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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY PETER NEILL FOR JUDICIAL REVIEW

Before Kerr LCJ, Nicholson LJ and Campbell LJ

KERR LCJ

Introduction

[1] Peter Neill is thirty eight years old. He has more than one hundred and fifty convictions for offences ranging from burglary to assault and riotous behaviour. The court appearances which resulted in these convictions occurred between 1983 and 2005.

[2] For some time before March 2005 Mr Neill lived with his sister at 2E Somerset Drive, Coleraine. Ms Neill is a tenant of the Northern Ireland Housing Executive. The difficulties that the Executive have experienced since Mr Neill went to live in Somerset Drive have been detailed in a statement made by an assistant district manager. They have been inundated with complaints and expressions of concern about his behaviour from other tenants of the Executive. Police have been called to the premises on a number of occasions when loud, drunken parties have been taking place. As well as this, Mr Neill has been barred from a number of licensed premises because of his behaviour.

[3] Against this background it is hardly surprising that in May 2005 Mr Neill was served with a summons to answer a complaint of anti-social behaviour under article 3 of the Anti social Behaviour (Northern Ireland) Order 2004. The matter came on for hearing before Coleraine Magistrates' Court on 11 May 2005 and the prosecution case against Mr Neill was presented on that day. The case was then adjourned and was due to resume on 23 May. On 20 May Mr Neill's solicitor, Pearse MacDermott, became aware that the Equality

Commission for Northern Ireland had conducted an investigation under paragraph 10 of Schedule 10 to the Northern Ireland Act 1998 into certain aspects of the 2004 Order. On 23 May, therefore, Mr MacDermott applied for and obtained an adjournment of the hearing of the summons against Mr Neill.

[4] On 31 May 2005 Mr Neill submitted an application for leave to apply for judicial review. He sought various orders including mandamus directed to the Secretary of State for Northern Ireland to require him to instruct the relevant public authorities to suspend the issue of applications for anti-social behaviour orders (ASBOs) until the Northern Ireland Office had complied with section 75 of the Northern Ireland Act 1998. He also applied for judicial review in the form of a declaration that article 3 of the 2004 Order was *ultra vires* the 1998 Act, firstly because the Secretary of State had not complied with section 75 of the Act, and secondly because he had not provided consent pursuant to section 8 of the Act and paragraph 1 of the Schedule to the Northern Ireland Act 2000. The consent of the Secretary of State was required, it was said, to enable Her Majesty in Council to legislate on the reserved matters that the 2004 Order dealt with. Leave to apply for judicial review was granted on 22 June 2005 and after a hearing before Girvan J, judgment was delivered on 7 October 2005 dismissing the application. Mr Neill's appeal against that decision was heard by this court on 9 February.

[5] Both before Girvan J and this court the Committee on the Administration of Justice (CAJ) were given leave to intervene. Mr Allen QC made oral and written submissions on their behalf.

Background

[6] On 8 January 2004 the government published a consultative document, entitled "Measures to tackle anti-social behaviour in Northern Ireland". Consultation with various interested groups then took place. After the consultation period it was decided that ASBOs should be introduced to Northern Ireland and a proposal for a draft Order in Council was published in May 2004. On 6 May 2004 the Children's Law Centre made a formal complaint to the Equality Commission under paragraph 10 of Schedule 9 to the 1998 Act. The main thrust of this complaint was that the Northern Ireland Office had not subjected the proposal for the draft Order to an equality impact assessment.

[7] On 10 May 2004 the Minister of State with responsibility for criminal justice announced his intention to lay the proposal for a draft Order in Council before Parliament and to shorten the period for consultation on the draft legislation. The Northern Ireland Commissioner for Children and Young People sought leave to challenge those decisions but this was refused

by Girvan J in a reserved judgment delivered on 23 June 2004. On 27 July 2004 the Anti-social Behaviour (Northern Ireland) Order 2004 was made.

[8] The Commission proceeded to investigate the Law Centre's complaint. It submitted a draft report on 18 March 2005 and, following a response from NIO on 15 April 2005, it published its report on 9 May 2005. The Commission found that NIO had failed to comply with duties arising under section 75 of and Schedule 9 to the 1998 Act.

Sections 75 & 76 and Schedule 9

[9] Section 75(1) of the 1998 Act provides:

> "A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity –
>
> (a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
>
> (b) between men and women generally;
>
> (c) between persons with a disability and persons without; and
>
> (d) between persons with dependants and persons without."

