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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN THE MATTER OF AN APPLICATION BY PADRAIG McSHANE

FOR LEAVE TO APPEAL AGAINST THE DECISION OF THE HIGH COURT TO REFUSE TO GRANT LEAVE TO APPEAL AGAINST DECISIONS OF THE NORTHERN IRELAND LOCAL GOVERNMENT COMMISSIONER FOR STANDARDS

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Before: Morgan LCJ, Stephens LJ and Sir Donnell Deeny

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MORGAN LCJ delivering the judgment of the court)

[1] This is an appeal from the decision of Burgess J refusing leave to appeal a decision of the proposed respondent dated 20 December 2016 made under the provisions of section 59 of the Local Government Act (NI) 2014 ("the Act"). Mr Lavery QC and Mr Bassett appeared for the appellant and Mr Coll QC and Mr Anthony for the respondent. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] On 10 July 2015 the Northern Ireland Local Government Commissioner for Standards ("the Commissioner") received a complaint from Councillor Trevor Clarke alleging that Councillor Padraig McShane, a member of Causeway Coast and Glens Borough Council ("the Council"), had, or may have, failed to comply with the Northern Ireland Local Government Code of Conduct for Councillors ("the Code").

[3] The complaint alleged that Councillor McShane had displayed an Irish tricolour and a Palestinian flag in the chamber at council headquarters in Coleraine on 19 August 2015. It was stated that a photograph of the display, which included Mohammed Al-Halabi of the Municipality of Gaza and "two republican councillors from Londonderry and Strabane Council", came into circulation and was published by the press on 23 June 2015.

[4] Councillor Clarke indicated that prior to this incident Councillor McShane had notified the Mayor's office requesting permission to show an unnamed Palestinian visitor around the Causeway Borough Council civic headquarters and Council Chamber. Neither the Mayor nor any other members of Council were invited and the unofficial visit was personally arranged and conducted by Councillor McShane.

[5] Councillor Clarke said that at the time the Council was equality screening a proposal to amend an interim flags policy and he claimed that Councillor McShane used his position improperly to gain political advantage for himself and others, behaved in a way that negatively impacted Causeway Counsel's reputation and breached the trust and spirit of goodwill in which the Mayor granted permission for him to show the Chamber to his visitor.

The investigation

[6] An investigation on behalf of the Commissioner was commenced on 7 August 2015 and both Councillors were informed. It was established that on 18 June 2015 at 10:30 AM Counsellor McShane visited the Council's Coleraine headquarters office accompanied by four men including a visitor from Gaza. Permission had been granted for the visit the previous day by the Chief Executive and the Mayor. The visitors spent some time inside the Council Chamber in the company of officials. Later that evening the three visitors returned and met again with Councillor McShane.

[7] On 23 June 2015 a photograph of Councillor McShane accompanied by three men appeared in a number of local newspapers. The photograph showed the men sitting behind a table draped with both the Irish tricolour and Palestinian flags. The article was entitled "Row after tricolour and Palestinian flag displayed in Council chamber". The caption below the photograph identified Councillor McShane, two councillors from Derry and Strabane council and Mohammed Al-Halabi. A press enquiry made the day before the publication of the photograph indicated that Councillor McShane promoted the publication of the photograph.

[8] Councillor McShane was invited on a number of occasions to attend for interview in connection with these matters but did not respond. He was quoted in the Irish News newspaper published on 4 May 2016 stating that he had no intention of taking part in the investigation.

[9] Causeway Coast and Glens Borough Council was a newly formed council comprising areas formerly contained in four previous councils. The investigation established that the policy on display of flags in the Council area was that the existing policies of the four legacy councils would apply. The policy in respect of the legacy Coleraine Borough Council provided only for the flying of the Union flag outside the building during business hours at Cloonavin, the building where the incident occurred on 18 June 2015.

[10] Councillor McShane did not have approval for the use of the Chamber for the purpose of staging this photo opportunity involving the display of flags. The

investigation concluded that he was not entitled to use the Council Chamber for this purpose.

[11] The investigation recommended a finding that he had acted in breach of the Code and that he had used his position improperly to confer an advantage for himself, that he had used or authorised others to use the resources of the Council in breach of the Council's requirements and improperly for political purposes and that he had failed to comply with a request from the Commissioner in connection with an investigation. In light of those breaches the Commissioner imposed a full suspension from the Council for the period of three months commencing on 28 November 2016.

