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(subject to editorial corrections)

Application to challenge minister's decision to introduce new legislation – Anti-social behaviour orders – whether a duty to consult – whether a duty to consult children – effect of the UN Convention on the Rights of Children – whether the Commissioner for Children and Young People a victim for the purposes of the HRA – whether the decision to introduce legislation unreasonable

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY THE NORTHERN IRELAND COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE OF THE DECISIONS ANNOUNCED BY THE MINISTER OF STATE FOR CRIMINAL JUSTICE, JOHN SPELLAR ON 10 MAY 2004

GIRVAN J

[1] This is an application brought by the Northern Ireland Commissioner for Children and Young People ("the Commissioner") seeking to apply for judicial review of a decision announced by the Minister of State with responsibility for criminal justice on 10 May 2004 to put before Parliament proposed legislation to introduce Anti-social Behaviour Orders ("ASBOs") and his decision announced at the same time to shorten the consultation period in respect of the draft legislation.

[2] The Office of the Commissioner was created under the Commissioner for Children and Young People (Northern Ireland) Order 2003 ("the 2003 Order") and the Commissioner's statutory remit is to safeguard and promote the rights and best interests of children and young people. She has a duty to keep under review the adequacy and effectiveness of law and practice relating to the rights and welfare of children and young persons, to advise the Government on matters concerning the rights and best interests of children and young persons, as soon as reasonable practicable after a request for advise is received or where he thinks it appropriate.

The Commissioner has a power to bring proceedings in her own name or to assist others in bringing proceedings.

[3] In 1998 the Government introduced ASBOs in England and Wales under the Crime and Disorder Act of that year. The legislation relating to ASBOs came before the House of Lords in R (McCann) v Crown Court of Manchester [2002] 4 ALL ER 593. The central issue for determination in that case was essentially whether proceedings for the obtaining of an ASBO constituted civil proceedings (in which case hearsay evidence to support the application would be admissible). The House of Lords held that the proceedings were of a civil nature. Nobody in that case (including, it would appear, Liberty who were given leave to intervene) sought to challenge the underlying validity of the concept of ASBOs. The House accepted the justification and good sense of such legislation which was intended, as Lord Steyn pointed out, to protect the fundamental rights of the community who suffer from anti-social behaviour. Lord Hope stressed the social disruption which such anti-social behaviour created and the desirability of a law that dealt with the apparent inability of the ordinary criminal law to restrain such activity. See also the comments of Lord Hutton at p.622. Lord Hutton also pointed out that the legislation had apparently worked effectively because the courts had proceeded upon the basis that it was of a civil nature. On the current state of the law (unless the European Court of Human Rights holds otherwise) the legislation appears to be perfectly lawful in England and Wales. An arguement that it would be invalid in this jurisdiction would face obvious difficulties.

[4] The Minister published a consultation paper in January 2004 with a consultation expiry date of 1 April 2004, on the topic of ASBOs. The Commissioner alleges that the paper failed to address the specific social needs or existing social and criminal policies in this jurisdiction and failed to identify the rights of children and young people which would be infringed by the introduction of ASBOs or to explain why the Minister considered that their infringement could be justified. The Commissioner made a late submission on 1 April in response to the paper and the Northern Ireland Office accepted that late submission. The various children's' organisations, including the Children's Law Centre, Save the Children, NSPCC and others all responded apparently opposing the introduction of ASBOs in Northern Ireland.

[5] On 10 March 2004 the Minister stated in the House of Commons that communities across Northern Ireland had resoundingly said yes to the introduction of ASBOs. The Minister said he had shortened the consultation period so that the Government could implement the measures as soon as possible. The Commissioner complained that the statement indicated that the Minister had made up his mind to introduce ASBOs without waiting to fully consider the proposed consultation in respect of the draft legislation.

[6] The Commissioner wanted children and young people to be engaged in the consultation process and argued that there is such a duty under Article 12 of the

United Nations Convention on the Rights of Children ("the Children's Convention"). Article 12 of the Convention provides that states parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For the purposes of Article 12.1 under paragraph 2, it is provided that the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child either directly or through a representative or an appropriate body in a manner consistent with the procedural rules of national law.

[7] On 10 May 2004 the Minister announced the introduction of a consultation period in respect of the draft legislation and that it would end on 4 June 2004. The draft legislation applies ASBOs to children from the age of 10 upwards. The explanatory document accompanying the draft legislation states that the consultation paper had attracted 69 responses, the majority supporting the proposal and some expressing concerns. The Commissioner complains that no submission appears to have been received from any child or young person. He complains that the majority of the bodies working in the field of children and young people and in human rights, oppose the introduction of ASBOs but "inexplicably and unreasonably, their opinions were either rejected or discounted." He also says that the Minister has not taken account of the specific Northern Ireland context in which the name and shame culture of the ASBOs could lead to individuals becoming victims of Para-military justice, he also relies on the different educational and social services context in Northern Ireland compared to England and Wales. He complains that the Minister's approach fails to take account of the Criminal Justice Review Group's Report and the provisions of the Justice (Northern Ireland) Act which introduced principles of restorative justice.