[10] Schedule 9 provides for the enforcement of a public authority's duties under Section 75 and is given effect by section 75 (4). Paragraph 1 of the schedule outlines the role of the Equality Commission as follows: -

> "The Equality Commission for Northern Ireland shall-
>
> (a) keep under review the effectiveness of the duties imposed by section 75;
>
> (b) offer advice to public authorities and others in connection with those duties; and
>
> (c) carry out the functions conferred on it by the following provisions of this Schedule."

[11] By paragraph 2 (1) of the schedule all public authorities (except those notified by the Commission that the sub-paragraph does not apply to them) must submit an equality scheme to the Commission. Under paragraph 4 (1) the scheme must show how the authority proposes to fulfil its obligations under section 75 and by paragraph 4 (2) the scheme must set out the authority's arrangements in relation to a number of specified functions. The relevant function for present purposes is to be found in paragraph 4 (2) (b) which requires that a statement be made as to the arrangements for assessing and consulting on the likely impact of policies adopted or proposed to be adopted by the authority on the promotion of equality of opportunity. Paragraph 4 (3) (a) requires a scheme to conform to any guidelines which are issued by the Commission with the approval of the Secretary of State. By paragraph 6 (1) the Commission may approve the scheme or refer it to the Secretary of State. It approved the NIO scheme on 28 November 2001.

[12] Under the title 'duties arising under equality schemes' paragraph 9 (1) and (2) provide: -

> "9. - (1) In publishing the results of such an assessment as is mentioned in paragraph 4 (2) (b), a public authority shall state the aims of the policy to which the assessment relates and give details of any consideration given by the authority to-
>
> (a) measures which might mitigate any adverse impact of that policy on the promotion of equality of opportunity; and
> (b) alternative policies which might better achieve the promotion of equality of opportunity
>
> (2) In making any decision with respect to a policy adopted or proposed to be adopted by it, a public authority shall take into account any such assessment and consultation as is mentioned in paragraph 4(2)(b) carried out in relation to the policy."

[13] Paragraph 10 deals with complaints. If the Commission receives a complaint made in accordance with paragraph 10 it must investigate it or give reasons for not doing so. By sub-paragraph (2) the complaint must be made in writing by a person who claims to have been directly affected by the failure of the public authority to comply with an equality scheme. In this case NIO argued before Girvan J that the Children's Law Centre was not directly affected and that the Commission was wrong to have carried out an

investigation on the basis of its complaint. That argument was not pursued on appeal.

[14] The manner in which complaints are to be investigated is provided for in paragraph 11 of Schedule 9. Not all of its provisions pertain to this investigation, for paragraph 12 provides that sub-paragraphs (2) (b) and (3) of paragraph 11 will not apply to a government department such as NIO. (These sub-paragraphs deal with sending the report of the investigations to the Secretary of State and notifying him of a failure of a public authority to take action recommended by the Commission).

[15] Where, as a result of an investigation carried out under paragraph 11, the Commission believes that a government department may have failed to comply with an equality scheme it may lay before Parliament and the Northern Ireland Assembly a report of its investigation. The Assembly is suspended at present but we were given to understand that the report was to have been laid before Parliament on 28 February.

[16] Section 76 forbids discrimination by public authorities against a person or class of person on the ground of religious belief or political opinion. Sub-section (2) provides for remedies for breach of sub-section (1): -

> "An act which contravenes this section is actionable in Northern Ireland at the instance of any person adversely affected by it; and the court may—
>
> (a) grant damages;
>
> (b) subject to subsection (3), grant an injunction restraining the defendant from committing, causing or permitting further contraventions of this section."

The NIO scheme

[17] Guidelines were issued by the Commission pursuant to paragraph 4 (3) (a) of Schedule 9 to the Act and the scheme followed broadly the structure outlined in them. In particular paragraph 3.2 of the scheme provided: -

> "The Department will consider the impact of each current or new policy on equality of opportunity in terms of the nine categories listed at section 75 of the Act. For each policy the following criteria will be applied;

a. Is there any evidence of higher or lower participation or uptake by different groups?

b. Is there any evidence that different groups have different needs, experiences, issues and priorities in relation to the particular policy?

c. Is there any opportunity to promote equality of opportunity or good relations better by altering the policy or working with others in government or the community at large?

d. Have consultations with relevant groups, organisations or individuals indicated that particular policies, functions or duties create problems that are specific to them?

