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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN THE MATTER OF AN APPLICATION BY "D"
FOR JUDICIAL REVIEW

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Before: Carswell LCJ, Nicholson LJ and McCollum LJ

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CARSWELL LCJ

[1] This is an appeal from a decision of Coghlin J given on 19 September 2001, whereby he made an declaration on the application of an unnamed person styled "D" for judicial review, declaring that the decision by the appellant the Department of Regional Development not to institute a prosecution against Carnmoney District Loyal Orange Lodge (the Lodge) for erecting an Orange arch without consent was unlawful. The applicant "D", the respondent on this appeal, is a young man who lives in the Glengormley area and is a wheelchair user.

[2] The erection of a structure such as an Orange arch across a road requires the consent of the Department and it is a criminal offence to erect it without such consent. Detailed provisions covering the matter are contained in Article 73 of the Roads (Northern Ireland) Order 1993, but for present purposes the material portions are paragraphs (1), (2)(*a*), (6) and (7) of that Article:

> "**73.**-(1) Subject to paragraph (2), any person who fixes or places any overhead beam, rail, arch, pipe, cable, wire or other similar apparatus over, along or across any road shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 2 on the standard scale.
>
> (2) Paragraph (1) does not apply to anything done –

> *(a)* with the consent of the Department;
>
> ….
>
> (6) A consent under paragraph (2)(*a)* may be given by the Department where it is satisfied that the safety or convenience of traffic using the road, or which may be expected to use the road, will not thereby be prejudiced.
>
> (7) A consent under paragraph (2)*(a)* shall be given subject to such conditions as seem to the Department to be adequate for securing the safety and convenience of traffic."

[3] From about 1983 until the year 2000 an arch was erected annually in the centre of Glengormley village by the Lodge, without the Department's consent having been sought or obtained. The supports of the arch were set into holes in the footpath. When the arch was not in place there were covers over the holes, and, in recent years at least, items of street furniture in the form of flower holders were situated over the covers.

[4] The erection of the arch appears to have attracted little controversy until the summer of 2000, when there was a rise in community tension, but its erection and removal passed off peaceably in that year. The Department and the police had by then become aware that arches had been erected in many areas over the preceding years without consent, and they began to put procedures in place to publicise the need for consent and check the arches put in place to ascertain if proper consent had been obtained. This does not appear to have resulted in any application for consent in 2000 or any proceedings against those responsible for the erection of the arch. On 24 May 2001 Mr Desmond Bell, the District Treasurer, met Sergeant Knox and Inspector McInnes at Glengormley police station to discuss the erection of the arch that summer on behalf of the Lodge. He informed them of the proposed date for its erection and gave them some operational details. In the course of the conversation Sergeant Knox brought it to Mr Bell's attention that consent would have to be obtained from the Department.

[5] On 2 June 2001 Messrs Madden & Finucane, the solicitors acting for the respondent in the present proceedings, wrote to the Department of the Environment Planning Service on behalf of "a number of clients", expressing concern about the impending erection of the arch and asking if consent had been given. In the course of the letter they stated:

> "A member of our client's family must use a wheelchair. We are informed that the effect of the arch last year was that people using wheelchairs had insufficient space to pass on the pavement and

> were forced out into the road. This is self-evidently a hazardous manoeuvre given the large volume of traffic in this area. The arch clearly obstructs and takes up part of the public highway posing an obvious risk to highway users particularly those who have to use wheelchairs."

They wrote on the same date to the Chief Constable of the RUC, giving a client's name (which was obliterated on the copy before the court, but was apparently that of the respondent), stating that he was obliged to use a wheelchair and that when the arch was in place there was insufficient space to pass on the pavement and wheelchair users were forced out on to the road. This assertion is not supported by the evidence before the court. The arch was inspected by Mr RJH Hamilton the Department's Section Engineer on 22 June 2001, when he formed the opinion that the footways were not obstructed in the manner alleged. He again inspected the arch on 29 June 2001, following which he wrote a report dated 2 July 2001. He found that the horizontal clearance on the footway at the base of the arch had a minimum value of 1.9 metres on the northern side and 2.4 metres on the southern side, which did not significantly restrict pedestrian usage. The minimum width required by the Road Service for footway construction is 1.4 metres, which is sufficient to permit access for the disabled or mothers with prams accompanied by a walking child. Chief Superintendent Verner also deposed that when the flower holders are removed and the arch is erected the area of footpath available for free passage is actually increased.

