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**IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND KING'S BENCH DIVISION (JUDICIAL REVIEW)**

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**BETWEEN:**

**OLIVER HUGHES**

**Appellant;**

**and**

**THE DEPARTMENT FOR COMMUNITIES**

**Respondent.**

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**Before: McCloskey LJ, Horner LJ and Huddleston J**

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**Mr Ronan Lavery KC and Mr Malachy Magowan (instructed by PA Duffy Solicitors) for the Appellant**
**Mr Tony McGleenan KC and Ms Laura Curran (instructed by the Departmental Solicitor) for the Respondent**

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**McCLOSKEY LJ (*delivering the judgment of the court*)**

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*Overview*

[1] In the year 2023, is it irrational in the Wednesbury sense for a provision of Northern Ireland legislation to restrict the ability to develop crematoria to city and district councils? That is the central question of law raised by Oliver Hughes (the "appellant"), a resident of Carrickmore, Co Tyrone, who professes to establish a privately operated crematorium in his county borough. At first instance Colton J answered this question in the negative and he appeals to this court in consequence. The respondent, the Department for Communities (the "Department") has, by its Notice pursuant to Order 59, rule 6 of the Rules of the Court of Judicature (NI) 1980 ("the 1980 Rules"), challenged the judge's determination of the issues of standing and delay, each resolved in the appellant's favour.

*The impugned statutory provision*

[2] Article 17 of the Local Government (Miscellaneous Provisions) (NI) Order 1985 (the "1985 Order") provides, in material part:

> "(1) A council may provide and maintain a crematorium.
>
> (2) No cremation shall be carried out in any crematorium provided under this Article until the cremation has been certified to the Department by the council to be complete and to be properly equipped for the purposes of cremations.
>
> (3) The Department may make regulations with respect to crematoria provided under this Article as to—
>
> (a) their maintenance and inspection;
>
> (b) the cases in and the conditions under which cremations may take place;
>
> (c) the disposition or interment of the ashes resulting from cremations;
>
> (d) the forms of the notices, certificates and applications to be given or made before any cremation is permitted to take place;
>
> (e) the registration of cremations;
>
> (f) the notification of cremations to the Registrar General or to registrars of births and deaths;

(g) the fees that may be charged in respect of the issue of any medical certificate required under the regulations.

(4) Regulations under paragraph (3) shall be subject to negative resolution.

(5) A certified copy of an entry in any register of cremations kept under paragraph (3) purporting to be signed by an officer of the council authorised by the council for that purpose or under the seal of the council shall in any legal proceedings be evidence of the cremation to which it relates.

(6) A council may fix the charges or fees for or in connection with cremations in any crematorium provided by it and such charges or fees, and any other expenses properly incurred in or in connection with the cremation of a deceased person, shall be deemed to be part of the funeral expenses of that deceased person.

(7) Nothing in this Article shall authorise a council to create or permit a nuisance.

(8) Any person who—

(a) contravenes any regulations made under paragraph (3); or

(b) knowingly carries out or procures or takes part in the burning of any human remains otherwise than in accordance with such regulations and the provisions of this Article,

shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale. "

The two main features of this discrete stationary regime are these. First, in Northern Ireland only a district/city council is empowered to provide and maintain a crematorium. Second, certain types of conduct relating to the disposal of human remains may attract criminal liability. The Department is the responsible government agency. This is so by virtue of Article 2(2) of the 1985 Order.

***Direct rule legislation in Northern Ireland***

[3] The 1985 Order is an Order in Council made pursuant to section 1(3) of and Schedule 1(1) to the Northern Ireland Act 1974, which provides:

> "(1) During the interim period—
>
> (a) no Measure shall be passed by the Assembly; and
>
> (b) Her Majesty may by Order in Council make laws for Northern Ireland and, in particular, provision for any matter for which the Constitution Act authorises or requires provision to be made by Measure."

The "Constitution Act" is a reference to the Northern Ireland Constitution Act 1973.

