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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY OLIVER HUGHES FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE DEPARTMENT FOR COMMUNITIES

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Mr Ronan Lavery KC led Mr Malachy McGowan (instructed by P A Duffy & Co, Solicitors) for the Applicant
Dr Tony McGleenan KC led Ms Laura Curran (instructed by the Departmental Solicitors Office) for the Respondent

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COLTON J

Introduction

[1] The applicant is Oliver Hughes who lives in Carrickmore, County Tyrone. He avers that for some time he has been interested in establishing a crematorium in his local area. He has carried out some preliminary research into purchasing equipment potentially for both a fixed crematorium and a mobile crematorium. He believes that there is a need for such a service and that it would be a profitable business. His evidence is that his intentions have been well received by a number of local councillors.

[2] The applicant however is prevented from taking any steps to implement such an intention by reason of Article 17 of the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1985 and in particular Articles 17(1) and (8), which, when read together, prohibit him from providing and maintaining a crematorium, and make it a criminal offence for him to do so.

The legislation in issue

[3] The Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1985 ("the 1985 Order") made sweeping changes to the functions and powers of district councils in Northern Ireland across a range of areas, which required extensive amendment and repeal of various provisions of other legislation, set out in Part VII of the Order and Schedule 5. This included repeal of section 10 of the Cemeteries Clauses Act 1847 (Schedule 5) and amendment to the Public Health (Ireland) Act 1878 by the substitution of section 181 (Article 35).

[4] Article 17 is the key provision in this application.

[5] Article 17(1) provides:

> "(1) A council may provide and maintain a crematorium."

[6] Article 17(2) provides:

> "(2) No cremation shall be carried out at any crematorium provided under this Article until the crematorium has been certified to the Department by the council to be complete and to be properly equipped for the purposes of cremations."

[7] Article 17(3):

> "(3) The Department may make regulations with respect to crematoria provided under this Article as to –
>
> (a) their maintenance and inspection;
>
> (b) the cases in and the conditions under which cremations may take place;
>
> (c) the disposition of interment of the ashes resulting from cremations;
>
> (d) the forms of the notices, certificates and applications to be given or made before any cremation is permitted to take place;
>
> (e) the registration of cremations;
>
> (f) the notification of cremations to the Registrar General or to registrars of births and deaths;

(g) the fees that may be charged in respect of the issue of any medical certificate required under the regulations."

[8] Article 17(8) provides for a related criminal offence:

> "(8) Any person who -
>
> (a) contravenes any regulations made under paragraph (3); or
>
> (b) knowingly carries out or procures or takes part in the burning of any human remains otherwise than in accordance with such regulations and the provisions of this Article,
>
> shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale."

[9] It will be seen that the legislation makes it a criminal offence for anyone but a council to provide and operate a crematorium in this jurisdiction. The legislation falls within the responsibility of the respondent, the Department for Communities ("DfC"), given its responsibilities for local councils.

The relief sought by the applicant

[10] The applicant seeks the following relief:

(i) An order of certiorari quashing Article 17(1) of the 1985 Order;

(ii) A declaration that the respondent's decision to maintain that that the impugned provision is lawful and its refusal to amend or repeal that provision is unlawful.

[11] The applicant argues that the legislation in question is unreasonable and irrational.

[12] The court refused leave on the grounds of an alleged failure to comply with section 1 of the Rural Needs Act (Northern Ireland) 2016 and an alleged breach of the applicant's Convention rights namely article 14 in conjunction with article 8 and/or A1P1 ECHR. In refusing leave on the rural needs issue, the court determined that the duty under section 1 was not engaged in respect of the respondent. In relation to the ECHR ground the court determined that the applicant

had not demonstrated that he was the victim of an unlawful act or that it was arguable that there had been any interference with his human rights.

Standing

[13] Dr McGleenan raised an issue about the applicant's standing. I am satisfied that the applicant has standing to bring these proceedings. I do so on two grounds. Firstly, I am satisfied that he is someone who had a genuine interest in establishing a crematorium as a commercial business and that he had carried out some research into the matter. Secondly, as a rate payer the applicant has an interest in the provision of a crematorium in his area which based on the current law can only be established by his local council.

Delay

[14] Dr McGleenan also raised an issue about delay in this case, which is more problematic for the applicant.

[15] Order 53 Rule 4(1) requires that an application for leave must be made within three months from the date when the grounds for the application first arose unless the court considers that there is good reason for extending the period in which the application shall be made.

[16] When did the grounds for the application first arise? On one, admittedly extreme view, time began to run from the point at which the 1985 Order came into place. In theory he has always been affected by it.

[17] However, a more realistic approach to the question is that the applicant should be taken to have been affected by the legislation at the point in time when he developed standing. Applying the basis upon which the court determined the applicant did have standing one potential date would be that upon which he developed a significant interest in establishing a crematorium. In this regard the evidence of the applicant is vague. In his affidavit he avers:

> "I can say that I have been interested in establishing a crematorium for some time."

