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Judgment: approved by the Court for handing down | *Delivered:* **28/06/07**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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BETWEEN:

THE NORTHERN IRELAND COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE

Applicant;

and

PETER HAIN, THE SECRETARY OF STATE and DAVID HANSON MINISTER OF STATE

Respondents.

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GILLEN J

The Application

[1] This is an application on the part of the Northern Ireland Commissioner for Children and Young People (NICCY) for an Order pursuant to Order 24 Rule 3(1) and Rule 7(1) compelling the respondents to serve copies of the following documents:

(a) All documents furnished to the Secretary of State and/or the Minister at the time the decision to introduce the Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2006 ("the 2006 Order") was taken.

(b) All documents furnished to the Secretary of State and/or the Minister at the time a decision not to introduce a total ban (*on physical punishment*) was taken.

(c) All documents summarising the reasons why these decisions were taken.

(d) All documents which relate to the issue by the Director of Public Prosecutions of guidance under Article 2 of the 2006 Order, as referred to in Ms McPolin's affidavit at paragraph 71.

Background

[2] The office of Commissioner for Children and Young People was established by the Commissioner for Children and Young People (Northern Ireland) Order 2003. This legislation charges the Commissioner with safeguarding and promoting the rights and best interests of children and young persons and has a role as an advocate for children. Specifically the legislation requires the Commissioner to have regard to the United Nations Convention on the Rights of the Child ("the CRC") in the exercise of the functions.

[3] In the exercise of that function, NICCY has acted to persuade the government to prohibit the physical punishment of children by their parents in accordance with European and international human rights standards and specifically Articles 19 and 37 of the CRC.

[4] The most recent judgment by the European Court of Human Rights on the question of corporal punishment is A v. UK (1998) 2 FLR 959 ("A v. UK"). NICCY argues that the judgment found that the UK was in breach of its obligations under Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on the basis that the criminal law did not provide adequate protection to children against treatment or punishment contrary to Article 3 of the Convention. NICCY argues that the court held that whether treatment breached Article 3 depended "on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental affects and in some cases, the sex, age and state of health of the victim".

[5] Following the court's decision in A v. UK, NICCY argues that the United Kingdom government undertook to review the operation of the defence and introduce measures which would provide children with effective protection against parental chastisement as required by Article 3. Legislation banning the use of corporal punishment in state schools has already been introduced throughout the United Kingdom (in Northern Ireland by Article 4 of the Education (Northern Ireland) Order 1998) – following the decision in Costello Roberts v. UK (1995) 19 EHRR 112. It is the applicant's case that the Government proposes legislation in Article 2 of the draft Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2006 ("the 2006 Order"). This Order was laid before Parliament on 12 June 2006 for affirmative resolution by both Houses, on 4 July 2006 it was discussed by the Northern Ireland Orders Grand Committee and on 5 July 2006 it was discussed by the

Delegated Legislation Standing Committee. It was approved on a motion without the need for any debate by the House of Commons on 10 July 2006 and the House of Lords on 12 July 2006 according to the affidavit in this matter by Mr Barney McNeany, the interim Commissioner for NICCY.

[6] It is the contention of the applicant that the introduction of Article 2 fails to uphold the Human Rights obligations under international and European human rights instruments and denies children effective protection to which they are entitled. The applicants argue that the legislation does not require the courts to have a discretion to consider all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental affects and in some instances the sex, age and state of health of the victim in determining whether the defence of reasonable chastisement has been established. The explanatory memorandum to the Order states:

> "The defence of reasonable chastisement
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> 6. The restriction of the defence of reasonable chastisement was one of the options which were consulted on widely following the judgment in A v. UK. Whilst there was strong support for a complete ban and retaining the status quo, the Department has concluded that the restriction of the defence will offer additional protection to children and ensure the necessary compliance with the Convention".