[4] The 1974 Act was the response of the Westminster government to political and social turmoil in Northern Ireland. It was rendered necessary by the inability of the Northern Ireland Assembly, a local legislature established for the purpose of legislating in respect of all devolved matters, to survive and flourish. The resulting legislative gap was filled by Orders in Council. As acute instability followed in this jurisdiction, the 1974 Act was succeeded by the Northern Ireland Act 1998 and the Northern Ireland Act 2000.

[5] The Order in Council phenomenon which dominated the many years which followed was the legislating mechanism of so-called "Direct Rule". These instruments were formally made by the Sovereign on the advice of Privy Councillors (viz senior government ministers). They were governed by either the affirmative resolution or negative resolution mechanisms established by the Statutory Instruments Act 1946. In short, they had to be either actively or passively approved by the Westminster parliament. By virtue of parliamentary procedures only some were the subject of debate and debates of this kind were restricted by time limits, normally 1½ hours. Furthermore, the powers of the two chambers – the House of Commons and House of Lords – were strictly limited. Neither could amend the draft measure in question. Only rejection in its entirety was possible.

***The Challenge***

[6] The professed aspiration of the appellant is noted in para [1] above. To this end, his solicitors corresponded with the Department, intimating a legal challenge to Article 17 of the 1985 Order. The grounds of challenge canvassed were irrationality/unreasonableness and infringement of the appellant's human rights protected by section 6 of the Human Rights Act 1998, namely Article 8 and Article 1 of The First Protocol both considered in conjunction with Article 14. The letter highlighted that there is only one crematorium in Northern Ireland, namely Roselawn in Belfast which is operated by Belfast City Council. The response on behalf of the Department joined issue with the appellant's complaints. By his judgment and order,

both dated 03 February 2023, Colton J dismissed the ensuing application for judicial review. The appellant appeals to this court in consequence. There is a cross – appeal by the Department (infra). At first instance Colton J disallowed the human rights grounds at the leave stage, leaving intact the Wednesbury irrationality ground only.

***Factual matrix***

[7] A chronology of material dates and events has been helpfully agreed between the parties. The salient landmarks are the following. It is appropriate to begin with the creation of Roselawn Crematorium. This took effect in 1961 pursuant to the Cremation (Belfast) Regulations (NI) 1961 which were made in accordance with one of the statutory predecessors of Article 17 of the 1985 Order. The next significant event occurred on 1 October 1985 when Article 17 of the 1985 Order came into operation.

[8] In November 2012 outline planning permission was granted for the development of a crematorium in Omagh. While no such development has taken place this authorisation remains extant by virtue of subsequent renewals. Next, in April 2015 the number of councils in Northern Ireland was reduced from 26 to 11 pursuant to the Local Government (Boundaries) Order (NI) 2012.

[9] From 2016 the Department has recognised in principle the possibility of cremation within the private sector. Dialogue with other NI Departments was initiated for the purpose of identifying the Department best equipped to undertake a review of crematorium legislation. This appears to have had no concrete outcome. However, in December 2017 a briefing of the Departmental Permanent Secretary expressed the view that the extant legislation was in need of reform. The necessity of a ministerial policy decision was emphasised. This ministerial briefing further recorded that planning permission for privately operated crematoria in Moira and Dungannon had been granted. A further grant of planning permission was made in August 2018, in the area of Antrim and Newtownabbey Borough Council. This briefing, in common with a further briefing of the Minister in 2019, was unproductive.

[10] In December 2021 the Minister for Communities considered several options relating to cremation policy. A review of the legislation, to include consideration of the possibility of private sector crematoria, was directed. The identification of the appropriate department remained an issue. The Minister was proposing to submit a paper to the NI Executive for its consideration. However, the Executive became dysfunctional with effect from February 2022, a situation which remains unchanged. NI has had no functioning government since then.

