty with that proposition is that the court is being asked to conduct a review of the legality of potential legislation that does not yet exist. To do so would be inappropriate in my view and would ultimately involve the court in intervening and assessing the issues upon which the Secretary of State is currently consulting. The cases relied upon by the applicant involve cases where the court was considering actual legislation, not proposals, with the exception of *Smedley* [1985] QB 657 which was dealing with an Order in Counsel, that is subordinate legislation which is subject to a degree of judicial control. The other cases related to Brexit issues which dealt specifically with Article 50 of the European Treaties. *Miller No.1* dealt with an examination of the exercise of Executive Power and the case of *Wightman* dealt with the circumstances in which notification could be given to revoke Article 50 after it had been invoked which are very different circumstances from proposals that may lead to primary legislation.

[20] In all the cases to which I have been referred the court had something concrete to review and was dealing with matters which had legal effect and force which is manifestly not the case here, with the possible exception of *Smedley* which dealt with subordinate legislation.

[21] Leaving aside the practical issues about whether or not it is advisable or appropriate for the court to review proposals I also have significant constitutional concerns which run counter to granting leave in this case. I am mindful of the provisions of Article 9 of the Bill of Rights which provides that:

> *"The freedom of speech in debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."*

[22] From a constitutional position it seems to me that it is for the Secretary of State to consult as he has indicated he will do in the Command Paper and decide on the contents on draft legislation. In my view, it would be inappropriate for the court to seek to advise him in advance of that consultation in any draft legislation. It is for Parliament to scrutinise any draft legislation proposed and again, in my view, it would be constitutionally inappropriate for this court to advise on or interfere with that process.

[23] Whilst not directly asking the court to do so in the sense that the applicants asked for an advisory judgment, it seems to me that the practical effect of granting leave in this case will involve the court, at this stage, in engaging and interfering with a Ministerial decision to lay a Bill before Parliament and depending on the contents of any Bill potentially intruding and interfering with the consideration of a Bill by Parliament something which, in my view, is constitutionally impermissible. Dr McGleenan referred to this as a "chilling effect" and certainly it seems to me that this would involve trespassing upon the province of Parliament and, as per, in the judgment in *Smedley* certainly appearing to do so.

[24] There are certainly many passages and dicta in the cases to which I have been referred which assert the constitutional importance of the role of the courts in scrutinising Acts of Parliament, but the fundamental principle of the separation of powers remains. This is evident even if one considers the authorities submitted by the applicant. The earliest case is *Smedley* which was decided in 1985 pre-Human Rights Act where it was said that:

> *"I think I should say a word about the respective roles of Parliaments in the courts, although the United Kingdom has no written constitution it is a constitutional convention of the highest importance that the legislature and the judicature are separate and independent of one another subject to certain ultimate rights of Parliament over the judicature which are immaterial present purposes. It therefore beholds the court to be ever sensitive to the paramount need to refrain from trespassing upon the province of Parliament, or so far as this can be avoided, even appearing to do so. Although it is not a matter for me, I would hope and expect that Parliament would be similarly sensitive to the need to refrain from trespassing upon the province of the courts. Against that background it would clearly be a breach of the constitutional conventions for this court, or any court, to express a view let alone take any action concerning the decision to lay this draft Order in Council before Parliament or concerning the wisdom or otherwise of Parliament supporting that draft."*

[25] The court went on to say that it was dealing with an Order in Council, which was a statutory instrument of subordinate means, which was in a different category from primary legislation.

[26] If one turns to the most recent case referred to and, of course, an important Supreme Court decision on the respective roles of Parliament in the courts, that is the case of *R (SC) v Secretary of State for Work and Pensions* [2021] 3 WLR 428 (SC) Lord Reed in paragraph 162 of the judgment cautions against the undue interference by the courts in the sphere of political choices:

> *"That risk can only be avoided if the courts apply the principle in a manner which respects the boundary between legality and the political process. Judicial independence is accepted only if the judiciary refrains from interfering with political processes. If the judicial power is to be independent that judicial and political sphere have to remain separated."*

He then goes on at paragraph 164 to refer to Article 9 of the Bill of Rights to which I have already referred and he says:

> *"That is not however a comprehensive statement of the privilege. It was more fully explained by Lord Brown-Wilkinson in Prebble v Television New Zealand Ltd:*
>
> > *'In addition to Article 9 itself there is a long line of authority which supports a wider principle of which Article 9 is merely one manifestation. It is that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges.'*
>
> *As that statement makes clear, the law of Parliamentary Privilege is not based solely on the need to avoid any risk of interference with freedom of speech in Parliament. It is underpinned by the principle of the separation of powers which so far as relating to the courts and Parliament requires each of them to abstain from interference with the functions of the other and to treat each other's proceedings and decisions with respect, it follows that it is no part of the function of the courts under our constitution to exercise a supervisory jurisdiction over the internal procedures of Parliament. That principle was referring to the case of R Buckinghamshire County Council. In my own*

> *judgment at paragraph 111 and in the judgment of Lord Neuberger and Lord Mance where they observed that scrutiny of the workings of Parliament and whether they satisfy externally imposed criteria clearly involves questioning and potentially impeaching i.e. condemning Parliament's internal proceedings and will go a considerable step further than any United Kingdom court has ever done."*

[27] The Human Rights Act itself upon which the applicants rely in terms of asserting the illegality of the potential proposals and which expressly incorporates the Convention of Human Rights into our domestic law expressly excludes either House of Parliament or a person exercising functions in connection with proceedings in Parliament from the definition of a public authority. The act also provides a mechanism for judicial supervision of legislation and empowers the court to grant declarations of incompatibility after legislation has been passed. Additionally, section 19 provides that a Minister introducing legislation at the second reading stage of any Bill must make a declaration as to compatibility of the Bill with the Convention.

[28] So clearly, Parliament in its scrutiny of any proposals that are brought forward will be alive to Convention issues and they will form part of the exercise that Parliament undertakes in scrutinising any Bill. It may be that ultimately there will be a clash between the courts and the legislature on the issues raised by the applicants in this application. As indicated, the court has the power in the event that primary legislation is passed to make declarations under the Human Rights Act. It also has the potential to consider these issues in the light of Article 2 of the Withdrawal Agreements and potentially, although problematically, under the common law to consider a challenge to any legislation which might be enacted.

[29] Mindful of the constitutional separation of powers I take the view that that is the time for any judicial review, not least because the court and any applicant will know precisely what Parliament has decided but also because that is the appropriate time for the courts to exercise their constitutional role in relation to primary legislation. Mr MacDonald complains that waiting on the legislation itself before issuing a challenge will result in another unjustifiable delay for those like the applicants pending the implementation of any legislation. As I understand it, the courts continue their work in relation to legacy in the civil courts, judicial review courts, in the criminal courts and in inquests. So certainly pending the legislation there will be no stay or delay in the work of the courts. I acknowledge that in the event that there is a challenge to any legislation that may be passed that will involve time but there is no reason why a challenge of the anticipated nature cannot be expedited. In that event at least the court will be dealing with an actual decision. It will know precisely what is being challenged rather than dealing with proposals which are yet to be formulated and considered by Parliament. Also, it would be, in my view, exercising its role in the proper constitutional fashion.

[30] Therefore, irrespective of any judicial aversion to the Secretary of State's proposals I consider that the proposed challenge is unarguable for the reasons I have set out and constitutionally impermissible. For those reasons, leave is refused.