[18] In his affidavit he sets out the basis upon which he asserts that a crematorium should be provided in his locality. Having set those beliefs out he goes on to aver:

> "As a result of these beliefs, a number of years ago (although I cannot remember now exactly when this was) I had spoken to an employee of Omagh District Council named Alison McCullough about establishing a crematorium for the area and to enquire how to go about this. She referred me to an individual I believe was called

> Ms Celine Fox, who is also an employee of the Omagh Council … [who] advised me that even the council in Omagh would not run a crematorium as it was against the law. I recall she advised that the council had received money from Derry and Strabane District Council for running the crematorium, but they were not, in fact, able to establish this due to the way the law operated. It was after this that I spoke to my solicitors to enquire about the law and whether there was anything that could be done about this."

[19] The court considers it reasonable to conclude that the stage at which he made those enquiries was the point at which time began to run for the purposes of Order 53. The problem with this is that the court cannot point to a concrete date.

[20] He did not issue pre-action correspondence to the respondent until 15 January 2021, at which stage, he would certainly have been beyond the three-month time limit if one takes the starting point to be when he was making enquiries about the matter. The respondent set out its position to the applicant in its reply on 5 February 2021 in pre-action correspondence. The applicant then issued a second pre-action letter in respect of the same issue to which the respondent replied on 23 April 2021 in which it maintained its position that the prohibition about which the applicant complained was lawful. Proceedings were issued on 21 July 2021.

[21] I do not consider that it is open to the applicant to argue that he only became affected by the legislation when he received the second PAP response on 23 April 2021. It is well-established that an applicant cannot avoid the application of a time limit by writing to a respondent and then characterising that response as a fresh decision - see *R(AK) v Secretary of State for the Home Department* [2021] EWCA Civ 119, at para [50] per Lewis LJ.

[22] Nor do I consider that Mr Lavery can avail of the argument that the matter about which he complains is ongoing as a basis for establishing the point at which time begins to run.

[23] Whilst the court cannot be precise about the date upon which time began to run against the applicant, I am satisfied that it was well before the application was made in this case and is, therefore, well in excess of the three-month time limit.

[24] In those circumstances, it is necessary for the applicant to seek an extension of time.

[25] The applicant has, through his solicitor, filed several affidavits in relation to the delay, but Dr McGleenan complains that none of the affidavits explain the initial period of delay between the applicant's enquiries about establishing a crematorium and raising correspondence with the proposed respondent.

[26] On balance, I am minded to extend time in this case. I do so on the grounds that there is a public interest in this matter being considered by the court. The applicant has raised an important issue which is of public interest. The proceedings have highlighted that this is an issue of concern to several councils and, indeed, to the respondent. Not for the first time, the court is confronted with a situation where it is acknowledged by a government department that change is required but despite this little progress appears to be made, whatever the intention of the relevant minister or department. None of this was apparent when the applicant issued proceedings.

[27] In the very particular circumstances of this case an investigation by the court, albeit in a supervisory role, is of benefit to the public. On this basis, I am prepared to extend time to permit the applicant to bring this application.

Are the impugned provisions amenable to judicial review?

[28] The 1985 Order was made pursuant to Section 1(3) and Schedule 1, para 1 of the Northern Ireland Act 1974, which provides:

> "(1) During the interim period -
>
> (a) no Measure shall be passed by the Assembly; and
>
> (b) Her Majesty may by Order in Council make laws for Northern Ireland and, in particular, provision for any matter for which the Constitution Act authorises or requires provision to be made by Measure."

[29] The 1985 Order was approved by a resolution of each House of Parliament.

[30] In the respondent's submission, Orders in Council made under foundational statutes for devolved legislators are properly to be considered as equivalent to Acts of those devolved legislators and should not be subject to judicial review on the common law grounds of irrationality.

[31] In this regard Dr McGleenan refers the court to the Supreme Court decision in *Axa General Insurance Ltd & Ors v HM Advocate & Ors* [2012] AC 868.

[32] There the court was dealing with an Act of the Scottish Parliament enabling claims in respect of pleural plaques resulting from employers' negligent exposure to asbestos. The court had to consider whether the Act was susceptible to challenge at common law by way of judicial review on the ground of irrationality.

[33] In paragraph 52 of his judgment Lord Hope says:

> "52. As for the appellants' common law case, I would hold, in agreement with the judges in the Inner House (2011 SLT 439, para 88), that Acts of the Scottish Parliament are not subject to judicial review at common law on the grounds of irrationality, unreasonableness or arbitrariness. This is not needed, as there is already a statutory limit on the Parliament's legislative competence if a provision is incompatible with any of the Convention rights: section 29(2)(d) of the Scotland Act 1998. But it would also be quite wrong for the judges to substitute their views on these issues for the considered judgment of a democratically elected legislature unless authorised to do so, as in the case of the Convention rights, by the constitutional framework laid down by the United Kingdom Parliament."

