

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY RICHARD WEST
FOR JUDICIAL REVIEW**

AND

IN THE MATTER OF A DECISION OF BELFAST CITY COUNCIL

DEENY J

[1] Freedom of speech is at the very heart of the freedoms essential to a democratic society. The right to express one's opinions, even when they are unpopular or controversial, is an essential right of any citizen and one which the courts should be vigilant to protect. The existing rights at common law to freedom of conscience and of speech have been formalised by the adoption into our domestic law of the European Convention on Human Rights, to be found in Schedule 1 of the Human Rights Act 1998. Article 9(1) provides:

"Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance."

I observe that, of course, this right by necessary implication includes a right not to hold religious beliefs or to hold beliefs which are contrary to the religious beliefs of others.

[2] Article 10 of the Convention deals with freedom of expression. Article 10(1) reads:

"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions

and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”

The important matter set out in Articles 9(2) and 10(2) of the Convention I will refer to later. I respectfully agree with the views of Baroness Hale in Campbell v MGN [2004] 2 AC 457 paras. 148 - 149 that freedom of political speech is particularly important and also intellectual, educational and artistic speech and expression as they are crucial for a democracy or a dynamic society which values individual originality and development.

[3] The applicant herein, for whom Mr Michael Lavery QC appeared with Ms Mary Higgins, contends that his freedom of expression and that of the magazine “Vacuum” has been interfered with by a decision of Belfast City Council. The Council, who were represented by Mr Bernard McCloskey QC and Mr David Scoffield, deny there was any interference with the Convention rights of the applicant and contend that the decisions of the Council were lawful and proper. "I reminded the parties of my own former links with some organisations in the case and only proceeded to hear it when counsel had been instructed that their respective clients wished me to do so." I have received considerable assistance from counsel both in oral argument and in the submission of a considerable body of authorities which I have considered. As always, however, it is essential to establish the facts upon which this application is based before coming to any conclusion.

THE FACTS

[4] The applicant says in his Statement pursuant to Order 53 rule 3(2) of the Rules of the Supreme Court that in his spare time he co-edits The Vacuum, a free cultural newsheet for Belfast with Stephen Hackett. They are not paid for that work. The Vacuum is produced by Factotum an unincorporated association established in April 2001 which seeks to foster the cultural life of Belfast by publications and by hosting cultural events and discussions. The Vacuum was first published in February 2003 and is sustained through grants to Factotum from the Arts Council of Northern Ireland and Belfast City Council. Further grant assistance was voted to Factotum by the Council on 16 January 2004 which was apparently paid on 7 July 2004.

[5] On 15 June 2004 two issues of The Vacuum were published simultaneously, one entitled “God” and one entitled “Satan”. Various aspects of these two publications caused offence to members of Belfast City Council. It is appropriate to quote a short passage from the “God” issue parodying a sermon given in the Whitewell Tabernacle:

“Sodomites in your dirty moth-eaten clothes, outside the walls with the dogs where you belong. The second coming of Christ will cast you outside with the mangy dogs. Do I hear an Amen? Amen! I said do I hear an Amen? Amen brothers and sisters! Halleluiah! Amen pastor! Ye ho ye boye! For the love of God. Jesus Christ. Holy Mother of f***! Halleluiah! Halleluiah! Amen praise Jehovah and f*** me sideways Amen.”

The words beginning with “f” were printed in full in *The Vacuum*. They were not the only four letter words in the publication. There were other articles without offensive language. The very fact of publishing an issue about satanism appears to have caused offence to some members of the Council which was added to by the fact that there were critical remarks about a number of well known and named preachers in that issue. There were cartoons which some might find offensive.

[6] Balanced against that is the fact to which Ms Roisin McDonagh, Chief Executive of the Arts Council of Northern Ireland, draws attention in her affidavit in support of the applicant, that a number of well respected writers such as David Brett, John Morrow and Glen Patterson contribute to the magazine. She avers that it has rapidly establish an iconoclastic reputation and that whilst its quality may vary “most editions prove to be engaging.”

