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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 PL FOR JUDICIAL REVIEW

v

BOUNDARY COMMISSION FOR NORTHERN IRELAND

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MCCLOSKEY J

REMEDIES

PART 1 [06 June 2019]

[1] The court has been considerably assisted by the written and oral submissions of the parties' representatives. In the judgment which was handed down on the 28th of May, the court said in the final paragraph:

> *"Arrangements will be made for the convening of a separate hearing for the purpose of considering argument on the interrelated issues of final order and remedies together with that of costs".*

[2] A relatively intense focus on the court's key finding and conclusion is essential in these circumstances. This is set forth in paragraph 56 of the judgment, where it is stated:

> *"The Commission's approach to and treatment of representations made in response to the consultation invitation during the second of the statutory engagement periods is expressed unambiguously. It proceeded on the basis of a self - denying stratagem of a general rule and an exception. It failed to appreciate the full extent of what the statutory provisions permitted it to do or what was required of it by the common*

> *law. It considered itself bound in some way, but not absolutely, by the proposals published in the RPR. The Commission therefore fettered it's broad discretion and simultaneously the decision making process was vitiated by procedural unfairness as the common law right of all consultees to have their views considered fully and conscientiously and on the basis of a level playing field was frustrated".*

Reading on and summarising, the court concluded:

> *"In consequence of this approach the Commission at one and the same time fettered the demonstrably broad discretion conferred on it by the legislature and acted in contravention of the common law principles".*

[3] This gives rise to the question of whether the court, consequential upon the finding and conclusion expressed in paragraph 56 of its judgment, should grant a remedy. That is the first question. By well- established principle, a remedy does not follow automatically upon the judgment of the court and the first aspect of the broad discretion conferred on the court concerns reflecting upon whether any remedy should be granted.

[4] That has given rise to the following submissions on behalf of the Applicant. It is contended that the court should exercise its discretion to grant a remedy and that the remedy should take the form of an order of certiorari quashing the Commission's final report submitted to the Secretary of State for Northern Ireland.

[5] The riposte on behalf of the Commission is that the court should consider three alternatives. The first is to allow the judgment to speak for itself. The second is to make what I might describe as a declaration *in limine*, in the terms proposed in counsel's written submission and the third is to make a declaration which would, as in the Consumer Council case, accompany the relevant measure in the parliamentary process.

[6] The task which the court must perform includes some measurement, or evaluation, of the extent of the legal defect which the court has diagnosed in the Commission's process. First of all, it belongs to a particular phase of what the court has described in broad terms in its judgment as a detailed and structured consultation process. If one stands back there can be no suggestion that the commission failed to fully observe the statutory requirements or that the Commission committed any error of process other than that diagnosed.

[7] Second, there is no finding by the court of a failure to give consideration to the representations made. Rather, the error of law arose in the manner in which the Commission considered the representations in question. I consider this to be common ground because Mr Scoffield QC, in my view correctly, has submitted that the Commission went wrong in failing to properly consider the representations in

question. This is not a case of an outright failure to weigh the representations concerned. Rather the failure which occurred was of a qualitative kind. Furthermore, I have explicitly held that the Commission was assiduous in all it did.

[8] The court must then graft onto all of this the Parliamentary process. There is a suggestion in the Applicant's written submission, in broad terms, that the court should have reservations about the efficacy of the Parliamentary process which is imminent. The response to that is twofold in my view. First, the court has no basis for questioning the efficacy of that process by reference to its legal ie statutory structure. Second, the court has no evidential foundation for any lack of faith in, or reservations about, the efficacy of that process. Indeed, the process is such that it would be open to the Applicant and others, in such manner as they consider appropriate, to make their views known to the politicians concerned who will make the final decisions.

[9] Thus, the court's ultimate decision in these proceedings materialises at the interface between the judicial process and the Parliamentary process. Taking into account the court's measurement and evaluation of the legal shortcoming which has been identified and positioning that in the fuller context, I am of the clear view that the quashing of this report would be disproportionate. There must be a reasonable relationship of proportionality between what the court has decided and what further step, if any, it should take. In its judgment the court has acknowledged the levels of attention and professionalism invested by the Commission in the process in question. Furthermore, the court must tread warily where there are issues of Parliamentary process. I conclude that in the exercise of the court's discretion a remedy is appropriate. In my view the remedy should be declaratory in nature.

[10] I am proposing to make a declaration that at the final stage of the statutory process which, I have said, was fully observed by the Commission, the Boundary Commission, as stated in paragraph 5.11 of its Final Recommendations Report, erred in law in its restrictive approach to certain of the representations received. The mechanics will entail reproducing in full paragraph 5.11, beginning with the words "*We consider that...*" ending with the words "*...local and incremental*".

[11] That raises one further question of process and mechanics and that is how the declaration should be promulgated. In the Consumer Council case, as Mr McGleenan QC and Mr McLaughlin observed in their skeleton argument, the court adopted a bespoke remedy in order to address a broadly comparable legal shortcoming which is correctly described in shorthand as a procedural defect in the consultation process which, in that case, culminated in The Water and Sewerage Services (NI) Order 2006. There the declaration, as the court is proposing in the present case, identified the defect and the court in effect made an order of mandamus that the declaration be appended to the draft Order in Council when laid before Parliament.

[12] The parties shall provide the court either with an agreed draft final text of the Order to be made or, in default of agreement, competing drafts, by 10 June 2019

PART 2 [14 June 2019]

[13] In the latest missive from the court I drew attention to the imperative of finality in these proceedings and finality will now be achieved.

