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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY MICHAEL HUTTON AND PHILIP DEVLIN FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY TOURISM NI

_____

Dessie Hutton KC (instructed by Lacey Solicitors) for the Applicants
Philip McAteer, of counsel (instructed by Cleaver Fulton Rankin, Solicitors) for the Respondent

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SIMPSON J

Introduction

[1] The applicants in this application for leave to apply for judicial review are committee members of the Derry and District Youth Football Association (the Association"). The respondent is Tourism NI (formerly known as the Northern Ireland Tourist Board). The test at this stage is whether the applicants have crossed the threshold of an arguable case having a realistic prospect of success" — see McCloskey LJ in *Ni Chuinneagain s Application for Judicial Review* [2022] NICA 56, paragraph [42].

[2] For some years the Association — an unincorporated voluntary, community organisation affiliated through the Northern Ireland Boys Football Association to the Irish Football Association — has been involved in the running of an international youth football competition known as the Foyle Cup , which attracts large numbers of youth football teams, their supporters and other visitors to the area. This brings financial and other benefits to the local economy and community. By way of example, in 2022 some 457 teams took part in the competition; teams from Ireland, the USA, Canada, the UK and Europe. The applicants pre-action protocol correspondence indicated that the 2023 competition would run from 17 to 22 July and would involve

some 588 teams and some 2,300 football matches, with approximately 200,000 visitors attending.

[3] In the past the Association has applied to the respondent for sponsorship/funding to support the running of the competition.

[4] For the year 2023/2024 the respondent published details of two schemes which it proposed to run, and invited applications for sponsorship. Those schemes were the International Tourism Events Fund (ITEF") and the National Tourism Events Sponsorship Scheme (which I will call "the Scheme"). It is the latter of those schemes to which the applicants applied for funding and with which this judicial review challenge is concerned.

[5] As articulated in the pre-action protocol letter from the applicants solicitors the challenge is:

> "… to a decision communicated by Tourism NI on 30 May 2023 whereby Tourism NI, having invited applications for sponsorship for tourism events under the [NTESS 2023/2024] and having received applications for sponsorship … including one from the Applicant … decided on 20 May 2023 to withdraw the NTESS Scheme entirely without prior consultation and without inviting representations from the applicant or any other applicant under the NTESS Scheme as to whether the said Scheme should be withdrawn."

[6] In the Order 53 Statement the applicants challenge the decision on the grounds that there was a breach of the applicants legitimate expectation; that there was a failure on the part of the respondent to consult before taking the impugned decision; that the decision was irrational; and that the decision was ultra vires, because it was not taken, as it should have been, by the Board of the respondent.

[7] The applicants seek an order of certiorari quashing the decision, a declaration that the impugned decision was unlawful and an order of mandamus requiring the decision to be re-taken.

Factual background

[8] I take the following chronology of events from the material in the leave bundle. All the dates, save the first date in the next paragraph, are in 2023.

[9] The application for funding under the Scheme had to be submitted online to the respondent, the portal opening on 5 December 2022 and closing at noon on 16 January 2023. No application would be considered after the closing date. The Association s application was submitted in time. The applicants make the case that

this was a time-consuming process and approximately seven days were taken up in compiling the application, which ran to some 200 pages.

[10] On 6 March following receipt of correspondence from the Department for the Economy (which I assume related to budgetary matters), a meeting of the respondent s senior management team was held to discuss, inter alia, how the required budget savings could be achieved." It was felt that both the ITEF and the Scheme could not be run, and consideration was given to not running the Scheme, and running only a reduced ITEF scheme. The decision was recognised to be one for the Board of the respondent to take.

[11] On 10 March the Board Finance and Casework Committee met noting, inter alia, (i) that the Scheme was heavily oversubscribed, so that even if the anticipated budget was available only between 7 and 11 of the 44 applications could be supported; (ii) that there was a need to take stock and review the strategic case for the respondent to support such events, in line with the emerging events policy and the broader tourism strategy being developed by the Department; (iii) that with a reduced budget the focus should be on the events in the ITEF where the anticipated impact is greatest.