[7] On 18 June 2004 Factotum, the publishers of the magazine, applied for grant assistance in a second round of Belfast City Council funding. It is important to establish exactly what was happening here. I refer to the affidavit of Siobhan Stevenson, Culture and Arts Manager of Belfast City Council. The minute of the Council meeting of 1 July 2004 recorded that several members had drawn the Council’s attention to a publication “the contents of which were considered by them to be extremely offensive, which had received financial assistance from the Council.” (This was *The Vacuum*). However the Council did not withdraw its previous award of funding to the magazine at this time. Rather it directed the Arts Sub-committee, after a lengthy discussion, to reconsider the question of the funding of arts publications “with a view to the criterion in this regard specifically requiring that, prior to financial assistance being provided, the Council must have sight of the material to be published in order to ensure that such material will not be likely to offend the majority of the city’s ratepayers and will contribute positively to the image of Belfast.”

[8] The view was subsequently expressed that this proposal, if enacted, would meet two objections. First, it would be quite impracticable for the Council’s members or officers to review every publication in advance.

Secondly, this would operate in effect a censorship over the publications of any organisation which received any funding from the Council. However what transpired was rather different from this minute. The issue was discussed at a meeting of the Development (Arts) Sub-committee on 4 August 2004. The minute of that meeting was accepted by the full Development Committee and came before the next meeting of the Council which was on 1 September 2004. I quote paragraph 13 of Ms Stevenson's affidavit:

"No award was made to Factotum under the second tranche of the Council's Culture and Arts Project Grants Scheme 2004/2005 as the recommendation to award funding was not approved by Council until such times as an apology was received. The relevant minute of Council of 1 September read:

'That the decision of the Arts Sub-Committee of 4 August under the heading 'Culture and Arts Project Grants Scheme 2004/2005: second tranche - Factotum', as adopted by the principal Committee at its meeting on 18 August agreeing to provide funding of £3,300 to Factotum, be amended to provide that financial assistance in respect of the 'The Vacuum' element of the Factotum application for grant assistance be not provided until such time as Factotum provides an apology for any offence which may have been caused to Members of the Council and the citizens of the city by previous publications and provides an assurance that future publications will meet such criteria as may be established by the Council."

She took the view, rightly in my view, that Factotum had therefore not succeeded under the second tranche of the Council's scheme. As she points out subsequently in her affidavit funding for culture and arts is a discretionary function of the Council. It takes place through a competitive grants scheme with criteria which support the Council's objectives detailed in the culture and arts plan 2004/2005:

“The grant process is very competitive. Within the second tranche of Project Grants Scheme Funding for 2004/2005 there were 35 applications seeking a total of £263,596 of funding. Only 19 of those applications were awarded funding from the available funds of just under £60,000. The Council is, therefore, involved in this area in making decisions about the allocation of scarce resources. There is and should be no expectation that funding will be provided in the second tranche of funding merely because funding was provided in the first tranche of funding. Although they are referred to as ‘tranches’ the two funding rounds are completely separate procedures. The Culture and Arts Project Grant Scheme is intended for one-off projects, not activities run as part of an annual programme. Each application is treated separately and is assessed and prioritised on an individual basis.”

[9] There was subsequently correspondence and discussions between the publishers of The Vacuum and officers of the City Council. An attempt was made to compromise the matter by inviting Factotum to furnish an apology or merely an expression of regret with a view to them securing future funding from the Council. It may be that if Factotum had accepted that offer it would have acquired a legitimate expectation which the court would have enforced. However it decided that it would compromise its own independence to go down that route and declined to do so. In the circumstances therefore I do not propose to consider that aspect of matters further. The decision of the Council which is open to challenge here is the one declining funding unless and until there was an apology. The Town Solicitors offer was never ratified by the Council.