[34] Mr Lavery counters that *Axa* does not undermine what he says is the long-established principle that an order in council is subordinate legislation.

[35] In his valuable publication "Judicial Review in Northern Ireland" (2nd Edition) Professor Gordon Anthony made the following comments regarding the status of orders in council:

> "[5.25] The key constitutional question about illegality and Acts of the Assembly or Orders in Council is whether they are to be regarded merely as a form of subordinate legislation or whether they are a form of primary legislation that demands a modified judicial approach when their validity is challenged. The leading authority on the point, by way of analogy, is now the Supreme Court's ruling in *Axa General Insurance,* which concerns a challenge to the lawfulness of an Act of the Scottish Parliament. The legislation at issue was the Damages (Asbestos Related Conditions) (Scotland) Act 2009 which enabled individuals to sue for damages where they had suffered the onset of pleural plaques as a result of an exposure to asbestos while working in Scotland's heavy industries (the legislation thereby reversed the effects of the *Rothwell* ruling of the House of Lords which had held that pleural plaques did not constitute physical harm and were not actionable; parallel legislation had also been enacted by the Northern Ireland Assembly). In real terms this meant that Axa and a number of other insurance companies would have to meet a very large number of

claims against employers, and they challenged the legislation on the basis that it was a disproportionate interference with their Article 1 Protocol 1 ECHR property rights and was thereby ultra vires (section 29(2)(d) of the Scotland Act 1998 (the corresponding provision in the Northern Ireland Act 1998 is section 2(2)(c)). Rejecting that argument, the Supreme Court noted that property rights are qualified rights under the ECHR; that the case law of the ECHR accord states a wide margin of appreciation when limiting such rights for reasons of the `public interest'; and that judicial intervention on ECHR grounds could not be justified because, it could not be said that the legislation lacked a 'reasonable foundation' or was 'manifestly unreasonable.' On the related question whether the legislation could be challenged as unreasonable/irrational at common law, the Supreme Court likewise held that it could not. The argument that it could be so reviewed had been advanced in addition to that centred on proportionality and, in dismissing the argument, the Supreme Court emphasised that the Scottish Parliament is a democratically legitimate body that commands wide-ranging powers within the framework of the Scotland Act 1998. While the Supreme Court at the same time made it clear that the Scottish Parliament is not legally sovereign in the sense that it is associated with the Westminster Parliament, it was firmly of the view that the court should exercise the fullest possible restraint when assessing the vires of Acts of the Scottish Parliament with reference to the common law. Unreasonableness, in the result, was not available as a ground for review and the court implied that intervention on the basis of the common law would be possible only where an Act of the Scottish Parliament proposes to abolish common law fundamental rights.

[5.26] It would appear from *Axa* that the courts can be expected to exercise restraint when reviewing Acts in the Northern Ireland Assembly under the terms of the Northern Ireland Act 1998, at least where an Act affects qualified rights and where the ECtHR would accord the State a wide margin of appreciation. Indeed, while Acts (and orders in council) may also be challenged with reference to the Human Rights Act 1998 – where there is case law to suggest closer judicial scrutiny depending on the right(s) in issue – *Axa* apparently seeks to limit the

> scope for judicial intervention given the nature of the decision-maker at hand. This can been seen in the Supreme Court's reference to the democratic legitimacy of the Scottish Parliament and, by extension, the Northern Ireland Assembly, which suggests that restraint will often be apposite precisely because the courts will be assessing the choices of a body that is accountable to a locally defined political community (albeit that the point is perhaps less forceful where orders in council are challenged as these will have been made when the Northern Ireland Assembly, or any of its predecessors bodies have been suspended)." (My underlining)

[36] Returning to the authorities relied upon by Mr Lavery his starting point is the decision of the House of Lords in *R (Bancoult) v Foreign Secretary (No 2)(HL(e))* [2009] 1 AC 453.

[37] There the court was considering orders in council for governance of a colony (the islands of the Chagos Archipelajo in the Indian Ocean). In its unanimous judgment at paragraph 34 Lord Hoffman explains:

> "34. It is true that a prerogative Order in Council is primary legislation in the sense that the legislative power of the Crown is original and not subordinate. It is classified as primary legislation for the purposes of the Human Rights Act 1998: see paragraph (f)(i) of the definition in section 21(1). That means that it cannot be overridden by Convention rights. The court can only make a declaration of incompatibility under section 4.
>
> 35. But the fact that such Orders in Council in certain important respects resemble Acts of Parliament does not mean that they share all their characteristics. The principle of the sovereignty of Parliament, as it has been developed by the courts over the past 350 years, is founded upon the unique authority Parliament derives from its representative character. An exercise of the prerogative lacks this quality; although it may be legislative in character, it is still an exercise of power by the executive alone. Until the decision of this House in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, it may have been assumed that the exercise of prerogative powers was, as such, immune from judicial review. That objection being removed, I see no reason why prerogative legislation should not be subject to review on ordinary principles of legality,

> rationality and procedural impropriety in the same way as any other executive action."