[12] On 15 March the respondent emailed the Association in the following terms:

> The purpose of this email is to provide an update on the progress of the [Scheme] 2023-24 application process.
>
> The assessment process for applications to the NTESS 2023-24 is well underway.
>
> Tourism NI has not, as yet, been allocated a budget for 2023/24 by the Department for the Economy. You will understand the budget challenges that the Department faces going into the next financial year and that decisions will be made subject to a review of all priorities and commitments.
>
> Tourism NI is hopeful that a budget will be agreed in the coming weeks and that we will be able to provide more clarity at that point.
>
> We acknowledge that the lack of clarity is very challenging for event promoters and commit to providing updates as soon as we are able to do so."

[13] On 30 March the Board was presented with a draft budget which it discussed in some detail. The Board agreed that the respondent should only seek to operate the ITEF this year and not the NTESS."

[14] On 9 May the respondent s budget allocation for the year 2023/4 was confirmed. The reduction, while substantial, was not as severe as had been anticipated. On 15 May a senior management team meeting considered potential recommendations, including the possibility of reconsidering the decision of the Board not to proceed with the Scheme.

[16] During this period there were issues with the number of members of the respondent s Board, as some appointment terms had expired on 31 March and could not be extended. For a number of reasons, it would not have been until 31 May that a quorate board would be able to meet. Accordingly, the CEO provided three of the Board members who were available with a briefing on the actual budget allocation and potential options. Those members indicated that they were content not to operate the Scheme for 2023.

[17] The relevant part of the letter of 30 May notifying the applicants of the decision says:

> I am writing with regards to your application in the above scheme. When we wrote to you in March, we highlighted the budget challenges which the Department for the Economy were likely to face in the 2023/24 financial year. Tourism NI has now received an indicative budget allocation from the Department for 2023/24 which is significantly lower than in previous years. The reduction to our budget has required Tourism NI to make a number of unpalatable decisions as to how we apply our more limited financial resources this year.
>
> Given the circumstances we now find ourselves in, we have had to make the regrettable decision not to operate the NTESS in 2023/24. This unfortunately means that we are not able to offer sponsorship funding to applicants to the NTESS for events being held in 2023/24."

[18] In the respondent s response to the pre-action protocol letter from the applicants solicitors the respondent states (para 11):

> Not proceeding with the NTESS would allow [the respondent] to focus in closing out on thematic plans such as food and drink/outdoors and on an innovation growth scheme as part of its Industry Development Programme. It would also allow [the respondent] to support marketing priorities such as the reinstatement of co-operative marketing programme and a second marketing campaign in-year."

[19] That letter also notes (para 12) that the Department had indicated some reluctance to permit [the respondent] to use resources for the NTESS", without any particularisation.

Legislation and guidance

[20] The applicants rely on several provisions of the Tourism (NI) Order 1992. Article 4(1) of the Order provides:

> 4.—(1) The functions of the Board shall be—
>
> (a) to encourage tourism;
>
> (b) to encourage the provision and improvement of tourist accommodation and tourist amenities;
>
> (c) to advise the Department generally on the formulation and implementation of its policy in relation to the development of tourism;
>
> (d) such other functions as are conferred on the Board by or under this Order or any other statutory provision."

[21] Article 4(2) provides a number of powers to the Board which it may use, including the powers to (b) provide or assist any event which appears to the Board likely to encourage tourism" and (g) make known the financial assistance which may be provided under this Order."

[22] Article 4(3) provides:

> It shall be the duty of the Board to establish machinery for consulting, and to consult regularly with, bodies appearing to the Board to have an interest in matters falling within the function of the Board."

[23] Article 11, under the rubric Selective financial assistance" provides, where material to this challenge:

> (1) The Board may, in accordance with a scheme under this Article, provide financial assistance to any body or person where in its opinion—
>
> (a) the financial assistance is likely to increase tourism and the revenue derived from tourism; and

(b) the form and amount of the financial assistance is reasonable having regard to all the circumstances; and

(c) the provision of such financial assistance will, or is likely to, achieve one or more of the following purposes, namely—

(i) to promote employment in the tourist industry,

(ii) to promote the development of an efficient and effective tourist industry,

(iii) to provide, or improve tourist amenities,

and is justified having regard to any of those purposes.

