Neutral Citation No. [2008] NICA 14 | *Ref:* **CAM7538**

Judgment: approved by the Court for handing down | *Delivered:* **17/6/09**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION

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IN THE MATTER OF AN APPLICATION BY RICHARD WEST FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DECISION OF BELFAST CITY COUNCIL

_____

Before Kerr LCJ, Sir Anthony Campbell and Sir John Sheil

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SIR ANTHONY CAMPBELL

Introduction

[1] This is an appeal from a decision of Deeny J whereby he dismissed the appellant's application for judicial review of the refusal of Belfast City Council to continue to provide funding for a magazine of which he was the co-editor. The appellant had contended that his freedom of expression and that of the magazine 'The Vacuum' had been breached by a decision of Belfast City Council to withhold funding until an apology or some expression of regret was made in respect of the offence said to have been experienced by some of its citizens as a result of a number of articles in the June 2004 editions of the magazine and until an assurance about the future content of the magazine was given.

Factual background

[2] The appellant, Richard West, is one of two co-editors of The Vacuum, a free cultural newspaper for Belfast. The Vacuum is produced by Factotum, an unincorporated association established in April 2001. Factotum seeks to

promote the cultural life of Belfast by publications and by hosting cultural events and discussions. The Vacuum was first published in February 2003, after start up funding for a local cultural publication became available through the Department for Culture, Arts and Leisure. Since then it has obtained funding through grants to Factotum from the Arts Council and Belfast City Council.

[3] On 15 June 2004 two issues of The Vacuum were published simultaneously, one entitled "God" and the other "Satan". The issue on Satan contained an article which parodied a sermon given in a local tabernacle and used profanities and critical remarks about certain well known preachers who were named in the article. Various aspects of these two publications caused offence to certain members of Belfast City Council.

[4] On 18 June 2004, Factotum applied for grant assistance in a second round of Belfast City Council funding. The Council directed its Arts sub-committee to consider the question of the funding of arts publications "with a view to the criterion in this regard specifically requiring that, prior to financial assistance being provided, the Council must have sight of the material to be published in order to ensure that such material will not be likely to offend the majority of the city's ratepayers and will contribute positively to the image of Belfast." Not surprisingly, it was pointed out that this proposal, if enacted, would give rise to two difficulties. First, it would be quite impracticable for the Council's members or officers to review every publication in advance. Secondly, this would operate, in effect, a censorship over the publications of any organisation which received any funding from the Council.

[5] The issue was discussed at a meeting of the Development (Arts) Sub-committee on 4 August 2004 and the minute of that meeting was accepted by the full Development Committee and came before the next meeting of the Council on 1 September 2004. At this meeting the decision of the Arts Sub-committee of 4 August was amended so that, whilst existing funding was not withdrawn, no award under the second tranche of funding was to be made to Factotum until such time as it had provided an apology for any offence to members of the Council and the citizens of the city occasioned by previous publications and provided an assurance that future publications would meet such criteria as might be established by the Council. The publishers of the magazine decided that to give such an assurance or to make an apology would compromise their independence and they declined to apologise or to provide the assurance sought.

The case at first instance

[6] Before Deeny J the appellant claimed that the decision to make funding conditional on an apology being furnished and the giving of an assurance as to future publications infringed his rights under articles 9 and 10 of the

European Convention on Human Rights and Fundamental Freedoms (ECHR). It was also submitted that the respondent had acted outwith its powers in imposing these conditions.

[7] Deeny J rejected these arguments, holding that the Council had a wide discretion under section 115(1) of the Local Government Act (Northern Ireland) 1972 as to whether to make the grant of funding. He found that while the Council must adopt a fair procedure in dealing with an application for funding, it was not required of councillors that they leave their own views on the publication out of account in deciding whether to award such funds. On article 9 of ECHR he held that the applicant was not prohibited from practising religion in any particular way nor was he compelled to attend any particular place of worship. In relation to article 10 the learned judge concluded that there had been no interference with the appellant's rights. Alternatively, he held that if there had been an interference with either article 9 or 10, such interference was justified under the terms of those provisions.

The appeal

[8] Mr CM Lavery QC on behalf of the appellant argued that the judge had erred in the following principal respects: -

- in finding that the Council's decision was not unlawful or ultra vires. It was submitted that it had imposed conditions on release of funding in the absence of any power to do so; that it had strayed beyond the limits of its legitimate discretion; it had failed to apply properly the criteria contained in the Culture and Arts Project Grant Scheme (2004 – 2005) (CAPG scheme); and that it had exercised its power to withhold funding for ulterior objects.

- in failing to find that there was a breach of articles 9 and 10 of the Convention, contrary to section 6 of the Human Rights Act 1998.