[38] The opinion of Lord Hoffmann was endorsed by Lord Rodger at para [105] of the judgment where he says:

> "Mr Crowe contended that, even without the 1865 Act, any exercise of the Royal Prerogative to make a legislative Order in Council could not be reviewed by the courts. I would reject that submission. *Campbell v Hall* 1 Cowp 204 Lord Mansfield was prepared to hold that the Crown had no power to make the letters patent imposing the tax on Granada. He would surely have done the same if the tax had been imposed by Order in Council; the precise form of the legislation was of no significance for that purpose. The court was, in effect, reviewing the legality of the letters' patent. Nowadays, a broader form of review of other prerogative acts is established; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. Therefore, like Lord Hoffmann, I see no reason in principle why, today, prerogative legislation, too, should not be subject to judicial review on ordinary principles of legality, rationality and procedural impropriety. Any challenge of that kind must, of course, be based on a ground that is justiciable."

[39] The Order in Council being considered in *Bancoult* was not one, unlike the 1985 Order, which had been approved by Parliament.

[40] However the Court of Appeal in England and Wales in *R (Javed) v Secretary of State for the Home Department* [2002] KB 129 found that an order in council which had been approved by Parliament could be challenged on the grounds of irrationality.

[41] In paragraph 38 Lord Phillips says:

> "38. Mr Pleming did not go so far as to submit that the affirmative resolution of the two Houses precluded judicial review of the order. His submission was that the critical common issue raised by the three applicants was one pre-eminently for the Secretary of State and for Parliament rather than for the court. That issue was whether Pakistan was a country in which there was in general no serious risk of persecution."

At paragraph 50 the judgment says:

"50. We would endorse the comments made in respect of the decisions in question by Auld LJ in *O'Connor v Chief Adjudication Officer* [1999] ELR 209, 220-221:

> 'Irrationality is a separate ground for challenging subsidiary legislation, and is not characterised by or confined to a minister's deceit of Parliament or having otherwise acted in bad faith. That means irrationality in the Wednesbury sense. Counsel have referred to the difficult notion of 'extreme' irrationality sometimes suggested as necessary before a court can strike down subsidiary legislation subject to parliamentary scrutiny, citing Lord Scarman in *R v Secretary of State for the Environment, Ex p Nottinghamshire County Council* [1986] AC 240. He spoke, at p 247g, of '… the consequences … [being] so absurd that … [the Secretary of State] must have taken leave of his senses', a form of words with which the other members of the Appellate Committee agreed. They also referred to Lord Bridge's reference in *R v Secretary of State for the Environment, Ex p Hammersmith and Fulham London Borough Council* [1991] 1 AC 521, 597f-g, to 'manifest absurdity.' It is wrong to deduce from those dicta a notion of 'extreme' irrationality. Good old Wednesbury irrationality is about as extreme a form of irrationality as there is. Perhaps the thinking prompting the notion is that in cases where the minister has acted after reference to Parliament, usually by way of the affirmative or negative resolution procedure, there is a heavy evidential onus on a claimant for judicial review to establish the irrationality of a decision which may owe much to political, social and economic considerations in the underlying enabling legislation. Often the claimant will not be in a position to put before the court all the relevant material bearing on legislative and executive policy behind an instrument which would enable it with confidence to

> stigmatise the policy as irrational. Often too, the court, however well informed in a factual way, may be reluctant to form a view on the rationality of a policy based on political, social and/or economic considerations outside its normal competence. That seems to have been the approach of Mustill LJ [in *R v Secretary of State for the Environment, Ex p Greater London Council* 3 April 1985].
>
> 51. For these reasons we reject Mr Pleming's submission that there is a principle of law which circumscribes the extent to which the court can review an order that has been approved by both Houses of Parliament under the affirmative resolution procedure. There remains, however, a lesser issue as to the manner in which the court should approach the review in the circumstances of this case."

[42] Returning to *Axa* Lord Hope cited *Javed* at paragraph 48:

> "48. I also think that the situation that was considered in *R (Asif Javed) v Secretary of State for the Home Department* [2001] EWCA Civ 789, [2002] QB 129 which was concerned with a draft order which was laid by the Secretary of State and approved by both Houses of Parliament is so different from that which arises here that it can safely be left on one side. The fact is that, as a challenge to primary legislation at common law was simply impossible while the only legislature was the sovereign Parliament of the United Kingdom at Westminster, we are in this case in uncharted territory. The issue has to be addressed as one of principle."

[43] In determining this issue I also bear in mind that the procedure by which the 1985 Order was approved by Parliament was such that it was not subject to the usual scrutiny applicable to primary legislation. There was no committee stage. There was no opportunity to amend the provisions of Article 17 which was one of several sweeping changes introduced by the legislation.