(2) The scheme under this Article shall be made by the Department with the approval of the Department of Finance and Personnel and the Department shall cause the scheme as for the time being in force to be published.

(3) Financial assistance under this Article shall be in one or more of the following forms, namely—

(a) a loan, whether secured or unsecured, and whether or not carrying interest or interest at a commercial rate;

(b) a grant;

(c) a guarantee to meet default on payment of a loan, or of interest on a loan; or

(d) the taking of an interest in property or in a body corporate,

and shall be given subject to such terms and conditions as may be specified in or determined in accordance with the scheme under this Article.
…"

[24] In addition to the above legislative provisions the applicants rely on the contents of a document published by the respondent and headed National Tourism Events Sponsorship Scheme 2023/24 Guideline for Applicants" in support of their

assertion that it was in the nature of a promise to run such a scheme that the organisers could legitimately expect would be progressed." The respondent also relies on certain contents of the Guidelines document, the entirety of which I have read. The paragraphs specifically relied on by the applicant are summarised in the skeleton argument:

> 2.3 The [Scheme] will offer financial support to eligible events taking place between [the relevant dates]"
>
> 2.4 Tourism NI will seek to provide financial support for National Tourism Events which provide an authentic visitor experience. The value of the packages will be:
>
> - £10,000
> - £20,000
> - £30,000
>
> All awards are inclusive of VAT."
>
> 2.5 Any financial award will depend on the overall budget available … and the number of applications received."

(The applicants say that paragraph 2.5 carries the implicit promise that whatever the budget, <u>some</u> funding will be available.)

> 3.2 All applications received … will be assessed; and will be assessed in a just and fair manner. Applications will be assessed and decision on awards will be made by panels…"
>
> And
>
> Tourism NI will appraise the application against the 9 criteria listed therein."
>
> 3.3 Tourism NI will assess the information in the application form."
>
> And
>
> Application scores will be assessed and weighted."
>
> And

> Tourism NI will notify applicants of their decision … as soon as possible."
>
> And
>
> Tourism NI will endeavour to provide feedback where requested."

(The applicants say that this last sentence implicitly promises that an assessment process will be taken through to completion.)

[25] In addition to the above examples, the Guidelines document contains a number of other paragraphs in which the word will" is used.

[26] Within para 2.3 appears the following: **Tourism NI support <u>cannot be included</u> as part of the minimum income requirement**. This is because your event should be able to proceed without our financial support." Within para 4.10 the guidance says: **Please note: Tourism NI is NOT a core funder of events**. Therefore, events that are applying to this scheme must be able to take place without Tourism NI funding."

[27] The final part of para 2.4 reads: **There is a finite budget available to support applications to the scheme. Successful applications will be selected on their ability to meet the full requirements of the scheme**."

[28] Under para 5.2, the penultimate paragraph of the guidance reads: **Payments are made using budget from Central Government. If Tourism NI does not receive adequate budget to cover the NTESS, we can suspend, end or reduce the amount we offer**."

(All emphases appear in the original guidance document)

The applicants' case

[29] As summarised in the skeleton argument supporting the application for leave the applicants challenge the impugned decision on the following bases:

(a) That the decision was unfair in that the decision-maker did not allow for representations to be made against the proposed decision, nor for consultation;

(b) That the decision breaches either the substantial or procedural legitimate expectation of the applicants;

(c) That the decision is irrational;

(d) That the decision is unlawful/ultra vires as there was no quorate decision taken by the Board on the basis of proper and actual information about the budget; rather the only quorate decision proceeded on a material error of fact as to the budget.

[30] They submit that fairness dictated that before the Scheme was withdrawn applicants to the Scheme would have the opportunity to make representations. The applicants rely on *Re McBurney s Application* [2004] NIQB 37: Procedural fairness requires that a party has the right to know the case against him and the right to respond to that case" (para [14]); *Osborn v Parole Board* [2013] UKSC 61: that procedurally fair decision-making results in better decisions, obviates any sense of injustice by paying due respect to the rights of affected persons and promotes the rule of law (see Lord Reed [67] to [71]).