[8] The Commissioner alleges that the legislation infringes various provisions of the European Conviction on Human Rights (including Articles 5, 6, 7 and Articles 2, 3, 12, 16, 19, 37 and 40 of the Children's Convention and the Beijing Rules).

[9] A central proposition in the Commissioner's attack on the Minister's approach, is that the Minister is in breach of section 75 of the Northern Ireland Act 1998. Section 75(1) provides:

> "A public authority shall in carry out it functions relating to Northern Ireland had 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 dependents and persons without."

The Commissioner complains that the Northern Ireland Office Equality Scheme has not been followed and the ASBOs would create a disproportionate impact on children and young people.

[10] On 28 May the Commissioner complained, under paragraph 10 of Schedule 9 of the Northern Ireland Act 1998, to the Equality Commission in respect of the alleged failure by the Northern Ireland Office to fulfil section 75 and comply with its equality scheme.

[11] Miss Higgins on behalf of the Commission, made a wide-ranging submissions in respect of her application to apply for judicial review. The essential attack was based on arguments of:

(a) a failure to properly consult, particularly a failure to consult with children on the proposed legislation;

(b) breach by the Minister of section 75 of the Northern Ireland Act 1998 and a failure to comply with the Departmental Equality Scheme in failing to have a proper equality impact study;

(c) alleged incompatibility of the proposed legislation with the ECHR and the international obligations including those in the Children's Convention;

(d) the Wednesbury unreasonableness of the proposal to introduce legislation which infringed the Convention and the international obligations;

(e) the failure to give proper weight to the Commissioner's view and preferring to give weight to the views of those in favour of ASBOs; and

(f) bias on the part of the Minister.

[12] On the question of consultation it must, of course, be noted that the Minister has in fact consulted, both at the consultation paper stage and in respect of the draft legislation. The Commissioner's complaint is that while there was a form of consultation, it was not real consultation because the opposing views of himself and the other children's organisation opposing ASBOs ought to have been given far greater weight that they where. He also complained that children should have been consulted. Consultation, to be a meaningful exercise, involves consulting with interested parties who are in a position to put forward measured and meaningful responses. It is argued that there are mechanisms in place for consulting children, though one wonders in practical and realistic terms what meaningful response could be obtained from children unless they were in a position to understand the legal and social issues to anti-social behaviour, the mechanisms of dealing with it, the

shortcomings of existing criminal law and effectiveness or otherwise of the English legislation and its suitability for transplant to the Northern Ireland context, and the interaction of Convention and international obligations. Token consultation would achieve nothing. A decision by the Minister to consult in the way in which he did could not be considered irrational or unlawful. Even if the Children's Convention imposed an obligation to consult children on draft legislation (and I am very far from convinced that Article 12 of the Convention requires that as opposed to taking into account children's views in respect of decisions immediately impacting on them) the Convention is not part of the domestic law. There is in any event a shorter answer to the Commissioner's consultation point, namely that there is no right to be heard or consulted before the making of primary or delegated legislation, unless it is provided by statute (see *Wade & Forsythe on Administrative Law 8th Edition at page 544)*. As Megarry J stated in Bates v Lord Hailsham [1972] 1 WLR 1373,

> "Nevertheless the considerations (in relation to a general duty of fairness) do not seem to me to affect the process of legislation whether primary or delegated. Many of those affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy …. I do not know of any implied right to be consulted or make objections or any principle whereby the courts may enjoin the legislative process at the suit of those who contend that insufficient time for consultation and consideration has been given."

No question of legitimate expectation arises in this context having regard to the absence of any right to be consulted. In many cases consultation will take place before the introduction or enactment of legislation but situations will arise where through urgency or policy considerations consultation may not be considered appropriate or necessary. As noted, consultation has in fact taken place in this case, and the Commissioner has had an ample opportunity to make known her views. There is nothing to indicate that the Minister disregarded or failed to consider those views. He was free to consider that notwithstanding those strongly expressed and weighty views, nevertheless the proposed legislation was desirable. It will be a matter for Parliament to consider the proposals and it can consider and debate the implications and issues that may arise in the submissions put forward by the Commissioner. The proposed legislation is subject to affirmative resolution in Parliament.