[7] Accordingly the applicant issued judicial review proceedings seeking declarations that the Secretary of State had no power to decide to introduce and the Minister had no power to make Article 2 of the 2006 Order, that the provision had no legal affect and that the decisions were otherwise unlawful. In addition the applicant sought an order of certiorari quashing the decisions. Alternatively the applicant sought a declaration that the provision is incompatible with Articles 3/8/14 of the Convention. Finally the applicants seek an Order under Section 81(2) of the Northern Ireland Act 1998 suspending the effect of Article 2 for a stated period in directing that the Secretary of State repeal Article 2 within that period.

The grounds on which the relief is sought are:-

[8] That the Secretary of State misdirected himself in law in introducing Article 2 contrary to section 6 of the Human Rights Act 1998 and Section 24 of the Northern Ireland Act 1998 as it breaches Article 3/8/14 of the Convention which the applicants interpret to prohibit all forms of physical punishment of children.

[9] That the Secretary of State and/or the Minister misdirected himself/themselves in failing to conduct a proper balancing exercise to determine whether the interference with children's rights was justified under Article 8.

[10] That the Commissioner was denied his legitimate expectation that the Secretary of State and/or Minister would act consistently with the provisions of the UNCRC and Convention.

[11] That the Secretary of State and/or Minister failed to take proper account and act in accordance with Articles 3/8/14 of the Convention.

[12] That the Commissioner was denied his legitimate expectation that the Secretary of State and/or Minister would consult with him about the proposal to introduce Article 2 and would not depart from the principles and policies stipulated in the consultation document of the Office of Law Reform and the children strategy in the absence of any cogent explanation for doing so.

[13] That the Secretary of State and the Minister acted unreasonably in breach of the principles of fairness and failing to take into account various Articles in the Convention, the UNCRC, the European Social Charter, UN Committees, and other international instruments.

[14] The Secretary of State and/or Minister has acted unreasonably.

The applicant's argument

[15] Ms Higgins QC, who appeared on behalf of the applicant, made the following points.

[16] This is an important case with reference to children's rights. No discovery has yet been made and more information is required in order to ascertain whether or not the legislation is proportionate in terms of Article 8 of the Convention.

[17] The applicant is entitled to know who the decision maker was and what factors were taken in favour and against the introduction of this legislation. The briefing paper to the Minister setting out the pros and cons of introducing the legislation should be discovered. The applicant is entitled to know what factors were identified in favour of the legislation and what against in order to assess whether or not the balancing assessment so necessary to a proportionate response was carried out. Ms Higgins asks rhetorically how else is the court to assess whether or not an appropriate balancing exercise has been carried out?

[18] Inter alia, Ms Higgins drew attention to the affidavit of Ms McPolin on behalf of the respondents who has not set out, it is argued, the nature of the balancing exercise and in particular the factors which were taken into account. Paragraph 35 of her affidavit suggests that the proper consideration of A v. UK should have been taken account of and discovery is needed of the documentation dealing with the consideration of this case.

[19] Ms Higgins resisted the proposition that this was merely a matter of the procedure by which the legislation was introduced.

[20] Counsel drew attention to the speech of Lord Carswell in Tweed v. Parades Commission for Northern Ireland (2006) UK HL 53 at paragraph 35 ("Tweed's case") where he said:

> "First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review in so much as it may require attention to be directed to the relevant weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in R v. Ministry of Defence, ex P Smith (1996) QB 517, 554 is not necessarily appropriate to the protection of human rights".

[21] Ms Higgins further relied upon the comments of Lord Bingham at paragraph 3 where he said:

> "In the minority of judicial review applications in which the precise facts are significant, procedures exist in both jurisdictions . . . for disclosure of specific documents to be sought and ordered. Such applications are likely to increase in frequency, since human rights decisions under Convention tend to be very fact-specific and any judgment on the proportionality of a public authority's interference with a protected Convention right is likely to call for a careful and accurate evaluation of the facts. But even in these cases, orders for disclosure should not be automatic. The test will always be whether, in the given test, disclosure appears to be necessary in order to resolve the matter fairly and justly".

