Judicial Communications Office

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COURT DISMISSES APPEAL BY RAYMOND McCORD ON BORDER POLL

Summary of Judgment

The Court of Appeal[1] today dismissed an appeal by Raymond McCord on the issue of a border poll.

Raymond McCord ("the appellant") submitted that there was insufficient clarity and transparency in relation to the mechanism for directing a border poll under the relevant provisions of the Belfast Agreement which were enacted in section 1 of, and Schedule 1 to, the Northern Ireland Act 1998 ("the NIA"). The appellant claimed that the refusal or failure of the Secretary of State for Northern Ireland ("the respondent") to have a policy setting out the circumstances in which he would direct the holding of a border poll was a breach of the constitutional issues provided for in the Belfast Agreement. The appellant sought an order that the respondent publish a policy setting out the circumstances in which he would direct the holding of a border poll.

The first instance judgment

The Court of Appeal set out the sequence in relation to the first instance proceedings in paragraphs [5] to [23] of its judgment and summarised in paragraphs [24] to [32] the appellant's submissions both at first instance and in the Court of Appeal. The trial judge dismissed the challenge.

The Belfast Agreement

The Court set out the relevant provisions of the Belfast Agreement in paragraphs [34] – [43}. It was made up of two inter-related documents:

1. The "Multi-Party Agreement" signed on behalf of the British and Irish Governments and eight political parties or groupings in Northern Ireland. In the section of the Multi-Party Agreement headed "Constitutional Issues" the participants endorsed the commitment made by the British and Irish Governments that they would for instance:

    (i) recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland;
    (ii) recognise that it is for the people of the island of Ireland alone to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland.

2. The "British-Irish Agreement" which was a draft international Treaty between the two governments subsequently was executed by an exchange of diplomatic notes. In Article 2 the

[1] The panel was Lord Justice Stephens, Lord Justice Treacy and Mr Justice Colton. Lord Justice Stephens delivered the judgment of the court.

governments affirmed their commitment to support, and where appropriate to implement, the provisions of the Multi-Party Agreement. As part of the British-Irish Agreement, the British Government agreed to repeal the Government of Ireland Act 1920 which had established Northern Ireland, partitioned Ireland and asserted a territorial claim over all of Ireland. The Irish Government agreed to propose draft legislation to amend Articles 2 and 3 of the Constitution of Ireland, which asserted a territorial claim over Northern Ireland.

The NIA

The Belfast Agreement was approved by voters across the island of Ireland in two referendums held on 22 May 1998. The draft clauses/schedules in the Multi-party Agreement dealing with the holding of a poll as to whether Northern Ireland shall cease to be a part of the United Kingdom and form part of united Ireland were incorporated into British legislation by section 1 and Schedule 1 of the NIA. The Court set out the relevant provisions in paragraphs [44] to [67] of its judgment.

The Court first considered the interpretative approach to the NIA. It determined that a flexible response is to be taken in interpreting the constitutional provisions in section 1 and Schedule 1 of the NIA. The Court went on to make a number of points in relation to the terms of section 1. Firstly, the section was exactly what was agreed between the two governments and the political parties. It is also what was approved in referendums in both parts of the island of Ireland and consistent with the democratic ideal. As a matter of domestic law section 1 means that the status of Northern Ireland as a part of the United Kingdom is expressly recognised and will not change without the consent of a majority of its population voting in a poll convened in accordance with Schedule 1.

The trial judge said it was clear that a border poll in Northern Ireland to produce the outcome of a united Ireland would have to be replicated by a poll in the Republic of Ireland producing a concurrent expression of a majority wish in the Republic to bring about a united Ireland. "A vote in the north in a vacuum would not produce a united Ireland and in any event following majority votes north and south in favour of unification agreement would have to be reached between the UK and Ireland as to the form of that united Ireland and the way it which it would be governed and structured". The Court agreed with the trial judge that there is such an inter-relationship which must involve both governments and that any decision as to the holding of a border poll will involve extremely complex political considerations and if not carefully handled taking account of *prevailing circumstances* could give rise to great instability.

The Court then considered Schedule 1 to the NIA which provides for "Polls for the purposes of section 1". Again the wording of Schedule 1 is almost a word-perfect reproduction of the draft legislation contained in Annex A of the Multi-Party Agreement and exactly what was agreed between the two governments and the political parties. It was also what was approved in referendums in both parts of the island of Ireland and consistent with the democratic ideal. Paragraph 1 of Schedule 1 confers upon the respondent *a discretion* to direct the holding of a border poll whilst paragraph 2 imposes upon the respondent *a duty* to direct the holding of a border poll. Paragraph 3 prohibits the respondent from directing the holding of a border poll earlier than 7 years after the holding of a previous border poll. Paragraph 4 provides that an order made under the Schedule must specify the questions to be asked and the persons entitled to vote and may include any other provision about the border poll which the respondent considers to be expedient. There is no requirement in paragraph 4(1) to formulate the question in any particular way nor are there any suggestions as to who is entitled to vote. These matters are therefore left to the respondent. Paragraph 4(2) is extremely wide for instance permitting any other provision which the respondent

thinks expedient. The Court said the powers in paragraph 4 must be exercised honestly in the public interest with rigorous impartiality in the context that it is for the people of Ireland alone to exercise their right of self-determination.