COUNCIL’S DISCRETION

[10] It is important to note that the Council’s expenditure on Factotum and other similar arts related bodies stems from Section 115 of the Local Government Act (Northern Ireland) 1972. The rubric for this section is “Expenditure for Special Purposes”. Section 115(1) provides that a council:

“... may make any payment for any purpose which in its opinion is in the interests of, and will bring direct benefit to -

- (a) the Council;
- (b) its district or any part of its district;

- (c) the inhabitants of its district or any part of its district.”

It can be seen that this wording gives the Council a very wide discretion. It would be unreal to suggest that the councillors should leave their own views, openly declared to the electorate, which have secured them election, outside the chamber in choosing to make decisions under this section. As indicated elsewhere they must adopt a fair procedure but it does not mean that they must vacate their minds of their own beliefs. They must not be biased against individual applicants but there does not seem to be any suggestion that that is the case here. They had made grants to Factotum for the Vacuum. They declined to make a fresh grant, without an apology, in September 2004, not because one or more than had a personal animus against Mr West, his co-editor or others but because the majority were offended by what had been published in the God and Satan issues. It is scarcely surprising that at least one of them may have expressed themselves firmly in that regard. A distinction can clearly be drawn between expenditure of this kind and a decision of this kind and a decision by the Council in a quasi judicial role as a licensing body. There, there will be particular statutory criteria and other considerations which they will be obliged to apply. Here Parliament gave them a wide discretion. I take into account the relevant caselaw to which counsel drew my attention but it does not seem to me that the applicant has made out a case of bias in this instance.

[11] It is interesting to note the decision of the House of Lords in Regina (Begum) v Denbeigh High School (The Independent 24 March 2006). The school in question forbade a pupil to attend wearing a Jilbab, a long garment, which she felt expressive of and a manifestation of her religion as a Muslim. But their Lordships held that there was no interference with her right to manifest her religious belief under Article 9 of the European Convention. For example she could have attended another school which did permit her to wear this garment. As Lord Hoffman is quoted as saying:

“Article 9 did not require that one should be allowed to manifest one’s religion at any time and place of one’s own choosing.”

In the instant case Factotum has not in fact been prevented from exercising its freedom of expression. It went on publishing after the refusal of the City Council to vote it a fresh grant in September 2004. Indeed it took the opportunity in its issue of December 2004 to seek to criticise and, it must be said, lampoon the decision of the majority of the Council. A number of writers contributed to that issue.

[12] Part of the case made by the applicant, perhaps more in his written argument than in oral submissions was an interference with the applicant’s

rights under Article 9 of the Convention to freedom of thought, conscience and religion. It seems to me that that case is not made out. There has been no suggestion that the applicant is to be prohibited from practising a religion in any particular way nor that he be compelled to attend any particular place of worship. All that was done was to make clear that the Council were unwilling to fund the publication of which he was the co-editor further unless there was an apology or *quaere*, a statement of regret, with regard to the nature of the issues of June 2004.

[13] It does not seem to me that this right any more than the right under Article 10 has in fact been interfered with. If I am wrong in that conclusion it is my view that the justification for any alleged interference was within the range of proportionate responses open to a local authority in Northern Ireland presented with a publication which chose to link religious language with four letter words and religious images with sexual images. In saying that, for the avoidance of doubt, I make it clear that, in the opinion of the court, the view taken by the minority on the Council would equally well have been a proportionate view if it had succeeded. Both views were within the Council's discretion. The task of making discretionary funding decisions is a sufficiently difficult one already without the court too quickly intervening.

