

Judicial Communications Office

12 April 2022

COURT OF APPEAL DISMISSES APPEAL IN CHALLENGE TO LEGACY PROPOSALS

Summary of Judgment

The Court of Appeal¹ today dismissed leave to appeal against a decision to refuse leave to apply for judicial review of the Government's Command Paper on Addressing the Legacy of Northern Ireland's Past.

Background

The Command Paper was published on 15 July 2021². It contained a statement from the Secretary of State for Northern Ireland that the purpose of the paper was to "set out a series of proposed measures for addressing the past that will be considered as part of the ongoing engagement process with a view to informing discussion and subsequent legislation". Following publication, there was engagement with multiple stakeholders on the proposals including the Irish Government, the Northern Ireland parties, victims' groups and others. The court was informed that no further formal steps have been taken in relation to the proposals and that the Secretary of State is on record as saying that the process is ongoing given the legal complexities involved.

In November 2021, Patricia Burns and Daniel McCready ("the applicants") sought leave to apply for a judicial review of the Command Paper but this was refused. Both applicants had relatives who were shot dead in north Belfast during the 1970s. They categorised the Command Paper as a decision to:

- Create a statute of limitations to apply to all Troubles' related incidents;
- Create a statutory bar preventing the PSNI and Police Ombudsman from investigating Troubles' related incidents thereby bringing an end to criminal investigations into Troubles' related offences and removing the prospect of prosecutions; and
- Preventing the courts from hearing any cases concerning Troubles' related matters, whether criminal cases, civil claims, judicial reviews or inquests or other proceedings and whether or not such cases are already before the courts or at hearing.

The applicants contend that should the proposals become law, there would be an impact on the investigations relating to the deaths of their relatives. It would also have a broader impact on the wider cohort of legacy litigation. The applicants also sought to challenge the refusal of the Secretary of State to acknowledge that the above would be "so fundamentally unconstitutional" that it could not lawfully be enacted by parliament.

Consideration

The legal question for the court was whether it is appropriate for it to intervene prior to the introduction of legislation by way of a declaratory opinion in relation to the law. The trial judge

¹ The panel was Keegan LCJ, Maguire LJ and Horner J. Keegan LCJ delivered the judgment of the court.

² [CP_498_Addressing_the_Legacy_of_Northern_Ireland_s_Past.pdf \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/106422/CP_498_Addressing_the_Legacy_of_Northern_Ireland_s_Past.pdf)

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agreed with the proposed respondent that it would be constitutionally inappropriate for the court to intervene in an area that is generally considered to be non-justiciable and, in any event, that the application is premature.

The court noted that it is one of supervisory jurisdiction:

“It performs an important function to scrutinise the actions of public authorities including government. As a general rule, the courts are concerned in judicial review adjudicating on issues of law that have already arisen for decision and where the facts are established. The courts will not generally consider cases which are brought prematurely because, at the time the claim is made, the relevant legal or factual events to which the claim relates have not yet occurred.”

Courts may have jurisdiction to grant an “advisory declaration” to clarify an issue of law but the court said it is not aware of one ever having been issued in Northern Ireland. Citing the decision of *The Queen (On the Application of Unison) v Secretary of State for Health* [2010] EWHC 2655, which was a claim in relation to a Government White Paper dealing with changes to the Health Service, the court said that declarations on points of law of general importance are only made where there is an identified point of law and that there are important reasons in the public interest for doing so:

“We can see that when points of law arise the courts may be asked to provide an opinion. However, this court is not in a position to know with sufficient certainty what issues will actually arise in the circumstances of this case. Put simply, we can discern no actual point of law. In our view it is neither appropriate nor wise to make rulings on questions of law until the precise terms of any legislation are known. In the present case, both applicants seek rulings in relation to an alleged decision which, has not yet finally been reached and which may or may not come to pass.”

The court added that there is no justiciable decision to review in this case given that the Command Paper sets out government proposals which have not yet resulted in the introduction of legislation. It said it remains to be seen what will happen in relation to the proposed legislation and that, in such a fluid situation, it would not be prudent for the court to offer any further opinion on the substantive issues raised. The court also noted that in a highly political and contentious context such as this it did not favour any interferences with political processes. Acknowledging the strength of feeling expressed by the applicants, the importance of this issue and the wider implications of any changes in the law, the court said, however, that it is one of supervisory jurisdiction and concluded that the claims are premature and non-justiciable. It further noted that the subject matter is part of an ongoing consultative process which is firmly within the political arena.

Conclusion

The court refused leave to apply for judicial review and dismissed the appeal.

NOTES TO EDITORS

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>).

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ENDS

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