The appeal

[12] Section 59 (13) of the Local Government Act (Northern Ireland) 2014 provides:

> "A person who is censured, suspended or disqualified by the Commissioner may appeal to the High Court if the High Court gives the person leave to do so."

The applicant sought leave to appeal on three grounds:

(1) The decision was contrary to section 6 of the Human Rights Act 1998 read with Article 10 ECHR, as the findings and/or sanctions imposed constituted a disproportionate interference with the right to freedom of expression enjoyed by the proposed appellant.

(2) The decisions were contrary to section 76 (1) of the Northern Ireland Act 1998 as the findings and/or sanctions imposed constituted unlawful discrimination on the basis of political opinion as there had been a failure to respect the constitutional principle of parity of esteem.

(3) The sanction of suspension was excessive and contrary to section 59 (14) (e) of the Act.

[13] The trial judge was satisfied that the provisions of the Code did interfere with the right to freedom of expression under Article 10. He concluded, however, that the interference was proportionate for the protection of the rights of others. He noted the limited extent to which the Code interfered with the right to freedom of expression. The Code was designed to ensure the upholding of high standards in those carrying out functions in public life and was intended among other things to secure good order. He concluded that the Commissioner was not subject to section 76 of the Northern Ireland Act and that the sanction was proportionate. He refused leave to appeal.

The preliminary point

[14] The applicant lodged a Notice of Appeal dated 20 July 2017 seeking leave to appeal the decision of the High Court refusing to grant leave to appeal the decision of the Commissioner. The appeal was brought under section 35 (1) of the Judicature

(Northern Ireland) Act 1978 and Order 59 Rule 14 of the Rules of the Court of Judicature 1980. There were three grounds of appeal:

> (1) That Burgess J erred in law by refusing to grant leave to appeal because he conducted a substantive examination of the proposed grounds of challenge rather than assessing whether the appellant's case was arguable.
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> (2) That Burgess J erred in holding that no arguable case could be made out that the respondent's decision was contrary to section 6 of the Human Rights Act 1998 as read with Article 10 ECHR.
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> (3) That Burgess J erred in holding that no arguable case could be made out that the three-month suspension was "excessive" within the meaning of section 59(14)(e), as read in the light of section 3 (1) of the Human Rights Act 1998 and Article 10 ECHR.

Respondent's submissions

[15] The respondent submitted that the Court of Appeal did not have jurisdiction to hear an appeal relying upon Lane v Esdaile [1891] AC 210. In Lane, the House of Lords held that no appeal lay from a refusal of the Court of Appeal to grant special leave to appeal from a judgment of the High Court in a case where the time limit for appealing had expired. Such a refusal was said by the House not to constitute an order or judgment of the Court of Appeal within the meaning of section 3 of the (now repealed) Appellate Jurisdiction Act 1876.

[16] Lane was later referred to by the Court of Appeal in England and Wales in In re Housing of the Working Classes Act 1890, ex parte Stevenson ([1892] 1QB 609, 611 & 613), where it was said that:

> "wherever power is given to a legal authority to grant or refuse leave to appeal, the decision of that authority is, from the very nature of the thing, final and conclusive and without appeal, unless an appeal from it is expressly given. … there is no appeal to this court. What is said in Lane v Esdaile supports the view that I am taking. But the very nature of the thing really concludes the question; for, if, where a legal authority has the power to decide whether leave to appeal shall be given or refused, there can be an appeal from that decision, the result is an absurdity and the provision is made of no effect. If the contention for the claimant is correct, it would follow that the case might be taken from one court to another till it reached the House of Lords on the question whether there should be leave to appeal ...
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> … the granting or refusal of leave by [the] Court is final and unappealable … If an appeal were allowed

> from the granting or refusal of leave to appeal the result would be that instead of checking appeals they might be multiplied to a most mischievous extent."