[6] The arch was erected on 19 June 2001. There had been heightened community tension in the area in the immediately preceding period, and according to Mrs Roisin McGurk opposing crowds gathered and a large contingent of police officers was on duty at the scene. No consent had been sought or obtained before the arch was erected. On 20 June 2001 the District Engineer Mr Hamilton sought out Mr Bell and spoke to him. He states in paragraph 3 of the affidavit sworn by him:

> "I explained to Mr Bell that the arch had been erected without the appropriate consent from the Department and that it was essential that an application for consent be made. I also told Mr Bell about the need for an engineer's certificate to be provided and for insurance cover to be put in place in respect of the arch. Mr Bell did not appear to be acquainted with the procedure involved as he asked me to explain it to him, which I did."

It is apparent that Mr Hamilton assumed from Mr Bell's request for details of the procedure that he was unaware of the need to obtain consent. It is not in doubt that he was aware before 19 June that consent had to be obtained.

[7] On 21 June Mr Ernest Pinkerton the District Secretary wrote to the Department on behalf of the Lodge requesting permission for the erection of the arch. A standard form of application signed by him and bearing the same date was also submitted. The District Engineer replied on 4 July, pointing out that the arch had been erected without permission and that the Department would consider whether to bring a prosecution. He went on to state that following his inspection he was of the view that it was not interfering with the safety or convenience of traffic using the road. The Department would be prepared to grant consent for the arch, provided proper proof of insurance cover was furnished, together with a certificate from a chartered engineer as to the structural integrity of the arch. These items were furnished on 10 July and on that date the Department issued a formal consent authorising the erection of the arch between 19 June and 31 July 2001 and requiring its removal by 31 July. At one stage the Department appears to have regarded this document as conferring retrospective consent to the erection of the arch on 19 June, but it was subsequently accepted that it did not have that effect and that the consent did not cover the period between 19 June and 10 July 2001.

[8] The arch was not removed on 31 July 2001. The police advised the Lodge officers that in consequence of the murder of a young man in the area on 29 July 2001 there would in the prevailing atmosphere be a real risk of a breach of the peace and further exacerbation of community sensitivities. The removal of the arch was accordingly postponed until 7 August, when it was carried out peacefully.

[9] The respondent's solicitors wrote a series of letters to the Department and the RUC, demanding that the Lodge be prosecuted for erecting the arch without consent. The Department replied on 4 July 2001 that it would consider prosecution for any period of time in relation to which the arch was in place without Article 73 consent. The matter was considered by Mr Grahame Fraser, the acting Chief Executive of the Roads Service, following consultation with a senior colleague. He decided on behalf of the Department against instituting a prosecution. He set out his reasons for so deciding in paragraph 7(ii) of his affidavit sworn on 4 December 2001, which may be summarised as follows:

- The Department understood at the time of the decision that the members of the Lodge, when they became aware of the requirements of Article 73, sought consent and adhered to the conditions of that consent (the delay in removal of the arch was upon police advice).

- To have prosecuted might only have had the effect of causing persons engaged in the erection of arches not to reveal their identity by applying for consent.

- The Department endeavours to obtain co-operation from such persons in following the statutory regime and prosecution would have been likely to be counter-productive.

- Considerations of retribution and deterrence did not warrant a prosecution.

- The Department did not consider that it was in possession of evidence of sufficient quality, for example as to the identity of the erectors, to sustain a criminal prosecution against particular individuals.

[10] On 20 June 2001 the respondent's solicitors, after some skirmishing with the Legal Aid Department, issued an application for judicial review of a number of decisions of the Department and the Chief Constable set out in the grounding statement, basically in failing to take steps to prevent the erection of the arch. Leave to apply was given by Kerr J on 29 June 2001 and a notice of motion was issued on 2 July 2001. The matter did not then proceed until after legal aid was eventually granted on 17 January 2002. The application was amended on 3 July 2001 to include orders for the removal of the arch. It was further amended on 15 October 2001 to seek relief in respect of the decision of the Department not to prosecute the Lodge for erecting the arch without consent. After numerous adjournments the substantive application was heard on 31 May 2002. The judge gave a written judgment on 19 September. He held against the applicant's case impugning the decision of the Department to consent to the erection of the arch and that of the police not to prevent its erection. He did, however, make a declaration that the Department's decision not to prosecute the Lodge for erecting the arch without consent was unlawful. He did not give any remedy against the Chief Constable and the Police Service was not concerned in the appeal. The only substantive issue argued on appeal was the validity of the Department's decision not to prosecute the Lodge.

