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

ICOS No: 21/8998/01

Delivered: 20/05/2022

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

**QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY DOLORES McGUIGAN
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

AND

**IN THE MATTER OF A DECISION OF THE
DEPARTMENT FOR COMMUNITIES**

**Mr Hugh Southey QC and Laura McMahon, BL (instructed by Phoenix Law)
for the applicant**

**Dr Tony McGleenan QC and Terence McCleave BL (instructed by Departmental
Solicitor) for the proposed respondent**

ROONEY J

Introduction

[1] This is an application in which the applicant seeks leave to challenge a decision of the Department for Communities ("the Department") dated 18 August 2021, by which it determined that consent should be refused under Regulation 12 of the Burial Grounds Regulations (Northern Ireland) 1992 (SR 1992/238) ("the 1992 Regulations") for the exhumation of the body of the applicant's deceased husband; and, relatedly, to challenge the Department's policy entitled, 'Revised Policy Guidance on Exhumations' (May 2021).

[2] The applicant wishes for the remains of her husband to be exhumed so that they may be interred in the same grave as their daughter. The deceased's mother, who owns the exclusive rights of burial in the plot in which he deceased was buried, has refused her consent to exhumation. Belfast City Council ("BCC") who is the owner of the relevant cemetery has indicated that consent is required on behalf of the Department, the deceased's nearest surviving relative and the owner of the

rights of burial. It is also emphasised that pursuant to Regulations 12 and 16 of the 1992 Regulations, a person causing or permitting the remains of a body to be exhumed without first having obtained the written consent of the Department is guilty of an offence.

[3] It is not in dispute that the applicant, who is the wife of the deceased, is entitled to inherit pursuant to section 7 of the Administration of Estates Act (Northern Ireland) 1955. Accordingly, the applicant falls within the definition of 'nearest surviving relative.'

[4] The applicant's husband was shot and killed in her presence on 13 August 2015. In an affidavit dated 22 February 2022 the applicant provides a detailed account of the devastating impact caused by her husband's death and her inability to engage in the decision making process regarding burial of her husband in the immediate aftermath of his death.

[5] The deceased was buried in a plot "owned" by his mother, the applicant's mother-in-law. In essence, the applicant's mother in law is the owner of the exclusive rights of burial. Guidance produced by BCC states that the purchase of the exclusive rights of burial is in effect a purchase of the right to bury and not a purchase of the land. Where the exclusive rights to burial have been purchased, the grave cannot be opened without the owner's permission. The rights to bury are owned forever.

[6] Prior to her death, the applicant's daughter, who was terminally ill, made a request to her grandmother to be buried with her father (the deceased). That request was refused. A subsequent request that the remains of the deceased be exhumed and reinterred with his daughter was also refused.

[7] The applicant contends that the refusal to consent to the exhumation of her deceased husband is in breach of her rights pursuant to article 8 ECHR. The applicant also challenges the Department's policy and its decision on the basis that the Department has erred in law by considering that the consent of the owner of the exclusive rights of burial is required before exhumation, save in exceptional circumstances, which is alleged to be inconsistent with the requirements of article 8 ECHR.

[8] The applicant does not seek interim relief but seeks "a modest level of expedition" given "the ongoing distress and upset" caused to her children and grandchildren by the Department's refusal of her application.

[9] The proceedings have been certified as raising a devolution issue within the meaning of paragraph 1(c) of section 10 to the Northern Ireland Act 1998, namely, a question whether a Northern Ireland Department has failed to comply with any of the Convention rights.

The test for leave

[10] In *Re Omagh District Council's Application* [2004] NICA 10 Nicholson LJ stated that the test for leave to apply for judicial review in this jurisdiction requires an applicant to show "an arguable ground for judicial review of which there is a realistic prospect of success."

