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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY BELFAST CITY COUNCIL

Before Kerr LCJ and Campbell LJ

KERR LCJ

Introduction

[1] This is an application for judicial review by Belfast City Council, challenging two sentencing decisions of Sarah Creaner, a deputy resident magistrate, sitting at Belfast Magistrates' Court. Two defendants, an entertainments licensee, Moyola Cellars Ltd, and the operations manager of a nightclub, Stephen Carson, both pleaded guilty to the offence of allowing a final exit to be barred shut thereby impeding a means of escape in the event of a fire or other emergency. These offences had been preferred under paragraph 10(2) of the First Schedule to the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1985. They were each fined £100.

[2] Belfast City Council is the local authority with responsibility for issuing entertainments licences in the city. Moyola Cellars Ltd is the holder of the relevant licence which covers the Elephant Room in the Europa Hotel. Mr Carson is the operations manager of the Europa and had responsibility for the arrangement of entertainment in the hotel.

The facts

[3] At 11.15pm on 2 September 2006, Monica Gallagher, an assistant building control manager with the council, entered the Europa Hotel for the purpose of checking whether the terms of the entertainments licence were being complied with. The licence included the following terms: -

> "1. All doors on escape routes to be free from restrictive fastenings other than panic bolt/latch type mechanisms.
>
> 2. Escape routes to be kept clear from obstructions …"

[4] A manager (not Mr Carson) offered to accompany Ms Gallagher on her inspection of the premises. They went to a nightclub area known as the Elephant Room where a discotheque was taking place. Ms Gallagher and the manager left the nightclub by what she has described as 'lobby doors'. The closing mechanisms which should have been in position at the top of the doors had been removed with the consequence that Ms Gallagher and the manager could not re-enter the nightclub area. The 'final exit' doors *i.e.* the doors which led on to the street from the lobby were secured by means of a padlock and chain. The manager did not have a key for the padlock and they were therefore unable to use the final exit doors. In fact, they were trapped in the lobby and the manager had to use his mobile telephone to summon assistance from other staff. They were not able to find the key for the padlock to release the chain and Ms Gallagher and the manager had to leave via the nightclub, after a member of staff had opened the lobby doors.

[5] After they were released from the lobby, Ms Gallagher and the manager went to the ballroom on the first floor. A wedding party was underway in that room. All fire exits were in a satisfactory condition but the exit from the ballroom to a room known as the piano lounge was obstructed by food trolleys. It was difficult to manoeuvre past these trolleys.

[6] The inspection continued outside the premises. One of the final escape routes from the hotel to the street was found to be blocked by a motor vehicle. It transpired that this was the car owned by the disc jockey who was conducting the discotheque. The manager said that the car "was not always parked in this location".

[7] Mr Carson was interviewed on 19 September 2006 about the failure of the hotel to observe the terms of the licence. He accepted that, although he had not been on duty on the evening of 2 September, it was his responsibility to ensure compliance with the conditions in the entertainments licence. Mr Carson told the council officers who interviewed him that the nightclub was open every Saturday evening. The final exit door had been chained because of a spate of break-ins, he said. The chain was "usually" removed when a function was taking place in the nightclub.

[8] Mr Carson suggested that the manager with responsibility for doing this in his absence "hadn't got to the nightclub" by the time Ms Gallagher's inspection took place. The implication that this would have led to the chain

being removed at some stage during the evening is difficult to accept, however, in light of the failure of staff to produce the key for the padlock. Moreover, Mr Carson's statement that the chain was removed 'usually' suggests that there were occasions when it was not removed.

The relevant statutory provisions

[9] Paragraph 10(2) of the 1985 Order provides: -

> "(2) If any place in respect of which an entertainments licence is in force is used for any entertainment otherwise than in accordance with the terms, conditions or restrictions on or subject to which the licence is held, then, subject to sub-paragraphs (3) and (4) -
>
> (a) the holder of the licence; and,
>
> (b) any other person who, knowing or having reasonable cause to suspect that the place would be so used, -
>
> (i) allowed the place to be so used; or
>
> (ii) let the place, or otherwise made it available, to any person by whom an offence in connection with that use of the place has been committed,
>
> shall be guilty of an offence."