[17] In Kemper Reinsurance v Minister of Finance [2000] 1 AC 1, 13, Lord Hoffmann, delivering the decision of the Board, said:

> "Their Lordships consider that the principle in *Lane v Esdaile*… as explained in … *Ex Parte Stevenson*, is that a provision requiring the leave of a court to appeal will by necessary intendment exclude an appeal against the grant or refusal of leave, notwithstanding the general language of a statutory right of appeal against decisions of that Court. This construction is based upon the 'nature of the thing' and the absurdity of allowing an appeal against a decision under a provision designed to limit the right of appeal."

[18] The respondent noted that Lane had not been applied expansively by the courts, in the sense that its reasoning had not been developed in the context of the judicial review procedure. However, in the leading authority on its sphere of application – R (Burkett) v Hammersmith LBC [2002] 1 WLR 1593 – Lord Steyn made it clear that the case is:

> "authority for the general proposition that whenever a power is given to a court or tribunal by legislation to grant or refuse leave to appeal, the decision of that authority is, from the very nature of the thing, final and conclusive" ([2002] 1 WLR 1593, 1597, para 11, citing Housing of the Working Classes).

[19] The principle in Lane was recently applied in In Re A (A Patient) (Court of Protection: Appeal) [2013] EWCA Civ 1661, [2014] 1 WLR 3773. That was a Court of Protection case concerned with deprivation of liberty where leave to appeal from the decision of a Circuit Judge was refused by a High Court judge. The litigant sought to appeal to the Court of Appeal which held that although section 53(1) of the Mental Capacity Act 2005 provided that, subject to the provisions of that section, an appeal lay to the Court of Appeal from "any decision" of the Court of Protection, those words were to be construed subject to the principle of statutory construction that a provision requiring the permission of a court to appeal would by necessary intendment exclude an appeal against the grant or refusal of permission, notwithstanding the general language in which the right of appeal was conferred; that, therefore, section 53(1) of the 2005 Act did not confer a right of appeal to the Court of Appeal against a decision made by a judge nominated under section 46(2)(a) to (c) of the 2005 Act granting or refusing permission to appeal against a decision of a circuit judge pursuant to rule 172(7) of the Court of Protection Rules 2007 ; that there were no grounds on which the High Court judge's decision to refuse permission to appeal could be characterised as no decision at all, unfair or

procedurally flawed, or otherwise in breach of the father's right to a fair trial; and that, accordingly, the Court of Appeal had no jurisdiction to entertain the father's application for permission to appeal.

Applicant's submissions

[20] The right of appeal from the High Court to the Court of Appeal is governed by section 35 of the Judicature (NI) Act 1978 ("the 1978 Act") which provides:

> "**35.— Appeals to Court of Appeal from High Court**
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> (1) Subject as otherwise provided in this or any other statutory provision, the Court of Appeal shall have jurisdiction to hear and determine in accordance with rules of court appeals from any judgment or order of the High Court or a judge thereof.
>
> (2) No appeal to the Court of Appeal shall lie—
>
> …(d) from an order or judgment of the High Court or any judge thereof where it is provided by or by virtue of any statutory provision that that order or judgment or the decision or determination upon which it is made or given is to be final;
>
> …(g) without the leave of the judge or of the Court of Appeal, from any interlocutory order or judgment made or given by a judge of the High Court…"

[21] Section 120(1) defines judgment as including order, decision or decree. Since the decision to grant or refuse permission to appeal did not finally determine the matter in litigation the decision was interlocutory (see Salaman v Warner (1891) 1 QB 734). Section 35(2)(d) of the 1978 Act had no bearing in this case. Section 35(2)(g) plainly contemplated leave in respect of an interlocutory decision being given by a judge of the High Court or the Court of Appeal. Order 59 establishes the procedure for pursuing such appeals and Rule 14(3) provides that where an ex parte application has been refused by the court below an application for a similar purpose may be made to the Court of Appeal ex parte within 7 days after the date of refusal.

[22] The applicant placed some reliance on the relationship between section 35 of the 1978 Act and Order 59 in the context of judicial review. We do not accept, however, that the comparison is valid. RCJ Order 53 is designed to provide a comprehensive procedural regime for judicial review cases. It expressly includes provision in Order 53 Rule 10(a) for an appeal to the Court of Appeal from a refusal of leave to apply for judicial review by a High Court judge. No such express provision is contained in the statutory regime for appeal in this case.