[11] There have been two material recent developments. First, in February 2023 Fermanagh and Omagh District Council allocated £6 million in its capital expenditure programme for the development of a crematorium. A decision on whether to proceed with this remains outstanding. Second, in June 2023 Antrim and Newtownabbey Borough Council began to operate its newly developed crematorium.

*The First Instance Judgment*

[12] As recorded in the judgment of Colton J ([2023] NIKB 5) and confirmed by the amended Order 53 Statement (of the 1980 Rules), leave to apply for judicial review was granted on confined grounds. In particular, the proposed human rights challenge was not permitted. As a result, the challenge proceeded on the sole ground of Wednesbury irrationality.

[13] First, the judge resolved the issue of standing (or sufficient interest) in the appellant's favour. He did likewise in relation to the issue of delay in initiating these proceedings. Both matters are the subject of cross-appeal in the respondent's notice. Next, Colton J recorded the following submission on behalf of the Department:

> "…… Orders in Council made under foundational statutes for devolved legislators are properly to be considered as equivalent to Acts of those devolved legislators and should not be subject to judicial review on the common law ground of irrationality."

The riposte on behalf of the appellant entailed recourse to "… the long-established principle that an Order in Council is subordinate legislation": see para [34]. The judge, having highlighted in particular, the Parliamentary procedure applicable to the 1985 Order, concluded that it had the status of subordinate legislation and, hence, was vulnerable to judicial review challenge in the High Court. In the event, this court having raised this issue at the case management stage, the above noted argument on behalf of the Department was not pursued.

[14] In rejecting the irrationality challenge, Colton J reasoned that the threshold for judicial intervention was high mainly because the target of the appellant's challenge had the imprimatur of Parliament. He accepted the submission on behalf of the Department that a democratically elected body must be accorded a considerable margin of appreciation, particularly in the absence of Convention rights considerations. The judge, in terms, accepted that the main purpose of Article 17 of the 1985 Order was to enable all of the councils in Northern Ireland to provide crematoria. He took into account that the impugned statutory prohibition is no longer replicated in other jurisdictions within the British Isles, by virtue of statutory developments during recent years.

[15] Having considered the passage in De Smith, Principles of Judicial Review (9th ed) at para 11-033, Colton J rejected the central argument on behalf of the appellant, namely that the impugned statutory prohibition was lacking in ostensible logic and comprehensible justification, in these terms, at para [93]:

> "Bearing these principles in mind, it is important to look again at what the "decision" under challenge actually is. The focus here is an Order of Council that was proposed

> by a Minister and approved by both Houses of Parliament, albeit not with the same protections as primary legislation. It does, therefore, have a democratic foundation. It is difficult to see how it can be said that in 1985 it was somehow irrational to provide that only Councils would be responsible for the provision of crematoria, subject to regulation by the relevant Department. There are complex procedures which must be complied with in undertaking cremation. This involves close co-operation and co-ordination with a range of other public sector bodies. In Northern Ireland, Councils are the authority through which many public services are delivered which are undertaken by private companies in other jurisdictions, such as waste management and recycling. The challenged provision must have been well within the ambit of decisions open to the Minister and legislature and well within the latitude afforded to it in law."

The judge added that taking into account the activity of the relevant Minister, "… steps are in place …" to review the impugned prohibition and there was a clearly more appropriate forum for addressing the appellant's complaint, observing further that any statutory revisions "… will enjoy democratic legitimacy".

[16] The judge next turned to address a further issue, prompted by the relief pursued by the appellant, at para [97]:

> "Just as it is important to consider the decision that is under attack in this application, it is important to look to the relief that is sought by the applicant. He seeks an order quashing Article 17(1) of the 1985 Order. This would simply remove the provision for a Council to provide and maintain a crematorium. The impact of that would render the operation of the only currently operational crematorium in Northern Ireland unlawful. It would not resolve the Applicant's concern around the inability of private companies to run crematoria, at the risk of committing a criminal offence."