The Court commented that the discretion to direct the holding of a border poll under Schedule 1 is unqualified. It said that Schedule 1 paragraph 1 does not specify any matter which should be taken into account or any matter which should be left out of account. The exercise of discretion must be preceded by the respondent's assessment of the prevailing circumstances which have and will change over time. It said the discretion must be exercised honestly and based upon the respondent's assessment of whether directing the holding of a border poll is in the public interest which assessment involves political judgment.

An aid to the interpretation of what is in the public interest are the terms of the British-Irish Agreement which was enacted in the NIA. Article 1 paragraph (ii) of the British-Irish Agreement provides recognition "that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland". Also Article 1 paragraph (v) provides an affirmation that "…the power of the sovereign government with jurisdiction (in Northern Ireland) shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities". The Court said there was no issue that these two provisions meant that not only must the respondent act honestly in the exercise of discretion to direct a border poll but he must also act with rigorous impartially in the context that it is for the people of the island of Ireland alone to exercise their right of self-determination. It concluded that Schedule 1 contains no express duty to publish a policy as to when or in what circumstances it is in the public interest to hold a border poll.

The Court also considered the duty to direct the holding of a border poll depends upon whether it appears likely to the respondent that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland. The Court said this duty is triggered by the respondent's assessment. Paragraph 1 of Schedule 1 involves an assessment of public interest while paragraph 2 involves an assessment as to the likely majority of those voting. The duty under paragraph 2 arises even if it is not in the public interest to direct the holding of a border poll. Paragraph 2 does not specify any matter which should be taken into account or any matter which should be left out of account in the assessment. Paragraph 2 is silent as to the sources of information which the respondent might rely upon.

The Court said the assessment involves an evaluative judgment as to a likely outcome. It considered this would be essentially a political judgment to be performed by the respondent, a politician who is to form an assessment as to the political views of others: "The political judgment as to the likely outcome of a border poll is not a simple empirical judgment driven solely by opinion poll evidence. It is also not a simple judgment based purely on perceived religion. The judgment depends on what are the prevailing circumstances at any given time. For instance a likely outcome may involve an evaluation as to whether there are other factors which will impact on voting intentions crossing traditional party or perceived religious lines and if so as to their impact. Instances of such factors are changes in social attitudes North and South, relative economic prosperity North and South, the taxation structures North and South, the outcome of Brexit and the nature of future trading relations

between both parts of Ireland which in turn depends on any agreement between the United Kingdom and the European Union." The Court noted that the NIA contains no express duty to publish a policy as to how the respondent should assess whether there is an obligation to direct the holding of a border poll. It agreed with the trial judge that the Secretary of State must honestly reflect on the evidence available to see whether it leads to the conclusion that the majority would be likely to vote in favour of a united Ireland. Also that the respondent must act honestly and with rigorous impartially in the context that it is for the people of the island of Ireland alone to exercise their right of self-determination.

The Grounds of Appeal

Inconsistency

The appellant submitted that the duty to introduce a policy derives from the principle that "*inconsistency is a ground for judicial review.*" He suggested that an obligation to publish a policy flowed from a general principle of acting consistently. The Court rejected the proposition that the powers contained in section 1 and Schedule 1 require consistency. Rather, the exercise of those powers involve political judgment in the context of differing and unpredictable events. Accordingly, it considered that a flexible response is required in accordance with the interpretative approach to the NIA. The Court also rejected the proposition that "inconsistency is a ground of judicial review" except in that it is evidence of *Wednesbury* irrationality. It said it has arisen in cases where it was argued that administrative decision makers had treated different individuals or classes of individual differently in arguably comparable circumstances.

The Court commented, however, that the respondent's discretion under paragraph 1 of Schedule 1 and his duty under paragraph 2 of Schedule 1 NIA do not require him to act in an adjudicative or regulatory capacity: "They involve him making political judgments about whether it is in the public interest to hold a border poll and as to whether it appears likely to him that a majority of those voting would express a wish to form part of a united Ireland. These political judgments do not involve analysis of "comparator" cases with which the respondent might otherwise be required to act consistently." The Court also noted "consistency" as a ground of judicial review had previously been considered in this jurisdiction where the court held that the requirement to act in a consistent manner (in the absence of justification) flowed from the existence of a published policy not as the appellant contends in this case that an obligation to publish a policy arises from a general principle to act consistently.

