

Neutral Citation: [2017] NIQB 27

Ref: MAG10220

Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 3/3/2017

2016 No: 28528/1

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY CONRADH Na GAELIGE
FOR JUDICIAL REVIEW

and

IN THE MATTER OF A FAILURE BY THE EXECUTIVE COMMITTEE OF THE
NORTHERN IRELAND ASSEMBLY TO COMPLY WITH ITS DUTY
PURSUANT TO SECTION 28D OF THE NORTHERN IRELAND ACT 1998

MAGUIRE J

Introduction

[1] This application for judicial review was begun on 31 March 2016. Leave to apply for judicial review was granted by Colton J on 31 May 2016. The applicant is Conradh Na Gaeilge. The applicant is described in the affidavit grounding the application as a "Democratic Forum for the Irish Speaking Community". It works, the court has been informed, to promote the Irish language and was founded in 1893. There is no issue in this case about the applicant satisfying the requirements of having a sufficient interest in the matter to which the application relates.

[2] It seems clear that the applicant is in favour of the development in Northern Ireland of a strategy for protecting and enhancing the development of the Irish language. It therefore was greatly interested in a commitment entered into by the United Kingdom government in 2006, as part of the St Andrew's Agreement. At that time the government endorsed "the need for respect for and recognition of the Irish language in Northern Ireland". This built upon earlier commitments which had been given. But, in this case, it gave rise to legal provision being made in connection with it. This took the form of a provision in the Northern Ireland (St

Andrew's Agreement) Act 2007 which added a new Section 28D to the Northern Ireland Act 1998 ("the 1998 Act").

[3] It is with Section 28D that this application is concerned as the applicant claims that the Executive Committee within Northern Ireland's devolved system of government has failed to discharge the legal obligation which rests upon it to adopt a strategy setting out how it proposes to enhance and protect the development of the Irish language. In these circumstances, the applicant seeks from the court, *inter alia*, a declaration that the Executive Committee "has failed to comply with its duty under Section 28D (1) of the Northern Ireland Act 1998 to adopt a strategy" as aforesaid.

Section 28D

[4] The terms of the above section are as follows:

"(1) The Executive Committee shall adopt a strategy setting out how it proposes to enhance and protect the development of the Irish language.

(2) The Executive Committee shall adopt a strategy setting out how it proposes to enhance and develop the Ulster Scots language, heritage and culture.

(3) The Executive Committee -

(a) must keep under review each of the strategies;
and

(b) may from time to time adopt a new strategy or revise a strategy."

In what follows the court will refer only to the strategy in respect of the Irish language referred to at subsection (1) *supra*, but in fact the events to be described below involve both a strategy for the Irish language and a strategy in respect of the Ulster Scots language.

[5] It is not in dispute between the parties that the terms of Section 28D (1) places a legal obligation upon the Executive Committee. Likewise, it is also not in dispute that the sub-section contains no express time period by which the strategy shall be adopted. However, it is common case that a proper reading of the provision would necessarily imply into it the notion that the obligation is to be performed within a reasonable period of time.

[6] The section came into force on 8 May 2007. Consequently, in considering the timeframe for the performance of the duty contained in the sub-section, this date would be the starting point.

[7] The court, as will be discussed further below, has not been provided with more than the following information about the steps which have been taken for the purpose of complying with the sub-section. The matter can be viewed in two parts. Firstly, there is no substantial information about any steps to perform the obligation in the period from 8 May 2007 to a date in 2012, save for a desultory discussion between the Department of Culture, Arts and Leisure (“DCAL”) Minister of the time and the DCAL Committee of the Assembly in 2010. Thereafter, as will be set out below in more detail, there has been a process ongoing dating from 2012 by which a strategy was being devised under the aegis of DCAL. However, in 2016, this process did not result in the Executive Committee adopting a strategy for the purpose of fulfilling the obligation under Section 28D. A strategy came before the Executive Committee for approval in March 2016 but it failed to be approved.

The CAJ Case

[8] The court’s attention has been drawn to the case of CAJ and Gormally’s Application [2015] NIQB 59. In a number of respects, this litigation, dealing with a very similar provision in the Northern Ireland Act to that involved in the present case, provides some guidance as to the approach which this court should take.

[9] In that case, the court was concerned with an alleged failure by the Executive Committee to discharge its statutory duty under Section 28E of the 1998 Act. Just as in the present case, the background to this section had been discussions which led up to the making of the St Andrew’s Agreement and subsequent to that Agreement the enactment of legislation amending the 1998 Act. Section 28E related to a “Strategy relating to poverty, social exclusion”. In its material part, it read:

“(1) The Executive Committee shall adopt a strategy setting out how it proposes to tackle poverty, social exclusion and patterns of deprivation based on objective need.

(2) The Executive Committee –

(a) must keep under review the strategy;
and

(b) may from time to time adopt a new strategy or revise the strategy.”

[10] The issue in the CAJ case, like the present, was whether the Executive Committee had fulfilled its duty to adopt the relevant strategy. The court held that

the Executive Committee had not fulfilled its obligation. At paragraph [50] Treacy J stated:

“Despite the lengthy and erudite arguments presented by both sides in this case, it resolves to a very simple decision: is there in existence a strategy which has been adopted to satisfy the duty at section 28E? On the evidence presented it is clear that there is no such strategy and for that reason I must find for the applicants.”

[11] In the CA case the argument before the court centred on the question of whether in fact a strategy had been adopted but that is not a feature of the present case, as it is not suggested that at any material time since the obligation with which the court is concerned came into being the Executive Committee has adopted a strategy which would meet the requirements of Section 28D (1).