[11] In *Re Chuinneagain Application* [2021] NIQB 79 at paragraph [14] Scoffield J stated as follows:

"[14] This formulation of the test for the grant of leave was adopted by the Court of Appeal in this jurisdiction in *Re Omagh District Council's Application* [2004] NICA 10 at paragraphs [5] and [43]. In *Sharma v Antoine* [2006] UKPC 57, at paragraph [14](4), Lord Bingham stated that it was now "the ordinary rule" that the court would refuse leave to apply for judicial review "unless satisfied that there is an arguable ground for judicial review *having a realistic prospect of success* and not subject to a discretionary bar such as delay or an alternative remedy."

[15] For my part, I consider that this somewhat enhanced test – rather than a threshold of simple arguability – is likely to be appropriate in many cases in this jurisdiction, where leave cannot be refused without providing the applicant an opportunity of being heard (see RCJ Order 53, rule 3(10)) and where it is the almost invariable practice of the court to invite the proposed respondent to attend any leave hearing and make submissions."

[12] This leave application had the benefit of helpful and comprehensive skeleton arguments from counsel and also oral submissions from Mr Southey QC on behalf of the applicant and Dr McGleenan QC on behalf of the proposed respondent ("the respondent").

The legal framework

[13] Regulation 12 of the 1992 Regulations provides as follows:

"12. Subject to section 11(4) of the Coroners Act (Northern Ireland) 1959, a person shall not cause or permit a body or the remains of a body, other than the cremated remains, to be removed from one place of burial to another or to be exhumed unless that person-

- (a) first obtains the written consent of the Department;
and
- (b) carries out the removal or exhumation in
accordance with Part III of Schedule 1.”

[14] Regulation 5 of the 1992 Regulations recognises the primacy of an exclusive right of burial and provides that a person shall not cause or permit a body to be buried, or cremated human remains to be interred or scattered, in or over any grave or vault in which an exclusive right of burial for the time being subsists, except by or with the consent in writing of the owner of the right.

[15] The 1992 Regulations are made pursuant to section 181 of the Public Health (Ireland) Act 1878 (“1878 Act”). Section 181 provides for the power to make rules and regulations in relation to the burial grounds covered by the 1878 Act for the protection of the public health, maintenance of public decency and the imposition of fines for breach of any Regulations.

[16] Section 178 of the 1878 Act provides for the power to sell the exclusive right of burial, either in perpetuity or for a limited period. In *Re Campbell's Application* [2013] NIQB 32, Treacy J stated that such a right granted pursuant to section 178 was contractual in nature and was not amenable to judicial review.

[17] The respondent submits that Regulation 12 of the 1992 Regulations corresponds with section 25 of the Burial Act 1857 (“the 1857 Act”). This is not entirely correct. In England and Wales, exhuming the dead requires legal authorisation. The vast majority of disinterment applications fall into two categories, namely, an application for either a Ministry of Justice licence or an ecclesiastical faculty, depending on where the remains were originally interred. Where human remains were buried in ground consecrated by the Church of England, any subsequent exhumation requires the grant of a faculty in accordance with ecclesiastical law. As a means of protecting burials which did not take place on consecrated ground, section 25 of the 1857 Act introduced a secular authority to exhume human remains. Therefore, section 25 applies to the removal of remains from un-consecrated ground, such as municipal cemeteries and burials on privately or publicly owned land as well as from other denominational burial grounds.

[18] The formal process for a section 25 licence requires submitting an application to the Ministry of Justice under the remit of the Secretary of State for Justice. Permission is usually sought by one of the deceased’s surviving relatives; however, anyone can apply provided an explanation is given for such a request. Any known objections must be detailed on the application form. The applicant must also secure the consent of the owner of any exclusive rights of burial on the grave as well as the relevant burial authority (or authorities). It is significant that any section 25 licence will only grant permission to exhume the deceased’s remains. The licence “does not authorise the licence holder to go onto the land on which the licence holder has no

interest.” (See *R (On the Application of HM Coroner for East London) v Secretary of State for Justice* [2009] EWHC 1974 (Admin) at paragraph 26.)

