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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY JAMIE BRYSON FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE MINISTER FOR INFRASTRUCTURE AND MINISTER FOR COMMUNITIES

AND IN THE MATTER OF DECISIONS MADE BY THE MINISTER FOR INFRASTRUCTURE AND MINISTER FOR COMMUNITIES TO ISSUE JUDICIAL REVIEW PROCEEDINGS AGAINST THE POLICE SERVICE OF NORTHERN IRELAND (PSNI) ON 9 JULY 2021

John Larkin QC with Denise Kiley (instructed by McConnell Kelly, Solicitors) for the Appellant
Nessa Murnaghan QC with Tom J Fee (instructed by the Department Solicitor's Office) for the Respondent

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Before: Treacy LJ, Horner J and Humphreys J

HORNER J (*delivering the judgment of the court*)

A. Introduction

[1] This is an appeal against a decision of Mr Justice Scoffield of 20 January 2022 whereby he dismissed the appellant's application for leave to apply for judicial review. He provided a reserved written judgment in which he set out in detail his reasons for refusing leave. His decision is challenged on the basis, inter alia, that:

(a) The learned trial judge erred in concluding that the challenge was academic.

(b) The learned trial judge erred in concluding that the applicant's challenge could have no practical effect.

(c) This case came within an exceptional category of cases where leave ought to be granted notwithstanding that the court had concluded that the decision was academic given the considerable public interest.

(d) The learned trial judge erred in concluding that to consider the challenge would fall foul of the general principle that courts do not give advisory opinions.

[2] We are grateful to counsel on both sides for the quality of the written and oral submissions.

B. Background Facts

[3] The background to this judicial review can be summarised briefly. A bonfire was constructed at Adam Street in Belfast by one community on one side of the peaceline in July 2021 as part of the annual Twelfth of July celebrations. The community on the other side of peaceline at the New Lodge Road raised concerns about the risk posed by the bonfire to their properties. There was a judicial review application about the bonfire brought by a resident which I heard on 8 July 2021. In refusing leave, I provided detailed advice as to how the bonfire problem at this location could be prevented in the future: see *Re JR169's Application* [2021] NIQB 90. The Department for Infrastructure ("DfI") and the Department for Communities ("DfC") and Belfast City Council ("the Council") engaged a specialist contractor to take down and remove the bonfire. The police refused to provide support to the contractor. The Ministers of the DfI and the DfC, together, then sought to judicially review the decision of the police. This application was heard by Keegan J on 9 July 2021 but was dismissed.

[4] The applicant to the above noted proceedings has acted, inter alia, as a spokesperson for the Tiger's Bay Bonfire Group ("TBBG"). He made representations to the DfI Minister urging her not to judicially review the decision of the police and claiming that any attempt by her without Executive approval would be unlawful. The applicant's views found favour with Mr Poots MLA, Minister with responsibility for the Department of Agriculture, Environment and Rural Affairs ("DAERA") and he wrote to the two Ministers pointing out that their application was significant or controversial and cross-cutting. This view was shared by some other ministers. Accordingly, it is submitted that any application absent Executive approval was unlawful being contrary to the relevant requirements of the Ministerial Code and section 28A of the Northern Ireland Act 1998.

[5] When the two Ministers brought their judicial review proceedings against the police, the appellant was served with papers as a notice party, being a representative of TBBG and PUL. In response he had provided written submissions and an affidavit.

[6] The learned trial judge was satisfied that:

(i) The application disclosed an arguable case of breach of the Ministerial Code by virtue of the relevant decisions being significant and/or controversial. But he offered no definitive view as to whether they were cross-cutting or as should now be understood in the light of section 20(8) of the Northern Ireland Act 1998.

(ii) The appellant did have sufficient interest to bring these proceedings in light of his earlier involvement with the bonfire judicial review.

(iii) A complaint to the Assembly's Standards Commissioner would not represent an adequate alternative remedy since the Commissioner could only consider the Ministerial Code of Practice set out in Schedule 4 to the Northern Ireland Act rather than an alleged breach of the full statutory Ministerial Code or the Ministerial Pledge of Office.

[7] The respondents took no issue with the conclusion of Scoffield J that:

(i) The application to disclose an arguable case of breach of the Ministerial Code and, accordingly, made no submissions on this issue.

(ii) The appellant had sufficient standing to bring these judicial review proceedings given his earlier involvement with the bonfire judicial review.

