Neutral Citation No: [2022] NIQB 4	*Ref:*	SCO11737
	ICOS No:	21/078136/01
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	20/01/2022

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

_____

IN THE MATTER OF APPLICATION BY JAMIE BRYSON FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE MINISTER FOR INFRASTRUCTURE AND THE MINISTER FOR COMMUNITIES

_____

John Larkin QC and Denise Kiley (instructed by McConnell Kelly, Solicitors) for the applicant
Neasa Murnaghan QC and Tom Fee (instructed by the Departmental Solicitor's Office) for the proposed respondents

_____

SCOFFIELD J

Introduction

[1] This is an application in which the applicant, a unionist activist, seeks to challenge decisions on the part of the Minister with responsibility for the Department for Infrastructure ("the DfI Minister") and the Minister with responsibility for the Department for Communities ("the DfC Minister") respectively to issue judicial review proceedings against the Police Service of Northern Ireland ("PSNI") in relation to its decision not to provide operational support for contractors to clear bonfire material at Adam Street, Belfast ('the bonfire judicial review').

[2] The applicant relies on two grounds of challenge only, namely:

(a) Illegality – in the form of failure to obtain Executive agreement to the issue of the judicial review proceedings, which was cross-cutting, significant and/or controversial, in breach of relevant requirements of the Ministerial Code, contrary to section 28A of the Northern Ireland Act 1998 ("NIA"); and

(b) Failure to take into account material considerations (namely submissions made by the applicant on behalf of the bonfire organisers relating to the requirements of the Ministerial Code).

Factual background

[3] The judicial review proceedings, the issue of which the applicant seeks to challenge in these proceedings, were dealt with on an emergency basis by Keegan J on 9 July 2021 and dismissed. The details of the bonfire to which those proceedings related were well known at the time but, for present purposes, do not need to be rehearsed. The two Departments and Belfast City Council had engaged a specialist contractor to remove bonfire material from the site due to health and safety concerns; but that gave rise to concerns about public order and the safety of the contractors in the course of this process. Policing support for the removal process had been requested but the PSNI declined to provide it. The Ministers contended that this approach on the part of the police was in breach of their public law duties and *Wednesbury* unreasonable.

[4] At around the same time, separate judicial review proceedings had been issued by a local resident seeking an order requiring the police to remove the bonfire material in advance of the planned bonfire on 11 July. An application for interim relief in the course of that judicial review was heard by Horner J on 8 July 2021 and refused. However, the judge later gave a detailed written ruling setting out his reasons for this course: see *Re JR169's Application* [2021] NIQB 90. That judgment provides a helpful explanation of the underlying factual context in which the Ministers' unsuccessful judicial review proceedings were commenced. The applicant's case in these proceedings is that the Ministers' judicial review proceedings should never have been brought.

[5] At the relevant time, the applicant had been engaged to act as a spokesperson for the organisers of the bonfire (the Tigers Bay Bonfire Group). In the course of this role he had, *inter alia*, engaged with the DfI Minister urging her not to bring her intended application for judicial review on the basis that it would be unlawful for her to do so without Executive approval. The evidence filed on his behalf also discloses that the Minister with responsibility for the Department of Agriculture, the Environment and Rural Affairs ("DAERA"), Mr Poots MLA, had written to the two Ministers who had at that stage just issued proceedings to indicate his view that their intended challenge was significant or controversial, as well as cross-cutting, and that a number of other Executive Ministers with whom he had discussed the matter shared the same view.

[6] When the two Ministers brought their judicial review proceedings, the applicant was served with the papers as a notice party (in his role as a representative of the bonfire organisers) and he provided written submissions and an affidavit to the court. He raised the issue of the proceedings having been brought unlawfully as

a result of the absence of Executive approval but, in the event, the proceedings were disposed of without this issue having to be determined.