[19] There is no statutory right of appeal against the grant or refusal of a section 25 licence. Judicial review is the only option. In *R (On the Application of Rudewicz) v Ministry of Justice* [2011] EWHC 3078 (Admin), the Secretary of State granted permission to exhume the body of a Polish Priest from a graveyard where it had been buried fifty years earlier. The Priest had achieved almost saint-like status among many in the Polish Roman Catholic community. The Priest was a member of the Marian Fathers and this religious order made a decision to sell the property and was contractually obliged to remove the deceased’s remains under the conditions of sale. The exhumation was strongly opposed by members of the Polish community including the claimant who was the closest living relative of the deceased Priest. A judicial review application was commenced. The court reviewed the decision making process by the Secretary of State and concluded that the decision would not be impugned on the facts of the case. It is noted that the exclusive rights of burial were owned by the Marian Fathers and not by the Priest’s nearest relative.

Case Management Direction Order

[20] Scoffield J considered that this case would benefit from a leave hearing. Without prejudice to any issues the parties may wish to raise at the leave hearing, Scoffield J directed submissions on the following:

- (a) Whether there was any material misdirection in this case in light of the fact that the Department’s policy appears to admit the possibility of consent to exhumation being granted even in the absence of consent on the part of the owner of the exclusive rights of burial (albeit the policy accepts that this would be exceptional) *and* that the Department’s correspondence of 11 August 2021 suggests a willingness to disapply (“read down”) the usual policy approach in the event that this was considered necessary in order to avoid violation of the applicant’s Article 8 rights.
- (b) What, if any, practical effect the grant of the Departmental consent to exhumation could have in the event that the owner of the exclusive rights of burial in the plot, in which the applicant’s husband’s remains are interred, continued to withhold consent to exhumation.

[21] The issues raised by Scoffield J in the case management direction order will be considered below.

Article 8 ECHR

[22] It is argued on behalf of the applicant that her article 8 ECHR rights are plainly engaged citing as authority, *X v Federal Republic of Germany* [1981] (No 8741/79); *Dodsbo v Sweden* [2007] 45 EHRR 22 and *Drascovic v Montenegro* (App 40597/17).

[23] For the purposes of the leave hearing, the respondent is prepared to proceed on the assumption that the article 8 ECHR rights of both the applicant and the applicant's mother-in-law are engaged.

[24] It is the view of this court that Convention rights are engaged in exhumation decisions on the basis that such decisions may legitimately raise issues regarding rights to private and family life under article 8 ECHR, particularly regarding the determination of the resting place of the remains of a loved one. Indeed, although not applicable in this case, exhumation decisions can also raise issues of freedom of religion under article 9 ECHR. Depending on the circumstances of each case, a refusal of permission to exhume may interfere with the applicant's article 8(1) ECHR rights and, even if does, such interference may be justified under Article 8(2).

[25] A leading authority is the decision of the European Court of Human Rights ("ECtHR") in *Dodsbo v Sweden* [2007] 45 EHRR 22. In 1938 the applicant married an Austrian national who had relocated to Sweden in the same year. The couple subsequently had five children. The applicant's husband died in 1963 and his ashes were buried in a family grave at a cemetery in Fagersta. Thirty four years later, the applicant requested the cemetery authorities' permission to relocate her husband's ashes to her family burial plot in Stockholm, where her parents were buried and where she intended to be buried. In support of the request, the applicant submitted that she no longer had any connection with Fagersta, that her children consented to the transfer, and that she did not believe that her husband would have objected. The Swedish authorities refused to sanction the relocation relying on domestic legislation that restricted the removal of remains of ashes and gave primary consideration to the express wishes of the deceased. In its submission to the court, the Government did not dispute that the refusal to grant permission to remove the urn from one burial place to another involved an interference with the applicant's article 8(1) rights, but argued that such an interference was in accordance with the law, that it served legitimate aims and was justified under article 8(2) of the Convention. With regard to legitimate aims, the Government submitted that the principle of the sanctity of graves had a long standing tradition and is founded on reverence for the deceased. Therefore, the strict approach taken by the law and by the public authorities in its application, served to prevent disorder and to protect morals in society at large. In addition, the Government submitted that this restrictive approach was important in order to prevent conflicts arising amongst relatives. As to the issue of necessity, the Government submitted that it should be afforded a wide margin of appreciation in cases of this kind, where the authorities and the courts have to balance the interests of the person requesting the removal against society's role in ensuring that graves are not disturbed. In addition, in this case, there was no indications that the applicant's husband had not been buried in accordance with his wishes.