[10] Sub-paragraphs (2A) and (2B) were added to paragraph 10 by article 10 of the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1995. The first of these provides: -

> "(2A) Any person guilty of an offence under sub-paragraph (1) or (2) shall be liable on summary conviction—
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> (a) in the case of an offence to which sub-paragraph (2B) applies, to a fine not exceeding £20,000 or to imprisonment for a term not exceeding 6 months or to both;
>
> (b) in any other case, to a fine not exceeding level 5 on the standard scale."

[11] The offences specified in sub-paragraph (2B) are: -

> "(a) any offence under sub-paragraph (1) where the entertainment provided is—
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> (i) entertainment referred to in sub-paragraph (2)(b) of paragraph 1 and to which that paragraph applies; or
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> (ii) entertainment to which paragraph 2 applies; and
>
> (b) any offence under sub-paragraph (2) where the entertainment for which the place is used is—
>
> (i) entertainment referred to in sub-paragraph (2)(b) of paragraph 1 and to which that paragraph applies; or
>
> (ii) entertainment to which paragraph 2 applies,
>
> and the terms, conditions or restrictions which are contravened or not complied with include one which imposes a limit on the number of persons who may be present at the entertainment."

[12] In order to qualify as an offence to which sub-paragraph (2B) applies, an offence under paragraph 10(2) (which the offences in this case plainly are) must involve contravention of a term of the entertainments licence restricting the number of persons who are permitted to be at the function. This does not arise in the present case. Sub-paragraph (2A)(b) therefore applies and the maximum penalty is a fine not exceeding level 5 on the standard scale.

[13] The standard scale of fines is established by article 5(1) of the Fines and Penalties (Northern Ireland) Order 1984 and is set out in article 5(2) of the same Order. The scale was amended – with effect from 9 January 1995 – by article 3(2) of the Criminal Justice (Northern Ireland) Order 1994. Level 5 is specified as £5,000 and the maximum penalty for each of the offences involved in this case is, therefore, a fine of that amount.

Judicial review of sentencing decisions

[14] In *R v Belfast Recorder ex parte McNally* [1992] NI 217 the Divisional Court considered whether a sentencing decision of a judge of the County Court

increasing a sentence imposed on an appellant on a charge of shoplifting was amenable to judicial review. Lord Lowry LCJ, who appears to have sat alone on the application, held that, although a sentence of three months' detention for an offence of shoplifting could be considered to be severe, it could not be said to be either 'harsh and oppressive' or so far outside the bounds of normal discretionary limits as to constitute an error in law. In light of that finding which, Lord Lowry said, disposed of the application on its merits, it was strictly unnecessary for him to deal with the question whether *certiorari* was available in any circumstances to quash a sentencing decision of an inferior court. He concluded, however, that since the case had "thrown up a number of important legal questions bearing on the applicant's entitlement to an order of *certiorari*" he should consider these. He was careful to say, however, that although the answers were "unnecessary to the decision of [the] case" they represented his considered opinion.

[15] Before looking at Lord Lowry's answers to the questions that this issue gives rise to, it is convenient to trace the development of this form of relief in some of the authorities in England and Wales. The first of these is *R v St Albans Crown Court, ex parte Cinnamond* (1980) 2 Cr App R (S) 235 where a disqualification for drink driving was challenged on the basis that it was unduly severe. In the course of his judgment, Donaldson LJ said:

> "… it is not sufficient to decide that the sentence is severe, perhaps even unduly severe or surprisingly severe. It is necessary to decide that it is either harsh and oppressive or, if those adjectives are thought to be unfortunate or in any way offensive, that it is so far outside the normal discretionary limits as to enable this Court to say that its imposition must involve an error of law of some description, even if it may not be apparent at once what is the precise nature of that error.
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> It seems to me that the jurisdiction which this Court is empowered to exercise in this field can be considered analogous to the jurisdiction which it exercises in relation to the Crown and Government departments where, on *Wednesbury* tests, it examines a decision and says that no reasonable authority could have reached this decision without a self-misdirection of some sort and therefore is satisfied that there has been some such misdirection."