Policy and the rule of law

The appellant relied on the proposition that a failure to publish a policy would contravene the rule of law. The Court did not consider the authorities relied on supported such a broad principle. It held that they supported two separate principles, namely:

- Where ECHR rights are engaged, the requirement that an interference "is in accordance with the law" may require publication of a policy. This was of no relevance in this appeal as the appellant had not relied on any ECHR rights.
- As a matter of domestic administrative law, where a public authority has formulated and applies a policy, it should be published. This also does not arise in this appeal as there is no policy and therefore there is nothing to be published.

The Court considered that the statutory discretions in section 1 and Schedule 1 can be subject to policy decisions at any given time in the context of "dealing with deadlocks and crises which are bound to occur" but they are not amenable to an enduring policy which would bind the respondent now and in the future as to how the flexible and politically sensitive powers are to be exercised. In that sense this also is an area which is not amenable to a policy. Indeed, such a policy would not accord with the requirement for flexibility.

Transparency and the requirement for an adequate policy

The appellant submitted that "transparency" is a common law constitutional principle. The Court, however, did not consider that the authorities cited by the appellant established a generally applicable constitutional principle of transparency. It rejected that there is a constitutional principle of transparency that requires the publication of a policy in relation to section 1 and Schedule 1 NIA.

Transparency as a constitutional and legal principle

The appellant's submissions under this heading were connected to those under the previous heading. It was submitted that "transparency or open government as a constitutional principle developed by common law has now been clearly recognised." The Court did not consider that this proposition, even if correct could lead to the requirement to publish a policy particularly given the constitutional value of flexibility and that the exercise of the powers under section 1 and Schedule 1 NIA involve political judgment in the context of differing and unpredictable events.

The requirement for a policy in accordance with the Belfast Agreement and the NIA

The Court said there was no requirement for a policy in either the Belfast Agreement or in the NIA. Rather the exercise of those powers involve political judgment in the context of differing and unpredictable events. Accordingly, The Court considered that a flexible response is required in accordance with the interpretative approach to the NIA.

An implied obligation derived from the NIA to publish a policy

The Court considered that an obligation to publish a policy cannot be implied as it is not necessary in order to give effect to the Multi-Party Agreement, the British-Irish Agreement or to the NIA. It said the implication of such an obligation would be inconsistent with the interpretative approach to the NIA since it could constrain the exercise of powers which were intended by both Governments, the political parties and by Parliament to be broad and sufficiently flexible to accommodate the changing and uncertain circumstances which might arise in Northern Ireland in the future.

Wednesbury unreasonable

The appellant's submission that the respondent's decision not to have a policy was *Wednesbury* unreasonable was only faintly made. The Court rejected the suggestion. It said the rationality of the decision was clear given what was agreed in the Multi-Party Agreement and in the British-Irish Agreement. Those agreements did not specify that a policy was required rather two sovereign governments and the political parties invested the power in the respondent without any constraints. Furthermore, the decision not to have a policy was rational given that the exercise of the powers under section 1 and schedule 1 NIA involve political judgment in the context of differing and unpredictable events. The Court said the provisions of section 1 and Schedule 1 NIA do not specify any particular matters which must, as a matter of duty, be taken into or left out of account by the

respondent in deciding on whether to direct a border poll: "In essence it is for the respondent's judgment to decide which matters it should take into or leave out of account subject to *Wednesbury* considerations. On that basis we consider that it is for the respondent to decide what is, or is not relevant to the decision-making process depending on the prevailing circumstances."

The electorate

The Court accepted that there is an inter-relationship between the decision as to who is entitled to vote and an assessment as to the likely outcome of that vote. In that respect the respondent is entitled to consider who should vote whenever making a decision as to the likely outcome of a border poll. The Court agreed with the trial judge's conclusion that this falls to be determined when the Secretary of State concludes that a poll should be ordered and in deciding how he thinks the majority would vote in a poll under Schedule 1 paragraph 2 the Secretary of State is entitled to consider what he considers would be the likely pool of voters that pool being the one to be chosen by the Secretary of State in the exercise of powers under Schedule 1 paragraph 4: "The Secretary of State is not required as a matter of law to enunciate a policy on how the pool of voters should be determined in advance of her exercising her powers under the Schedule."

The Court added that a decision as to who should vote is also a political judgment as to what is acceptable or appropriate in our community. That involves political judgment in the context of differing and unpredictable events, for example lowering the voting age to 16 as in the Scottish referendum, which may have a considerable impact on the outcome of a border poll. The Court considered that the judgment formed in Northern Ireland may or may not be the same as in the Republic of Ireland but that whatever decision is made in the Republic of Ireland might be a factor to be taken into account by the respondent in Northern Ireland: "We consider that the constitutional value of flexibility requires to be maintained and that it would not be maintained by the publication of a policy as to present views in relation to voting age or in relation to any other present decision as to demographics."

Conclusion

The Court dismissed the appeal.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

If you have any further enquiries about this or other court related matters please contact:

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