(iii) The complaint to the Assembly Standards Commissioner would not represent an adequate alternative remedy since the Commissioner was restricted in what he was able to consider.

[8] The sole focus therefore of these proceedings was on the issue of whether the court was correct in refusing leave on the basis that the application was academic (para [18]) and that this was not an exceptional case justifying the grant of leave (para 29).

[9] The appellant submitted that while the bonfire was past history the issue of whether or not the Ministers had acted legally was not and that the declaratory and prohibitory relief sought on the basis of the Ministers' refusal to consider the legality was both of considerable utility and not academic.

[10] The respondents joined issue with the appellant. Firstly, they argued that the central issue was not whether the Ministers' decision to issue proceedings was "unlawful" but whether there should be a full judicial review when the matter was now of academic relevance only. The decision of the Ministers was inextricably linked to the factual matrix which underpinned the bonfire which had long since "burnt itself out" as Scoffield J observed. Further judicial guidance was now available in *JR169* [2021] NIQB 90 which should mean that those involved on each side of the bonfire dispute would no longer need to seek recourse to the courts. In all the circumstances, there was no public interest in having a further judicial review.

C. Decision

[11] We have no doubt that the learned trial judge was correct in refusing to give leave to the applicant to judicially review the decision of the Ministers to issue judicial review proceedings against the PSNI.

[12] The factual background against which the application was made has changed utterly. There is a judgment providing detailed advice on how to avoid problems over bonfires in the future (see *JR169*) and the ownership of the lands on which the bonfire is situated has changed. It is now largely under the control of Invest NI.

[13] It seems to us that given the change in circumstances that this is a case in which there is no practical purpose served in providing a judgment on the substantive merits, even though as De Smith on the Principles of Judicial Review (2nd Edition) says at 15.99:

> "An answer would satisfy academic curiosity, for example, by clarifying a difficult area of law."

[14] Scoffield J set out at paras [17]-[24] his views on the issue of whether a judicial review in the circumstances is academic and, if so, the effect on this application. We agree with his judgment and endorse as he has expressed in it:

> "**Is the case academic?**
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> [17] The applicant's Order 53 statement identifies, at section 3, the impugned decisions in this case as: "The decision of the Ministers, made on 9th July 2021, to issue judicial review proceedings against the PSNI challenging its refusal to provide operational support for contractors engages [*sic*] to clear bonfire material at Adam Street, Belfast." The Order 53 statement goes on to note that those proceedings were heard and dismissed by Keegan J on 9 July 2021.
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> [18] It seems to me to be plain that these proceedings, practically speaking, are now academic, in light of the fact that the relevant judicial review proceedings have been disposed of. Mr Bryson's initial invocation of the point he seeks to establish in these proceedings was designed to prevent the Ministers bringing their judicial review or, alternatively, to result in its being dismissed. That has now happened. Even if the applicant were successful in having the relevant Ministers' decision to issue such proceedings quashed, that would now have no practical effect, given that those proceedings are no longer extant in any event.

Albeit they were not dismissed on the basis of the point raised by the applicant in these proceedings, the Ministers failed to secure any relief. Moreover, the particular bonfire to which those proceedings related has also now long since burned out.

[19] The applicant argues that the proceedings are nonetheless *not* academic, and continue to raise a live issue, on a number of bases. The central submission was that neither of the proposed respondents has accepted that their initiation of the judicial review proceedings without Executive approval was unlawful. In a second affidavit in these proceedings, the applicant has relied on two particular matters to suggest that neither proposed respondent has seen the error of their ways and that either or both of them may again seek to commence legal action of a similar nature without Executive approval. In the first instance, my attention has been drawn to a media report of comments made by the DfI Minister in an Assembly committee appearance defending her decision to bring the proceedings including by reference to the fact that, by doing so, she was living up to her legal responsibilities. Secondly, Mr Bryson has referred to the DfC Minister being represented in a number of hearings in the recent case of *Re Napier's Application* (see [2021] NIQB 86 and [2021] NIQB 120) for the purpose of keeping a watching brief in those hearings and considering whether or not she ought to apply to be represented as an interested or notice party.