[11] We would observe at this point that the affidavit grounding the application was sworn, not by the applicant, but by a Mr Richie MacRitchie, described as an apprentice solicitor with the applicant's solicitors. In this affidavit he purports to depose to a number of substantive facts at the heart of the matter, which no doubt he obtained on instructions from his client. We have said on previous occasions that affidavits which contain such facts in judicial review applications ought to be sworn by the persons with first-hand knowledge of the essential facts and that it is undesirable that affidavits should be sworn by solicitors or other persons deposing to such facts. In our opinion leave to apply for judicial review should not generally be given nor should legal aid be granted unless proper first-hand affidavit evidence is filed.

[12] The issue of the applicant's standing and the authority for him to remain anonymous were raised before the judge. He was informed that the

court had on an earlier application given leave for his name to be withheld and accordingly he did not pursue the matter. When the case came on appeal we were told that the judge had been misinformed and that no such order had in fact been made. We took the view that an application should be made to us to permit the respondent's anonymity to continue and indicated that we should require evidence to justify it. Counsel made submissions to us that the respondent had justified fears for his personal safety if his name were publicly known (he furnished it to the court on a sheet of paper). Although we gave him an opportunity to produce evidence from the respondent to substantiate these submissions he declined to do so.

[13] It is quite possible that there may be cases in which anonymity would be justified, on the grounds of fears for an applicant's personal safety. A court should, however, require the grounds for the application to be properly established on sufficient evidence. Applications for judicial review ought ordinarily to be brought by identified persons who can establish their interest in doing so, and a court should require well founded reasons to be established before permitting anonymity.

[14] The question of anonymity is linked with that of the respondent's interest, which was fully argued on appeal. Section 18(4) of the Judicature (Northern Ireland) Act 1978 provides:

> "The court shall not grant any relief on an application for judicial review unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

Since this enactment the requirement has been the same for applicants for all prerogative orders, although the view has been expressed that the application of the test should vary according to the relief sought: see the opinions given in the House of Lords in *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617. The matter is not one of pure discretion, but is a mixed decision of fact and law, to be decided on legal principles: *ibid*, per Lord Wilberforce at page 631 and Lord Roskill at page 659.

[15] There has been much discussion of the topic of standing in textbooks and legal periodicals and examples abound in the reported cases, yet it is difficult to pin down any authoritative statement of the principles to be applied by a court in determining the question. It appears to be incontestable that the courts have tended in recent years to take a more liberal attitude to matters of standing. We would tentatively suggest that the following propositions may now be generally valid:

(a) Standing is a relative concept, to be deployed according to the potency of the public interest content of the case.

(b) Accordingly, the greater the amount of public importance that is involved in the issue brought before the court, the more ready it may be to hold that the applicant has the necessary standing.

(c) The modern cases show that the focus of the courts is more upon the existence of a default or abuse on the part of a public authority than the involvement of a personal right or interest on the part of the applicant.

(d) The absence of another responsible challenger is frequently a significant factor, so that a matter of public interest or concern is not left unexamined.

[16] When the application for judicial review was first instituted, a reasonable case could be made that a wheelchair user had the necessary standing to complain about a decision to allow the erection of an arch which was alleged to create danger for him and persons similarly handicapped. By the time the application came on for hearing before Coghlin J the arch had been removed and the factual basis for the original complaint was shown to be unfounded. The arguments presented at the hearing centred round the erection of the arch without consent, the subsequent grant of consent and the Department's decision not to prosecute the Lodge. If the applicant had the necessary standing at the outset, it is difficult to suppose that the court should have dismissed the application on the ground that the basis for it had gone by the time of the hearing. Similarly, although the appeal was confined to the issue of the validity of the decision not to prosecute, the applicant was by then the respondent to the appeal and it would be hard to say that he should not have attempted to uphold the judge's decision. An issue might arise in another case whether a person in his position would have the necessary standing if he were the appellant.