[14] I note that Mr Lavery QC did not contend in argument that the decision was outwith the powers of the Council. I accept his submission that freedom of speech must include the freedom to be offensive on occasions. I accept his submission that for the Council to have made a public statement condemning the publication while continuing to grant aid it would have been a proportionate response. They chose to take the matter a stage further by not making a fresh grant to Factotum. In that it may be said that they were not completely unlike his own clients who declined the offer from the town solicitor to proceed on the basis of making a statement of regret for causing offence falling short of an apology. It seems to me that the approach of the Council from its correspondence was a constructive one. Counsel submitted that his client had complied with the grant criteria of the Council. I consider that the Council were entitled to think otherwise but that in any event in dealing with competing grant applications they had a discretion to exercise. I accept Mr Lavery's submission that the facts here differed from those in R v BBC [2004] 1 AC 185 but it seems to me, again, open to the elected councillors to consider these publications and reach a balanced decision in the way that they ultimately did. I must respectfully say that some of his submissions would have been more applicable if the Council had actually removed existing funding already voted to the Council. There indeed they would have had to justify such a decision as the minimum necessary for one of the reasons under Article 9(2) and Article 10(2). See paragraph [19] below. It seems to me that that was not the situation here but that it was and is certainly arguable that an attempt to provide against this particular form of offensiveness in future publications subsidised by the Council would have constituted a

proportionate and minimum interference. I was referred to the case of Re Ryan McKinney's Application. The decision of the Court of Appeal has now been delivered. I do not feel that it assists the applicant but rather the reverse. The court left to the public authority the decision as to where to draw the line regarding the participation of civil servants in politics. I was also referred to the decision of the Court of Appeal in Re Misbehavin' Limited [2005] NICA 35. However in that case the Court of Appeal had found against Belfast City Council principally on the ground that it had a discretion to exercise to admit late objections to an application for a sex shop licence but there was no evidence that they had done so in admitting 69 of the 70 objections which were in fact outside the statutory time limit. It was obviously a very different case from here. Secondly the Court of Appeal held that the Council had not considered the rights of the applicant in a Convention context pursuant to the earlier decision of the Court of Appeal in Re Connor and elsewhere. This was admitted by the Council in that case. However here I find that there was no interference. And see below.

RELEVANT CONSIDERATIONS

[15] In coming to the decision as to whether or not to make an award of grant to Factotum for the second tranche of 2004/2005 the council was obliged to act fairly, lawfully and taking into account any relevant considerations and excluding any improper or irrelevant considerations. It was submitted on behalf of the applicant that their reliance on the good relation strategy of the council in the papers before the court was an afterthought and one that played no part in the deliberations of the council. However one finds it at page 18 of the book of papers in the course of the minutes of the Development (Arts) Sub Committee of 4 August 2004 that there was a clear linking of concern about the foul language in "The Vacuum" which was thought to be in bad taste and likely to offend people and for all these reasons contrary to the council's policy in relation to good relations and good governance. The council was exercising a discretionary power here under Section 115 of the Local Government Act 1972 to expend monies which in its opinion were appropriate by way of grant aid. This was not a case where it was accepting some tender for one of its principle statutory functions but a situation in where it was clearly exercising a discretionary judgment. It seems to me inappropriate and unrealistic to expect that councillors should not be entitled to take into account the offensive nature of material in a publication which they were subsidising. It is worth noting that the council in this regard was not in the same position, in my view, as it was when acting as a licence authority with the quasi judicial overtones implicit in such a role. It is also apparent from the documents through which I was carefully taken by Mr McCloskey QC that the council had the benefit of legal advice at all times which drew the council's attention to the need to act fairly and to take into account the human rights of the applicants for grant aid.

[16] I accept the evidence that this was a fresh round of funding by the Council at its meeting on 1 September 2004. It does not seem to me that a decision not to grant aid a publication, which did not have a right to such funding, constituted substantial interference with the Article 9 and 10 rights of that publication or its editor.

[17] There are certain other submissions of counsel related to the principle submissions which were dealt with by Mr McCloskey QC in his reply which I need not examine in detail save to say that I was not persuaded by them to arrive at a different decision. Likewise in the circumstances it is not necessary for me to go through the submissions of Mr McCloskey in detail in the light of my findings. I note his reliance on the decision of our Court of Appeal in Re Parson's Application for Judicial Review [2004] NI38. Without going into that decision in detail it might be said to be a far more striking example of an apparent disadvantage caused by one's religious beliefs, far exceeding the complaint of the applicant here but the court concluded that Article 9(1) was breached only when a certain level of disadvantage was reached. In my view it clearly was not reached here. The same principles would be applicable to Article 10. I accept the submission that there was no real and substantial interference here which would warrant the intervention of the court. I note further that even if there had been such an interference that this is not a case of the prevention of a publication which the European Court has viewed as more serious than the application of some subsequent sanction see F Wingrow v UK [1997] 24 EHRR 1.