[26] The court, in its decision, found that the Swedish authorities had taken all relevant circumstances into consideration and balanced them carefully and proportionately. The court concluded that the reasons given by the Swedish authorities for refusing to relocate the remains of the applicant's husband were

relevant and sufficient and that the national authorities had acted within the wide margin of appreciation afforded to them in such matters. Accordingly, the majority of the court (four votes to three) concluded that there had been no violation of article 8 of the ECHR.

Whether there was a material misdirection

[27] Returning to the facts of this case, it is noted that the respondent, whilst accepting that article 8 has been engaged, does not proceed on the assumption that there has been any interference with the applicant's article 8(1) ECHR rights. With regard to the respondent's policy entitled "Revised Policy Guidance on Exhumations" (May 2021) (the "2021 policy"), the respondent submits that the purpose of the 2021 policy is to provide guidance in relation to the circumstances in which it will exercise its discretionary power contained within Regulation 12 of the 1992 Regulations. The respondent submits that the 2021 policy recognises the potential for coexisting rights both of a public and private nature and also the wider public interest considerations concerning the protection of buried human remains. The respondent argues that, in the event that the owner of the rights of burial on the one hand and the nearest surviving relative of the deceased on the other hand do not consent, the respondent retains a discretionary power. Accordingly, the respondent recognises that the 2021 policy admits the possibility of consent to exhumation being granted even in the absence of consent on the part of the owner of the exclusive rights of burial.

[28] For the reasons given, the respondent submits that the 2021 policy does not inhibit any consideration of or the balancing of Convention rights should they arise in the context of any particular application for exhumation. It is also argued that the express reservation of discretion on the part of the respondent demonstrates that no limitation has been applied to its power contained within Regulation 12 of the 1992 Regulations. Therefore, it is submitted that the 2021 policy exhibits no material misdirection or illegality.

[29] In reaching its decision, the respondent submits that it gave careful consideration to the representations made by the applicant. Contrary to the submissions made by the applicant, the respondent argues that it recognised and considered not only the article 8 ECHR rights of the applicant, but also those of the deceased's mother together with the latter's associated A1P1 ECHR rights. It is claimed that the decision process of the respondent reflects and is consistent with the approach advocated by the ECtHR in *Dodsbo* (op cit) at paragraphs 28-29. The respondent argues that it engaged in a balancing exercise in the context of its statutory discretion, carefully considered the circumstances presented by both parties and came to a decision which was carefully balanced and gave reasons that were relevant and sufficient. Accordingly, the respondent submits that such an approach demonstrates no material misdirection or illegality.

[30] In its decision dated 18 August 2021, the respondent states as follows:

“The Department’s policy on exhumations is that it is only in exceptional circumstances that the Department would give consent in the absence of agreement of the grave owner. The Department has given consideration to the representations made about the emotional impact of the refusal of consent by the grave owner upon your client. However, while acknowledging with sympathy the effect reported to the applicant, the Department does not consider this to be an exceptional case which would warrant overriding the private law rights of the grave owner.”

[31] The applicant, on the other hand, seeks to argue that the respondent in reaching its decision, gave excessive weight to the property rights of the applicant’s mother-in-law and by applying an exceptional circumstances test failed to apply a balancing exercise required by article 8 ECHR.

[32] The respondent seeks to argue that the balancing exercise undertaken is not reflective of an “exceptionality test.” I disagree. The respondent’s decision dated 18 August 2021 specifically states that “the Department’s policy on exhumations is that it is only in exceptional circumstances that the Department would give consent in the absence of agreement of the grave owner.” If the focus of the policy is only on exceptional circumstances, then the test of exceptionality is not the same as the application of a test of proportionality (see *Huang v Secretary of State for the Home Department* [2007] 2AC1 67 at [20]).

