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JR 2018/45292/01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JM3 (A MINOR)
BY HIS MOTHER AND NEXT FRIEND SM,
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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McCloskey J

Introduction

[1] The main issue thrown up by this challenge concerns the territorial limits of the judicial review jurisdiction of the High Court of Justice in Northern Ireland.

Anonymity

[2] The court ruled at the outset of these proceedings that there must be no publication of the identity of the Applicant or of anything which could lead to his identification.

The challenge

[3] The Applicant is a boy aged 14 who suffers from certain disabilities. From the age of 3 he has been a member of the "S" Gymnastics Club. It is evident that he has a passion for this sport and he benefits much, both socially and otherwise, from participating in it.

[4] "S" Club is one of a number of Special Olympics Clubs on the Island of Ireland. Each of these clubs is affiliated to the entity known as "Special Olympics Ireland" ("SOI"). The Ireland National Special Olympics Games are scheduled to be held, in Dublin, in early June 2018. The Applicant has not been, and will not be, selected to participate in the circumstances to which I now turn.

[5] The Applicant was suspended from Special Olympics training from April 2016 to January 2018. This gave rise to an earlier judicial review challenge in which Belfast Health and Social Care Trust was the respondent. Mediation was directed and overseen by the court, yielding a consensual outcome, the main feature whereof was the Applicant was re-admitted to the "S" Club. The salient features of his case were formulated by his father in a letter dated 14 February 2018 to SOI:

> "[We are] *in a position to come to Special Olympics and request consideration to be given to* [JM3's] *inclusion in Team Ulster for the All Ireland Games …*
>
> *Had it not been for the complete failure in the safeguarding procedures at* ["S" Club] *on the evening of the alleged incident* [JM3] *would have been competing in the Regional Advancement Competition and eligible for selection to be in Team Ulster heading for the All Ireland Games in Dublin this coming June …*
>
> *The loss of the opportunity for* [JM3] *to compete at these Games would be totally unfair as he has been the innocent party from the beginning. He will not have the opportunity to compete at the All Ireland level again until 2022. We understand that the final date for any amendments for inclusion or alteration is 16 March ….*"

[6] The response which this elicited from SOI constitutes the decision under challenge in these proceedings. Their response refers to the SOI handbook "Regulations Governing Special Olympics Sport" and in particular, the rule which provides that:

> "*In order for athletes to advance onto the next competition level, the athlete must take part in the previous competition level. Following the Ulster Regional Events, the selections (which were completed in an open and transparent way) took place on 01 July* [2017] *at ……. Omagh. All clubs are invited to the selections and a strict process is followed.*"

The SOI response continues:

> "*It is with regret that based on the fact that* [JM3] *did not compete in the Ulster Region Advancement Event (even if this was outside his control) it would not be possible for the organisation to make an exception to* ***this very fundamental regulation***." [Emphasis added.]

It is unnecessary to reproduce the exact text of the rule in place. It is contained in paragraph 15.3 of the SOI handbook in a section entitled "Selection and Advancement". The presumptively mandatory "must" features throughout the text.

[7] Given the factor of urgency, this case was processed by the court on a fast track. Papers were filed on 03 May 2018, the court made a case management directions order dated 09 May 2018 and a hearing was arranged for 23 May 2018. An adjournment, to facilitate mediation, ensued. The mediation having failed to achieve a mutually acceptable outcome, the court completed the hearing on 30 May 2018, giving judgment on that date.

[8] It is convenient to reproduce two passages from the court's initial order:

> "*It is not clear from the papers filed that the Court has jurisdiction over SOI, which appears to be a Dublin based entity ….*
>
> *It is equally unclear that SOI, in making the impugned decision, was exercising public law functions which would render it amenable to challenge by judicial review.*"

The purpose of the hearing which the court has conducted was designed primarily to determine these two fundamental issues. The court also received the parties' representations relating to the arguability of the Applicant's case.

Jurisdiction

[9] First the relevant factual matrix, which is both compact and uncontentious. SOI is a company limited by guarantee, incorporated on 08 February 1995 and registered in the Republic of Ireland ("ROI"). The company is not registered in Northern Ireland. Nor does it have the status of a registered charity in this jurisdiction. It is administered from offices on the National Sports Campus, Blanchardstown, Dublin. There it operates from purpose built premises which were formally inaugurated by the ROI Minister of State for Tourism and Sport in November 2016. In the same year SOI reviewed and revised its Memorandum and Articles of Association. It describes its principal activity as "*the development and promotion of the Special Olympics movement in Ireland*". Its programmes and activities embrace the whole of the island of Ireland.