Finally, the judge held that none of the forms of relief pursued by the appellant was achievable given that the Department is not competent to amend or repeal the impugned statutory provision. He stated at para [103]:

> "The respondent is unable to take steps unilaterally to deal with the wider issues and, in particular, the issue raised by the applicant, in the absence of a Minister or Executive."

***The Issues For This Court***

[17] As appears from the opening paragraph of this judgment, the sole question for this court is whether Colton J erred in concluding that Article 17 of the 1985 Order does not qualify for the condemnation of irrationality in the *Wednesbury* sense. The other issues to be addressed are those relating to standing and delay raised by the Department.

[18] The several components of the irrationality submission developed by Mr Lavery KC are these: there is private sector provision of crematoria in neighbouring jurisdictions; there is no public interest in confining the provision of crematoria in Northern Ireland to Councils; some of those who die within this jurisdiction are cremated in the crematoria of neighbouring jurisdictions; Councils have no special expertise in the activity of cremation; the statutory prohibition limits the burial choices available to the local population; and the limited Council provision of crematoria in NI (only two) indicates frustration of one of the purposes of the impugned statutory provision, namely the provision of cremation services beyond the Belfast area.

[19] Mr Lavery further submitted that, evidentially, the parliamentary scrutiny to which the 1985 Order was subjected was limited. In this respect the evidence before the court contains the Hansard record of a debate conducted in the House of Lords on 16 July 1985. This court, while alert to the factual and legal shortcomings of evidence of this nature, notes that at an early hour of the morning the Parliamentary Under-Secretary of State for Northern Ireland, moving the motion for approval of the 1985 Order as a whole, described Article 17 of the 1985 Order as one of a "miscellaneous array of council functions" which would "… update the law on cremation to provide simpler procedures …" The language "modernise and extend the legislation on cremation" is found in other passages.

[20] Mr Lavery further contended that any objection to the appellant's challenge based on considerations of democratic accountability has no traction as there are no functioning institutions of democratic accountability in this jurisdiction at present. It is further argued that the irrationality standard of review should be applied to the circumstances prevailing now and not confined to the circumstances prevailing when the impugned statutory provision was enacted some 30 years ago. Furthermore, the adoption of the latter approach would logically exclude consideration of the various events in the chronology which have unfolded subsequently.

***This Court's Assessment***

[21] It is appropriate to highlight at the outset one of the basic principles of judicial review challenge, a principle which receives surprisingly little attention in practice. There is an onus of proof on the challenging party and the standard of proof is the balance of probabilities. One of the formulations of this principle at the highest judicial level is particularly apposite in the present context:

> "… the task of a subject who endeavours to challenge the validity of …. a regulation is a heavy one … the onus lies upon the party challenging the subordinate legislation to establish its invalidity."

(*McEldowney v Forde* [1971] AC 632, at 649A and 661A.) And in more compendious terms:

> "… the onus is on the [claimants] to establish that the local authority reached a decision that no reasonable authority could have approved."

(*R v Birmingham City Council, ex parte Owen* [1983] 1 AC 578, 597C, per Lord Brightman).

[22] It is especially appropriate to draw attention to this elementary principle in this appeal given the proliferation of bare assertion and notable gaps in the appellant's case. In particular, the suggestions that the impugned statutory provision (a) has operated so as to obstruct the provision of crematoria by Councils other than Belfast City Council and (b) that the development of the new crematorium in the area of Newtownabbey and Antrim Borough Council came about only as a result of the amalgamation of these two Councils are mere assertion. They do not have the necessary supporting evidential foundation. Nor is there evidence upon which the court could reasonably and properly infer that these claims are established evidentially.