[16] This approach has been consistently followed in a series of decisions, albeit that a variation in the formulation of the test to be applied can be

detected in some of these – see, for instance, *R v Tottenham Justices, ex parte Joshi* [1982] 2 All ER 507 (where it was held that the Divisional Court could properly review an order for costs if it was so far outside the normal discretionary limits as to show that the magistrates had misdirected themselves in law); *R v Truro Crown Court, ex parte Adair* [1997] COD 296 (where Lord Bingham CJ said that the Court should ask "whether the sentence or order in question falls clearly outside the broad area of the lower court's sentencing discretion"); *R v DPP, ex parte McGeary* [1999] Crim LR 430 (where it was held that before any challenge could succeed, the departure of the sentencing court from the normal standards or levels or practice of sentencing must be so great as to constitute an excess of jurisdiction or an error of law); *R v Southwark Crown Court, ex parte Smith* [2001] 2 Cr App R (S) 163 (where it was said that recent cases had indicated that the sentence was likely to be quashed if it fell outside the broad area of the lower court's discretion – see *Adair* above – and that this formulation was to be preferred to that which suggested that the principle would operate in the case of a sentence which was *prima facie* lawful only if it was by any acceptable standard truly astonishing); and *R (Sogbesan) v Inner London Crown Court* [2003] 1 Cr App R (S) 79 (where a sentence of four weeks' detention in a young offender institution imposed on a young man of hitherto impeccable character for 'economic crimes' involving £216 was so far outside the broad area of the Crown Court's sentencing discretion as to demonstrate an excess of jurisdiction or an error of law).

[17] Many of these decisions partake of a pragmatic approach to the review of sentencing. This is hardly surprising since most of them involved cases where no appeal was available against what were judged to be aberrant sentences. The only means by which such sentences could be challenged was judicial review. Lord Lowry eschewed such a pragmatic approach in *McNally.* At page 228j of his judgment he said: -

> "I am satisfied that *St Albans* and the cases that followed it were wrongly decided and I also consider it desirable to dissipate, if possible, the unwanted and unwarranted confusion which at present bids fair to envelop the remedy of *certiorari*."

[18] After a learned disquisition on the history of cases that have dealt with the availability of the remedy of *certiorari*, Lord Lowry at page 230 letters a-d set out a series of principles which, he said, could be confidently taken to represent the state of the law in this jurisdiction and in England and Wales in 1952. Among these were included: -

> "(2) Errors of law within jurisdiction including (except in extradition cases) the error which

consists of reaching a decision unsupported by evidence, cannot be corrected by *certiorari* unless the error is apparent on the face of the record.

(3) *Certiorari* will lie to correct an error of law apparent on the face of the record.

(4) A mere error of law does not mean that the court or tribunal has exceeded its jurisdiction.
…

(6) A completely unreasonable decision by a court or tribunal will not on that ground alone be quashed on *certiorari*."