[10] This last mentioned fact represents the first of SOI's main connections with the jurisdiction of Northern Ireland. The second is financial in nature. In the financial year ending 31 December 2016 SOI received total grant income of almost €2.2 million, the main contributors being Sport Ireland (€1.2 million) and Sport Northern Ireland (€631,000). Thus a Northern Ireland agency contributed approximately 30% of SOI's grant income (having done likewise in the previous

financial year). Third, there are certain references to Northern Ireland agencies in SOI's memorandum of association: Sport Northern Ireland (regarding doping policy), the Charities Commission for Northern Ireland (as regards regulation? - unclear), HMRC (regarding charitable status? - unclear) and the United Kingdom Department of Health (regarding the definition of "Intellectual disability"). I observe that there is a *lacuna* in the evidence and, as a minimum, a query regarding whether the public authorities noted as a matter of law exercise jurisdiction over SOI: this latter issue was not developed.

[11] I formulate the fundamental question in the following way: does the High Court of Justice in Northern Ireland have jurisdiction to entertain a challenge by judicial review to the decision of SOI? This question, self-evidently, is a contextual one, to be decided by reference to the facts and considerations identified in the foregoing paragraphs.

[12] The judicial review jurisdiction of the High Court has, in common with its English counterpart, elements of both judge made law and statutory intervention. The main statutory prescription is contained in Part II of the Judicature (NI) Act 1978 ("the 1978 Act"). Section 18 is the key provision:

> *"Application for judicial review*
>
> *18. - (1) Rules of court shall provide for a procedure, to be known as an application for judicial review, under which application may be made to the High Court for one or more of the following forms of relief, that is to say, relief by way of-*
>
> *(a) an order of mandamus;*
> *(b) an order of certiorari;*
> *(c) an order of prohibition;*
> *(d) a declaration;*
> *(e) an injunction.*
>
> *(2) Without prejudice to the generality of subsection (1), the rules shall provide-*
>
> *(a) that leave of court shall be obtained before any application for judicial review, other than an application for an order of certiorari by the Attorney General acting on behalf of the Crown, is made;*
>
> *(b) that such leave shall not be granted if, having regard to the nature of the persons and bodies against whom relief may be granted by way of an order of mandamus, prohibition or certiorari, the court is satisfied that the case is one in respect of*

which relief could not be granted by way of any such order;

(c) that, where leave is so obtained, the grounds relied on and the relief granted shall only be one or more of those specified in the application;

(d) that the court may direct, or grant leave for, the application to be amended to specify different or additional grounds or relief; and

(e) that the court may, subject to subsection (6), direct pleadings to be delivered or authorise or require oral evidence to be given where this appears to the court to be necessary or desirable.

(3) On an application for judicial review the court may grant any of the forms of relief mentioned in subsection (1)(a) to (e) which the applicant has claimed and to which he appears to be entitled whether or not he appears to be entitled to any of the other forms of relief so mentioned, whether claimed or not.

(4) The court shall not grant any relief on an application for judicial review unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

(5) Without prejudice to section 25 of this Act or to Article 159 of the Magistrates' Courts (Northern Ireland) Order 1981 where, on an application for judicial review, the court finds that-

(a) the sole ground of relief established is a defect in form or a technical irregularity; and

(b) no substantial wrong and no miscarriage of justice has occurred or no remedial advantage could accrue to the applicant,

the court may refuse relief and, where a lower deciding authority has exercised jurisdiction, may make an order, having effect from such time and on such terms as the court thinks just, validating any decision or determination of the lower deciding authority or any act done in consequence thereof notwithstanding that defect or irregularity.

> *(6) No return shall be made to orders of mandamus, prohibition or certiorari and no pleadings in prohibition shall be allowed but, subject to any right of appeal, such orders shall be final.*
>
> *(7) For references in any statutory provision coming into operation as respects Northern Ireland before 15th September 1965 to a writ of mandamus, prohibition or certiorari there shall be substituted references to the corresponding order and for references to the issue or award of any such writ there shall be substituted references to the making of the corresponding order."*

The rules of court made pursuant to section 18(1) are arranged in Order 53 of the Rules of the Court of Judicature. The Order 53 regime contains no provision bearing directly on the issue of territorial jurisdiction. This is unsurprising, given that an issue of such fundamental dimensions would not be apt for regulation by procedural rules.