The parties' submissions at the leave hearing

[7] In the proposed respondents' detailed response to pre-action correspondence dated 11 August 2021 they raised a number of objections to the applicant's proposed proceedings, including lack of standing, the availability of an alternative remedy (particularly in the form of a complaint to the Assembly Standards Commissioner) and that the challenge is now academic.

[8] I considered the application for leave on the papers and made a case management directions ("CMD") order on 20 October 2021, indicating that this was a case in which, in my view, a leave hearing would be appropriate in order to consider, in particular, the proposed respondents' submission that leave to apply for judicial review should be refused on the basis that the application was now academic (the Ministers' judicial review proceedings which form the subject matter of this application having been dismissed).

[9] I also set out the court's provisional views on the remaining issues which arose at the leave stage which were as follows:

(a) The application does disclose an arguable case of breach of the Ministerial Code by virtue of the relevant decisions being significant and/or controversial. The position was much less clear as to whether the decision was cross-cutting, as that phrase is now to be understood in light of section 20(8) of the NIA.

(b) The applicant does have sufficient interest to bring these proceedings in light of his earlier involvement with the bonfire judicial review.

(c) Complaint to the Assembly Standards Commissioner would not represent an adequate alternative remedy since that Commissioner can only consider the Ministerial Code of Conduct set out in Schedule 4 to the NIA rather than an alleged breach of the full statutory Ministerial Code or the Ministerial Pledge of Office. The other suggestions raised by the proposed respondents did not represent an alternative remedy available *to the applicant*.

[10] A leave hearing was convened yesterday. The applicant was represented by Mr Larkin QC, who appeared with Ms Kiley; and the proposed respondents were represented by Ms Murnaghan QC, who appeared with Mr Fee. I am grateful to all counsel for their helpful submissions.

[11] Taking his cue from the provisional views expressed in the earlier CMD order, Mr Larkin focused his submissions on whether the Ministers' initiation of the judicial review proceedings was cross-cutting; on whether the application was

academic; and on why, in the applicant's submission, even if the application was academic, the court ought nonetheless to exercise its discretion to proceed to hear the application.

[12] Ms Murnaghan for the proposed respondents resisted the argument that the Ministers' decisions or actions which were under challenge were cross-cutting. She primarily focused her submissions on the contention that the application was both fact specific and academic, and that there was no good reason in the public interest for the court to grant leave in light of the fact that the central focus of the applicant's challenge, the Ministers' judicial review against the police, had come to an end without the Ministers having secured the result for which they had hoped. Ms Murnaghan submitted that this was a classic 'knock-out blow' which ought to result in the refusal of leave. She did not press the other objections which had been raised in pre-action correspondence.

The merits of the application

[13] I remain of the view that the threshold for the grant of leave on the merits has been surmounted, certainly in relation to the issues summarised at paragraph [2](a) above. There is an arguable case that an Executive Minister seeking to judicially review an operational decision of the PSNI is significant; and a plainly arguable case that the application made by the Ministers in this instance was significant and/or controversial within the meaning of those terms in section 20(4) of the NIA, given the general political controversy surrounding the bonfire in question. The arguability of those matters is put beyond doubt, however, by the fact that another Executive Minister, the DAERA Minister, made clear in the correspondence to the DfI and DfC Ministers referred to at paragraph [5] above that he and other Ministers considered the issues to be significant and controversial. As I observed in *Re Safe Electricity A&T Ltd and Woods' Application* [2021] NIQB 93 ("*SEAT & Woods*"), at paragraphs [76] and [82], the views expressed on these matters within the Executive Committee by other Ministers will usually be a powerful indicator as to whether or not a decision is one which requires Executive approval as a matter of law.