[18] The respondent has raised the legitimate question as to whether the applicant, Richard West, is a victim within the meaning of the jurisprudence of the European Court of Human Rights. In the light of my other findings this is not a question that I need resolve. They also contended that even if I found there had been a substantial interference with the rights of the applicant to freedom of expression the response of the respondent was proportionate, within the terms of Article 10(2) of the Convention. I would just say a word on this topic in the light of counsel's helpful submissions. It seems to me that if the City Council had rescinded funding already awarded to the applicant, but not yet paid, as was a potential outcome on 1 July 2004, it is more than arguable that would have constituted an interference with the Convention rights. If so, the court might have to consider whether it was a proportionate response. I set out Article 10(2) at this point:

“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for

the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

The key word is “necessary”. While those who were antagonistic to the Vacuum publication were no doubt concerned with issues of morals and perhaps with issues of the reputation or rights of others it must be questioned whether it would have been necessary to rescind funding already granted. I would incline to the view that such a decision might only be considered necessary if the party awarded the funding had clearly broken one of the conditions on which it had been awarded.

[19] Of course, if there had been an interference with the Article 10 rights of the applicant by the withdrawal of funding already awarded, the City Council would be obliged to conduct a balancing exercise between the applicants Convention rights and the matters that might justify interference with those rights. See In the matter of an Application by Misbehavin’ Limited for Judicial Review [2005] NICA 35, consistent with earlier decisions of that court. For my part, on consideration of the materials before me it seems to me that if I am wrong in holding that the decision of the council was not an interference with the applicant’s Article 10 rights ie by not making a fresh award of grant under the second stage of applications, their response was proportionate. On the one hand they might have held, as clearly some councillors did, that a journal of this kind should be allowed to make outspoken remarks without losing its funding. On the other hand it seems to me that the majority were entitled to conclude that the nature and contents of the God and Satan issues were such as to make it inappropriate for the Belfast City Council to continue to grant aid for Vacuum. It should be noted that the duties of the City Council are clearly different from those of the Arts Council of Northern Ireland. It may be that a body charged with the furtherance of the arts would not only be right but might be obliged to give precedence to the expressions of artistic opinion even when offensive to the majority of the community. But it is the City Council with which I am dealing here.

[20] I am reinforced in this view by approaching it through the common law doctrine of substantive legitimate expectation. Where a public authority has agreed to pay a grant to an individual, group or restricted body of persons, particularly if they have then acted on that representation, the courts are likely to hold it to the representation of the making of a grant. See my judgment in In Re Neale and Ors (2005) NIQB 33 Consideration of that reinforces the conclusion already reached that the legitimate expectation, of the Factotum or the applicant was to have its application for grant aid fairly considered. They did not have a legitimate expectation, although they may have been reasonably hopeful, of having a further award of grant, having

succeeded on a few previous occasions but given that the value of the applications greatly exceeded the resources available to meet them it does not seem to me that it could be said that they had a substantive legitimate expectation of success. No promise to that effect had been made to them.

[21] I have already indicated that the letter of 17 November 2004 may well have created a substantive legitimate expectation that the council would act in accordance with the letter if Factotum furnished an apology or statement of regret. But they did not do so. For completeness it seems to me that the City Council were entitled to adopt the position set out in the letter. It is clearly a matter on which two views can be taken on the merits, as the council had earlier been divided on this issue but it must have been a position within the reasonable range of responses of a public authority.

[22] For all these reasons, I dismiss the application.