[33] The 2021 policy does not provide details or examples of “exceptional circumstances” in the absence of agreement by a grave owner. I can foresee cases which might fall within the category of “exceptional circumstances”, such as the exhumation of remains mistakenly interred in the wrong grave. However, at the very least, it is the view of this court that the respondent should at least specify its reasons for applying more weight to the owner of the exclusive rights of burial than the nearest surviving relative. Furthermore, if the respondent intends to rely upon article 8(2), it must specify each and every respect in which it is claimed that the interference was in accordance with the law, serves legitimate aims and is accordingly justified.

[34] For the reasons given, leave is hereby granted.

The practical effect of the respondent’s consent to exhumation

[35] Scofield J asked the pertinent and relevant question as to what would be the practical effect to the Department’s consent to exhumation in the event that the owner of the exclusive rights of burial continued to refuse consent to exhumation.

[36] With regard to this question, the parties may wish to consider the decision of Tugendhat J in *R (On the application of) HM Coroner for the Eastern District of London v Secretary of State for Justice and Susan Sutovic Velisa Sutovic and Marko Sutovic* [2009] EWHC 1974 (Admin). In this case, the claimant was the Coroner for the Eastern District of London. The court challenged the decision of the Secretary of State for Justice not to re-issue a licence under section 25 of the Burial Act 1857 for the exhumation of Peter Sutovic ("the deceased") who died in Belgrave in 2004, aged 24. The Coroner argued that it was in the public interest that the body of the deceased should be exhumed. The deceased was buried in Gunnersbury Cemetery in Acton which was owned and run by the Royal Borough of Kensington and Chelsea ("RBKC"). RBKC raised no objection to the exhumation of the deceased's body. The deceased's mother, Mrs Sutovic, was the owner of the exclusive rights of burial and was also the deceased's nearest relative. She and her family objected to the exhumation of the deceased, arguing, inter alia, that the exhumation interfered with their article 8 and article 9 ECHR rights. Normally, all cases in which a Coroner wished to exhume a body in England and Wales, the Coroner can do so by issuing a warrant of exhumation pursuant to section 23 of the Coroners Act 1988. However, for reasons unique to this case, the Coroner was obliged to request the Secretary of State to issue a licence under section 25 of the Burial Act 1857.

[37] The Secretary of State, when balancing the objection to exhumation as raised by Mrs Sutovic on the one hand with the reasons raised by the Coroner for the exhumation licence, decided in favour of Mrs Sutovic. The court agreed and concluded that, on the basis of the proceedings constituted against the Secretary of State, it was not prepared to override the rights of Mrs Sutovic.

[38] The decision is relevant for two reasons. Firstly, it is a clear example of the balancing exercise conducted by the Secretary of State in his decision as to whether to grant or refuse an application for an exhumation licence. Secondly, and relevant to the question raised by Scofield J, reference is made to paragraph 26 of the judgment which provides as follows:

"26. ... it is not accepted that the Secretary of State fettered his discretion by reference to the policy. It was relevant to take into account whether the grant of a licence would, in fact, enable the deceased's body to be exhumed. The Secretary of State was correct to take the view that the existence of exclusive rights of burial gives the owner a right which is to be equated with the right of property, interference with which is actionable: see *Reed v Madon* [1989] 2All.E.R. 431. A licence under section 25 does not authorise the licence-holder to go onto land on which the licence-holder has no interest for the purpose of exhumation. It does not confer or override any property or other right in respect of the grave. The rights in respect of the memorial stone enjoyed by Mrs Sutovic were such that the claimant would need her consent and, in light of

that, the fact RBKC did not object to the exhumation was of limited relevance.”

[39] At the full hearing, the parties should give consideration to the practical effect of the Department’s consent to the exhumation. The question is whether a licence for exhumation granted by the Department overrides any property or other right in respect of (a) the grave owner and (b) the owner of the exclusive rights of burial.

[40] The respondent also argues that the applicant has an alternative remedy. Further arguments are required detailing any alternative remedies, citing relevant authorities.

Conclusion

[41] For the reasons given above, I allow the application for leave to apply for judicial review.