[13] It is appropriate to make brief reference to Order 11 of the Rules. Its subject matter is service of "*a Writ or Notice of a Writ out of the jurisdiction*". The phraseology "*Writ or Notice of a Writ*" takes its meaning from certain surrounding provisions of the Rules. In my judgment, Order 11 has no application to the originating process in judicial review proceedings which per Order 53, Rule 3(2), takes the form of:

> "*(a) A statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought; and*
>
> *(b) an affidavit or affidavits, as the case may require, verifying the facts relied on.*"

Neither Order 11 nor Order 53 recognises the existence of the other. This is readily explained by the major private law/public law dichotomy which underpins and separates their respective regimes. I consider that Order 53 does not speak to the issue of jurisdiction raised in this case. I would add that no application for leave to serve proceedings out of the jurisdiction has been made on behalf of the Applicant.

[14] The central submission of Mr White (of counsel) on this issue is formulated in the following terms: the size, scale and role of SOI, coupled with the significant amounts of public monies it has received and continues to receive from the governmental entities in both Ireland and Northern Ireland, bring the proposed Respondent within the scope of judicial review as there is a public interest in ensuring that there is proper administration of its selection processes for choosing athletes to participate in competitions and events. To this end Mr White would add

the "connectors" which I have already identified in [10] above. On behalf of SOI, the core submission of Mr Humphries QC is that the supervisory jurisdiction of the High Court exercisable under section 18 of the 1978 Act does not extend to decisions made by entities domiciled outside Northern Ireland. I resolve these arguments in the following way.

[15] While the territorial limits of judicial review is a subject of not less than fundamental importance, it has received scant attention in the decided cases. Neither party brought to the attention of the court any Northern Ireland decision, reported or otherwise, bearing on this issue. While, in the court's experience, the issue has arisen in certain contexts such as challenges to decisions of the Parole Board of England and Wales, it has flickered only faintly for a variety of reasons, prosaic and otherwise.

[16] The judicial review jurisdiction of the High Court is of some longevity. This is confirmed by some of the few decisions in which the issue of territorial jurisdiction has been considered. In R v Cowle 2 BURR 834, Lord Mansfield CJ, addressing the question of whether the court had jurisdiction to issue the (then prerogative Writ of) *certiorari* to Berwick–Upon–Tweed stated at page 858:

> *"Writs not ministerially directed (sometimes called prerogative Writs because they are supposed to issue on the part of the King) such as Writs of prohibition, habeas corpus, certiorari are restrained by no clause in the constitution given to Berwick. Upon a proper case they may issue to every dominion of the Court of England. There is no doubt as to the power of this court: where the place is under the subjection of the Crown of England, the only question is as to the propriety."*

Many will be familiar with the saying "*the Queen's/King's Writ runs to ….*". As the decision in Cowle demonstrates, at common law all of the prerogative Writs "ran" to all parts of the Sovereign's dominions, the rational being the authority of the Sovereign over all of its subjects. For "prerogative Writs" one substitutes, in the modern era, the judicial review remedies listed in section 18(1) of the 1978 Act: mandamus, certiorari, prohibition, declaration and injunction.

[17] In the limited jurisprudence in this sphere, one may view the decision in R v Commissioner of Police of the Metropolis, ex parte Bennett [1995] QB 313 as an orthodox illustration of Lord Mansfield's principle. There it was held that the English court had no jurisdiction to entertain a judicial review challenge to the execution in England of an arrest warrant issued in Scotland. One contrasts R (Bancoult) v Secretary of State for the Foreign and Commonwealth Office [2001] QB 1067, where the crux of the finding that judicial review lay was that the overseas territory in question was subject to the Sovereign's dominion and, further, the impugned decision was procured by the United Kingdom Government. To like

effect is R (Quark) Fishing v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1409. More recently, in Lenzing AG –v– Courtaulds [1997] EULR 237, it was held that judicial review did not lie against a public authority which had certain distinctive features, namely it was the Comptroller of the United Kingdom Patent Office, an entity having its seat in Munich and established via the EU Treaty and the European Patent Convention. In short, the decision lay outwith the sovereign scope of the United Kingdom.

[18] The latter decision is considered in an interesting treatise on this subject, "The Territorial Limits of JR" (Beloff and Mountfield) [1997] JR 131, which ends with the colourful statement at [20]:

> "*The conclusion must be that judicial review, so expansive in other ways, essentially stops short at the White Cliffs of Dover (or other boundaries) of England and Wales*".