If the answer to any of these questions is positive or "Don't Know", consideration will be given as to whether to subject the policy to the equality impact assessment procedure. Equality impact assessments will be conducted in accordance with the procedure set out in Annex 1 to the Equality Commission's Guidelines on the form and content of Equality Schemes. The Department has recognised that in many policy areas there is a dearth of statistical data on which to base either its screening judgment or its impact assessments. A data availability audit for each policy area has been completed. Other means of forming objective judgments about equality impact will also be employed such as consultation with representative groups, surveys etc. In some cases at least in the interim these may be the only objective means of forming judgments."

[18] Paragraph 4.3 dealt with consultation on the screening process of various policies. It is in the following terms: -

"The Department will consult on the screening processes and subsequently on equality impact assessments with relevant public sector organisations and with those representative groups and individuals of the section 75 categories listed at Annex B. In addition the Department will consult all those affected by the policy whether or not they have a direct economic or personal interest".

[19] The groups listed in Annex B were categorised according to religious belief, political opinion, racial or ethnic group, gender, marital status, age, disability, persons with dependants and sexual orientation.

The screening exercise

[20] NIO conducted a screening exercise of the ASBO proposals. This has been described in paragraphs [20] and [21] of Girvan J's judgment and need not be rehearsed at any length. It was accepted that ASBOs would constrain the freedom of certain individuals but this was necessary in order to allow an acceptable quality of life for other individuals. The question 'Is there any evidence of higher or lower participation or uptake by different groups?' produced an affirmative answer. It was concluded that the group most likely to be constrained by ASBOs was young male. It was nevertheless decided that an impact assessment was not required.

The Commission's findings

[21] Again these are set out in paragraphs [23] to [31] of Girvan J's judgment and need not be repeated in extenso here. In broad outline the Commission concluded that NIO was obliged to consider whether an equality impact assessment was required in light of the conclusion that young males were more likely to have been affected by the introduction of ASBOs than other groups. NIO's screening documentation simply recorded that such an impact assessment was not required. It did not give reasons to support that statement and there was an implicit requirement in the guidelines that reasons should be provided. The failure to give reasons indicated that NIO had not given the requisite consideration to that issue contemplated by paragraph 3.2 of the scheme.

[22] In the course of the Commission's investigation NIO explained that it had reached the view that the proposals were unlikely to have an adverse differential impact on any section 75 group since they were directed at the population as a whole and would be universally applied. Those falling within the ambit of the legislation would be self-selecting by virtue of their behaviour. This explanation did not find favour with the Commission. It did not agree that this was a sufficient basis for not undertaking an impact assessment.

[23] The Commission concluded that NIO should undertake an equality impact assessment of the 2004 Order policy in relation to its potential impact on children and young people. It suggested that this should begin on 1 June 2005 and that a report on progress on such assessment should be provided to the Commission by 5 August 2005. It also made recommendations about the conduct of future screening exercises. Is a failure to comply with an equality scheme amenable to judicial review?

[24] For the appellant Mr Larkin QC submitted that NIO's decision not to conduct an equality impact assessment amounted to a failure to have due regard to the need to promote equality of opportunity, a central imperative of section 75. That omission invalidated the legislation, he claimed. Mr McCloskey QC for the respondent, while resisting the claim that NIO was obliged to carry out an impact assessment, contended that the legislation supplied a scheme for the redress of failures to comply with the section. The existence of that scheme was not consistent with an extensive right to challenge such failures by judicial review. Mr McCloskey did not suggest that judicial review would never be available to impugn a breach of section 75 but asserted that the circumstances in which such challenges might be made were extremely limited.

[25] Mr Allen steered a course somewhat between these two positions. He drew an analogy with section 71 of the Race Relations Act 1976 which, he claimed, is in broadly similar terms to section 75 of the 1998 Act. He submitted that the justiciability of disputes about the application of that provision had never been questioned and pointed out that the section had received judicial attention in such cases as Wheeler v Leicester City Council [1985] AC 1054 and R v Lewisham LBC, ex p. Shell Ltd. [1988] 1 All ER 938. Mr Allen accepted, however, that once the Schedule 9 procedure has been carried out, judicial review would normally be otiose.