- in failing to find that the Council were in breach of the principles of fairness and had acted unreasonably and had failed to take account of proper considerations.

- in misdirecting himself on the facts; in failing to find that the respondent had been guilty of irrationality/perversity; in failing to apply the appropriate test (the "high intensity *Wednesbury* review"), contrary to article 6 of the Human Rights Act 1998 and in failing to give reasons in his judgment for rejecting relevant contentions advanced by the appellant.

The CAPG scheme

[9] The first of the appellant's arguments was founded on the premise that the scheme defined and restricted the factors to which the council could properly have regard in reaching a conclusion as to funding. We have no hesitation in rejecting that argument. It confuses the purpose of the eligibility criteria for funding with the factors that the council may take into account in deciding whether those who are eligible for funding should receive it. Section 115 of the Local Government Act (Northern Ireland) 1972 gives the council a very wide discretion in relation to the disbursement of public money. It provides in subsection (1) that a council:

> "… may make any payment for any purpose which in its opinion is in the interests of, and will bring direct benefit to –
>
> (a) the Council;
> (b) its district or any part of its district;
> (c) the inhabitants of its district or any part of its district."

[10] It is doubtful whether the council could lawfully delimit the discretion vested in it by this subsection by drawing on to itself a set of criteria that restricted the recourse that it could have to the breadth of this provision. Thus, for instance, the funding of a project that would satisfy the criteria of a particular scheme but which would run directly counter to the requirement that the funded project should bring direct benefit to the council, its district or the inhabitants would surely not be lawful.

[11] It is to be noted that the benefit that is sought to be secured is one on which the council is to make its own judgment. In order to qualify for payment, therefore, the project to be funded *must be* one which the council has concluded would bring direct benefit to one of the objects specified. It follows that if the council has concluded that a project would not have that effect, or that conditions had to be attached to the grant in order to ensure that it did have that effect, it would not only be entitled to, it would be bound to refuse funding or to make it conditional on the fulfilment of such conditions as were necessary to bring the proposal to a state that satisfied the statutory requirement.

[12] The ulterior objects which, it was claimed, actuated the council's refusal of funding were the promotion of religious beliefs and the suppression of views which were seen by the majority of the council as disrespectful to religion. It is not accepted that these were in fact motivating factors in the council's decision but, whether they were or not, they clearly fell within the ambit of matters which the council was entitled to take into account in the

exercise of its power. As we have said, it was for the council to decide whether the project would bring benefit to the district or its inhabitants. If it concluded that it would not, then it did not have the power to order the funding.

Articles 9 of ECHR

[13] Article 9 of the convention provides: -

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

[14] As the appellant pointed out, frequent reference has been made to the fundamental nature of this right – see, for instance *Kokkinakis v. Greece* (1993) 17 EHHR 397 at [31] 'freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention'; and *Copsey v WWB Devon Clays Ltd* [2005] EWCA Civ 932 where wider recognition of 'the fundamental and pervasive character of Article 9' was predicted.

[15] The appellant contended that the council's decision to require him to apologise for the offence caused by the articles interfered with his article 9 right to freedom of thought and conscience in that it sought to compel him to express views that he did not hold. Indeed, these were contrary to the beliefs that he held. The expression of such views would have been against the appellant's conscience. They would inevitably be insincere and would offend his strongly held belief in freedom of speech. Imposing such a condition on him would also have offended his rights under article 9 (2), he argued, again because he was being required to express beliefs that he did not hold, *viz.* that he agreed to the Council's censorship of the articles in question and that he was sorry for causing offence to some citizens by certain articles in the June issues and that he that he accepted the Council's right to censor publications in this way.

[16] On behalf of the respondent it was argued that the freedom of conscience for which the appellant contended was, in effect, a freedom to express his views in the Vacuum. Nothing that the council had done interfered with that freedom. As the learned judge at first instance said: -

> "… Factotum has not in fact been prevented from exercising its freedom of expression. It went on publishing after the refusal of the City Council to vote it a fresh grant in September 2004. Indeed it took the opportunity in its issue of December 2004 to seek to criticise and, it must be said, lampoon the decision of the majority of the Council."

[17] We consider that the respondent is correct in its analysis on this point. The obligation contained in article 9 is not to interfere with freedom of conscience or the manifestation of belief. It does not require that these rights be *facilitated* by a public authority. What the appellant's case amounts to is a claim that the council was bound to continue funding the publication so that the views which it wished to express could continue to be voiced in the magazine. This goes well beyond anything contemplated in article 9 and the fact that the right is a fundamental one does not assist the appellant in his argument.

Article 10

[18] Article 10 of the convention provides for the right of freedom of expression: -

> "1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information

> received in confidence, or for maintaining the authority and impartiality of the judiciary."

