

# Judicial Communications Office

21 September 2021

## COURT DELIVERS BONFIRE GUIDANCE

### Summary of Judgment

Mr Justice Horner today delivered his reasons for refusing to granting leave to apply for judicial review of a decision by the police not to remove an Eleventh Night bonfire on the peace line between Tiger's Bay and the New Lodge. The court heard the emergency application brought on 8 July 2021 by a person referred to as JR169 who lives closed to the bonfire. The applicant was seeking an order of mandamus and/or an injunction compelling the police to remove the bonfire materials before they could be ignited. The court rejected the application for interim relief on an *ex tempore* basis and the bonfire was ignited but the judge said he would provide guidance as to how the recurring problem might be resolved.

#### Background

On 3 December 2020, a memorandum of understanding was drawn up following a meeting between the Minister for Infrastructure, the Minister for the Communities, residents and local police which it was hoped would prevent a confrontation at the location of the bonfire. The Minister for Infrastructure met with the Tigers' Bay Bonfire Group on 8 July 2021 but no resolution was reached. The Department for Infrastructure ("DfC") had requested the police to provide support to contractors to remove the bonfire but in a letter dated 7 July 2021 an Assistant Chief Constable ("ACC") set out in detail the reasons why the police should not and would not intervene:

- The bonfire was occupied by children and it would be difficult to remove them safely when trying to dismantle it;
- Intelligence suggested that police intervention would be resisted by the local community and could result in the risk of casualties;
- There was intelligence that a significant number of petrol bombs had been assembled and it was likely that the use of force by the police would result in them being thrown at the police and contractors. Also there was untested intelligence that there was a risk of firearms being discharged.

In summary, the police considered this was a highly charged situation.

#### Legal Considerations

The court said it seemed that the different parties involved relied on different "rights" to try and impose their solution and no one was prepared to compromise. All sides raised the European Convention on Human Rights ("ECHR"). The applicant relied on Articles 2, 8, and 11 and on section 32 of the Police Act (Northern Ireland) 2000 (which places a general duty on police officers to protect life and property, to preserve order, to prevent the commission of offences and, where an offence has been committed to take measures to bring the offender to justice). The applicant contended that the police were obliged to dismantle the bonfire in order to protect property and to prevent the commission of offences. The police submitted that the dismantling of the bonfire would have provoked widespread unrest, resulting in the commission of offences and endangering both life and property.

# Judicial Communications Office

The court said that when looking at whether the police acted reasonably and lawfully it was important to consider the circumstances they faced. In this case the welfare of children was clearly at stake, according to the evidence of the ACC, and the rights of those children caught up in a disorder which was not of their making had to be given due consideration: "Their safety was, quite properly, a paramount consideration of the police". The court said it did not enjoy the expertise and knowledge which has been acquired by the police in handling situations fraught with the risk of widespread civil disorder, which it found was the situation in this case. Citing case law, the court said that this was an area of discretionary judgment which must be allowed to them, particularly in the realm of operational decisions.

In this case the applicant was seeking through the courts to force the police to take action in a situation where the applicant had no experience of what the consequences of taking such a course of action were likely to be. The court said it was a situation where the police were resolutely opposed to taking any action to dismantle the bonfire because of the risks to life and limb that it might precipitate:

"In such a context, the assertions made by the applicant are likely to carry little weight in circumstances where the police on the basis of what appears to the court to be sound and sensible reasons are opposed to just such a course of action. The complaints by [the applicant] that the police should have acted more robustly, were "quite insufficient to establish the course adopted" by the police was either misguided or unreasonable or unlawful. In exercising any statutory power, it also has to be recognised that there are legal limits built in. If the court concludes that a power has been exercised unreasonably or oppressively then it should not hesitate to find that such an exercise of that power was unlawful. In the instant case there was no basis laid for any challenge as to how the police had exercised their statutory powers."

When granting interim relief there is no requirement to establish a prima facie case. Instead a plaintiff has to prove that there was a serious issue to be tried and establish that it was justice and convenient to grant an interim injunction. Where the public interest is involved, as in this case, then the balance of convenience test will be of crucial importance. The balance of convenience will be looked at widely and will also have to take into account the importance of upholding the law of the land and the duty placed on certain authorities to enforce the law in the public interest.

## **Discussion**

The court said the police in this case were placed in an intolerable situation on the basis of the evidence that had been filed. Intimidation of residents in the New Lodge area was taking place in the form of golf balls being hit towards their houses and the throwing of bricks. These criminal actions were compounded by the singing of sectarian songs late at night. The court said this was "intimidation of the worse kind" and that it was wrong that people should be permitted to indulge in criminal behaviour or to be seen to escape sanction for such behaviour when they do:

"However, against that it is also unacceptable that police action against such criminal conduct should endanger the lives of children and result in a real risk of further widespread civil disorder. The police are satisfied that these were real and serious risks. The court is in no position to gainsay the police's conclusions on this issue. There is no basis for the court interfering with the decision of the police who were best

# Judicial Communications Office

placed to judge the likely consequences of any attempt to dismantle the Adam Street bonfire, namely widespread civil unrest with a particular risk to young children. On the basis of the evidence placed before this court the police's decision was lawful, proportionate and rational."

The court held it was not arguable that the police decision to refuse to intervene and try to dismantle the bonfire once it had been constructed was unlawful. It refused leave to apply for judicial review. Both sides accepted that the judgment became academic once the court refused interim relief and the bonfire was ignited. The court, however, said there are some cases where it is appropriate for it to give some direction to the decision maker to help them to exercise their powers lawfully in the future. The court gave the following guidance:

- Before any bonfire is constructed in an area where there is a likelihood of dispute, there should be clear ground rules for the construction of the bonfire such as its size, location and composition.
- The ground rules should be agreed with responsible, representative members of whichever community is going to build the bonfire and they should accept responsibility for the rules being observed.
- A failure to agree reasonable ground rules and/or to put forward responsible representatives of the local community may result in action being taken at the outset to prevent a bonfire from being constructed on public land at all.
- If the ground rules are agreed but ignored, then those responsible citizens who accepted responsibility for their enforcement should be held to account.
- If there are no responsible representatives willing to come forward to guarantee observance of the ground rules then that sends out a very clear message as to what is likely to happen.
- If the ground rules are not agreed and/or there are no responsible citizens prepared to come forward then the Departments can take the appropriate steps to prevent the bonfires being built at the outset and the police will no doubt have a role to play in the enforcement of any orders the courts may make.

The court concluded that the costs, both financial and to community relations which bonfire disputes can engender, are excessive, unreasonable and should be avoided if at all possible:

"It is incumbent upon all those who care about their community and who want to celebrate their culture to try and reach consensus as to how this problem can be managed in future years. The absence of any agreement as to clearly defined ground rules for the construction and management of this bonfire on public land at this community interface may leave the authorities with only one option, namely to prevent the construction of any bonfire at the outset. It is in the interests of both sides that a solution is found which will permit the Protestant Unionist Loyalist community to enjoy the bonfire in future years while at the same time eliminating the criminal and anti-social conduct which does so much to poison relations between the two communities."

## NOTES TO EDITORS

# Judicial Communications Office

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://judiciaryni.uk>).

ENDS

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