[13] In relation to the alleged breach of section 75 of the Northern Ireland Act 1998, that Act distinguishes between the "promotion of equality of opportunity" in section 75 and the outlawing of discrimination in section 76 on the part of public authorities. Discrimination outlawed is on the ground of religious belief or political opinion. Legislation which has a differential impact on persons of a certain background or age may be indirectly discriminatory, though in the present case no question of religious or sexual discrimination arises. It is a different question from whether the Minister's proposals are in breach of an obligation "to promote equality

of opportunity". Miss Higgins sought to argue that this should be interpreted as including the opportunity not to be disadvantaged. All criminal or quasi-criminal legislation will impact on persons breaking the law as determined by the legislature. The present legislation, if it goes through, would deal with anti-social behaviour as defined. Nobody of either sex or any class, creed, age or ethnic background is free to disregard the ordinary law or is entitled to carry out anti-social acts as defined. All are free to obey the law. I can see no arguable case that the proposal to introduce this legislation in any way infringes the Minister's obligation to "promote equality of opportunity". Miss Higgins has failed to persuade me that there is any arguable case on this point.

[14] In relation to the question of the incompatibility of the proposed legislation with the Convention, the Commissioner faces the legal problem created by the need to establish victimhood within the Act and Convention. In addition, under the Northern Ireland Act 1998 itself a challenge to Ministerial action or legislation on the grounds of a breach of Convention obligations must be brought by a "victim". The Commissioner himself is not a victim and the fact that she is empowered to bring proceedings under the 2003 Act does not of itself confer upon her a power to bring proceedings to challenge legislation or draft legislation. Miss Higgins sought to argue that in some way the 2003 Act impliedly abrogated the victimhood requirement in relation to proceedings brought by the Commissioner. I cannot read the legislation in this way however.

[15] Miss Higgins presented a number of arguments to establish the incompatibility of the legislation with various provisions in the Convention. Questions may arise in concrete cases in the future if this legislation is enacted and I shall forebear to comment on them, except to say that the proposition that this legislation is incompatible with the Convention is by no means clear or manifestly correct. When the Executive seeks to put before Parliament legislation on which there are human rights issues, the courts must be slow to intervene to stop such legislation being considered by Parliament itself, bearing in mind the various checks and balances that exist under the legislation and bearing in mind the individual citizen's rights to be protected under the Human Rights Act after the legislation is enacted in the way fixed by that Act. In R v HM Treasury ex parte Smedley [1985] 1 ALL ER 590 the Court of Appeal held that where an administrative order or regulation is required by statute to be approved by resolution of both Houses of Parliament the court could, in an appropriate case, intervene by way of judicial review before the Houses had given their approval, even though in most cases the only appropriate form of relief, if any, would be by way of declaration. The court, however, stressed that that jurisdiction was to be exercised with great circumspection and with close regard to the dangers of usurping or encroaching of any function which statute has specifically conferred on Parliament or on the functions of Parliament in general. It should be added that the jurisdiction would require even greater circumspection when it is a matter for political judgment by a Minister to decide whether or not to introduce legislation in Parliament. Although the legislation in the present case would be by way of Order in Council and thus

technically subordinate, one must not lose sight of the fact that such subordinate legislation in Northern Ireland replaces primary legislation and to that extent differs from the more ordinary understood concept of delegated legislation.

[16] The Commissioner challenges the alleged Wednesbury unreasonableness of the decision to introduce the legislation and to shorten the consultation period. Counsel argued that these steps are Wednesbury unreasonable in that the actions of the Minister would infringe the Convention (though here again the Commissioner faces the victim issue) and the steps are alleged to be in breach of international provisions. The Executive is under no obligation to have regard to enforce international provisions which have not been introduced into domestic legislation (see Re Adams [2001] NI 1). In any event the applicant has failed to persuade me that there is an arguable case that the Minister's decision is perverse or that it fails to take account of relevant considerations or took into account irrelevant considerations. There is no argument to support the proposition that he failed to have regard to the views of the Commissioner. I reject the argument that he should have given greater weight to the views of the Commissioner as compared to other persons who made submissions to the Minister in the light of the consultation process and/or in respect of the draft legislation. Clearly the Commissioner presented weighty arguments against the introduction of the legislation. The Minister had to decide, in the light of all the submissions and in light of all the issues raised by the question, whether the legislation should be introduced. There can be no support for a proposition that in some way the Commissioner's view should have carried the day or that the Minister was abound to accord them any greater weight that he considered they were entitled to receive.

[17] On the issue of bias, one must remember that a Minister is called on to exercise a judgment as to whether and what legislation should be brought in to deal with what he legitimately considers to be a social problem which calls for a response. The test of bias ("motivated by a desire unfairly to favour one side or to disfavour another") is not relevant in the context of a Minister having to make a political judgment or make a policy choice. There are circumstances in which the traditional tests of bias may well be applicable to ministerial actions but this is not one of them.

[18] The Commissioner has accordingly failed to persuade me that there is an arguable case in any of the issues raised in support of the application for leave and accordingly I refuse leave.