[17] It appears accordingly that the court should look at the question of the applicant's standing by reference to the time when the proceedings were commenced, and if satisfied that he had sufficient standing then it should be slow to hold that he did not possess it at a later stage in the litigation. One has then to consider the effect of his commencing the proceedings under a pseudonym and his subsequent failure or refusal to make his name public or furnish a satisfactory reason why it should be withheld. This issue is cognate with that of standing, and is a ground which the court may take into account in deciding on the exercise of its discretion.

[18] We consider that the respondent might have been able to make out a ground for a claim that he had sufficient standing, were it not for the question of the pseudonym. We do not regard it as necessary to reach a definite conclusion on this, however, for we regard the question of the pseudonym as conclusive against him. The judge was not in a position to make a proper exercise of his discretion, since he was misled on the point, and it falls to us now to do so. We should not be willing to afford the anonymous respondent

a remedy, if he would otherwise be entitled to one, since he has failed and refused to put forward sufficient reason to withhold his name and to bring the proceedings anonymously, and on this ground alone we should be prepared to allow the appeal.

[19] The substantive issue argued on appeal was the validity of the Department's decision not to prosecute the Lodge. In his judgment the judge considered the effect of taking into account a mistaken fact in making a decision, and concluded at paragraph 43:

> "The belief that the officers of Carnmoney District LOL did not know that it was necessary to apply to the Department for consent to erect the Orange arch would clearly be a material and significant factor to be considered when deciding whether to prosecute and this has been formally confirmed by the affidavits sworn by Mr Carlisle and Mr Fraser. While it may not have been the only factor taken into account in relation to that decision, I am quite unable to hold that, had they known the true extent of Mr Bell's knowledge so recently imparted in the course of police advice, the officers of the Department would have reached the same decision."

[20] As Mr McCloskey QC for the appellant pointed out in his argument, in reaching this conclusion the judge did not advert to the principles to be applied in considering whether to review decisions of the Director of Public Prosecutions. Counsel submitted that the same principles should apply to the decision of another department of government whether to prosecute a person or body which had been in breach of the law. In *Re Adams' Application* [2001] NI 1 at 12 we held as follows:

> "It was not in dispute between the parties that the court does have power in appropriate cases to review the decisions of the DPP, though the power is one to be sparingly exercised: see, eg *R v DPP, ex p C* [1995] 1 Cr App R 136. In that case, which concerned a decision of the DPP not to prosecute a husband whose wife had complained of repeated acts of buggery, Kennedy LJ said at 141:
>
> > `… in the context of the present case this court can be persuaded to act if and only if it is demonstrated to us that the Director of Public Prosecutions acting through the

> Crown Prosecution Service arrived at the decision not to prosecute: (1) because of some unlawful policy (such as the hypothetical decision in *Blackburn (R v Metropolitan Police Comr, ex p Blackburn* [1968] 2 QB 118, [1968] 1 All ER 763, [1968] 2 WLR 893, CA) not to prosecute where the value of goods stolen was below £100); or (2) because the Director of Public Prosecutions failed to act in accordance with her own settled policy as set out in the Code; or (3) because the decision was perverse. It was a decision at which no reasonable prosecutor could have arrived.'
>
> To these grounds must be added those of improper motive and bad faith."

We consider that the appellant's submission is correct and that these principles apply to the review of the decision of any public body whether to prosecute. If that be so, then none of the criteria enunciated by Kennedy LJ or ourselves apply to this case and the decision should not be upset. The Department did not follow any unlawful policy or depart from its own settled policy; there were ample sustainable reasons why it should have decided not to prosecute and the decision could not be regarded as perverse; and no question of bad faith or improper motive was raised.

[21] If we are wrong in this conclusion and the Department's decision not to prosecute is not to be judged by the same criteria as a similar decision made by the DPP, then the question arises which the judge discussed at paragraphs 39 to 44 of his judgment, whether the Department's mistaken understanding that the officers of the Lodge did not know of their obligation to seek consent to erect the arch vitiated the decision. The effect of a mistake of fact upon a decision is one whose boundaries are not yet clearly determined in the common law, and a useful discussion may be found in the article by Mr TH Jones in [1990] PL 507, to which the judge referred. At one end of the spectrum of opinion is that of the learned authors of Wade & Forsyth, *Administrative Law,* 8th ed, p 282, where they express the categorical view that mere factual mistake has become a ground of judicial review. This view is supported by some decisions in England at first instance, by a remark of Lord Wilberforce in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1047 and by a clear statement of opinion by Cooke J in *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 at 149. A contrary view may be found in the judgment of Watkins LJ in *R*

v London Residuary Body, ex parte Inner London Education Authority (1987) *The Times,* 3 July.