[31] By not inviting representations the respondent denied itself the opportunity of obtaining information from the applicants about the importance of sponsorship to the event being run by the applicants, about how the respondent s tourism offering would be disadvantaged by the lack of funding and about the remarkable return on investment brought about by the Foyle Cup.

[32] In relation to legitimate expectation, the applicants point to the clear and unequivocal" promises which they say were made. They say that the respondent was well aware of budgetary pressures when it published the guidance document, because paragraph 2.4 specifically refers to a finite budget. Notwithstanding that knowledge, the series of promises was made, including what the applicants say is a promise that the competition would be run, a promise that an assessment would be made, an implicit promise that some award would be made and a promise that feedback would be offered. Further, the respondent asked applicants to indicate how a reduced award might affect events, but notably" it did not ask how a nil award would affect events.

[33] The applicants also assert that the Association, relying on the promises, saw no need to apply for sponsorship under the ITEF scheme, for which the applicants believe the Association would have qualified. The effect of both this and the fact that the Association spent some 7 days preparing its application for sponsorship, amounts to a detrimental reliance on the promises.

[34] The applicants note that the update letter of 15 March 2023 (see para [12] above) gave no indication that the Scheme would not be run, nor did it give any hint that it might be withdrawn, nor did it invite consultation on what should be [the respondent s] priorities and commitments, how it should address those priorities and commitments or what might be done about the already open competition under NTESS."

[35] They rely on *R v North and East Devon HA Ex p. Coughlan* [2001] QB 213, the three possible outcomes" and the court s approach identified by Lord Woolf MR in paras [57] and [58]. They say that if this is a category (a) case (see para [57]), the review

is on Wednesbury grounds; if a category (b) case, the court will require the opportunity for consultation, unless there is an overriding reason to resile from this position; if a category (c) case, where the legitimate expectation is of a benefit which is substantive, rather than procedural, the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."

[36] Into whichever category this case falls, the applicants say that the respondent is in breach of a legitimate expectation.

[37] As to irrationality, it is the applicants contention that by failing to consult and by failing to obtain representations the respondent deprived itself of the information which would have permitted it to ask the appropriate questions of the effect of its decision on events, event organisers, tourism in general in Northern Ireland, morale within the events or tourism sector and on the reputation of [the respondent] itself." In addition, these failures are exacerbated by the respondent failing to engage with its own statutory consultation machinery under article 4(3) of the 1992 Order.

[38] The applicants refer to the decision of 30 March 2023 as being based on incomplete information, given that it had only been presented with a draft budget. As is stated in the written submissions: The Board appear to have taken essentially budget-driven decisions without knowing what the actual budget for the year would be."

[39] It is specifically the applicants case that no public body tasked with the statutory objective of promoting tourism in Northern Ireland … could have come to the decision" which it came to.

[40] The ultra vires challenge is based on the assertion that the 30 March decision was made on the basis of a material error of fact" ie the indicative budget, and that after the actual budget figures were known no lawful decision was made nor reconsideration undertaken (of the 30 March decision) by a quorate Board. It requires 4 members for the Board to be quorate.

The respondent s case

[41] Without doing it an injustice, I can summarise briefly the case being made by the respondent:

(i) That the matter is non-justiciable as being a challenge to a multi-factorial decision regarding allocation of resources in the complex area of budgetary arrangements, in the context of cutback in public funding — relying on *Department of Justice v Bell* [2017] NICA 69 at para [19];

(ii) That even if there was any legitimate expectation, the respondent was entitled to resile from it — see eg *Bhatt Murphy v Independent Assessor* [2008] EWCA Civ 75 at para [41]; *Re Finucane s Application* [2019] UKSC 7, para [76].

(iii) That in the absence of a statutory requirement to consult, the common law does not recognise a generally applicable obligation of consultation;

(iv) That the decision was rational;

(v) That the decision was not ultra vires, since the decision not to operate the 2023/24 Scheme was taken at a quorate meeting of the Board on 30 March.