[23] The applicant sought to distinguish Lane on the following bases:

> "i. In *Lane v. Esdaile* there had been a hearing of the dispute between the parties. The appellant has not

had the opportunity to fully present his case and have it determined by a court. Instead, his appeal has been dismissed on a summary basis by the High Court.

ii. *Lane v Esdaile* is a decision based on whether there should be an appeal from a decision of the Court of Appeal to the House of Lords on a leave application. The ratio is different as is the legislative matrix.

iii. The principal purpose of the rule in *Lane v. Esdaile* was, and is, to protect public administration against false, frivolous or tardy challenges to official action. That cannot be said to be the case in this appeal. The delay has been slight rather than excessive and the subject matter of the appeal, free speech of elected politicians, is not frivolous but of constitutional significance.

iv. RCJ Order 59, rule 14 expressly creates a right of appeal for unsuccessful ex parte applicants. As stated by the Court of Appeal in *McDonnell* it clearly enables the disappointed applicant to appeal without seeking the leave of the court below.

v. Section 59 of the 2014 Act does nothing to restrict the possibility of an appeal by an ex parte applicant such as the appellant.

vi. Section 35(2)(d) of the 1978 Act, read together with section 59 of the 2014 Act, cannot be construed as impliedly and necessarily abolishing the right of appeal that an ex parte applicant would otherwise enjoy.

vii. An appeal under section 59 of the 2014 Act is comparable to an application for judicial review as the appellant is challenging the legality of the adjudication decision rather than the merits – see *Kemper Reinsurance Co. v. Minister for Finance (2000) 1 AC 1, pg 14A & 18C (per Hoffman)*"

[24] The final submission on behalf of the applicant is that a reading down of section 59 of the Act pursuant to section 3 of the Human Rights Act 1998 was required to enable the applicant's right to freedom of expression to be effectively protected. It was particularly important that the rights of elected politicians to freedom of expression should be protected and such protection should be practical and effective. If the court was of the view that this amounted to an interference with that right it should intervene.

Consideration

[25] Lane concerned the interpretation of section 3 of the Appellate Jurisdiction Act 1876 which provided that an appeal shall lie to the House of Lords from any order or judgment of the Court of Appeal. The Court of Appeal had refused special leave to appeal to the House of Lords and the disappointed litigant wanted to appeal that decision to the House. The House concluded that such an appeal did not fall within the terms of section 2 of the 1876 Act.

[26] The reasoning can be discerned from the opinion of Lord Halsbury:

> "But when I look not only at the language used, but at the substance and meaning of the provision, it seems to me that to give an appeal in this case would defeat the whole object and purview of the order or rule itself, because it is obvious that what was there intended by the Legislature was that there should be in some form or other a power to stop an appeal— that there should not be an appeal unless some particular body pointed out by the statute (I will see in a moment what that body is), should permit that an appeal should be given. Now just let us consider what that means, that an appeal shall not be given unless some particular body consents to its being given. Surely if that is intended as a check to unnecessary or frivolous appeals it becomes absolutely illusory if you can appeal from that decision or leave, or whatever it is to be called itself….
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> My Lords, I confess that when I look both at the subject-matter with which the order deals and at the language of the order itself it seems to me obvious that it was intended that the decision should be final (whether that is said in terms or not seems to me to be immaterial), unless the Court of Appeal, the body there prescribed, in the exercise of that jurisdiction should give leave to appeal. As no leave has been given in this case, and as no appeal can be brought unless leave has been given, I am of opinion that this preliminary objection ought to prevail, and that this appeal should be dismissed."

[27] Lord Macnaughten added:

> "I think that according to the true construction of the Judicature Act and Orders, the Court of Appeal are constituted the sole and final judges of the question whether an appeal to them should or should not be admitted when the proposed appellant has allowed

> the prescribed period to elapse, and therefore that there can be no appeal from the grant or refusal of that indulgence."

All other members of the House agreed for broadly the same reasons.

[28] The respondent applies the same principle to section 59(13) of the Act. The applicant argues first that the principles governing appeals of decisions refusing leave to apply for judicial review should now be followed. We do not accept that submission. There is a distinction between leave to apply and leave to appeal which was explained in R v Secretary of State for Trade and Industry, ex parte Eastaway [2000] 1 WLR 2222. Lord Bingham stated:

> "The requirement of permission to apply for judicial review is imposed primarily to protect public bodies against weak and vexatious claims. The requirement of permission to appeal is imposed primarily to protect the courts against the burden of hearing and adjudicating on appeals with no realistic chance of success. The purpose of these filters is different, even though there is an incidental benefit to the courts in the first case and the successful litigant (or both litigants) in the second."