[14] In addition, the points raised by Mr Larkin have been sufficient to persuade me that it is at least arguable that the decisions of the relevant Ministers were cross-cutting. I still retain doubt about the ultimate prospects of any such argument when viewed in the context that, pursuant to section 20(8) of the NIA, a "cross-cutting matter" must affect "the exercise of the statutory responsibilities of one or more other Ministers more than incidentally." Of course, as highlighted in *SEAT & Woods* (see paragraphs [104]-[105]), this stricter test which was inserted by the Executive Committee (Functions) Act (Northern Ireland) 2020 has not yet been reflected in the wording of the Ministerial Code itself. Leaving that aside for the moment, Mr Larkin pointed to the fact that a variety of Departments had potential involvement as landowners or occupiers with interests in the vicinity of the bonfire site including the Department for Communities, the Department for Infrastructure, the Department of Justice (which controls security gates at the site) and the Department

for the Economy (whose arm's length body, Invest NI, owns the security gates). The relevant judicial review proceedings were brought by the two Ministers jointly and interdependently; although the respondents suggested that this does not render the matter cross-cutting since separate proceedings could have been brought by each Minister in parallel and, conceptually, there was no difference in them combining their complaints into one set of proceedings for reasons of economy and efficiency.

[15] Returning to the new statutory test in section 20(8) of the NIA, the two relevant Departments had private law interests in the bonfire site or land adjacent to it. Mr Larkin argued that, since each respective Minister is in control of their Department pursuant to Article 4 of the Departments (Northern Ireland) Order 1999, the exercise of their statutory responsibilities were engaged – in essence because the Minister had a statutory responsibility for anything their Department chose to do. I also have some doubt about that analysis since, if correct, it would appear to deprive the newly introduced section 20(8) of much of its intended effect. The Minister's control of the Department's "functions" under Article 4 of the 1999 Order is unlikely, in my view, to render anything the Department choses to do but which falls outside its statutory responsibilities a matter falling within the *Minister's* statutory responsibilities (or affecting those responsibilities "more than incidentally") for the purposes of section 20(8) merely because the Department is under the Minister's control. Nonetheless, I consider that there is an arguable basis for contending that the bringing of the Ministers' proceedings was cross-cutting in light of the submissions which have been advanced on these issues on the applicant's behalf.

[16] As I also indicated in the *SEAT & Woods* case, the view taken within the Executive as to whether a matter is or is not significant or controversial, and the view of Ministers in relation to this, cannot itself be determinative of the issue (see the observations at paragraphs [77] and [83]), although it will be an important starting point. An interesting and complex issue may arise, for instance, as to whether what can legitimately be considered to be 'significant' or 'controversial' has to be determined with reference to the constitutional values embodied in the NIA, such as respect for the rule of law. Such a consideration may be thought to arise in the present case where, if the applicant is correct, a Minister or Department would be deprived of what is generally considered to be a fundamental right, namely access to the courts. But just because a case raises interesting or complex issues does not mean that it requires adjudication, particularly if it is academic as between the parties, which is the issue to which I now turn.

Is the case academic?

[17] The applicant's Order 53 statement identifies, at section 3, the impugned decisions in this case as: "The decision of the Ministers, made on 9th July 2021, to issue judicial review proceedings against the PSNI challenging its refusal to provide operational support for contractors engages [*sic*] to clear bonfire material at Adam Street, Belfast." The Order 53 statement goes on to note that those proceedings were heard and dismissed by Keegan J on 9 July 2021.

[18] It seems to me to be plain that these proceedings, practically speaking, are now academic, in light of the fact that the relevant judicial review proceedings have been disposed of. Mr Bryson's initial invocation of the point he seeks to establish in these proceedings was designed to prevent the Ministers bringing their judicial review or, alternatively, to result in its being dismissed. That has now happened. Even if the applicant were successful in having the relevant Ministers' decision to issue such proceedings quashed, that would now have no practical effect, given that those proceedings are no longer extant in any event. Albeit they were not dismissed on the basis of the point raised by the applicant in these proceedings, the Ministers failed to secure any relief. Moreover, the particular bonfire to which those proceedings related has also now long since burned out.