Non-justiciability

[42] The respondent submits that since the court is dealing with a multi-factorial decision regarding allocation of resources" involving questions of policy and discretion in the complex area of budgetary arrangements" such decisions should be treated as non-justiciable." The eight principles set out by Gillen LJ in para [19] of the judgment of the Court of Appeal in *Bell* are specifically relied on by the respondent. Those principles were distilled by the court following consideration of a number of authorities, and were articulated thus:

> (a) Normally, the question whether the Government allocates sufficient resources to any particular area of state activity is not justiciable.
>
> (b) A decision as to what resources are to be made available often involves questions of policy, and certainly involves questions of discretion. It is almost invariably a complex area of specialized budgetary arrangements taking place in the context of a challenging economic environment and major cutbacks on public spending. There should be little scope or necessity for the court to engage in microscopic examination of the respective merits of competing macroeconomic evaluations of a decision involving the allocation of (diminishing) resources. These are matters for policy makers rather than judges: for the executive rather than the judiciary.
>
> (c) The greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational. Where decisions of a policy-laden nature

are in issue, even greater caution than normal must be shown in applying the test, but the test is sufficiently flexible to cover all situations.

(d) Provided the relevant government department has taken the impugned decision in good faith, rationally, compatibly with the express or implied statutory purpose(s), following a process of sufficient inquiry and in the absence of any other pleaded public law failing, such a decision will usually be unimpeachable.

(e) However, when issues are raised under Articles 5 and 6 of the European Convention on Human Rights and Fundamental Freedoms as to the guarantee of a speedy hearing or of a hearing within a reasonable time, the court may be required to assess the adequacy of resources, as well as the effectiveness of administration.

(f) Nonetheless in general a court is ill-equipped to determine general questions as to the efficiency of administration, the sufficiency of staff levels and the adequacy of resources.

(g) There is a constitutional right of access to justice and access to the courts.

(h) Powers ought to be exercised to advance the objects and purposes of the relevant statute."

[43] In his reply, Mr Hutton was somewhat dismissive of any suggestion that the issue in this case involved macroeconomics. Macroeconomics is defined by the Concise Oxford English Dictionary as the branch of economics concerned with large-scale or general economic factors, such as interest rates or national productivity." Precisely when macroeconomics becomes economics or microeconomics is wholly unclear. I note that a number of the decisions cited by Gillen LJ in *Bell* (para [18]) and leading to his articulation of the principles to be derived, did not involve central government, but involved decisions relating to resources of eg local authorities, the police ombudsman, a chief constable and the Mental Health Review Tribunal.

[44] While Tourism NI is not central government, nor even a government department, nevertheless in questions involving allocation of resources the court has to be wary of the consequences of intervention. In the current (9th) edition of De Smith s Judicial Review the following is stated in paragraphs 1-047 and 1-048:

> 1.047 Most allocative decisions' — decisions involving the distribution of limited resources — fall into the category of polycentric decisions. If the court alters such a decision the judicial intervention will set up a chain reaction, requiring a rearrangement of other decisions with which the original has interacting points of influence…
> 1.048 Another typical polycentric decision is one involving the allocation of scarce resources among competing claims…"

[45] And at para 1.109:

> One of the reasons why a polycentric decision is not ideally amenable to judicial review is that the re-allocation of resources in consequence of the court s judgment will normally involve the interests of those who were not represented in the initial litigation."

[46] The allocation of resources by the respondent in this case is not on foot of a statutory duty, but in exercise of a power. Although in a case involving local authorities, I consider that assistance can be gleaned from the judgment of Lord Nicholls in *R(G) v Barnet London Borough Council* [2003] UKHL] 57. In paragraphs [11] and [12] he said:

> [11] The financial resources of local authorities are finite. The scope for local authorities to increase the amount of their revenue is strictly limited. So, year by year, they must decide what priority to give to the multifarious competing demands on their limited resources. They have to decide which needs are the most urgent and pressing. The more money they allocate for one purpose the less they have to spend on another. In principle, this decision on priorities is entrusted to the local authorities themselves. In respect of decisions such as these council members are accountable to the local electorate.
>
> [12] The ability of a local authority to decide how its limited resources are best spent in its area is displaced when the authority is discharging a statutory duty as distinct from exercising a power. A local authority is obliged to comply with a statutory duty regardless of whether, left to itself, it would prefer to spend its money on some other purpose. A power need not be exercised, but a duty must be discharged."