[14] In the interests of transparency, I have drawn to the attention of the parties a working document which I was effectively debating with myself just before and immediately after the incomplete remedies hearing last week. I have also commissioned the transcript of that hearing, which remains a draft document at the moment because it has not been edited or corrected by me.

[15] That transcript and all that has transpired in the aftermath in tandem make abundantly clear that finality was not achieved one week ago. While finality had been the aim of the hearing, the court raised certain questions about how the Consumer Council mechanism could be effected in this indisputably different litigation context. And one of the court's reflections and concerns, expressed but incomplete, related to the question of whether an order of that kind has a mandatory character. That in turn has given rise to an appropriate intervention on the part of the Minister for the Cabinet Office (represented by Mr Philip McAteer, of counsel) who, insofar as any formality is required at this stage, is formally accorded the status of an interested party in these proceedings.

[16] Pausing, it is appropriate to observe that two of the counsel who were involved in the Consumer Council case, and there were only three in total, have been directly involved in these proceedings, albeit one as an advocate and the other in his judicial capacity and neither, as has been transparently made clear in exchanges, has any independent recollection of any debate before Weatherup J about the final order mechanism which he was proposing. Furthermore, it is a fact that at the stage when the challenge was brought in the Consumer Council case and the proceedings were completed and the order was drawn up, everything was happening at a very fast pace indeed, dictated by an immutable parliamentary timetable.

[17] In the events which have occurred, as I have endeavoured to explain them, the court has now received argument on the propriety of a declaratory order, in particular a declaration including any kind of mechanism of the type devised in the Consumer Council case. It is appropriate to draw attention again to what that mechanism was, namely, the court made a declaration in certain terms and then proceeded to order that the declaration accompany and remain with the draft Order in Council in the parliamentary process.

[18] Properly analysed, the unexpected but welcome further assistance which the court has now received through the intervention of the Minister for the Cabinet Office, draws attention to some elementary doctrine: the separation of powers and

the distinctive roles of the court and the legislature in what is sometimes described as the dual sovereignty element of the unwritten British constitution.

[19] I have reminded myself of some of the judicial pronouncements on this subject in addition to those helpfully brought to the court's attention in Mr McAteer's written and oral submission. I have noted, for example, that in the case of Re F [2001] Family Reports 58, in which the central issue was that of the court's jurisdiction, Sedley J stated:

> *"The relationship between Parliament and the courts is a working relationship between two constitutional sovereignties".*

In the case of Morgan-Grampian [1991] 1 AC 1 Lord Reid stated at page 48E:

> *"The maintenance of the rule of law is in every way as important in a free society as the democratic franchise. In our society the rule of law rests upon twin foundations, the sovereignty of the Queen and Parliament in making the law and the Sovereignty of the Queen's courts in interpreting and applying the law".*

There are further comparable pronouncements.

[20] The interface which is highlighted by the intervention and further arguments which have materialised in this case raises the question of whether it would be constitutionally appropriate for this court to take a step which could interfere inappropriately in the democratic parliamentary process. In this context I consider it unnecessary to review the question of whether the course of action taken in the Consumer Council case was the correct one: that is a peripheral and ancillary issue in the present context. I remind myself also of the fact sensitive, legislative sensitive and litigation sensitive features of the present proceedings.

[21] Having reflected on this constitutional interface I have come to the clear conclusion that the court should make a declaration *simpliciter*. Any further step would represent a constitutionally improper intrusion which would impermissibly traverse the boundary which separates the courts and the legislature.

[22] That in turn raises the question of what the final terms of the declaration should be. First, in the current working draft of the court the text draws attention to the consideration that the statutory process which the Boundary Commission followed was an obligatory one. Second, in its current formulation the text highlights that that statutory process was fully observed. I have considered a submission on behalf of the Applicant in relation to the inclusion of those words. I reject this submission because in my view it will be abundantly clear from the current text that the court is there conveying that the Commission took all of the steps which it was required to take by the statute. In other words, all of the statutory

requirements and procedures were duly observed. The court's preference to include the text of the relevant passage in chapter 4 of the FRR, will make clear to all readers the nature of the legal defect which the court has assessed in its judgment.

[23] A further question arises as to whether the final text of the declaration should make clear that the Commission's report has not been quashed. I accept that in the real world in the absence of a provision of that kind there could be scope for doubt and uncertainty, because it is of the essence of the real world of politics that there might be some scope for what some might consider mischief making, political gain, posturing, political strategy and tactics and so forth.

[24] There is a recent parallel in the judgment of this court in the case of Bryson [2019] NIQB 51. In that judgment, in the context of a case where the court found a single defect in the acts under challenge and rejected all other aspects of the challenge (and I pause to observe that to that extent there is a parallel with the present case) and in the further context of the court ruling that its judgment would speak for itself and would not attract any of the available judicial review remedies, the court went to some considerable lengths to make abundantly clear that the measures under challenge, namely, the search warrants procured by the respondents under the relevant legislation and activated and generating the seizure of certain materials and apparently resulting in an incomplete pending prosecution in the appropriate criminal court had no bearing whatever on the underlying criminal process.

[25] Finally, in my view it will positively promote the distinctive constitutional roles of the court and the legislature to include in the declaratory order of this court a provision stating unambiguously that the report of the Commission has not been quashed.