[23] A comparable analysis must be applied to the appellant's claim that the ministerial inclination in favour of reviewing the crematorium legislative framework in Northern Ireland supports the view that Article 17 of the 1985 Order is irrational. This claim cannot be sustained for the following reasons: first, it has no evidential foundation; second, the envisaged review will embrace the totality of cremation legislation and will not be confined to Article 17 of the 1985 Order; third, as a matter of well-established legal obligation, the review would have to be conducted with an open mind and all evidence and representations assembled would have to be evaluated without any prejudice or predetermination; and, finally, the willingness of the executive to review a substantial piece of legislation almost 40 years following its introduction in the context of heavily transformed central government and local government arrangements in Northern Ireland does not betoken, even arguably, a recognition that one specific provision of this Order in Council, Article 17 of the 1985 Order, is infected by irrationality. In the abstract, the analysis that one of the possible outcomes of such a review could be the maintenance of the status quo is unimpeachable.

[24] This court can identify nothing in the Hansard materials which supports the appellant's complaint of irrationality. The theme of these materials is that of active

and conscientious parliamentary consideration. The legislative intention underlying Article 17 of the 1985 Order emerges clearly. This provision was designed to modernise and simplify crematorium arrangements in Northern Ireland. The 1985 Order, at its draft stage, was considered by both Houses of Parliament. Notably, within the appellant's wide-ranging arguments there is no specific criticism of the Hansard materials. Mr Lavery, somewhat faintly, drew attention to the factor of limited parliamentary time. No consequential argument was developed. We consider that it would be quite inappropriate for this court of supervisory superintendents to engage in a micro-analysis of matters such as the length of parliamentary debates, the contributions made, the identities of the contributors and votes taken. Such an exercise would in our view be antithetical to the doctrine of separation of powers.

[25] The judge, in our view, was entirely correct to draw attention to the declaratory relief sought. It is framed in these terms:

> "A declaration that the Respondent's decision to maintain that the impugned provisions of the 1985 Order were lawful and their refusal to amend or repeal these provisions was unlawful."

The judge, in substance, highlighted the unsustainability of this remedy. It was – and is – based upon unspoken, and manifestly fallacious, assumptions about the respondent's statutory and constitutional competence. The Department is the responsible organ of government, nothing more. It is not and was not the legislator. It is not competent to amend or repeal Article 17 of the 1985 Order. Its "decision to maintain (etc)" is a misconception. In pre-proceedings correspondence the Department, being the appropriate judicial review respondent, simply took issue with the grounds upon which the appellant was proposing to challenge Article 17 of the 1985 Order. There was no "decision" of any kind. Furthermore, and in any event, the Department could not have done anything about the impugned statutory provision.

[26] We consider the appellant's discrete submission that the judge erred in reckoning the issue of the remedy pursued unsustainable. Every application for judicial review must be considered in all of its component parts. The modern version of the Order 53 Statement (of the 1980 Rules) in the jurisdiction of Northern Ireland makes this abundantly clear. Furthermore, the practice in this jurisdiction in the matter of amending the Order 53 of the 1980 Rules pleading is a liberal one. In this case the Order 53 Statement is in its second incarnation. Careful reflection was required of the appellant's legal representatives following the disallowance of the Convention rights grounds. There has been no amendment of the relief sought, much less any proposal to amend.

[27] Mr Lavery's response that at the hearing below it was suggested that any question of remedy should await the judgment of the court leads nowhere. The High Court was obliged to adjudicate upon the merits of the challenge as constituted. It had no choice to act otherwise. The inescapable juridical reality is that the act of

amending or repealing Article 17 of the 1985 Order must be a legislative one. The impugned provision was introduced by legislative act and can be amended or repealed only by some further legislative act. This is elementary dogma. Government ministers and departments, unless specifically empowered by legislation to do so, are not legally competent to alter any provision of extant litigation.

[28] The appellant, in effect, invites this court to conduct a wide-ranging review of why in the wake of the 1985 Order only one further Council operated crematorium has been developed in Northern Ireland and to conclude that this fact is a strong indicator of irrationality in the impugned legislation. It is not the function of this court of supervisory jurisdiction to conduct the kind of sweeping inquiry in substance suggested. Nor is this court equipped with the extensive evidence from a multiplicity of sources which such an exercise would require. Furthermore, the main hallmark of the appellant's contention is, in our view, conjecture.