[44] Whilst the matter is by no means straightforward it seems to the court that as a matter of principle the court should treat the 1985 Order as subordinate legislation amenable to judicial review under common law. Applying the principles set out above it does not enjoy the status of a primary Act of Parliament nor has it gone through the procedures which would be required by an order of the local Assembly.

[45] The court therefore determines that the legislation is amenable to judicial review on common law grounds. The real issue is the scope and standard of review that is applicable in determining whether the applicant can establish irrationality.

The legislative history in relation to crematoria in Northern Ireland

[46] It is helpful to set out some further detail in relation to the history of the impugned legislation and its impact on the provision of crematoria in Northern Ireland.

[474] This is helpfully set out in the affidavit of Anthony Carleton who is currently the Director of the Local Government and Housing Regulation Division within the DfC.

[48] The only crematorium currently operating in Northern Ireland is at Roselawn, run by Belfast City Council. It is governed by the Cremation (Belfast) Regulations (Northern Ireland) 1961 ("the 1961 Regulations"). Those Regulations were made under the Cremations Act 1902 ("the 1902 Act").

[49] At the time the 1902 Act was passed, it applied to England, Wales and Scotland but not to Northern Ireland. Its provisions were later applied to the Belfast Local Government District by section 26 of the Belfast Corporation (General Powers) Act (Northern Ireland) 1948 ("the 1948 Act"), providing that the then Belfast Corporation (now Belfast City Council) should be treated as a "burial authority" within the meaning of the 1902 Act. This enabled the council to build Roselawn Crematorium. It also enabled the then Department of Health and Local Government to make the 1961 Regulations under which Roselawn Cemetery currently operates. Those Regulations only apply to crematoria maintained and run by Belfast City Council.

[50] The 1985 Order repealed section 26 of the 1948 Act and made provision, in Article 17(11), for the Order to apply to any crematorium maintained by a council immediately prior to the coming into operation of the Order. This brought the Roselawn crematorium within the governance framework of the 1985 Order.

[51] The provisions in Article 17(1), (3) and (8) reflected the provisions then applicable in England and Wales under sections 4, 7 and 8 of the 1902 Act respectively. Under section 4 the powers of a "burial authority" to provide and maintain burial grounds or cemeteries, or anything essential ancillary or incidental thereto, were deemed to include the provision and maintenance of crematoria. "Burial authority" was defined in section 2 as follows:

> "The expression 'burial authority' shall mean any burial board, any council, committee, or other local authority having the powers and duties of a burial board, and any

> local authority maintaining a cemetery under the Public Health (Interments) Act, 1879 or under any local Act."

[52] Section 1(1) of the Cremation Act 1952 restricted the use of crematoria until certified through the Secretary of State "by the burial authority or other person by whom it is established to be complete, … and be properly equipped for the purposes of the disposal of human remains by burning."

[53] The definition of "burial authority" in section 2 of the 1902 was repealed by section 1 in Schedule 1 Part XVII of the Statute Law (Repeals) Act 1978. The Cremation (England and Wales) Regulations 2008, made under section 7 of the 1902 Act, regulate the use of crematoria in England and Wales. They apply to "a cremation authority", which is defined in regulation 2 as follows:

> "'cremation authority' means any burial authority or any person who has opened a crematorium and, in Article 3(a), includes any burial authority or person who intends to open a crematorium."

[54] The result of these legislative changes in England and Wales is that crematoria may be opened and run by the local authorities or private organisations. Responsibility for the legislation in relation to cremations lies within the Ministry of Justice.

[55] In Scotland, both council and private crematoria operate under the Burial and Cremation (Scotland) Act 2016 and the Cremation (Scotland) Regulations 2019. Section 46 of the 2016 Act permits that a local authority (ie council) may provide, or enter into arrangements with another person, for the provision of a crematorium. Responsibility for this legislation lies with the Health and Social Care Directorate.

[56] In the Republic of Ireland the establishment and operation of a crematorium is subject to the provisions of legislation such as the Planning and Development Acts, the Environmental Protection Agency Act 1992 and the Air Pollution Act 1987. Specific legislative provision for cremations does not exist.

[57] Returning to Northern Ireland there were no developments under the 1985 Order or in relation to crematoria for over 25 years. No regulations have been made under the 1985 Order. The only operative crematorium is that in Roselawn, run by Belfast City Council which is subject to the 1961 Regulations made under the 1902 Act.

Applications for new crematoria

[58] The former Omagh District Council was originally granted outline planning permission in November 2012 with a Chapel of Rest at the Greenhill Cemetery, Gortin Road, Omagh. This permission has been renewed by Fermanagh and Omagh

District Council, initially in 2015 and again in 2020. There is much uncertainty about whether such a crematorium will ever be developed. The council entered into an agreement with Derry and Strabane and Mid Ulster Councils to explore the joint provision of a crematorium.