[22] The synthesis may perhaps be found in applying the well established principles founded upon the taking into account of an irrelevant consideration, as is suggested by the learned editors of de Smith, Woolf & Jowell, *Judicial Review of Admininstrative Action,* 5th ed, p 288. If the decider bases his decision on a certain ground, but has been mistaken as to a basic fact forming the foundation of that ground, then he may have incorrectly taken into account that consideration and his decision may thereby be vitiated. This was the ground on which the English Court of Appeal set aside a minister's planning decision in *Simplex GE (Holdings) v Secretary of State foe the Environment* (1988) 57 P & CR 306, to which the judge referred in his judgment. In that case the minister had rejected an inspector's recommendation in favour of granting planning permission, on the mistaken assumption that the planning authority had made a study of the area and decided to retain the area as green belt. In fact the study obtained by the planning authority was not directed to that issue. The Court of Appeal held that the error was a significant factor in his decision-making process and that it could not be said that he would necessarily have reached the same conclusion if he had not acted on the erroneous factor, the proper test to be applied.

[23] The judge concluded, as he held in paragraph 43 of his judgment that the belief of the officers of the Lodge was clearly a material and significant factor to be considered in the decision whether to prosecute, and that it could not be said that if the Department had known the true facts it would necessarily have reached the same decision. This factor was, however, only one of a number considered by the Department, which we summarised in paragraph 9 of this judgment. We share the judge's view that the last-mentioned factor, the difficulty in ascertaining who erected the arch, did not carry much weight. The other reasons were nevertheless cogent. While it may not be possible to say that the Department would necessarily have decided not to prosecute if it had known that the Lodge's District Treasurer (and by implication other officers) had been aware from 24 May 2001 that consent was required for the erection of the arch, it appears to us a strong probability that it would have reached the same decision on the other grounds.

[24] This conclusion is in our view material in considering the exercise of the court's discretion whether to grant a remedy. The judge weighed up the arguments for and against making a declaration in paragraph 48 of his judgment:

> "[48] A declaration must serve some useful purpose and, usually, that is to establish the rights of the parties and resolve any uncertainties. Even

> where a defence is abandoned, clarification of the law may be of value in the future, both as guidance for those charged with the performance of public duties and an assurance for the public that those duties would be carried out in a fair and lawful manner. Both the decision not to prosecute and the particular arch itself have now been relegated to history and, even had certiorari been sought and granted at the material time the result would have been a reconsideration of the decision by the Department which might, or might not, have produced a different outcome having regard to the particular circumstances of this case. In this context, it is arguable that it is not easy to identify the extent of any benefit in terms of clarification and/or guidance which would be produced by granting a declaration at this stage. On the other hand, to refuse relief would be to preserve a decision taken by the Department which has now been shown to have been based upon the false premises that the officer of the lodge did not know that it was necessary to obtain consent and was taken without being aware that the arch had apparently been erected without any attempt being made to comply with the police advice that consent should be obtained. Ultimately, I am persuaded that both justice and fairness require me to grant a declaration that the decision by the Department not to prosecute this Lodge was unlawful."

[25] In accordance with the principles enshrined in *Evans v Bartlam* [1937] AC 473, we would normally be slow to reverse a decision made by a judge at first instance in the exercise of his discretion. In the present case, however, we consider that we ought to do so. The possibility of making an order of certiorari has become as much a part of history as the decision not to prosecute. No person's situation would be altered either way and we are of the clear opinion that it would settle nothing to make a declaration in the terms made by the judge. Every decision regarding the bringing of such a prosecution depends on a multiplicity of facts, which are likely to vary infinitely, and we cannot see that making a declaration would give any guidance to the Department or other parties if a similar situation were to occur. Moreover, there were cogent factors against prosecuting and we consider it probable that the Department would have reached the same decision if it had known the true facts. In these circumstances to declare that the decision made was unlawful would not assist any one to determine

whether the Department really should have decided not to prosecute. We therefore cannot agree with the judge that making a declaration would serve the interests of justice or fairness. Accordingly, even if the decision not to prosecute was unlawful, contrary to our opinion, we should not be prepared to affirm the judge's decision.

[26] For the reasons which we have given we propose to allow the appeal and dismiss the application for judicial review.