The Applicant’s Case

[12] In the circumstances described, the applicant’s case as presented to the court by Ms Quinlivan QC (who appeared with Mr Aidan McGowan BL) was that the issue before the court was uncomplicated and could be dealt with summarily. It simply was that after almost 10 years since the Section 28D (1) duty had come into force there had been a complete failure to adopt any strategy in discharge of the duty the Executive Committee was under. This, counsel argued, defeated the purpose of the provision and there was no prospect of a strategy being adopted in the foreseeable future. There had been, in short, a clear and manifest breach of the obligation imposed by Section 28D (1).

The Respondent’s Case

[13] For the Executive Office (not the Executive Committee) Mr McGleenan QC, who appeared with Mr Philip McAteer BL, argued that the court had to view Section 28D in its due context. This involved taking account of the operation of the Executive and its relationship with Ministers. The court needed to keep in mind that Executive Committee business was conducted in an established way and involved a process which included the devising of proposals in Departments and these proposals being consulted on and being ultimately brought before the Executive Committee where they could be considered and decisions made about them.

[14] In counsel’s submission, while it was true that no strategy for the purpose of Section 28D had been adopted, it was undeniable that DCAL had for a considerable period of time applied itself to devising such a strategy. This had involved a variety of stages, including consultation stages. Ultimately, Ministers had more than once been consulted but it had not proved possible for there to have been agreement about a strategy. Nonetheless, the matter had come before the Executive Committee

but in March 2016 the strategy then presented did not command the necessary level of support to enable it to be adopted at the relevant meeting of the Executive Committee. The case, therefore, was not one where the obligation had simply been neglected and left unattended to.

The Process 2012-2016

[15] Undoubtedly it is the case that in the period 2012-2016 steps had been taken to seek to devise a strategy in respect of the Irish language. While this ultimately did not succeed in the sense that no strategy in fact was adopted by the Executive Committee, the process involved was outlined to the court and may be described succinctly.

[16] The process essentially was as follows:

- (i) In 2012 DCAL did devise draft strategies relating both to the Irish language and the Ulster Scots language.
- (ii) In the period July-November 2012, these were the subject of public consultation.
- (iii) In June 2013 the draft strategies and summaries of the public consultation process were provided to all Ministers who were invited to make any comments on them.
- (iv) DCAL duly received comments from some Ministers.
- (v) In July 2014 the draft strategies were revised within the Department and again comments on them were sought from Ministers.
- (vi) Comments in respect of the strategies were received from some Ministers.
- (vii) On 30 January 2015 the DCAL Minister wrote to colleagues advising them that she that day published the strategy documents. At this stage neither had been referred for adoption by the Executive Committee.
- (viii) In December 2015 the DCAL Minister produced a draft paper intended for the Executive Committee and circulated it for comment. The purpose of this was to seek agreement from the Executive Committee as to what was described as "A Strategy to Enhance and Protect the development of the Irish language 2015-2035" as well as a similar strategy in respect of the Ulster Scots language.
- (ix) Some responses were received from Ministers but it was judged by the Department that these did not require any alteration to the draft Executive Paper.

- (x) Eventually the paper was included in the agenda for the Executive Committee meeting on 10 March 2016 but this occurred after it had failed to reach the agenda on a number of occasions.
- (xi) At the Executive Committee meeting of 10 March 2016 a vote was taken on a cross community basis on the paper. This required concurrent majorities: of those present and of those Ministers designated as Unionists and Nationalists. The paper failed to achieve the necessary level of support and accordingly the strategies were not agreed.
- (xii) The matter has not been before the Executive Committee since. In May 2016 DCAL was dissolved and responsibility for policy in this area passed to the new Department for Communities. No further strategy, to date, has been developed.

The Court's Assessment

[17] The court is of the opinion that it should make a declaration that the Executive Committee has failed, in breach of its statutory duty under 28D (1) of the Northern Ireland Act 1998, to adopt a strategy setting out how it proposes to enhance and protect the development of the Irish language.

[18] The reasons for the court's view are as follows:

- (i) Nearly 10 years have elapsed since the obligation contained in Section 28D had been imposed yet in fact no strategy as required by the Section had been adopted. In the court's view, there has been more than a reasonable time in which this obligation on the Executive Committee could have been performed since it was originally imposed. In the court's view it cannot have been the intention of Parliament that after nearly 10 years from the coming into force of the Act in 2007 this obligation would remain unfulfilled.
- (ii) In the court's view, the obligation is an obligation of outcome not means. The required outcome is adoption. The fact that there have been efforts at times to move matters on towards the development of a strategy or strategies cannot excuse the non-performance of the obligation from a legal point of view, though it may offer some insight into the difficulties.
- (iii) It is up to the Executive Committee to take whatever steps it needs to take to ensure that it complies with the obligation which Parliament has imposed on it. It cannot escape its obligation by seeking to blame others. The Executive Committee remains the key body which has been at the centre of the delivery of government in Northern Ireland and it cannot simply avoid doing what the law requires.

- (iv) The object of the provision appears to the court to be to ensure that a required target be met. The court considers that it is safe to assume that Parliament was well aware of the difficulties involved in finding a political consensus in terms of devising a strategy in respect of the enhancement and protection and development of the Irish language in Northern Ireland. Notwithstanding these difficulties, and no doubt as a means of procuring a measure of progress in respect of this issue, Parliament imposed the statutory obligation on the Executive Committee. If Parliament had wished only to require the consideration by the Executive Committee of the issue as to whether a strategy could be devised it would surely have said so. Instead, Parliament, it seems to the court, imposed a requirement to adopt the strategy.
- (v) The result after nearly 10 years is that the purpose of section 28D *viz* to require the Executive Committee to adopt a strategy as aforesaid, has been frustrated and section 28D has been robbed of any practical effect.

Conclusion

[19] For the reasons given the court will grant the declaration sought at paragraph 2(a) of the applicant's Order 53 Statement.