[19] The applicant argues that the proceedings are nonetheless *not* academic, and continue to raise a live issue, on a number of bases. The central submission was that neither of the proposed respondents has accepted that their initiation of the judicial review proceedings without Executive approval was unlawful. In a second affidavit in these proceedings, the applicant has relied on two particular matters to suggest that neither proposed respondent has seen the error of their ways and that either or both of them may again seek to commence legal action of a similar nature without Executive approval. In the first instance, my attention has been drawn to a media report of comments made by the DfI Minister in an Assembly committee appearance defending her decision to bring the proceedings including by reference to the fact that, by doing so, she was living up to her legal responsibilities. Secondly, Mr Bryson has referred to the DfC Minister being represented in a number of hearings in the recent case of *Re Napier's Application* (see [2021] NIQB 86 and [2021] NIQB 120) for the purpose of keeping a watching brief in those hearings and considering whether or not she ought to apply to be represented as an interested or notice party.

[20] I do not consider that the failure of the proposed respondents to concede that they have acted unlawfully is the appropriate yardstick by which to judge whether or not the proceedings are academic. There are a range of ways in which applications for judicial review may turn out to no longer serve a practical purpose. Sometimes that will be because the respondent concedes the application in whole or in part. On other occasions, it may simply be because the relevant circumstances change or the decision in question ceases to have any practical effect. The mere fact that the underlying legal dispute has not been resolved does not mean that the proceedings should not be viewed as academic. The focus of the court's enquiry on this issue will be intensely practical. It was characterised in the *ex parte Salem* case (discussed further below) as whether there was any "longer a *lis* to be decided which will directly affect the rights and obligations of the parties *inter se*" [underlined emphasis added].

[21] Mr Justice Fordham (as he now is), in the encyclopaedic *Judicial Review Handbook* (7th edition, 2020, Hart), at paragraph 4.5, describes the key issue as whether the claim has lost "practical substance", since the method of the common

law is to "delineate and apply legal principles through adjudicating contested disputes requiring resolution for a sound practical reason." In this jurisdiction, the authors of *Judicial Review in Northern Ireland: A Practitioner's Guide* (SLS, 2007), at paragraph 5.27, cast the issue as "whether or not the application can have any practical benefit", that is to say whether "the result of the proceedings can have no practical effect or serve no useful purpose between the parties…" Anthony comments (in *Judicial Review in Northern Ireland* (2nd edition, 2014, Hart) at paragraph 8.18) that:

> "… the courts are generally reluctant to grant the remedy where the matter between the parties has since become academic (in the sense that it is no longer live) or the issues raised are speculative and where the judgement of the court would be in the form of advice."

[22] The "matter between the parties" is in my view to be understood as the real-life dispute or circumstance which has given rise to the legal question. The fact that there is an ongoing legal debate – which may arise in future between the same or, more likely, *other* parties – is relevant to the separate and posterior question the court will address in a case which has become academic, namely whether the case nonetheless ought to be permitted to proceed in the public interest.

[23] By the same token, I accept Ms Murnaghan's submission that the applicant cannot insulate his claim against the charge that it has become academic merely by seeking (as he has) "an order of prohibition restraining the Ministers and each of them from seeking to judicially review decisions of the PSNI without the approval of the Executive Committee." That is a bootstraps argument made in circumstances where there are no anticipated or threatened legal proceedings in prospect on the part of either respondent. I further accept Ms Murnaghan's submission that the prospect of the court granting such an order is extremely remote because each case must be assessed on its own merits and the court would be exceptionally cautious before granting a prospective order, in such broad terms and so plainly interfering with the right of access to the courts, where the particular circumstances in which this order may bite are entirely speculative and unknown.

[24] The applicant shared the proposed respondents' pre-action response with Minister Poots in order to seek his views upon it, which were set out in a further letter from him to the applicant's solicitors of 26 August 2021. He is, in general, strongly supportive of the applicant's case and dismissive of most of the objections raised on the respondents' behalf in the pre-action response from the Departmental Solicitor's Office. On the question of whether the applicant's challenge is academic, however, he observed that "this is really a matter for the courts." For the reasons summarised above, I accept the respondent's submission that the application is, properly understood, academic as between the parties. The principal remedy relates to a decision (the initiation of the judicial review proceedings in July 2021) which no longer has any ongoing legal or practical effect.