[29] To summarise, the hurdle to be overcome by any litigant seeking to establish that a provision of subordinate legislation of this kind which has been enacted following parliamentary debate and scrutiny is vitiated by Wednesbury irrationality will invariably be an elevated one. Every legal challenge of whatever species is unavoidably contextual. This court has considered carefully all of the material contextual facts and factors bearing on this challenge. For the miscellany of reasons found in paras [22]–[28] above, concurring with Colton J, our firm conclusion is that the appellant's case falls demonstrably short of qualifying for the judicial condemnation of Wednesbury irrationality viz-a-viz Article 17 of the 1985 Order. The appeal must be dismissed accordingly.

***The first cross-appeal issue: standing***

[30] In many judicial review cases there is no issue about the standing (or "sufficient interest") of the challenging party. In some cases, a minority, it must be apparent from the outset to the putative litigant and their legal representatives that standing will be a live, contentious issue. This is incontestably one such case. In such circumstances the appellant would – or as a minimum should – have been aware that the evidence to be provided by him in attempting to discharge his burden of establishing his standing would be subjected to close scrutiny. Furthermore, it will have come as no surprise that at the preliminary leave stage the Department intimated its contention that the appellant lacked standing.

[31] This gave rise to two notable developments. First, the appellant swore a second affidavit designed solely to address his standing. Second, both parties' counsel compiled skeleton arguments addressing this and other issues. On behalf of the appellant, it was asserted in written argument that he is a rate payer and contended that this sufficed to establish his standing. This assertion was repeated. This repeated assertion was made in this way after the appellant had sworn his second affidavit. In this there is an averment that he does not pay rates. In his judgment Colton J

determined the standing issue in favour of the appellant on two grounds, namely (a) he had a "genuine interest" in developing a crematorium and (b) –

> ".. as a rate payer [he] has an interest in the provision of a crematorium in his area …"

See para [13].

[32] As demonstrated above, the second of these two reasons is erroneous. This error is unsurprising on two grounds. First, there was a misstatement, repeated, in counsels' skeleton argument. Second, the relevant exhibit to the appellant's second affidavit is manifestly incomplete, being only the first page of a four page letter from the relevant government agency, the Department of Finance (Land and Property Services). This incomplete document does disclose that the appellant was in receipt of Housing Benefit. The terminology "rate relief" indicates clearly that the appellant was the beneficiary of a rates payment dispensation.

[33] One of the two pillars of the judge's determination of the issue of standing is, therefore, untenable. We turn to consider the other. The appellant describes himself in his first affidavit as "unemployed." He therefore has no income from employment. Having regard to the evidence relating to his receipt of Housing Benefit and his relief from paying rates this court readily infers that he has no worthwhile financial or other resources. If it were otherwise, it would have been incumbent upon the appellant, in the discharge of his duty of candour to the court, to disclose same fully. Given these factual realities it is unsurprising that there is no evidence of a business plan to develop a crematorium or of even elementary enquiries about securing finance. The internet research materials and associated letter were generated by his son. Strikingly, it was his son – and not the appellant – who wrote to the manufacturer/supplier concerned. This discrete evidence raises a serious question regarding whose interest is in play in these proceedings.

[34] In his second affidavit the appellant avers:

> "I also make clear that the reason I have been unable to take more steps than I have done is that the law prohibits me from doing this and in fact makes it a criminal offence. I do not therefore see what more I could reasonably have done to demonstrate an interest."

These averments are strikingly silent on the obviously material issues of personal resources, economic ability, financial viability and even elementary market research. Furthermore, they fail to engage with the fact that the preparation of a business plan or the making of enquiries about possible finance would have entailed no criminality. They also smack of sworn argument, which is prohibited.

[35] The reservations and concerns expressed in the immediately preceding paragraphs are multiplied when one turns to consider the appellant's evidence about his interaction with Omagh District Council. This amounts to an assertion of two conservations with Council employees of unspecified designation. There is no averment about the circumstances of these conversations. Nor is there even an approximate indication of their dates ("a number of years ago"). Furthermore, the appellant's affidavits fail to address the obvious question of why the aforementioned letter from the putative crematorium equipment manufacturer/supplier postdated the PAP letter transmitted by his solicitors by some two months. The judge, correctly, described the appellant's affidavit evidence as "vague."

