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2017 No. 059609

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 RAYMOND McCORD FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF SECTION 1 AND SCHEDULE 1 OF THE NORTHERN IRELAND ACT 1998

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THE RT HON SIR PAUL GIRVAN

Introduction

[1] This is an application for judicial review in which the applicant seeks a declaration that the failure by the Secretary of State for Northern Ireland ("the respondent") to have a policy which sets out the circumstances in which the respondent will order the holding of a border poll under Section 1 in Schedule 1 of the Northern Ireland Act 1998 ("NIA") is unlawful and unconstitutional. He claims that the refusal or failure of the respondent to have a policy setting out the circumstances in which the respondent will order the holding of a poll is a breach of the constitutional issues provided for in the Good Friday/Belfast Agreement. He seeks an order that the respondent publish a policy setting out the circumstances in which the respondent will order the holding of a poll.

[2] Mr Ronan Lavery QC appeared with Mr Fegan for the applicant. Dr McGleenan QC appeared with Mr McLaughlin and Ms Ellison on behalf of the respondent. The court is grateful for their well-presented and succinct submissions and for the careful preparation of the papers for use by the court.

The Statutory Context

[3] Section 1 NIA confers on the Secretary of State a power to hold a border poll and sets out the circumstances in which they may exercise that power. Section 1 of the Act declares that Northern Ireland is part of the United Kingdom and shall only cease to be so with the consent of a majority of the people of Northern Ireland voting

in a poll held under Schedule 1. In the event of a majority voting for a United Ireland the Secretary of State must lay before Parliament such proposals to give effect to that wish as may be agreed between the British Government and the Government of Ireland. Schedule 1 provides

> 1. The Secretary of State may by order direct the holding of a poll for the purposes of section 1 on a date specified in the order.
>
> 2. Subject to paragraph 3, the Secretary of State shall exercise the power under paragraph 1 if at any time it appears likely to him 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.
>
> 3. The Secretary of State shall not make an order under paragraph 1 earlier than seven years after the holding of a previous poll under this Schedule.
>
> 4(1) An order under this Schedule directing the holding of a poll shall specify—
>
> (a) the persons entitled to vote; and
>
> (b) the question or questions to be asked.
>
> (2) An order—
>
> (a) may include any other provision about the poll which the Secretary of State thinks expedient (including the creation of criminal offences); and
>
> (b) may apply (with or without modification) any provision of, or made under, any enactment."

[4] The text of what is contained in Section 1 and Schedule of 1 of NIA was agreed between the British and Irish Governments at the time of the Belfast Agreement and the words of the statute incorporates the text agreed in Annex A of the Belfast Agreement. The Belfast Agreement contains a section entitled Constitutional Issues in the Annex and it contains the agreement between the UK and Ireland. The participants endorsed the commitment made by the British and Irish Governments that they would recognise the legitimacy of whatever choice was freely expressed 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. They agreed to recognise that it is for the people of the island alone by agreement between the two parts and respectively and without external impediment to exercise their right of self-determination on the basis of consent and concurrently freely given, North and South, to bring about a united Ireland, if it 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 in Northern Ireland. If the people of Ireland exercised their right of self-determination to bring about a united Ireland it would be a binding obligation on both Governments to introduce in their respective Parliaments legislation to give effect to that wish.

[5] It is 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. In effect if not de jure there would have to be an agreement between the UK and the Republic to have parallel polls in each jurisdiction. 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 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 question arises whether any agreement between the two governments as to the nature of the united Ireland to follow from the votes would itself have to involve the consent of the majority in Northern Ireland. It would be likely to require changes in the Irish Constitution which would require the consent of the people in that jurisdiction. The legal, practical and economic complications involved in unifying the country would be considerable. All this points to the conclusion that any decision as to the holding of a border poll involves extremely complex political considerations and if not carefully handled taking account of prevailing circumstances it could give rise to great instability.

