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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 LC2 FOR JUDICIAL REVIEW

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Ex Tempore Ruling

KEEGAN J

Introduction

[1] This is an application by LC2 who has been granted anonymity as she is a person under disability, residing at Muckamore hospital. The case relates to her ability to smoke in the grounds of the hospital. The original Order 53 Statement of 23 April 2017 sought to challenge an alleged prohibition on the applicant smoking in the hospital grounds and a declaration of incompatibility was also sought under section 4 of the Human Rights Act. The latter application was fairly swiftly abandoned. I granted leave on 11 September 2017 after a contested hearing. Thereafter, I encouraged the parties to engage with each other on the issue. I am grateful that they did so as this led to a modification of proceedings in that confirmation was received that discretion was exercised in the applicant's favour in that she was allowed to smoke in Muckamore's grounds. That situation is encapsulated in a letter written from the Trust's solicitor to the applicant's solicitor on 26 June 2018 inviting the applicant to discontinue proceedings because:

> "Your client initiated these proceedings on the basis that the Trust had prohibited her from smoking on Trust property. There is no such prohibition in place and there is therefore no issue arising from your client's Order 53 Statement that requires to be litigated. In the interests of saving further costs we would invite your client to agree to the dismissal of these judicial review proceedings which serve no further useful purpose."

[2] This correspondence led to an application to amend the Order 53 Statement by the applicant and also a Salem point was raised by the respondent, see R v Secretary of State for the Home Department ex parte Salem [1991] AC 450. The application to amend the Order 53 Statement is the first in time and it seeks the following relief:

> "A declaration in terms of and to the effect the impugned smoking ban policy is unlawful as it fails to make an exception in respect of the applicant given her circumstances and others in a similar situation i.e. detained patients and inpatients who need to smoke by reason of therapeutic necessity."

[3] If I then turn to the arguments of Mr McGleenan which have been made in writing and orally. Firstly, he submitted the case is now academic regarding this lady, there is no detriment to her, she is not a victim and she is now a voluntary patient. He contended there is no issue of statutory construction in this case. He asserted that there is no body of cases waiting to be heard on the same point. He said that this issue of the lawfulness of a smoking ban is well-trodden ground having been dealt with by a number of courts up to the Supreme Court in McCann [2017] UKSC 31. He said that in this case discretion was exercised, which is exceptional, but it has been utilised nonetheless by the Trust. He said the court should not get involved in writing policy. He also said that if the court was concerned about the position of the applicant the case may come back to court and a remedy is available to her.

[4] Mr McAteer supported these arguments on behalf of the department. In any event he said that the department was not engaged here as this is a challenge to Trust policy. Whatever else I agree with that last submission because this challenge is really directed towards the Trust.

[5] I pause to observe the care and attention applied to this case by Mr Potter and his solicitor on behalf of a vulnerable client. I now turn to his submissions. Firstly, he said that there was clearly an effect on the applicant's health and that is substantiated by the expert report of Professor Ricks. There is not much controversy about that. Secondly, he said that whilst discretion has been exercised in her favour that could be removed at any time so some certainty is required for the applicant. Thirdly, he said there were wider implications for others who are vulnerable. Fourthly, he said the Trust approach does not satisfy the requirements of legal certainty and he drew from Bournewood HL v UK [2004] ECHR 471 albeit that is in a different context as it involves Article 5. Mr Potter said that this really amounted to an arbitrary application of discretion and he said there was a strong public interest argument given the vulnerability of the group involved.

[6] I have considered all of this overnight and in reaching my ruling. I start by looking at the principles outlined in the seminal judgment of Salem. I set them out in a case that I decided called Re Wright's Application [2017] NIQB 29 from paragraphs 13-16. The dictum in Salem is well rehearsed, encapsulated in the following quotation:

> "The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

[7] In Wright's Application I was also referred to Re E [2003] NIJB 288 which is a decision of Kerr J, as he was, in 2003 where he looked at this paragraph from Salem and said:

> "Unsurprisingly, no attempt is made in the authorities to state definitively what might qualify as a matter of general public interest or a question of fundamental importance. This is something that must be decided according to the particular facts of the individual's case."

[7] At paragraph [16] of my judgment in Wright I say:

> "It seems to me, flowing from these cases, that the guiding principle is whether or not a case raises a point of general public interest. This will depend upon the facts of each case. The identified categories in Salem in relation to statutory construction and such like are by way of example and do not form an inflexible code. So in my view the court must look at the facts of each case to decide on an overall appraisal whether or not a case should proceed in the public interest taking into account that an appropriate measure of caution should be applied."

[8] There is no dispute in relation to these legal principles. It is also clear that any application of this nature is fact specific. Turning to the circumstances of this case the following is clear. As I have said there is no body of cases waiting in the wings in relation to this issue. There is no issue of statutory construction. Also, in relation

to this area of law is the judicial guidance that has been provided from the McCann case in particular where a challenge to Article 8 and Article 14 failed.

[9] So having considered this case I am of the view that the matter is academic regarding this applicant. The utility of pursuing further litigation falls on the side of the respondent in this case. This case is about the application of policy and I agree with Mr McGleenan's analysis in relation to a court treading into that area. The court is naturally going to be reluctant to get involved into rewriting policy but this case demonstrates that some discretion may be applied in specific circumstances to that policy. That cannot be said to be unlawful. Indeed, that speaks for itself.

[10] I have considered carefully what Mr Potter said about the issue of certainty and lack of protection for the vulnerable adult but it seems to me that the courts can adapt to any future challenge if it arises but I would be very surprised if it did arise given the facts and the medical evidence in this case. The Trust may face a challenge if it acts unlawfully within that context and the courts will immediately react. So whilst Mr Potter's fears regarding immediacy are noted I am not convinced that they bring me to a position of needing to have a full hearing on this matter with all the consequent costs that it would involve. I do understand the concern and I have sympathy for it but I think it can be accommodated within the current legal structure.

[11] The final word is that it seems to me that in dealing fairly with the issue that has been raised in this case it would potentially be useful for the Trust to send a note or a circular outlining the approach that was taken as it may assist decision makers faced with the application of this policy going forward in the future. I stress that this suggestion is simply by way of comment.

[12] I find in favour of the respondent in this case. I am going to exercise my discretion not to proceed with the case on the basis of the above. Accordingly, the application is dismissed.