[26] Girvan J drew a contrast between the sanctions provided for in section 76 of the 1998 Act in relation to discrimination perpetrated by a public authority and the manner of enforcing an authority's duties under section 75. At paragraph [42] of his judgment he said: -

> "[42] The way in which the "due regard" duty [in section 75] is enforced is provided for in Schedule 9. The history of the background to the drafting of the 1998 legislation … bear[s] out the clear impression emerging from the wording of section 75 that Schedule 9 represented the legislature's decision as to how effect would be given to the enforcement of section 75 duties. The width, ambit and boundaries of the concept of equality of opportunity are not particularly clearly delineated. Parliament appears to have opted for a wide concept and recognised that giving effect to the obligation to have "due regard" to the need to promote equality of opportunity would call for structured assessment, consultation, monitoring and publicity. It has in Schedule 9 set out a quite complex machinery for the introduction and approval of equality schemes and mechanisms for

> ensuring compliance with such schemes. Alleged breaches of schemes are to be the subject of investigation and reporting with political consequences. It appears that the legislature, no doubt by way of a political compromise, opted for that route to remedy breaches of schemes rather than by conferring rights to be asserted by action or other litigious means. The consequence in the present instance is that the 2004 legislation is not open to challenge in the way provided for in relation to section 76. …"

[27] It is important, we believe, to focus on the context of the present dispute in deciding whether judicial review will lie to challenge the validity of the 2004 Order. At the kernel of this is the avowed failure of NIO to comply with its equality scheme. This is precisely the type of situation that the procedure under Schedule 9 is designed to deal with. Equality schemes must be submitted for the scrutiny and approval of the Commission. It is charged with the duty to investigate complaints that a public authority has not complied with its scheme (or else to explain why it has decided not to investigate) and is given explicit powers to bring any failure on the part of the authority to the attention of Parliament and the Northern Ireland Assembly.

[28] It would be anomalous if a scrutinising process could be undertaken parallel to that for which the Commission has the express statutory remit. We have concluded that this was not the intention of Parliament. The structure of the statutory provisions is instructive in this context. The juxtaposition of sections 75 and 76 with contrasting enforcing mechanisms for the respective obligations contained in those provisions strongly favour the conclusion that Parliament intended that, in the main at least, the consequences of a failure to comply with section 75 would be political, whereas the sanction of legal liability would be appropriate to breaches of the duty contained in section 76.

[29] Mr Larkin suggested that it would be incongruous if the failure to observe section 75 should be immune from judicial review while a failure to observe its precursor, the Policy Appraisal and Fair Treatment guidelines, would render a decision invalid. This argument fails, in our judgment, to recognise the impact of the statutory framework which provides for redress in a different form where an equality scheme has not been complied with. This remedy was not available to deal with failures on the part of public authorities to have regard to the guidelines.

[30] The conclusion that the exclusive remedy available to deal with the complained of failure of NIO to comply with its equality scheme does not mean that judicial review will in all instances be unavailable. We have not decided that the existence of the Schedule 9 procedure ousts the jurisdiction

of the court in all instances of breach of section 75. Mr Allen suggested that none of the hallmarks of an effective ouster clause was to be found in the section and that Schedule 9 was principally concerned with the investigation of procedural failures of public authorities. Judicial review should therefore be available to deal with substantive breaches of the section. It is not necessary for us to reach a final view on this argument since we are convinced that the alleged default of NIO must be characterised as a procedural failure. We incline to the opinion, however, that there may well be occasions where a judicial review challenge to a public authority's failure to observe section 75 would lie. We do not consider it profitable at this stage to hypothesise situations where such a challenge might arise. This issue is best dealt with, in our view, on a case by case basis.

[31] It should perhaps be observed that, even if judicial review is available to challenge breaches of section 75, it is by no means automatic that, in a situation where legislation has been enacted following the breach, it would be thereby rendered invalid. Much will depend on the nature of the breach and the availability of other effective remedies. Again, however, further comment on this should await instances where the issue arises directly.

The consent of the Secretary of State

[32] Part II of the Northern Ireland Act 1998 regulates the law-making competence of the Northern Ireland Assembly. Section 8 of the Act provides:

> "8. The consent of the Secretary of State shall be required in relation to a Bill which contains-
>
> (a) a provision which deals with an excepted matter and is ancillary to other provisions (whether in the Bill or previously enacted) dealing with reserved or transferred matters; or
>
> (b) a provision which deals with a reserved matter."