[22] Subsequent to the termination of this case, Ms Higgins forwarded to me a number of further authorities under the heading "the court's power to review or strike down delegated legislation" without further comment. Inter alia, these cases were authority for the following propositions:

[23] Re (Jackson and Others) v. Attorney General [2005] UK HL 56 is authority for the proposition that where the language of an act is ambiguous or obscure, resort to Hansard would be permissible (Pepper v. Hart [1993] AC 593) at paragraph 51 Lord Nicholls of Birkenhead said:

> "This question of statutory interpretation is properly cognisable by a court of law even though it relates to the legislative process. Statutes create law. The proper interpretation of a statute is a matter for the courts, not Parliament. This principle is as fundamental in this country's constitution as the principle that Parliament has exclusive cognisance (jurisdiction) over its own affairs."

[24] However it should be noted that whilst Hansard may be used to identify the mischief at which the legislation was directed and its objective setting, it is constitutionally unacceptable to try to discover the intentions of the Government from Ministerial statements in Parliament. (See Lord Steyn at para 97). I similarly conclude that briefings given to Ministers are not helpful in attempting to ascertain the intention of Government in passing legislation.

[25] Counsel further drew my attention inter alia to:

(a) McEldowney v. Forde [1971] AC 632 to found the proposition that the court has power to strike down delegated legislation (see paras 644D-E and 6489).

(b) R v. Secretary of State for Health ex parte United States Tobacco International Inc [1992] QB 353 on the issue of ultra vires and the obligation to inform.

(c) Re McKevitt's application [2005]NIQB56

and to various extracts from "Judicial Review Handbook" 4th Edition by Michael Fordham to underline these propositions.

The Respondent's case

[26] Mr McMillen who appeared on behalf of the respondent, made the following points:

(1) He drew my attention to Order 24 Rules 3, 7 and 9 arguing that the essential test is whether or not these documents are necessary for disposing of the matter before me.

(2) He distinguished the Tweed case on the basis that disclosure had been made in that instance of reports from investigations at ground level with reference to relations in the community if the march were to continue. The court could properly take that into account in looking at the issue of proportionality. In contrast in this case the applicant is seeking any document recording any consideration given to the legislation itself.

(3) He drew my attention to the comments of Lord Carswell in Tweed's case at paragraphs 35, 37 and 38. He emphasised, as Lord Brown had said at paragraph 50, that disclosure in judicial review cases is not automatic and indeed will still be only granted in exceptional cases. The Tweed case was only authority for the proposition that disclosure may be more readily given in judicial review than in the past but still is not easily made.

[27] Relying on Begum, R v. Denbigh High School [2006] 2 WLR 719 and Belfast City Council v. Miss Behavin' Limited 2007 (UKHL) 19 he argued that the court is concerned with substance and not procedure. The question is whether or not this law breaches human rights and that process by which the legislation was arrived is not relevant.

[28] In effect Mr McMillen argued that the applicants were seeking evidence of the process whereas in fact it was only the substance of the legislation that was relevant. The applicants failed to recognise that the focus in judicial review is not on the procedure but rather on the product of the decision making process. Does the resultant legislation violate Convention rights is the key issue? He therefore urged that disclosure should not be made of these documents.

CONCLUSIONS

[29] Tweed's case came under close scrutiny in the application before me. I have derived the following principles from Tweed's case:

[30] Disclosure of documents will still remain ordinarily unnecessary in judicial review. It should not be routinely ordered as in civil litigation. Lord Brown of Eaton – Under-Heywood said at paragraph 56:

> "In my judgment disclosure orders are likely to remain exceptional in judicial review proceedings, even in proportionality cases, and the court should

> continue to guard against what appeared to be merely "fishing expeditions" for advantageous further grounds of challenge. It is not helpful, and is often both expensive and time consuming, to flood the court with needless paper".

[31] I conclude in this case that there is no basis laid for seeking the documents sought in this matter and that the applicants are on a pure fishing expedition to ascertain whether or not something might turn up to the disadvantage of the respondents.