The Applicant's Case

[6] The applicant in his grounding affidavit avers that he is a British citizen and resident in Northern Ireland and that he has been an active victims' campaigner following the murder of his eldest son by Loyalist paramilitaries in November 1997. According to his affidavit as a result of the Police Ombudsman's investigation collusion between the paramilitaries and the Royal Ulster Constabulary was established. The applicant is concerned that the respondent and the United Kingdom Government had not adequately addressed the issue of the holding of a border poll. He complains that the Government has not made clear whether it has a policy that a border poll would be held if polls suggested that the people of Northern Ireland preferred a united Ireland and if so how many polls were required over what period, who would commission and carry out such polling and what percentage would be required to trigger a border poll. Nor was it clear whether the Government simply took account of the number of pro-Union and anti-Union

politicians elected in the Northern Ireland Assembly and/or Westminster. He asserts that the lack of transparency and the uncertainty of the situation ~~was~~were not good for peace. He asserts that –

> "there is now an absolute imperative in the interests of transparency that the respondent have a published policy setting out in adequate detail the conditions and criteria for holding a border poll. In this way the people of Northern Ireland can objectively ascertain whether the conditions and criteria have been met at any given time and hold the respondent and Government to account in the normal democratic way."

[7] Mr Lavery submitted that the respondent's response to the applicant's pre-action correspondence disclosed no policy on the issue of when a border poll should or would be called. He contends that the failure of the respondent to have a policy was unlawful. The failure was unconstitutional and in breach of the Belfast Agreement. The requirement to have a policy was a straightforward one in the consistency it was a principle of good administration. A policy provides consistency and gives guidance in the exercise of discretion. Counsel relied on *R (On the Application of Alconbury Developments Limited) v Secretary of State for the Environment* [2003] AC 295; *Re Findlay* [1985] AC 318, *Ex parte Venables* [1997] 2 WLR at 67. He called in aide what Lord Phillips MR said in *R (L and Another) v Secretary of State for Home Department* [2003] 1 WLR 1230, *R (Lumba) v Secretary of State for the Home Department* [2011] 4 All ER 1. He cited what was said by the Court of Appeal in *B v Secretary of State for Work and Pensions* [2005] 1 WLR 3796:

> "It is axiomatic in modern government that a lawful policy is necessary if an executive discretion of the significance of the one now under consideration is to be exercised as public law requires to be exercised consistently from case to case but adaptively to the facts of individual cases."

Counsel relied on what was said by Stephens J in *Re Rodgers Application* [2014] NIQB 79. He argued that Stephens J had recognised the requirement to have a policy when the Belfast Agreement was central to the operation of the exercise of the Secretary of State's power. The principle of transparency is a component of the rule of law and the principle of legal certainty. Mr Lavery referred to *Nadarajah v Secretary of State* [2005] All ER (D) 283 in which Laws LJ said that public bodies ought to deal straightforwardly and consistently with the public. Distilling his arguments Mr Lavery contended that firstly a Minister is required to have a policy where he is conferred with a wide discretion to make a complex and significant decision. Secondly, a policy is required not only for transparency and consistency but also by

the rule of law itself. Thirdly, transparency requires that a policy be promulgated, ascertainable and knowable by those affected by it.

[8] Mr Lavery referred to what Lord Hoffmann said in *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32 in choosing between constructions of the provisions of the Northern Ireland Act it was, Lord Hoffmann said, reasonable to ask which result is more consistent with a desire to implement the Belfast Agreement. From this Mr Lavery argued that in interpreting the constitutional provisions embodied in the NIA interpretation should be carried out in a way that was consistent with the Belfast Agreement and in a manner that was generous and purposive.

[9] Mr Lavery pointed to what he argued were very good reasons why it was compelling that a policy on the exercise of the Secretary of State's powers was required. Under the Schedule the respondent could not properly decide whether she was required to discharge the duties under paragraph 2 until she established who should be entitled to vote. The Secretary of State alone is given the power to select the electorate under Schedule 1 paragraph 4. The complexion of the electorate would be significant. Sixteen years olds could be given the vote as happened in the Scottish Independence Referendum. Those born in Northern Ireland but ordinarily residence elsewhere could be given the vote. Foreigners and EU nationals who have been in Northern Ireland for a specified period of time could be given the vote. Prisoners could be given the vote. In view of the democratic changes, in franchising 16 year olds could have a significant impact on voting numbers. Without knowing who is to be given the vote the Secretary of State could not inform herself correctly on the question whether it appeared likely that a majority of the voters would express a wish for Northern Ireland not to leave the United Kingdom and form part of a united Ireland. A policy would be necessary to show what criteria would be applied in selecting the electorate. If the respondent has in fact identified who she considers should have the vote in a poll then transparency requires the publication of those criteria.