[47] I also agree with the sentiment expressed, notwithstanding the different background facts, by Stanley Burnton J in *R(KB) v Mental Health Review Tribunal* [2002] EWHC 639 (Admin), para [46]

> It is at this point that I must mention an important qualification. In general, a court is ill-equipped to determine general questions as to the efficiency of administration, the sufficiency of staff levels and the adequacy of resources. It is one thing to instruct a team of management consultants to go out into the field to study and to report on the efficiency and adequacy of the Tribunal system and its practices; it is another to expect a judge, in the confines of a 2-day hearing, to reach sensible and reliable conclusions as to whether, for example, the practice of allocating hearing dates before it is known whether a panel will be available is an aid or a hindrance to speedy hearings. Not only is the time available to the court limited: so is the evidence; and such expertise as the judge may have is, notwithstanding the title to this Division of the High Court, legal, rather than administrative."

[48] In the circumstances of this case the court is not equipped to examine the allocation of the resources of the respondent. This would involve a micro-examination of the respondent s budget; for example, why ITEF could be run, but not the Scheme; whether the decision of the respondent — "to focus in closing out on thematic plans such as food and drink/outdoors and on an innovation growth scheme as part of its Industry Development Programme…[and to] allow [the respondent] to support marketing priorities such as the reinstatement of co-operative marketing programme and a second marketing campaign in-year" (see para [18] above) — was appropriate.

[49] Arising from the above, it is my view that the decision relating to the allocation of scarce resources by the respondent is not one which this court should examine. Accordingly, the respondent succeeds on the issue of non-justiciability.

[50] If I am wrong about that, I now consider the other issues in the challenge.

Did the applicants have a legitimate expectation?

[51] In *Re Finucane s Application* (op cit) Lord Kerr said a clear and unambiguous undertaking" made by the public authority in question was capable of giving rise to a legitimate expectation.

[52] I do not consider that the combination of the 1992 Order and the Guidelines for Applicants" gave rise to any legitimate expectation in the sense, as argued for by the applicants, of a promise on the part of the respondent to carry the application

process through to a conclusion. As is made clear in para 5.2 of the Guidelines document, there was no guarantee that the process would be carried through to conclusion. In bold type the document informed applicants that: **Payments are made using budget from Central Government. If Tourism NI does not receive adequate budget to cover the NTESS, we can suspend, end or reduce the amount we offer**." Thus, it was made clear that the process could be ended if the budget was inadequate. Mr Hutton KC submitted that the use of the word offer" meant that the time when such a decision could be made was only after the competition had been run. I consider this to be incorrect. It would fly in the face of common sense if the respondent, knowing that it did not have available to it the necessary budget to allow for the Scheme to be finalised, nevertheless wasted further money running the scheme to the date when an offer could be made, and only then abandoning the process.

[53] Further, I consider that the applicants reliance on the use of the word will" where it appears in the document is misguided. In my view the use of the word in the particular context of the entirety of the Guidance document does not imply a guarantee or a promise that the process will take place through to completion; merely that if it takes place, certain matters will" be done during the process.

[54] Even if, contrary to what I have just said, the applicants had any legitimate expectation, I consider that the respondent was entitled to resile from any promise which it may have made. I have taken into account what was said by Laws LJ at para [41] in *Bhatt Murphy v Independent Assessor* (op cit) and Lord Kerr in *Re Finucane s Application* [2019] UKSC 7, paragraphs [55] to [81], the paragraphs in which Lord Kerr deals with legitimate expectation and resiling from the undertaking. As he said:

> [62] From these authorities it can be deduced that where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so. The court is the arbiter of fairness in this context. And a matter sounding on the question of fairness is whether the alteration in policy frustrates any reliance which the person or group has placed on it. This is quite different, in my opinion, from saying that it is a prerequisite of a substantive legitimate expectation claim that the person relying on it must show that he or she has suffered a detriment.
> …
>
> [76] Where political issues overtake a promise or undertaking given by government, and where contemporary considerations impel a different course, provided a bona fide decision is taken on genuine policy grounds not to adhere to the original undertaking, it will

> be difficult for a person who holds a legitimate expectation to enforce compliance with it."