[32] On the other hand whilst there is an overlap between the traditional grounds of review and the approach of proportionality, the intensity of review is somewhat greater under the proportionality approach (see Lord Carswell 's statement at paragraph 35f set out in paragraph 20 of this judgment).

[33] However the test still is whether or not the documents are necessary in order for the court to determine the issue before it (see Order 24 Rule 9). Whilst the presence of the issue of proportionality will require the court to look more closely at the facts than would normally be the case, that does not make disclosure automatic.

[34] Disclosures should be limited to the issues that require it in the interests of justice. Parties seeking disclosure should continue wherever possible to follow the practice of specifying the particular documents or classes of documents required rather than asking for general disclosure.

[35] This application is in my view misconceived because it places emphasis on whether the approach to the legislation is the produce of a defective decision making process rather than whether the legislation under consideration violates Convention rights.

[36] In Wilson v. First County Trust Limited (No 2) [2004] 1 AC 816 at 843f-844a Lord Nicholls of Birkenhead said:

> "In particular, it is a cardinal constitutional principle that the will of Parliament is expressed in the language used by it in its enactments. The proportionality of legislation is to be judged on that basis. The courts are to have due regard to the legislation as an expression of the will of Parliament. The proportionality of a statutory measure is not to be judged by the quality of the reasons advanced in support of it in the course of Parliamentary debate, or by the subjective state of mind of individual ministers or other members. Different members may well have

> different reasons, not expressed in debates, for approving particular statutory provisions. They may have different perceptions of the desirability or likely effect of the legislation. Ministerial statements, especially if made ex tempore in response to questions, may sometimes lack clarity or be misdirected. Lack of cogent justification in the course of Parliamentary debate is not a matter which "counts against" the legislation on issues of proportionality. The court is called upon to evaluate the proportionality of the legislation, not the adequacy of the ministers' exploration of the policy options or of its explanations to Parliament".

[37] I consider that the documents now being sought by the applicant fall into the same category as the material mentioned in the comments of Lord Nicholls.

[38] In Begum, R v. The Governors of Denbigh High School [2006] 2 WLR 719, a case concerned with Article 9 of the Convention, Lord Bingham of Cornhill said at paragraphs 29 and 30:

> "29 . . . The focus at Strasbourg is not and has never been on whether a challenge decision or action is a produce of a defective decision making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated . . .
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> 30 – The courts approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial view on a domestic setting . . . There is no shift to a merits review, but the intensity of review is greater than was previously appropriate . . . The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time . . . proportionality must be judged objectively, by the court".

[39] In Belfast City Council v. Miss Behavin' Limited (2007) UK HL 19 – a case involving Article 10 of the Convention - Baroness Hale of Richmond said at paragraph 31:

> "The first, and more straightforward, question is who decides whether or not a claimant's Convention rights have been infringed. The answer is that it is the court

> before which the issue is raised. The role of the court in human rights adjudication is quite different from the role of the court in an ordinary judicial review of administrative action. In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not whether the administrative decision maker properly took them into account. If it were otherwise, every policy decision taken before the Human Rights Act 1998 came into force but which engaged a Convention right would be open to challenge, no matter how previously compliant with the right in question it was".

[40] I believe that in this case it is the court's role to assess for itself the proportionality of the legislation and that disclosure of the documentation will not assist me in that regard. The four classes of document referred to in paragraph 1 of this judgment deal solely with what the Ministry took into account. They do not address the issue of whether the legislation infringes human rights.

[41] For the removal of doubt I further add that the application to obtain documents relevant to the guidance given by the Director of Public Prosecutions refers to guidance which occurred after the introduction of the legislation and cannot be relevant to the issue of whether or not the relevant rights were impugned. Ms Higgins argued on the basis that such documents were relevant to costs. I regard that as a purely speculative future requirement which is quite independent of the legislation and is not appropriate for a disclosure application at this stage.