[19] The essence of the appellant's argument on this issue is encapsulated in the following paragraph from his skeleton argument: -

> "Publication of the Vacuum was not prevented but an attempt was made to make publication more difficult. However, in order to continue to publish the Vacuum and ensure that its voice was not suppressed, Factotum had to divert funding from other projects that it wished to pursue. The appellant had argued that the Council was guilty of unlawful censorship in breach of Article 10 in seeking to suppress and inhibit the right to freedom of expression. This was not alleged to be a direct act of censorship, but rather indirect censorship or "prior restraint" which the appellant was extremely concerned would create a "chill factor" and result in groups who received or wished to receive funding from the Council self-censoring the content of their publications or performances if the Council was allowed to withhold or deny them funding if it considered their work to be offensive."

[20] In his written submissions the appellant developed an elaborate argument about the need to avoid prior restraint, drawing on a number of decided authorities on the matter. But these were essentially incidental to the main issue here and that is whether there was in fact an interference with the appellant's article 10 right. On that issue, consideration of the facts of the case permits one simple answer only. There was no interference. Nothing was done that made it impossible for the appellant to fully express the views that he wished to convey through the pages of the Vacuum. True it is that the council no longer assisted in the promulgation of those views by the provision of funding but a decision not to provide funding does not equate with interference. The concepts are entirely and distinctly different. There is an obligation not to interfere but there is no obligation to assist or facilitate.

Fairness and reasonableness

(i) Bias

[21] Before Deeny J, the appellant had argued that the Council had been guilty of real or apparent bias in reaching the decision not to renew funding. It was pointed out that there was a requirement in the Standing Orders that every Council session must begin with a reading from the Scripture. This, the

appellant contended, demonstrates that the exercise of democracy at Belfast City Council is subject to accepting the paramountcy of Christianity over other religious beliefs. Indeed, it might be characterised as a "premeditated act of coercion" directed at the Council members' freedom of conscience and religion. The fact that most members of the Council had not read any issues of the Vacuum also gave rise to the appearance of bias; and finally, comments made in the Council Chamber about the paper betrayed bias on the part of some at least of the councilors who were party to the decision.

[22] The issue of bias – whether actual or apparent – must be examined in the context in which it arises. A judge or tribunal charged with the responsibility of deciding impartially between two competing cases must not allow personal feelings or beliefs touching on the subject in dispute affect the judgment or determination of the outcome. That type of context has been in play in virtually all decided cases on this topic. Thus, it is observed in *Wade and Forsyth* chapter 13 at page 455, "most decided cases on bias concern decisions of courts of law".

[23] Decisions taken by an elected body such as the Council call for a markedly different approach. Councillors are elected on the views that they represent to the public. They cannot be expected to discard those views in making decisions affecting the public. On the contrary, they are expected by their electorate to keep faith with and apply the views which they had expressed and which were instrumental in having them elected. That is not to say, however, that they must not take decisions that are actuated by what Deeny J called 'personal animus'. In the written argument submitted for the appellant, objection was raised to the judge's reference to this and it was suggested that he had introduced an argument that had not been made. But, the reference by the judge was entirely apt, indicating as it did the type of bias that would be required to be shown in the present circumstances.

[24] The well known statements of principle in such cases as *Re Medicaments* [2001] 1 WLR 700 and *Porter -v- Magill* [2002] 2 AC 357on the issue of apparent bias must therefore be approached with some caution in their application to this case. At paragraph 103 in *Porter -v- Magill* Lord Hope of Craighead said:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

[25] Applying this principle in the case of *Re William Young* [2007] NICA 32, this court said: -

> "[6] The notional observer must therefore be presumed to have two characteristics: full knowledge

> of the material facts and fair-mindedness. Applying these qualities to his consideration of the issue, he must ask himself whether there was a real possibility that the decision-maker was biased. In this context, it is pertinent to recall Lord Steyn's observation in *Lawal v Northern Spirit Ltd* [2003] UKHL 35, quoting with approval Kirby J's comment in *Johnson v Johnson* (2000) 201 CLR 488 at 509 that 'a reasonable member of the public is neither complacent nor unduly sensitive or suspicious.'"

[26] Bias in the present case does not arise because a councillor draws on his religious conviction to inform his choice about funding. He is not required to leave that out of account. In our judgment, therefore, the fact that each session of the Council must begin with a reading from Scripture is not relevant to the question of bias in this context. Likewise the fact that councillors expressed themselves vigorously or that some of them had not read any issue of the Vacuum do not sound on the issue. A fair minded observer would acknowledge that councillors were entitled to bring their personal views to bear on the subject. He would also know that all the councillors had the opportunity to glean from the reports of the sub committee sufficient material to allow them to form a judgment. We have concluded, therefore, that no case of bias, whether actual or apparent, has been made out by the appellant.