[55] In all the circumstances of this case, I am satisfied that for entirely understandable, rational and bona fide budgetary reasons and genuine policy reasons the respondent was entitled to change tack and abandon the process, notwithstanding that the process was well underway. Accordingly, I consider that there is no arguable case having a realistic prospect of success that there was a breach of any legitimate expectation.

Unfairness/failure to consult

[56] The applicants point to article 4 of the 1992 Order (specifically article 4(3) — see para [22] above) in support of the proposition that there was a statutory duty to consult with them before the Scheme was abandoned. In my view the duty in article 4(3) — to consult regularly with, bodies appearing to the Board to have an interest in matters falling within the functions of the Board" — could not be construed so as to comprehend a duty to consult with every applicant for funding before a decision, such as the impugned decision, was taken. The functions of the Board are high-level and general, and I consider that the statutory duty to consult in relation to its functions is a duty to consult with bodies who can have an input into such high-level and general functions, not an applicant for financial support.

[57] I consider, therefore, that there was no statutory duty to consult with the applicants before making the impugned decision.

[58] In relation to any common law duty, I note that in *R(Moseley) v Haringey LBC*, a case involving a statutory duty to consult, [2014] UKSC 56 Lord Reed said (para [35]):

> The common law imposes a general duty of procedural fairness upon public authorities exercising a wide range of functions which affect the interests of individuals, but the content of that duty varies almost infinitely depending upon the circumstances. There is however no general common law duty to consult persons who may be affected by a measure before it is adopted. The reasons for the absence of such a duty were explained by Sedley LJ in *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139, paras 43-47. A duty of consultation will however exist in circumstances where there is a legitimate expectation of such consultation, usually arising from an interest which is held to be sufficient to found such an expectation, or from some promise or practice of consultation. The general approach of the common law is illustrated by the cases of *R v Devon*

> *County Council, Ex p Baker* [1995] 1 All ER 73 and *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, cited by Lord Wilson, with which the *BAPIO* case might be contrasted.

[59] The contrast referred to by Lord Reed is this. *Baker* was a case involving the question as to whether a local authority had a duty to consult with residents of a home for old people which the authority proposed to close. *Coughlan* was a case in which the applicant had been moved to a special nursing facility from a hospital, with an assurance that she could live there for as long as she chose, but notwithstanding this a decision was made to close the facility. *BAPIO*, on the other hand, concerned the lawfulness of two government measures: the alteration without consultation by the Home Secretary of the Immigration Rules so as to abolish permit-free training for doctors who lacked a right of abode in the United Kingdom; and advice given by the Department of Health to NHS employers that doctors on the Highly Skilled Migrant Programme whose limited leave to remain was due to expire before the end date of any training post that was on offer should be offered the training post only if the resident market labour criterion was satisfied. In *Baker* and in *Coughlan*, fairness dictated that consultation with those affected should have taken place; in *BAPIO*, no consultation was necessary. In my view this is not a case such as *Coughlan* or *Baker*, but is more akin to *BAPIO*.

[60] In *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531, Lord Mustill, at page 560, considered the concept of fairness in a different context, that of affording a prisoner serving a mandatory life sentence the opportunity to submit in writing representations as to the period he should serve for the purposes of retribution and deterrence. Amongst the principles stated, which are of more general application, was sub-para (3):

> The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects."

[61] In the circumstances of this case, if Mr Hutton be right, the respondent would have had to consult with every applicant for support under the Scheme. In addition, depending on whether the scare resources meant that only some or none of the ITEF applicants would be provided with funding, some or all of those applicants. Further, perhaps all the people who might be affected by any decision not to focus in closing out on thematic plans such as food and drink/outdoors" or on an innovation growth scheme as part of its Industry Development Programme" or not to support marketing priorities such as the reinstatement of co-operative marketing programme and a second marketing campaign in-year."

[62] In my view, in the context of the decision to be made in this case there was no necessity to consult with the applicants and I refuse leave on this basis of challenge.