Should the court nonetheless grant leave?

[25] For me, the more difficult issue in this case is whether or not it falls within the exceptional category of cases where leave to proceed ought to be granted notwithstanding that a successful result for the applicant will be of no practical benefit to him at the present time.

[26] The classic statement of guidance on this issue is contained in the speech of Lord Slynn of Hadley in *R v Secretary of State for the Home Department, ex parte Salem* [1999] UKHL 8, as follows:

> "The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

[27] The first and most basic point arising from this guidance is that the court should be cautious about hearing cases which are academic between the parties. In order to do so, there ought to be a good reason in the public interest. As to this, the examples given are non-exhaustive but usually form the starting point of the court's analysis of this issue. I do not consider that this is a case which raises a discrete point of statutory construction. There is now a substantial (and growing) body of case law examining what the relevant statutory terminology in section 20 of the NIA means and how it should be approached as a matter of law, of which the decision in the *SEAT & Woods* case referred to above is probably the most recent instance. The issue in this case is essentially about application of the legal principles which have previously been explained to the factual circumstances which arose in summer 2021. Albeit those facts may not be particularly complex or contentious, detailed consideration of them would still be required.

[28] In addition, I do not consider it likely that there is a large number of similar cases which presently exist (indeed, this was not suggested) or which are anticipated. In the event, Minister Hargey did not seek to intervene in the *Napier* proceedings, which have now largely concluded. There is no 'bonfire litigation' ongoing or presently anticipated (and, indeed, Horner J's judgment in *Re JR169* was obviously designed to provide guidance which would hopefully reduce the scope for contention and litigation in this field in future). If any such further litigation does arise, the question of whether the relevant Minister is deprived of authority to commence proceedings in the absence of Executive approval can be addressed at

that point: ideally, in the first instance, in the Executive Committee itself but thereafter, as necessary, in court, either by way of judicial review or by way of collateral challenge to the Minister's actions in the course of the defence of the proceedings in question. To seek to address the issue now, for the benefit of future cases in unspecified circumstances, would in my view be to fall foul of the general approach that the courts will not give advisory opinions (see *Re McConnell's Application* [2000] NIJB 116, at 120).

[29] In light of these considerations, I do not consider that this is a case where exceptionally the court should exercise its discretion to permit the application to proceed where it will have no practical effect in relation to the circumstances which gave rise to the decisions under challenge. In reaching this conclusion, I also take into account the need to allocate resources fairly and proportionately amongst the Judicial Review Court's heavy case-load. That would indisputably be a relevant consideration in giving effect to the overriding objective contained in RCJ Order 1, rule 1A (as expounded in Order 1, rule 2) but – whether or not the grant of leave to apply for judicial review is formally the exercise of a power given to it by the Court Rules for the purposes of Order 1, rule 3 – it is also, in my view, plainly a relevant consideration in the exercise of the court's *Salem* discretion.

Conclusion

[30] By reason of the foregoing, I dismiss the applicant's application for leave to apply for judicial review. In my judgement, the case is properly to be viewed as academic and there is insufficient reason for the court to exercise its discretion to proceed to hear the case, notwithstanding the interesting issues it raises. If, and in the event that, an Executive Minister is again considering initiating judicial review proceedings against the PSNI (or another public authority, such as another Minister) no doubt further consideration will be given to the themes which the applicant had hoped these proceedings might address. If any such issue requires resolution by the courts it would be preferable for that to occur in the context of the new factual scenario in which it arises. This application will no doubt have been of some utility in ensuring that, where a Minister is considering such a step, this issue will be given careful consideration in advance.

[31] I propose to follow the usual course of making no order as to costs between the parties at this stage; but to order legal aid taxation of the applicant's costs.