(ii) Legitimate expectation

[27] The appellant claimed that the Council acted unfairly in denying him a legitimate expectation that it would adhere to the criteria set out in the CAPG scheme. The Council was bound to apply those criteria, the appellant argued, unless some overriding reason justified their resiling from it. Moreover, if the criteria were to be modified or if they were no longer the basis on which the decision as to funding was to be made, he and other applicants were entitled to be consulted about them before they made their applications for funding.

[28] This argument must fail for essentially the same reasons that we have given in rejecting the contention that the Council was bound to disregard all factors other than the CAPG criteria. As we have pointed out, it is doubtful (at best) that the Council could restrict the discretion that had been vested in it by section 115 (1) of the 1972 Act. Certainly, no applicant for funding could acquire a legitimate expectation that the Council would ignore its statutory obligation to be of the opinion that the project would benefit the Council, its district or the inhabitants, before it could authorise the requested funding.

(iii) Failing to take account of relevant considerations

[29] The appellant's first argument on this topic mirrors that which he made on the exclusivity of the CAPG criteria as matters to be taken into account by the Council on its decision on funding. It was suggested that the Council had had regard to irrelevant matters which did not appear in the criteria. A second argument was that it had reached its decision on the basis of a misunderstanding of the overall tone and content of the publications. It was also claimed that the Council had failed to take account of relevant matters such as the content of previous issues and the respect which the paper had gained within the arts community. It was further argued that councillors should have been mindful that they had been elected to serve a multi-cultural multi-faith society.

[30] The respondent's riposte to the first of these arguments is that the Council was bound to have regard to the statutory imperative in section 115 (1). As to the remaining arguments, the respondent says that these are factors which are not obviously material to the Council's decision and that there was, on that account, no obligation to have regard to them before the decision was made.

[31] In what has become a celebrated and much quoted passage, Cooke J in *Creednz -v- Governor General* [1981] 1 NZLR 172 said that the test to be applied to a determination of whether regard must be had to particular factors was, in the first instance, whether the statute expressly or impliedly identified considerations that had to be taken into account as a matter of legal obligation. He then said this about the test of materiality of what are claimed to be relevant considerations: -

> "It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision …
>
> There will [however] be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the Ministers … would not be in accordance with the intention of the Act".

[32] The only factor which the Council was *required* by express stipulation to take into account was whether the funding would bring benefit to the council, its district or the inhabitants. None of the canvassed factors impinges directly on that central consideration. It is of course possible to conjure up all manner of things that might be said to be relevant to a consideration of whether

funding should be made but that does not make them legally relevant in the sense that regard must be had to them. We do not consider that the Council was required to take the matters advanced by the appellant into account.

Misdirection on the facts

[33] The appellant claimed that the judge had failed to make findings on a number of issues of fact and had reached conclusions as to other facts which were unsustainable. It is unnecessary to rehearse these arguments at any length for the simple reason that it has not been established that, had the findings which the appellant has contended for been made, any different outcome to the application would have been warranted.

Irrationality

[34] The appellant argued that a high intensity review of the rationality of the Council's decision was warranted in this case. That claim was based on the assertion that his rights under articles 9 and 10 of ECHR had been violated. Since we have rejected this argument, we do not consider that an examination of the rationality of the Council's refusal of funding should take place on other than the conventional ground of *Wednesbury* unreasonableness (*Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223). On that basis we can find no reason to say that the decision was irrational. Its motivation was clear. The reasons that underlay it, while they would not necessarily commend themselves to everyone, were at least intelligible. We reject the argument based on irrationality, therefore.

Failure to give reasons for rejecting arguments

[35] At paragraph [17] of his judgment, Deeny J said "there are certain other submissions of counsel related to the [principal] submissions which were dealt with by Mr McCloskey QC in his reply which I need not examine in detail save to say that I was not persuaded by them to arrive at a different decision". The appellant criticised this approach, arguing in effect that none of the principal arguments that he had advanced had been considered by the learned judge.

[36] We do not accept that submission. It may be that the appellant's contentions were not recorded in the judgment in quite the way that they had been formulated by the appellant and presented to the court but we consider that the broad thrust of the case made was examined by the judge and that he dealt with all the principal arguments. In any event, those arguments have been fully ventilated before this court and we have endeavoured to address them seriatim. A different outcome to the application and the appeal could only be warranted if we had concluded that an argument made in the

appellant's favour which had been neglected by the judge should have succeeded. We have not reached that view.

Conclusions

[37] None of the arguments advanced by the appellant has succeeded. The appeal must be dismissed.