[33] In Schedule 3 to the 1998 Act, reserved matters are stated to include the criminal law and the creation of offences and penalties (paragraph 9) and the maintenance of public order (paragraph 10). The 2004 Order is plainly concerned with reserved matters, therefore.

[34] Section 1 of the Northern Ireland Act 2000 provides: -

> "1 (1) While this section is in force, the Northern Ireland Assembly is suspended and the following provisions of this section have effect.

(2) No Act is to be passed by the Assembly.

(3) Neither the Assembly nor any committee of the Assembly is to hold a meeting or conduct any business.

…

(8) The Schedule to this Act makes further provision in connection with that made by this section."

[35] The Schedule to the 2000 Act is entitled "Legislation by Order in Council". Paragraph 1 (1) provides: -

"1 (1) While Section 1 is in force, Her Majesty may by Order in Council make provision for any matter for which the 1998 Act authorises or requires provision to be made by Act of the Assembly.

(2) A provision which would be outside the legislative competence of the Assembly may not be included in such an Order."

[36] Paragraph 2 (1) of the Schedule provides:

"2 (1) An Order in Council may not be made under paragraph 1(1) unless -

(a) a draft of the Order has been approved by resolution of each House of Parliament; or

(b) the Order declares that the Secretary of State has advised Her Majesty that because of the urgency of the matter it is necessary to make the Order without that approval."

[37] Paragraph 3 (1) provides: -

"3 (1) References to Acts of the Assembly in any enactment or instrument (whether past or made before or after the coming into force of Section 1) are to be read, so far as the context permits, as including references to Orders in Council made under paragraph 1 (1)."

[38] Mr Larkin argued that in relation to reserved matters no greater legislative competence was conferred on Her Majesty in Council than that granted to the Northern Ireland Assembly. Since the Assembly could not have enacted the provisions at issue in this appeal without the consent of the Secretary of State it followed that for Her Majesty in Council to validly legislate, the Secretary of State's consent was also required and it had not been given. The 2004 Order was therefore invalid.

[39] Mr McCloskey's riposte to this argument was that Part II of the 1998 Act had no function while the Assembly was suspended. Section 8 did not therefore apply to Orders in Council made under the Schedule to the 2000 Act. It had not been incorporated into the Act of 2000 and in any event governed an entirely different species of legislation viz Bills introduced to the Assembly as opposed to Orders in Council that were subject to a wholly different Parliamentary procedure.

[40] The respondent's alternative submission was that if the Secretary of State's consent was required this had in fact been provided. That was "the substance and reality of what [had] occurred". NIO was the sponsoring department which had prepared and promoted the measure to the point where it became law. The Secretary of State was the minister responsible for NIO and he had expressly approved the laying of the draft Order in Council before Parliament.

[41] The key to this dispute lies in the ascertainment of the intention of Parliament in enacting the various statutory provisions. It is tolerably clear that the purpose of section 8 was to act as an inhibition to the legislative powers of the Assembly. In relation to certain excepted matters and all reserved matters, Parliament decided that the Assembly should only be competent to legislate where the consent of the Secretary of State had been obtained. The purpose of section 8 was to enable the government (through the Secretary of State) to prevent the Assembly legislating in areas considered inappropriate. The essence of the constraint is a curb, applied by the Secretary of State, on the legislative power of the Assembly. Its application to the Order in Council route to enactment (whereby the Secretary of State would be required to give his consent to legislation that his department was piloting through Parliament) would be an entirely artificial and pointless exercise. We are satisfied, therefore, that section 8 does not apply to Orders in Council made under the Schedule to the Act of 2000.

[42] If we had concluded that the Secretary of State's consent was required, we would have held, largely for the reasons given by Mr McCloskey, that it had in fact been given. We do not consider that it would have been necessary that this be signalled in any formal fashion and it is abundantly clear that the Secretary of State wanted to have the legislation enacted. As Girvan J said,

"requiring a formalised written consent to himself to do what he fully wishes and intends to do makes no real sense."

Conclusions

[43] We have concluded that the only route by which NIO's avowed failure to comply with its equality scheme can be challenged is by the procedure set out in Schedule 9 to Northern Ireland Act 1998 and that in this instance judicial review is not available to the appellant. We have further concluded that the Secretary of State's consent was not required for the enactment of the Anti social Behaviour (Northern Ireland) Order 2004. The appeal must therefore be dismissed.