[29] That distinction was also recognised in R (on the application of Burkett and another) v Hammersmith and Fulham London Borough Council [2002] 1 WLR 1593. That case decided that a renewed application for judicial review was an appeal. The difference between applications to apply and applications for leave to appeal was addressed by Lord Steyn:

> "First, *Lane v Esdaile* is only authority for the general proposition that whenever a power is given to a court or tribunal by legislation to grant or refuse leave to appeal, the decision of that authority is, from the very nature of the thing, final and conclusive: see *In re Housing of the Working Classes Act 1890, Ex p Stevenson* [1892] 1 QB 609 (Court of Appeal)."

[30] Lord Hope relied on the observations of Lord Esher in In re Housing of the Working Classes Act 1890, Ex p Stevenson [1892] 1 QB 609, 611:

> "I am, on principle and on consideration of the authorities that have been cited, prepared to lay down the proposition that, wherever power is given to a legal authority to grant or refuse leave to appeal, the decision of that authority is, from the very nature of the thing, final and conclusive and without appeal, unless an appeal from it is expressly given. So, if the decision in this case is to be taken to be that of the

> judge at chambers, he is the legal authority to decide the matter, and his decision is final; if it is to be taken to be that of the High Court, then they are the legal authority entrusted with the responsibility of deciding whether there shall be leave to appeal, and their decision is final. In either case there is no appeal to this court. What was said in *Lane v Esdaile* [1891] AC 210 supports the view that I am taking."

[31] In the course of submissions it was contended that the principle in Lane should be confined to applications for leave to appeal from the Court of Appeal to the Supreme Court. There is no authority which supports such a confined reading of Lane and Sarfraz v Disclosure and Barring Service [2015] EWCA Civ 544 is against that submission.

[32] In that case the Upper Tribunal had refused under Section 13 of the Tribunals, Courts and Enforcement Act 2007 to grant the applicant permission to appeal against a decision of the Disclosure and Barring Service to continue to include his name in the children's and adults' barred lists. There was a general right under section 13 to appeal to the Court of Appeal from the Upper Tribunal on point of law. The applicant applied for permission to appeal the refusal to the Court of Appeal. The Court applied the Lane principle and refused the application. The reasoning is set out by Lord Dyson MR at paragraph [26]:

> "26. The essence of the principle is that, in the absence of express statutory language to the contrary, a provision giving a court the power to grant or refuse permission to appeal should be construed as not extending to an appeal against a refusal of permission to appeal. This is not because the word used to describe the decision in respect of which permission to appeal is sought bears a special or narrow meaning. It is because, as Lord Esher MR put it in the *Stevenson case [1892] 1 QB 609* , the decision which it is sought to appeal is "*from the very nature of the thing*, final and conclusive and is without appeal, unless an appeal from it is expressly given" (emphasis added). As Lord Hoffmann put it in *Kemper's case [2000] 1 AC 1* , a provision requiring the leave of a court to appeal "will by *necessary intendment* exclude an appeal against the grant or refusal of leave, notwithstanding the general language of a statutory right of appeal against decisions of that court" (emphasis added)."

[33] The applicant submitted that he had been deprived of a hearing as a result of the refusal. That is plainly incorrect. The applicant had every opportunity to engage with the investigative process but chose not to do so. The process was by its nature

inquisitorial but no less effective for that and any point which the applicant wished to make could have been considered. That is also the answer to the point on the Convention. The procedure provided an opportunity for the applicant to participate and pursue an application for leave to appeal before Burgess J. He cannot now complain that he needs a further opportunity to be heard.

Conclusion

[34] For the reasons given we conclude that the applicant cannot pursue an appeal to this court against the refusal of Burgess J to give leave to appeal to the High Court. Accordingly, this application must be dismissed. We wish to emphasise our support for the proposition that the courts should be careful to protect the right of politicians to exercise their right to freedom of expression. Any justification for interfering with that right must be carefully scrutinised.