[20] I do not consider that the failure of the proposed respondents to concede that they have acted unlawfully is the appropriate yardstick by which to judge whether or not the proceedings are academic. There are a range of ways in which applications for judicial review may turn out to no longer serve a practical purpose. Sometimes that will be because the respondent concedes the application in whole or in part. On other occasions, it may simply be because the relevant circumstances change or the decision in question ceases to have any practical effect. The mere fact that the underlying legal dispute has not been resolved does not mean that the proceedings should not be viewed as academic. The focus of the court's enquiry on this issue will be intensely practical. It was characterised in the ex parte Salem case (discussed further below) as whether there was any "longer a lis to be decided which will

directly affect the rights and obligations of the parties inter se" [underlined emphasis added].

[21] Mr Justice Fordham (as he now is), in the encyclopaedic Judicial Review Handbook (7th edition, 2020, Hart), at paragraph 4.5, describes the key issue as whether the claim has lost "practical substance", since the method of the common law is to "delineate and apply legal principles through adjudicating contested disputes requiring resolution for a sound practical reason." In this jurisdiction, the authors of Judicial Review in Northern Ireland: A Practitioner's Guide (SLS, 2007), at paragraph 5.27, cast the issue as "whether or not the application can have any practical benefit", that is to say whether "the result of the proceedings can have no practical effect or serve no useful purpose between the parties …" Anthony comments (in Judicial Review in Northern Ireland (2nd edition, 2014, Hart at paragraph 8.18) that:

> '… the courts are generally reluctant to grant the remedy where the matter between the parties has since become academic (in the sense that it is no longer live) or the issues raised are speculative and where the judgement of the court would be in the form of advice.'

[22] The "matter between the parties" is in my view to be understood as the real-life dispute or circumstance which has given rise to the legal question. The fact that there is an ongoing legal debate – which may arise in future between the same or, more likely, *other* parties – is relevant to the separate and posterior question the court will address in a case which has become academic, namely whether the case nonetheless ought to be permitted to proceed in the public interest.

[23] By the same token, I accept Ms Murnaghan's submission that the applicant cannot insulate his claim against the charge that it has become academic merely by seeking (as he has) "an order of prohibition restraining the Ministers and each of them from seeking to judicially review decisions of the PSNI without the approval of the Executive Committee." That is a bootstraps argument made in circumstances where there are no anticipated or threatened legal proceedings in prospect on the part of

> either respondent. I further accept Ms Murnaghan's submission that the prospect of the court granting such an order is extremely remote because each case must be assessed on its own merits and the court would be exceptionally cautious before granting a prospective order, in such broad terms and so plainly interfering with the right of access to the courts, where the particular circumstances in which this order may bite are entirely speculative and unknown.
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> [24] The applicant shared the proposed respondents' pre-action response with Minister Poots in order to seek his views upon it, which were set out in a further letter from him to the applicant's solicitors of 26 August 2021. He is, in general, strongly supportive of the applicant's case and dismissive of most of the objections raised on the respondents' behalf in the pre-action response from the Departmental Solicitor's Office. On the question of whether the applicant's challenge is academic, however, he observed that "this is really a matter for the courts." For the reasons summarised above, I accept the respondent's submission that the application is, properly understood, academic as between the parties. The principal remedy relates to a decision (the initiation of the judicial review proceedings in July 2021) which no longer has any ongoing legal or practical effect."

[15] The question to be answered in the instant case can only ever be an academic one given the change of circumstances.

[16] The issue therefore is whether this is one of those exceptional cases which required a clear answer from the court to satisfy the public interest. We are quite certain that the public interest does not require a challenge to the decision of the Ministers which related to particular circumstances are unlikely to recur again. Certainly, the appellant was unable to put forward to this court any cogent reason(s) why such an exercise was exceptional and/or in the public interest.

D. Conclusion

[17] In the circumstances and for the reasons appearing above, we consider that the decision of the trial judge on the particular circumstances is unimpeachable. The facts and circumstances relating to the original challenge have changed with the passing of time. There is now a road map provided for how these bonfire issues can be resolved lawfully and with minimum fuss. It is not in the public interest to have a judicial review that will have to be based on facts which are now of historic significance only.

E. Further Thoughts

[18] The recurring bonfire litigation has resulted in very substantial costs being incurred which will be visited directly or indirectly on the UK tax payer. There should now be adequate advice from the court to provide sufficient guidance to the parties to prevent future disputes about bonfires at this location. We note that in the Casement Park litigation the local residents, with the benefit of a costs protection order, assumed responsibility for their own costs. Of course, in appropriate circumstances, the lawyers can agree to act on behalf of any community on a pro bono basis.