[10] Counsel further argued that an adequate and transparent and promulgated policy would allow political parties and individuals to democratically lobby or agitate for their preferred outcome on the basis of that policy. In the absence of a published policy there would be likely to be legal challenges on decision-making and on the poll itself. This could lead to political instability. The 1973 poll was boycotted by members of the Catholic community because of the way in which the poll was set up.

The respondent's case

[11] Ruth Sloan, the Deputy Director, Political Strategy and Implementation Group in the Northern Ireland Office, swore an affidavit on behalf of the Secretary of State. In paragraph 13 of her affidavit she stated that in order to make an assessment about both public opinion within Northern Ireland and whether a poll was in the

public interest the Secretary of State had the benefit of a constitutional position which placed her very close to all areas of political life in Northern Ireland. She is the Head of the Northern Ireland Office which is in a position and has resources to monitor political, social and economic life in Northern Ireland. The Secretary of State's position invariably involves continuing and regular contact with elected political representatives across all political parties. Her level of contacting and engagement had been close and intense. The Secretary of State receives frequent and detailed representations from political representatives on issues of importance within Northern Ireland and she maintains close and regular contact with elected representations. In paragraph 14 of the affidavit she states that the Secretary of State also enjoys the benefit of frequent engagement with members of the public, community groups, business and organisations which help to inform her judgment. In relation to making an assessment about the likely outcome of a border poll the Secretary of State may decide to take account of opinion poll evidence and may even decide to commission such evidence. She has not done so to date. She is likely to be informed by the results of elections and opinion evidence where available and reliable. No fixed criteria or sources of evidence has ever been prepared by which the Secretary of State might make an assessment of public opinion in Northern Ireland for the purposes of considering ordering a border poll. The position of all Secretaries of State since the commencement of the Northern Ireland Act has been that it entitles them to make broad assessments and retain flexibility in identifying sources of evidence when deciding whether they must or should order a border poll. Secretaries of State have not considered it to be appropriate to limit pre-emptively the factors or sources of evidence which they may wish to take into account. In paragraph 17 of the affidavit she states that the Secretary of State considers that there is a public interest in maintaining flexibility around such an important decision for Northern Ireland. History has shown that the circumstances in Northern Ireland can change quickly and that political developments can be unpredictable. She considers that a formal published policy prescribing when and how her discretion might be exercised or which predetermined how public opinion should be assessed may prove to be unnecessarily restrictive and not in the public interest. Conversely if the policy was drafted in terms which were more flexible and undefined it would be unlikely to provide the type of certainty which the applicant seeks. In the light of the unconditional nature the discretion, the position of uncertainty about political developments in Northern Ireland, the potentially wide range of factors which might bear upon the public interest in Northern Ireland and the range of possible sources of evidence, in common with previous Secretaries of State, the current Secretary of State is of the view that it is more appropriate not to formulate or publish a formal policy concerning how to assess public opinion, whether a border poll should be ordered and how it should be conducted. The Secretary of State considers that the better approach is for the question of a border poll to be kept under review by reference to her political judgment as informed by her position in charge of the Northern Ireland Office and her place within political and public life in Northern Ireland. She does accept that she does not consider that an election result alone can be a determining indication of political opinion in Northern Ireland in relation to a border poll.

[12] Dr McGleenan rejected the applicant's proposition that the principle of inconsistency was a ground of judicial review. He referred to developments in the law on that issue (*R (Gallagher Group) v Competition and Markets Authority* [2018] UKSC 25 and cited *Matadeen v Pointu* [1999] 1 AC 98 per Lord Hoffmann ("issues of consistency may arise but generally are aspects of rationality under Lord Diplock's familiar tripartite categorisation"). See also *Re Croft* [1997] NI 457. In *Re Morrison* [1998] NI 68 Kerr J held that where a public authority had published a policy explaining how its discretion should be exercised it was normally required to act consistently with the policy but no such obligation arose where there was no policy. There was support for the proposition that a duty to publish a policy might arise by implication from a statutory provision. While publication of a policy was a perfectly proper course for the provision of guidance in the exercise of administrative discretion cases like *Alconbury* this did not do anything more than recognise the role of published policy in appropriate cases. *Alconbury* was a planning case in which publication of policies was appropriate to lay down consistent planning frameworks for decision-making. In *Re Findlay* the issue was whether a policy actually published was lawful. In *Venables* Lord Woolf recognised the desirability of a policy in areas such as the release of prisoners. In *R v Secretary of State for Work and Pensions* [2005] 1 WLR 3796 the issue was whether a policy should be published when in fact the policy had been formulated. In *R (Lumba) v Secretary of State* [2011] 4 All ER 1 the court recognised the need for uniform practices in immigration detention cases to avoid inconsistency and arbitrariness. Where Convention rights are in play the need to satisfy the quality of law requirement to avoid arbitrariness calls for consistent and transparent policies in practice. Counsel contended that the power of the Secretary of State under the NIA to call a poll was entirely different. There was no interference of Convention rights and the principle of Convention law legality did not arise. Referring to *Re Rodgers* [2014] NIQB 79 counsel cited what Stephens J stated at paragraph [87]:

> "… I also consider that no policy should undermine the legislative intent that those subsequently convicted should serve two years imprisonment before being entitled to accelerated release. On those grounds I do not consider that this is an area which is amenable to a policy which could conceivably cover the factual situations which might arise. Any policy that was created could only reiterate the legislative intent that a person subsequently convicted should serve two years in relation to any sentence imposed before being entitled to accelerated release and then go on to state that each case will be considered on its particular facts. I consider that the number of occasions upon which decisions require to be made are not so numerous that a policy is necessary to ensure consistency from case to case. The RPM has

> been exercised 16 times in the last 14 years. It has not been exercised in Northern Ireland since 2002. I am also satisfied that it was perfectly possible to bring all the facts in relation to the applicant's case to the attention of the Secretary of State without there being a policy in existence."

[13] In relation to the Belfast Agreement counsel stated that where a provision of the Belfast Agreement had been enacted into domestic law through the NIA reliance upon the agreement added nothing to the legal arguments the court must consider in assessing the application. Where the applicant relied on provisions of the Belfast Agreement which had not been enacted into domestic law these were unincorporated treaty provisions and thus not justiciable. In fact, counsel argued, the statutory provisions of the NIA in this context faithfully reflected the Belfast Agreement annex. The Belfast Agreement made no reference to the need for a policy or subordinate legislation and in the light of *Robinson* the NIA fell to be interpreted and applied with flexibility. Tying the Secretary of State down to a policy would detract from the need for a flexible political decision in the light of evolving circumstances.

[14] Counsel further contended that the discretion afforded to the Secretary of State does not specify any particular lexicon of factors that must be considered. Any common law or statutory duty of enquiry does not arise where it is excluded by legislation. It is for the public body and not the court, subject to Wednesbury review, to decide on the manner and intensity of enquiry to be undertaken into a relevant factor accepted or demonstrated as such. (See also *HR* [2013] NIQB 105 and *Re Foden* [2013] NIQB 2). In *Bayani* [1990] 22 HLR 906 Neill LJ held that:

> "The court should not intervene merely because it considers that further enquiries would have been sensible or desirable it should intervene only if no reasonable authority could have been satisfied on the basis of the enquiries made."

Conclusions

[15] The central question for determination in this application is whether by failing to publish a policy for the manner in which her powers under Schedule 1 of the NIA are to be exercised the Secretary of State was acting unlawfully. Put another way was the Secretary of State bound as a matter of law to formulate and publish such a policy?

[16] The court cannot intervene merely because it considers that a production of publication of such a policy would be sensible or desirable. It can only intervene if as a matter of law the Secretary of State is obliged to make and publish such a policy.

[17] There is no wide ranging established principle of law that a decision-maker given statutory powers is bound to produce and publish a policy establishing how the power will be exercised. As Dr McGleenan demonstrated in his argument the question whether a policy should or must be produced in relation to the exercise of a given statutory power or discretion is dependent on context and the nature of the legislation. It is dependent on what legal requirements are necessarily imposed in the context of the particular statutory power. Different considerations arise in cases involving the quality of law requirement in Convention law which may necessitate the production of a policy or code to ensure that a discretion is exercised in a transparent and clear way which avoids arbitrariness. In other cases the production of a policy may be desirable without being required as a matter of law. Context is everything.