[59] Antrim and Newtownabbey Borough Council was granted full planning permission on 24 August 2018 for a proposed crematorium at a site on the Doagh Road, Newtownabbey. The applicant exhibits an article in the Belfast Newsletter which reports:

> "Antrim and Newtownabbey Borough Council spent around £200,000 developing its plans for a crematorium at Ballyearl, just a few hundred yards from its Mossley Hill Headquarters.
>
> The £5 million facility was to be developed and run through a public-private partnership.
>
> In May 2016 the local authority said it was close to concluding its search for a private sector partner to build and operate the new facility and was hopeful that it would be operational within a year.
>
> However, those plans were scuppered when it was discovered that a private sector firm would not be permitted to operate the facility. And any hopes of getting the legislation updated ended when the Assembly collapsed in January 2017."

[60] The Article goes on to report that the council was "in discussion with Belfast City Council regarding options for collaboration" in a bid to progress the project.

[61] Lisburn Crematorium and Cemetery Ltd was granted full planning permission for a proposed cemetery and crematorium in October 2013, at lands opposite 3 and 5 Lisburn Road, Moira. The court has no further detail about this development although there is no indication that it is likely to be operational in the near future.

[62] It is probable that these various applications for planning permission demonstrate an increasing demand by the public for access to crematoria in their local areas. The 1985 Order clearly envisaged the provision of crematoria by councils in Northern Ireland.

[63] Notwithstanding the apparent increase in demand and the very significant changes that have taken place in the rest of the UK it remains the position in Northern Ireland that there is only one operational crematorium in the jurisdiction

and that crematorium is subject to regulations made in 1961 some 24 years before the passing of the 1985 Order.

[64] Unsurprisingly, this has come to the attention of the relevant Minister and Department. Mr Carleton in his affidavit informs the court that:

> "19. The Department is in the process of developing regulations under Article 17(3) of the 1985 Order which will ensure the new crematoria are fully regulated in line with the policy intention of the 1985 Order. They will also bring the regulation of crematoria in line with many amendments made since 1961 to the regulations applicable to England and Wales. I anticipate these regulations being in force by December 2022 to ensure they are operational before the completion of the crematorium operated by Antrim and Newtownabbey Borough Council …"

As far as the court is aware no such regulations have been laid.

[65] Leaving aside the question of making regulations under the 1985 Order there have also been developments in relation to the future of cremation provision in Northern Ireland.

[66] In 2016 DfC initiated dialogue with other Northern Ireland departments to establish which department would be best placed to take forward a review of cremation legislation, which would include the possibility of regulation of private sector crematoria.

[67] Thus the Permanent Secretary for DfC wrote to the Permanent Secretaries of the Department of Justice ("DoJ"), the Department of Health ("DoH") and the Department of Finance ("DoF") requesting policy context to compile an initial assessment of the relevant departmental interests in this area. No agreement was ever reached between officials as to how the review should be progressed.

[68] On 20 December 2017 at a meeting to discuss local government issues officials briefed the Permanent Secretary in relation to the issue of crematoria provision in Northern Ireland. It was recognised at that stage that a ministerial decision was required in order to make further progress.

[69] The briefing paper provided to the Permanent Secretary is revealing.

[70] The note records that:

> "The current legislation for council-run crematoria is outdated, and:

- does not allow the department to regulate council run crematoria other than those belonging to Belfast City Council;
- prevents councils from taking forward plans to establish crematoria in their districts as joint council/private sector run establishments."

[71] The note also indicates that:

> "Private crematoria have been proposed for the Moira and Dungannon areas and have been granted planning permission."

[72] The court has no further information in relation to these proposed developments.

[73] The note concluded:

> "There is a pressing need to bring forward subordinate legislation to enable the department to regulate any new council operated crematoria (other than those belonging to Belfast City Council) as Antrim and Newtownabbey and Fermanagh and Omagh are in the process of developing plans for crematoria in their districts."

[74] The issue was further addressed in departmental updates during the period of Assembly suspension from 2017 to 2020. An update in September 2019 repeats many of the issues raised in the briefing paper of 20 December 2017. The update note commences with the following:

> "1. The current legislative framework for crematoria provision in Northern Ireland is outdated and only applies to crematoria operated and maintained by Belfast City Council. Whilst there is legislative provision for councils to establish crematoria, the current legislative framework –
>
> - does not allow the department to regulate council run crematoria other than those belonging to Belfast City Council;
>
> - prevents councils from taking forward plans to establish crematoria in their districts as joint council/private sector run establishments; and

- does not make provision for privately run crematoria."

[75] The proposed way forward again returns to the issue of the requirement for subordinate legislation to update the regulations for both the current council run crematorium at Roselawn and to apply those regulations to all council run crematoria.

[76] It is recognised that a ministerial decision was required as to how the wider issue on crematoria provision in Northern Ireland should be progressed. A position paper on such provision has been finalised for consideration by the Permanent Secretary.