[19] Lord Lowry then turned to consider a number of authorities, most notably *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 and conducted a painstaking analysis of the speeches of the House of Lords and reached these conclusions as to their effect: -

> "When I read carefully the speeches in *Anisminic*, the only thing approaching a novelty that I can find (which does not appear to go beyond what had been said in *Ridge v Baldwin* [1963] 2 All ER 66 at 105, 110, 116, [1964] AC 40 at 118, 126, 136) is a willingness, not essential to the decision, on the part of Lord Pearce and Lord Wilberforce to equate neglect of the principles of good faith and natural justice with excess of jurisdiction (see [1969] 1 All ER 208 at 233, 236, 244, [1969] 2 AC 147 at 195, 198, 207). In all other respects the decision (like those of Browne J and the Court of Appeal) is based on conventional wisdom, and the real question was whether the commission's error of law (if it was an error) went to its jurisdiction or was committed while exercising jurisdiction.
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> What Lord Reid said ([1969] 1 All ER 208 at 213-214, [1969] 2 AC 147 at 171) illustrates the difference between the absence of jurisdiction to enter on the inquiry and the excess of jurisdiction which occurs when, for example, a court imposes a sentence or grants a remedy which it is beyond that court's power to impose or grant. It also leaves it clear that an inferior court, while exercising jurisdiction may make an erroneous decision in

> point of law which cannot be challenged by *certiorari* unless it is on the face of the record and which cannot be challenged at all if there is an ouster provision (see also [1969] 1 All ER 208 at 216, [1969] 2 AC 147 at 174)."

[20] The final conclusion reached by Lord Lowry in the *McNally* case was summarised by him in the following passage at page 235e: -

> "To conclude the discussion, while the view which I now express is not necessary for the decision of this application, I consider, adopting the view expressed by Kelly LJ in *Re Weatherall* [1984] NIJB 19 that, even if the sentence here had been grossly unreasonable (or 'harsh and oppressive', to use the description found in *Fleming v McDonald* 1958 JC 1), the court would not have been guilty of any error of law and no remedy by way of *certiorari* would have lain."

[21] Lord Lowry's approach might be characterised as a purist one and his judgment bears the hallmarks of great clarity of thought and logical deduction. But like many classic expositions of principle, it must be reviewed in the light of changing needs and further reflection on what may once have been considered to be immutable precepts.

[22] In De Smith, Woolf and Jowell's *Principles of Judicial Review* (1999, Sweet & Maxwell) the impact of the *Anisminic* case is discussed at paragraph 4-028: -

> "The most important breakthrough in *Anisminic* was the emphatic rejection by the House of Lords of the idea that the jurisdiction of an inferior tribunal was determinable only at the outset of its inquiry. It was observed that a tribunal having jurisdiction over a matter in the first instance might exceed its jurisdiction by breaking the rules of natural justice[1], applying a wrong legal test and answering the wrong question[2], failing to take relevant considerations into account or basing the decisions on legally irrelevant considerations. Although they accepted the survival of the rule that a judicial tribunal has power to err within the limits of its jurisdiction, it was not easy to identify

[1] [1969] 2 AC 147, 171, 195, 207, 215

[2] *Ibid* 171, 195, 215

> errors of law which, in light of their analyses, would not be held to go to jurisdiction."

[23] In Fordham, *Judicial Review Handbook* (4th edn, 2004, Hart) commentary to similar effect is found at pp 845/6: -

> "Although as a result of the landmark *Anisminic* case judicial review is generally available to correct a material error of law, there are categories of case (such as University Visitors) where only the narrower (pre-*Anisminic*) errors going to "jurisdiction" or appearing "on the face of the record" will suffice. That position was once said to apply to "courts of law", but that is not the modern approach."

[24] The requirement that there be an error on the face of the record for a challenge to a mistake of law by an inferior court while acting within its jurisdiction received its final quietus in *R v Lord President of the Privy Council, ex parte Page* [1993] AC 682. At page 692, Lord Griffiths said: -

> "In the case of inferior courts, that is, courts of a lower status than the High Court, such as the justices of the peace, it was recognised that their learning and understanding of the law might sometimes be imperfect and require correction by the High Court and so the rule evolved that certiorari was available to correct an error of law of an inferior court. At first it was confined to an error on the face of the record but it is now available to correct any error of law made by an inferior court."