[18] In the present case the Secretary of State is given a discretionary power to order a border poll under Schedule 1 paragraph 1 even where she is not of the view that it is likely that the majority of voters would vote for Northern Ireland to cease to be part of the United Kingdom and to become part of a united Ireland. Under paragraph 2 she is subject to a duty to call a border poll "if at any time it appears to her" that a majority would be likely to vote in favour of leaving the United Kingdom and joining a united Ireland. The discretionary power as opposed to the mandatory duty to call a poll could be exercised by the Secretary of State for a number of different reasons and in different circumstances. For example, the Secretary of State could call a poll in order to give a quietus to the controversial question of a united Ireland for a period of time if she thinks that a majority would vote in favour of remaining in the United Kingdom. She could direct such a poll if there was a doubt in her mind as to whether a majority was to be found on one side or the other. She could decide to call such a poll if persuaded by political representatives that it would be desirable to sound the people out on the issue or to close the issue for a number of years. The precise circumstances and the political context of a decision are variable and highly political. Decision-making in this area requires a political assessment on the part of the Secretary of State and in this context political flexibility and judgment are called for. In such a context I am wholly unpersuaded by the argument that the Secretary of State is to be bound by a policy detailing the way in which that flexible and politically sensitive power is bound to be exercised. Mr Lavery recognised that a policy would have to have elements of flexibility within it. That being the context the cases called in aid by Mr Lavery in support of the proposition that there is a legal duty on the Secretary of State to have in place a policy provide no authority for such a principle. In exercising her powers the Secretary of State must determine what she considers to be the relevant considerations to be taken into account or left out of account in deciding the political question whether the calling of a border poll would in the circumstances be appropriate. What Stephens J said in *Re Porter* [2008] NIQB 10 at paragraph [51] is of relevance:

> "In arriving at my decision in relation to this aspect of the case I bear in mind that the legislative framework which I have set out in this judgment does not specify

> any particular matters which must, as a matter of duty, be taken into or left out of account by the trust in deciding on the nature or extent of the accommodation arrangements which it should make. There is nothing which must as a matter of duty be taken into or left out of account by the trust. In essence it is for the trust's judgment to decide which matters it should take into or leave out of account.
>
> Accordingly, subject to *Wednesbury* considerations, it is for the trust, and, it is not for this court, to decide what was, or was not relevant to the decision-making process."

That approach appears entirely apt in the context of decision-making by the Secretary of State in relation to the discretionary power to call a border poll. The statutory framework does not specify the matters which must be taken into account or left out of account in deciding whether a border poll is or is not appropriate. In essence it must be for the Secretary of State to decide on what matters should be taken into account on the political question of the appropriateness of a poll.

[19] The Secretary of State has indicated that a form of published policy prescribing how the discretion should be exercised and which pre-determines how public opinion should be assessed may prove unduly restrictive and not in the public interest. This is a tenable and rational conclusion on her part. Her decision not to make or publish a policy in relation to the exercise of her discretionary power cannot be impugned and there is no legal requirement to have a policy in place to govern and qualify how the broad discretionary power is to be exercised. It should furthermore be noted that Mr Lavery's reliance on the Belfast Agreement, whether justiciable or not, gives no support to the applicant's case. The statutory power, which does not express or imply a duty to produce a policy, reflects what the United Kingdom and Irish Governments agreed in the relevant Annex.

[20] Schedule 1 paragraph 2 imposes a duty on the Secretary of State to exercise the power to call a border poll if it appears likely to her that a majority would favour a united Ireland. If the evidence leads the Secretary of State to believe that the majority would so vote then she has no choice but to call a border poll. It is necessarily implied in this provision that the Secretary of State must honestly reflect on the evidence available to her to see whether it leads her to the conclusion that the majority would be likely to vote in favour of a united Ireland. Evidence of election results and opinion polls may form part of the evidential context in which to exercise the judgment whether it appears to the Secretary of State that there is likely to be a majority for a united Ireland. The overall evidential context on how it should be analysed and viewed is a matter for the Secretary of State. The conclusion will have to take account of a wide range of factors and considerations dependent on prevailing circumstances. The Secretary of State concluded that a published policy

predetermining how public opinion should be assessed could be unnecessarily restrictive and not in the public interest. That represents a tenable and rational conclusion which the Secretary of State is entitled to reach. A policy worded in undefined flexible terms would add nothing to the statutory powers and duties already arising under the legislation.

[21] On the question of determining who should vote in a border poll that is a question that falls to be determined when the Secretary of State concludes that a poll should be ordered. In deciding how she thinks the majority would vote in a poll under Schedule 1 paragraph 2 the Secretary of State is entitled to consider what she 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. She 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.

[22] In the result I conclude that the application must be dismissed.