[77] Returning to Mr Carleton's affidavit he avers:

> "25. In December 2021, the Minister for Communities considered a number of options in relation to cremation policy, including maintaining the status quo, the simple removal of Article 17(8) of the 1985 Order, or a review of the legislation. She directed that a review of the legislation relating to crematoria, including consideration of making provision for private crematoria was required. She also considered that a review of the legislation in relation to burial grounds would be advisable. She decided to seek Executive consideration as to which department should be responsible for wider cremation and burial policy, and for conducting this review. Unfortunately, the Executive was disbanded before an Executive paper could be tabled for consideration.
>
> 26. In June 2022 the Minster reviewed the matter further to her pre-election decision. She has decided to issue a paper to ministerial colleagues concerning the commencement of a review of cremation and burial legislation in order to make some progress in the absence of an Executive."

Rationality/Scope of Review

[78] Whilst the court has accepted that it has the power to review an Order in Council of the type in this case it seems clear that the threshold for establishing any illegality must be high. The scope of judicial intervention is limited having regard to the fact that the impugned provision has the imprimatur of Parliament.

[79] Returning to *Javed,* in the context where human rights were in play the court quoted with approval the judgment of Sir Thomas Bingham MR in *R v Ministry of Defence, ex p Smith* [1996] QB 517 at p54 where he said:

> "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."

[80] Dr McGleenan argues convincingly that in the context of this case one is not dealing with an interference with human rights and that the margin of appreciation afforded to a democratically elected body is considerable and must be respected by the court.

[81] What then is Mr Lavery's argument? He says that there are two broad aspects to the irrationality challenge, although he concedes that there is some overlap between both:

(i) The legislation did not operate in a manner that was logically connected to its purpose, but rather served to frustrate that purpose;

(ii) The legislation, in fact, operates in a manner lacking in ostensible logic or comprehensible justification.

[82] The purpose of the legislation is in contention. The respondent suggests through Mr Carlton by reference to the House of Commons debate that the order would "update the law on cremation to provide simpler procedures." Similarly, in the House of Lords, Lord Lyell stated that Article 17 would "modernise and extend the legislation on cremation." Mr Lavery suggests that the purpose of Article 17 was to provide procedures to allow for additional crematoria to be developed outside of Belfast.

[83] He suggests that the fact that 37 years later there still is only one crematorium in Northern Ireland supports the conclusion that rather than simplifying, modernising or extending procedures to providing and maintaining a crematorium, Article 17 has served to hinder the development of crematoria in this jurisdiction.

[84] Interestingly, a background note that was drafted in respect of the draft provision at the relevant time provides as follows:

> "Para [1] of article 12 (the then version of the current article 17) contains the formal authority to enable a council to provide and maintain a crematorium. The only crematorium in Northern Ireland at present was established by the former Belfast Corporation in 1961 at Roselawn, Castlereagh. It is doubtful whether any of the other councils were to find it viable to run a crematorium alone. However, the existing powers in sections 106 (Contributions towards the exercise of another council in providing facilities) and 113 (Exercise of functions outside district) would involve council to co-operate in providing crematorium for shared use."

[85] When the legislation was enacted it was clearly envisaged that crematoria would be the sole responsibility of councils. The order made it possible for other councils in Northern Ireland to provide crematoria, either alone, or in conjunction with other councils.

[86] That was entirely consistent with the practice in the rest of the UK at that time.

[87] The failure of the department to make regulations to provide for councils to provide crematoria may well be the subject matter of criticism. A local council seeking to establish a crematorium might well have a strong case for judicial review against the respondent. Nonetheless, it is clear that in response to the increasing demand for crematoria, as evidenced by the planning permission provided to a number of councils, the process of developing the necessary regulations is advanced. That said, the court is disappointed to note that it does not appear that the regulations anticipated for December 2022 have materialised, presumably because of the absence of any minister.

[88] The real complaint, of course, by the applicant is that there is no provision for bodies other than councils providing crematorium facilities. That is the gravamen of his challenge to the order. This is the real issue to be determined by the court rather than an attempt to engage in an interpretative exercise of the intention of the policy behind the order in 1985.

[89] Thus, can Mr Lavery make good his submission that the legislation, in fact, operates in a manner lacking in ostensible logic or comprehensible justification?

[90] Elaborating on this submission he points to five matters which support that conclusion as follows:

(i) The experience of neighbouring jurisdictions demonstrates that it is not reasonable or rational to conclude that the public interest requires that the

provision and maintenance of crematoria be restricted to councils, as many private companies successfully operate facilities in England, Scotland, Wales and the Republic of Ireland and the law permits this.

(ii) Many of the private companies identified at (i) above provide cremations outside this jurisdiction for individuals who die in this jurisdiction.

(iii) (i) and (ii) operate to demonstrate that councils in this jurisdiction do not have particular expertise in providing and maintaining a crematorium, as only Belfast City Council, in fact, does this.

(iv) The impugned provision therefore restricts both the applicant's ability (and the ability of any other non-council entity) to provide and maintain a crematorium and does so for no good reason.