[25] Lord Browne-Wilkinson was, if anything, more emphatic. At pp 701/2 he said: -

> "In my judgment the decision in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147 rendered obsolete the distinction between errors of law on the face of the record and other errors of law by extending the doctrine of ultra vires. Thenceforward it was to be taken that Parliament had only conferred the decision-making power on the basis that it was to be exercised on the correct legal basis: a misdirection in law in making the decision therefore rendered the decision ultra

vires. Professor Wade considers that the true effect of *Anisminic* is still in doubt: *Administrative Law,* 6th ed., pp. 299 et seq. But in my judgment the decision of this House in *O'Reilly v. Mackman* [1983] 2 AC 237 establishes the law in the sense that I have stated. Lord Diplock, with whose speech all the other members of the committee agreed, said, at p. 278, that the decision in *Anisminic*:

> 'has liberated English public law from the fetters that the courts had theretofore imposed upon themselves so far as determinations of inferior courts and statutory tribunals were concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within their jurisdiction. The break-through that the *Anisminic* case made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, *i.e.,* one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported 'determination', not being 'a determination' within the meaning of the empowering legislation, was accordingly a nullity.'"

[26] The matter is effectively put beyond doubt by the decision in *R v Bedwellty Justices, ex parte Williams* [1997] AC 225 where Lord Cooke of Thorndon said, at page 233: -

> "The authorities now establish that the Queen's Bench Division of the High Court has normally in judicial review proceedings jurisdiction to quash a decision of an inferior court, tribunal or other statutory body for error of law, even though the error is neither apparent on the face of the record nor so serious as to deprive the body of jurisdiction in the original and narrow sense of power to enter on the inquiry and to make against

> persons subject to its jurisdiction the kind of decision in question."

[27] These decisions constitute unassailable – and binding – authority that an error of law made by an inferior court even within jurisdiction in the narrow or literal sense is amenable to judicial review in the form of *certiorari*. To the extent that Lord Lowry's decision in *McNally* suggested otherwise, it can no longer be regarded as good law.

[28] We are in any event satisfied that Lord Lowry's pronouncements on this matter were *obiter dicta* as he himself made clear in the passage that we have quoted at paragraph [20] above. This position was recognised In *Re Maginn's Application* (Divisional Court, unreported, 20 October 1997), where Carswell LCJ said: -

> "We would in the ordinary way regard ourselves as bound to follow an earlier decision of this court, but it is correct to say that Lord Lowry's remarks were *obiter* and it is an area of law on which there has been much debate, and accordingly we do not propose to advance any opinion on the issue dealt with in *Re McNally's Application*."

Conclusions

[29] We are satisfied that a decision of a resident magistrate, if wrong in law, is not immune from *certiorari* solely because it was taken within jurisdiction in the literal sense. We are also satisfied that it is open to prosecuting authorities to apply for judicial review of a decision by a magistrate. There are a number of recent examples of such applications in this court – see, for instance, *Re Director of Public Prosecutions' Application* [2007] NIQB 3 where the prosecution successfully challenged a decision of a magistrate not to adjourn summary proceedings on their application.

[30] The way is now open for this court to pronounce that a sentencing decision that is obviously wrong in the sense that it falls clearly outside the broad area of the lower court's sentencing discretion may be challenged as an error of law. And, as Mr Scoffield for the applicant pointed out, if a defendant can judicially review a sentence imposed on the grounds of irrationality, there is no reason in principle or practice why a prosecuting authority might not also do so.

[31] The question then arises whether the sentences imposed in this case fall clearly outside the area of discretion that was available to the magistrate. We have concluded that they do. The offences in this case were extremely serious. The combination of the overhead closures on the door and the locked

and barred final exit would have meant that if a fire had occurred in the nightclub, those patrons who passed through the lobby doors would have been trapped if the doors had been closed behind them. They would not have been able to escape through a final exit whose very purpose was to provide a means of egress in an emergency. We will therefore quash the sentences imposed by the resident magistrate and substitute for them a fine of £2500 in each case.