Irrationality

[63] Mr Hutton submitted that no public body tasked with the statutory objective of promoting tourism in Northern Ireland … could have come to the decision" which the respondent came to in this case. However, in light of what I have said above about the nature of the decision and the circumstances in which it was made, I consider that it is not an arguable proposition, in the *Ni Chuinneagain* sense, that the decision was irrational.

Was the decision ultra vires?

[64] It appears to be common case that the decision not to proceed with the funding of the Scheme was made on 30 March 2023. Mr Hutton says that it was made by an assumedly quorate Board" and that it was made on the basis of a material error — ie the draft budget, the actual budget being made known on 9 May. At the subsequent briefing of the three members of the Board on 23 May, they indicated that they were content with the 30 March proposal not to use resources for the Scheme. Therefore, says Mr Hutton, no quorate Board has ever made a decision based on the actual budget figures.

[65] I do not consider that the fact that the 30 March decision was made on the basis of a draft budget, which was somewhat different from the actual budget but still a substantially reduced budget, renders the 30 March decision one infected by a material error. At the time of the meeting of what the respondent says was a quorate Board on 30 March the Board was aware of a very challenging budget and of the need to plan for a significant reduction in funding. On that basis the quorate Board made its decision. In my view the fact that the actual budget was slightly better than the draft budget had suggested does not vitiate the original decision or call it into question.

[66] Accordingly, I consider that it is not arguable that the decision was made ultra vires.

Academic/utility

[67] The event for which the applicants sought funding took place in 2023 without any funding from the respondent. According to the grounding affidavit it took place between 17 to 22 July 2023. The pre-action protocol letter from the applicants solicitors is dated 6 July 2023, and the Order 53 Statement was issued on 24 August. The application for leave came before me in mid-November 2023. The respondent s budget for the 2023/24 year will have been allocated and there is no suggestion anywhere that there are additional funds available which could be used to provide funding to the applicants long after the event.

[68] In *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450, 457A Lord Slynn said:

> The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

[69] Taking Lord Slynn s examples, in the present case there is no discrete point of statutory construction. Further, there was no submission before me that a large number of similar cases presently exist or are anticipated in the future. There is no suggestion that issues raised in this case will need to be resolved in the near future in another case, so that the guidance of the court is required.

[70] As to the application for an order of certiorari, in the circumstances of this case I respectfully agree with what Lord McDermott said in *R(McPherson) v Ministry of Education* [1980] NI 115, 121F/G:

> Certiorari is a discretionary remedy and does not usually issue if it will beat the air and confer no benefit on the person seeking it."

[71] There is no reason to think that any benefit could accrue to the applicant if the impugned decision was quashed, nor was any suggested in the hearing.

[72] In relation to the claim for declaratory relief, in *Re JR47* [2013] NIQB 7, McCloskey J identified utility" to be the primary factor in considering whether a court should make a declaration in proceedings which were otherwise academic. He said, at para [85]:

> "… I remind myself that declaratory relief is not granted for the asking. Rather, a declaration is a discretionary public law remedy. … In reflecting on the propriety of granting any of the declaratory relief now sought, I consider the main criterion in the present context to be that of utility. Where the grant of declaratory relief would serve an important practical purpose, this will clearly count as a positive indicator; see The Declaratory Judgment (*Zamir & Woolf*, 4th Edition) paragraph 4-99 and following. I refer particularly to the following passage:

> If … the grant of declaratory relief will be likely to achieve a useful objective, the court will be favourably disposed to grant a relief …
>
> [Conversely] a declaration which would serve no useful purpose whatsoever can be readily treated as being academic or theoretical and dismissed on that basis.'"

[73] In the circumstances of this case I see no utility which could be derived from a declaration such as is sought by the applicants.

[74] The applicants also seek an order of mandamus directing that the decision be re-taken. However, there could be no utility whatsoever in this. As stated above, the event for which funding was sought took place months ago. Further, there is no indication that there is any budgetary resource available for payment to the applicants, or to any other of the Scheme 2023/24 applicants, if the decision was re-taken and was in their favour.

[75] I am satisfied that this matter is entirely academic, and any order of the court would be of no utility. On that basis alone I would dismiss the application for leave.

Disposition

[76] The application for leave to apply for judicial review is dismissed.

[77] I make no order as to the cost of this application.