(v) The detrimental consequences this legislation has for ensuring the population's access to a crematorium also suggests that the prohibition is lacking in comprehensive justification. The prohibition has resulted in only one crematorium operating physically within the jurisdiction, in Belfast, which severely restricts those from outside the area in accessing a crematorium, and places significant demand on that facility, again, for no good reason.

[91] Recognising that a high threshold is required how should the court approach the analysis of rationality?

[92] De Smith's "*Principles of Judicial Review*" provides some helpful guidance. At para 11-033 the author states:

> "Although the terms irrationality and unreasonableness are these days often used interchangeably, irrationality is only one facet of unreasonableness. A decision is irrational in the strict sense of that term if it is unreasoned; if it is lacking ostensible logic or a comprehensible justification. Instances of irrational decisions include those made in an arbitrary fashion, perhaps "by spinning a coin or consulting an astrologer." In such cases the claimant does not have to prove that the decision was 'so bizarre that its author must have been temporarily unhinged' but merely the decision simply fails to "add up" in other words, there is an error or reasoning which robs the decision of logic.
>
> 'Absurd' or 'perverse' decisions may be presumed to have been decided in that fashion, as may decisions where the given reasons are simply unintelligible. The

> less extreme examples of the irrational decision include those in which there is an absence of logical connection between the evidence and the ostensible reasons for the decision, where the reasons display no adequate justification for the decision, or where there is absence of evidence in support of the decision. Mistake of material fact may also, according to recent cases, render a decision unlawful."

[93] Bearing these principles in mind, it is important to look again at what the "decision" under challenge actually is. The focus here is an Order of Council that was proposed by a minister and approved by both Houses of Parliament, albeit not with the same protections as primary legislation. It does, therefore, have a democratic foundation. It is difficult to see how it can be said that in 1985 it was somehow irrational to provide that only councils would be responsible for the provision of crematoria, subject to regulation by the relevant department. There are complex procedures which must be complied with in undertaking cremation. This involves close co-operation and co-ordination with a range of other public sector bodies. In Northern Ireland, councils are the authority through which many public services are delivered which are undertaken by private companies in other jurisdictions, such as waste management and recycling. The challenged provision must have been well within the ambit of decisions open to the minister and legislature and well within the latitude afforded to it in law.

[94] It can be reasonably argued that the situation has changed, given the demand for crematoria and the views of at least one council that a public private partnership is the appropriate way to deliver the facility.

[95] No doubt this is why the law has changed in the other jurisdictions in the UK. That they have done so, does not mean that any failure in this jurisdiction to do so is somehow unlawful.

[96] However, importantly, the fact that the legislation may well be out of date has been recognised by the relevant minister. Steps are in place to review and consider this matter. In the court's view that is the appropriate forum for this issue to be addressed. The court is dealing with political and social issues, not well suited to judicial intervention. The fact that the provision for crematoria in this jurisdiction is now under active review and consideration is important. That is the proper way to deal with the important issues raised by the applicant in this application. Any reforms or changes arising will enjoy democratic legitimacy.

[97] Just as it is important to consider the decision that is under attack in this application, it is important to look to the relief that is sought by the applicant. He seeks an order quashing Article 17(1) of the 1985 Order. This would simply remove the provision for a council to provide and maintain a crematorium. The impact of that would render the operation of the only currently operational crematorium in

Northern Ireland unlawful. It would not resolve the applicant's concern around the inability of private companies to run crematoria, at the risk of committing a criminal offence.

[98] If Article 17(1) and 17(8) were quashed then Article 17(3) could not be logically interpreted as having reference to any crematoria whatsoever, so there would be no facility for the department to regulate in any way a private crematorium.

[99] The real difficulty with the application is illustrated by the second substantive relief sought by the applicant, namely a declaration that the respondent's decision that the provision is lawful, and refusal to amend or repeal that provision, is unlawful.

[100] Put simply, it is not within the gift of the respondent to amend or repeal the provision. Government in this jurisdiction is complicated. Such amendment or repeal requires approval across a number of departments under the Northern Ireland Act 1998.

[101] The minister has decided to seek Executive consideration as to which department should be responsible for wider cremation and burial policy and for conducting a review of the legislation relating to crematoria.

[102] In the meantime, the respondent has commenced the necessary steps to regulate crematoria to be operated by councils.

[103] The respondent is unable to take steps unilaterally to deal with the wider issues and, in particular, the issue raised by the applicant, in the absence of a minister or Executive.

[104] The court recognises that the applicant has raised an important issue. To some extent the wind is at his back given what has been revealed as a result of this application. For the reasons set out above the court concludes that it could not be said that the provisions challenged in this application meet the high common law threshold required to be deemed irrational. The court is influenced by the evidence submitted by the respondent and is satisfied that this matter is under appropriate review by the appropriate authorities.

[105] For these reasons judicial review is refused.