For "*White Cliffs of Dover*" one substitutes, in the context of Northern Ireland, constitutionally part of the United Kingdom but having its separate legal system, "the North/South border".

[19] I consider the governing principle to be the following. The judicial review jurisdiction of the High Court of Justice in Northern Ireland does not extend to an entity registered exclusively in another country which is neither registered nor incorporated in accordance with the laws of Northern Ireland and has no seat of business here. This analysis is unaffected by the willing submission of SOI to selected laws and public authorities of this jurisdiction, noted in [10] above and irrespective of the legal efficacy of this commendable willingness. The elementary juridical reality is that Northern Ireland and the Republic of Ireland are separate constitutional entities under both domestic and international law. No sovereign power of any kind is exercised by the United Kingdom over SOI. While the scope for more detailed examination of this fundamental issue – for example in the realm of charities law and revenue law – might, in theory, exist, the foregoing conclusion is one which must be made on the state of the available evidence. Accordingly, the interesting question of whether the court's primary conclusion would be affected if it were clearly the case that SOI is subject to regulation via certain provisions of domestic legislation of the kind just noted, or kindred provisions, does not fall to be determined.

[20] Jurisdiction must, by its very nature, be the first and foremost issue in every judicial review challenge. On the grounds and for the reasons elaborated above, I conclude that the High Court has no jurisdiction to entertain the Applicant's challenge to the impugned decision of SOI.

Public law?

[21] While this discrete issue does not arise in light of my primary conclusion, I shall nonetheless address it briefly. The decided cases are to the effect that a sporting body such as SOI is, by its nature and by virtue of the functions and activities which it performs, outwith the public law reach of judicial review. I refer particularly to R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan [1993] 1 WLR 909, R v Football Association ex parte Football League [1993] 2 All ER 833 and R v International Sailing Federation, ex parte International RSX [2013] EWHC (Admin). No basis for applying any different juridical template to SOI, which is fundamentally a sports governing body and regulator, has been identified. This analysis is not undermined in any way by Mr White's invocation of the intensely contextually sensitive decisions in Re Kirkpatrick [2004] NIJB 15, Re Wiley [2005] NIQB 2, Re Wadsworth [2004] NIQB 8 and Re City Hotel (Derry) Limited's Application [2004] NIQB 38.

Arguability

[22] Finally, as indicated in my *ex parte* ruling, I consider that the Applicant's challenge does not in any event establish an arguable case that SOI has committed the key public law misdemeanour attributed to it, namely in the formulation of the Order 53 Statement:

> "*The Applicant further contends that the impugned decision is vitiated by the proposed Respondent having failed to take into account the following material facts/considerations …*
>
> *The proposed Respondent had caused and/or materially contributed to the Applicant's suspension … [and] …… should have taken its own actions and failures into account …*"

Seccundum allegata et probata: this Latin maxim expresses pithily the fundamental rule of evidence that he who asserts must prove. As the decision in Re SOS Application [2003] NIJB 253 at [18] – [19] confirms, this principle has as much purchase in the public law world of judicial review proceedings as it possesses in the private law field. In short, the Applicant asserts that the proposed Respondent, SOI, ignored the factor in question. I consider that the evidence fails to establish whether by direct evidence or reasonable inference, to the level of arguability, this assertion.

[23] Furthermore, the related complaint of improper fetter of discretion, in my judgment, simply cannot fly in a context where a body such as SOI operates within a regime containing a series of bright line rules and requirements. Indeed, this may be viewed as one of the features contributing to the second of the court's principal conclusions expressed in [21] above.

[24] Accordingly, no arguable case is made out in any event.

Omnibus Conclusion

[25] The court therefore decides:

(a) The Applicant's challenge is defeated on the fundamental ground of territorial jurisdiction.

(b) In the alternative to (a), the impugned decision is not justiciable in public law in any event.

(c) In the further alternative to (a) and (b), the central public law misdemeanour canvassed by the Applicant is not established in any event.

(d) A conversion order under Order 53, Rule 9(5) is plainly inappropriate having regard to the foregoing conclusions, my assessment that the declaratory relief sought is of the purely makeweight nature and my further conclusion that the "*might have been granted*" threshold enshrined in Order 53, Rule 9(5) is not overcome.

(e) The application for leave to apply for judicial review is dismissed accordingly.

(f) Having considered the parties' submissions and taking into account that the dismiss occurs at the leave stage, I make no order as to costs *inter-partes*.

(g) The Applicant's costs will be taxed as an assisted person.