[36] Given the critique and analysis in the preceding paragraphs, this court finds itself unable to agree with the second reason proffered by the judge in support of the appellant's standing, namely that he has "… a genuine interest in establishing a crematorium as a commercial business …" As to the "genuine interest", this court's analysis of the affidavit evidence raises serious questions which have not been satisfactorily addressed by the appellant. As to the "commercial business" intention, the evidence demonstrates that this is manifestly devoid of substance. The first of the cross-appeal grounds succeeds in consequence.

***The second cross-appeal issue: delay***

[37] Colton J made two determinations regarding the issue of delay under Order 53, rule 4 of the 1980 Rules. First, he ruled that the appellant had failed to comply with the three-month time limit. We consider that he was incontestably correct in doing so. Furthermore, the appellant does not challenge this determination on appeal. The second determination by the judge was to extend time, per para [26]:

> "… on the grounds that there is a public interest in this matter being considered by the court."

In another passage, Colton J added:

> "… the proceedings have highlighted that this is an issue of concern to several councils and, indeed, to the [Department]."

[38] This court does not question the judge's assessment that an issue of public interest had been raised in the proceedings initiated by the appellant. Whether this was sufficient to warrant an extension of time is debatable. It cannot be gainsaid that other judges would have taken a stricter line. Furthermore, the analysis which this court has undertaken in paras [31]–[36] above would favour a refusal to extend time. However, it is incumbent upon an appellate court to recognise that there is scope for differing judicial views in every case where an issue of extending time arises. The resulting determination in every case involves an exercise in judicial discretion. This

per se means that an appellate court will be slow to interfere with the first instance court's exercise of such discretion in any given case.

[39] The submissions of Mr McGleenan KC and Ms Curran contain a cogent critique of the appellant's affidavits from the perspective of the delay issue. They invoke, persuasively, the first instance decision in *Re McCabe* [1994] NIJB 27, pp28– 29 and the decision of this court in *Re Laverty* [2015] NICA 75, at para [21]. In addition, they highlight, pertinently, that whereas the appellant's affidavits are silent on the issue of public funding, (a) proceedings were not initiated until after the appellant had secured such funding and (b) the corresponding justification for delay was proffered in an affidavit sworn by the appellant's solicitor and not the appellant. Linked to this, there has been a manifest failure on the part of the appellant to engage with a succession of decisions in this jurisdiction bearing on this issue: *Dillon v Chief Constable* [2016] NICA 15, *Re Osbourne's Application* [2018] NIQB 44, *Re Fionda (A minor)* [2018] NIQB 51 and *Re Watterson's Application* [2021] NIQB 16, at paras [10]–[15] especially. It follows inexorably from the foregoing that the exercise of focusing the notional lens on the appellant strongly favoured a refusal to extend time.

[40] The judge's reason for extending time is entirely unrelated to the appellant. Properly analysed, it is based on the fundamental dogma that these are public law proceedings entailing no lis inter-partes. While the appellant was unquestionably fortunate to overcome this major hurdle, this court nonetheless considers that the exercise of judicial discretion under scrutiny had a sustainable foundation. It follows that the second aspect of the Department's cross-appeal must be dismissed.

[41] We would add that in all cases raising issues under Order 53, rule 4 of the 1980 Rules, it is to be expected that practitioners will draw to the attention of the court the decision of this court in *Re Allister's Application* [2022] NICA 15 at paras [567]–[600].

***Disposal***

[42] For the reasons given:

(i) The substantive appeal is dismissed, and the decision and order of Colton J are affirmed.

(ii) The Department's cross-appeal on the issue of standing succeeds.

(iii) The Department's cross-appeal on the issue of delay is dismissed.