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[2024] UKSC 31

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Regulators must regulate lawfully: The availability of private law claims and remedies does not oust judicial review (In re exp McAleenon) ([2024] UKSC 31)

Tim Green KC & Freya Foster

In this important recent decision the Supreme Court has found that in respect of an established nuisance, even where there were available to the claimant alternative private law remedies (nuisance and private prosecution) these did not oust an application for judicial review against the public authority in respect of an allegedly unlawful failure to exercise regulatory powers.

THE FACTS

1. Ms McAleenon lived close to a landfill site in Lisburn, south-west of Belfast, and claimed that from early 2018 she and her family's mental and physical health had been impacted by noxious odours and gases emanating from the site, which was privately run (by Alpha Resource Management Ltd – **Alpha**). In January 2021 Ms McAleenon sent pre-action letters to her local authority, Lisburn and Castlereagh City Council (**LCCC**) and the Northern Ireland (**NI**) Department of Agriculture, Environment and Rural Affairs

(**the Department**) asking them to exercise their regulatory powers to compel Alpha to manage the site more effectively, including by eliminating the fumes said to affect Ms McAleenon's property.

2. Unsatisfied with the response, she commenced judicial review proceedings against the LCCC, the Department, and the NI Environment Agency (**NIEA**) – the Defendants. Ms McAleenon claimed that LCCC had breached its statutory duty to investigate her complaints and that the Department and NIEA had failed to apply relevant limits and guidelines for the permit under which Alpha operated the site

THE ISSUE

3. LCCC's response to Ms McAleenon claim included a defence that given the aim of her judicial review was to end the nuisance caused by the site, there were two suitable alternative remedies available to her in the form of:

   i. a private prosecution under section 70 of the Clean Neighbourhoods and Environment Act (Northern Ireland) 2011 (**the private prosecution**), or

   ii. a civil law action for common law nuisance (**the nuisance claim**).

FIRST INSTANE DECISIONS: HUMPHREYS J

4. At the full hearing, the Defendants submitted that they had a defence in evidence to the claim on its merits, but in the alternative also maintained that Ms McAleenon had a suitable alternative remedy in the form of the nuisance claim or the private prosecution. The first instance judge, Mr Justice Humphreys, was provided with a significant volume of expert evidence on environmental impact and public health risks. He dismissed the

claim on the merits, but also rejected the alternative remedies defence ([2022] NIQB 39), noting:

> *The instant case concerns the public law issues of regulation and enforcement. Any proceedings in the magistrates' court would centre on the issue of whether a nuisance has been caused. Whilst there is an obvious overlap between the two questions, the two species of litigation have quite different purposes. In my conclusion, a member of the public with sufficient interest is entitled to hold regulators to account by pursuing any public law wrongdoing. It would be an unfortunate and unattractive position if a regulator could effectively be immune from suit in this sphere by reference to alternative proceedings in the magistrates' court.* (at §92).

5. Ms McAleenon appealed the High Court's decision against her on the merits. At the same time the Defendants cross-appealed the judge's ruling on, *inter alia*, the question of whether or not the availability of a suitable private law alternative remedy (private prosecution or nuisance) ousted Ms McAleenon's claim to judicial review.

THE COURT OF APPEAL

6. The NI Court of Appeal (**NICA**) decided to hear the issue of suitable alternative remedy without hearing oral argument on the merits of her claim ([2023] NICA 15). The NICA (Lady Chief Justice Keegan, Treacy and Horner LJJ) held that the private law claims were suitable alternative remedies available to Ms McAleenon capable of giving her the relief she sought. Moreover, insofar as she sought to complain about the conduct of the regulators, she could also complain to the NI Public Services Ombudsman (the **Ombudsman**) (at §57-61).

7. Those conclusions were reached against the background of the NICA's concern about the significant conflicts of expert evidence before Humphreys J (at §38-42):

> *In the present judicial review application given that the experts on each side remain irredeemably divided, the only course a court could take would be to accept the expert evidence filed on behalf of the respondents who did not have the onus of proof. If the expert evidence is approached in this manner, the whole basis of the appellant's case is fatally undermined. We consider that this would be an unsatisfactory way of resolving the contentious scientific debate put before this court.* (at §42).

8. The NICA concluded that Ms McAleenon's claim was unsuited to judicial review for reasons, including the "*plethora of experts retained on each side who cannot agree*" and absence of cross-examination, such that the 'unsatisfactory' approach identified of preferring the Defendants' evidence would have had to be followed (at §74).

SUPREME COURT

9. The Supreme Court, with Lord Sales and Lord Stephens delivering the unanimous judgment of the Court, overturned the conclusion of the NICA. In doing so it reiterated a number of key principles underpinning the judicial review of regulators.

Judicial Review of Regulators

10. First, the Court emphasised the nature of judicial review:

> *Judicial review is directed to examination of whether a public authority has acted lawfully or not. This means that the general position is that the focus of a judicial review claim is on whether the public authority had proper grounds for acting as it did on the basis of the information available to it. […] [I]t is*

> *for the public authority to determine on the information available to it the facts which are relevant to the existence and exercise of its powers, subject to review by a court according to the usual rationality standard. The court has a supervisory role only.* (at §40).

11. Second, it followed from that proposition that judicial review is supposed to be "*a speedy and effective procedure, in respect of which disputes of fact which have a bearing on the legal question to be determined by the court - that is, whether the public authority has acted lawfully - do not generally arise.*" (at §41). This, combined with the duty of candour, was such that a judicial review claim can normally be resolved without resolving disputed questions of fact (at §41).

12. In this context the NICA had erred in finding that resolving Ms McAleenon's claim would require a court to make definitive findings of fact. The proper approach would involve the court assessing whether the defendants had done enough to justify their decisions applying the usual rationality standard (or where the European Convention on Human Rights (**ECHR**) was engaged, the appropriate proportionality analysis). This would involve an analysis of the quality of the investigation conducted and the information available to the defendant regulators as a result in order to assess whether they had acted lawfully (at §44).

13. Third, this approach was not impacted by the involvement of a claim based on article 8 ECHR, notwithstanding that Ms McAleenon sought compensation in respect of the breach alleged. The court's role remained "*essentially one of review*" and even if required to resolve disputed facts, oral evidence would not necessarily be required (at §45-47).

The suitable alternative remedy principle

14. The Supreme Court reaffirmed the existence of the suitable alternative remedy principle, emphasising that the judicial review procedure itself is discretionary and that "[i]*f other means of redress are conveniently and effectively available, they ought ordinarily to be used before resort to judicial review*" (at §50). However, the Supreme Court noted that there was no such avenue open to Ms McAleenon – there was no statutory right of appeal in respect of a failure by the defendant regulators to carry out their public law duties. While there were other forms of legal proceedings available, it was for Ms McAleenon to choose which claim to bring:

> *She was entitled to assess that her overall objective might best be promoted by ensuring that the defendant regulators did their job properly, as she saw it, and brought their more extensive resources to bear on the problem. It was not for the Court of Appeal to say that she could not sue them, because she could instead bring different claims against Alpha.* (at §54).

15. The Court endorsed Humphreys J's observations (noted at paragraph 4 above) holding that "[p]*ublicly funded regulators are given the resources to take effective action where individual citizens may be unable to do so. It therefore cannot be a good answer for such a regulator to say in response to a judicial review claim to require it to carry out its duty in the public interest that the individual member of the public should take action themselves to address the problem.*" (at §58). Indeed it considered it inappropriate for a public authority to invite the court to point to third parties with a view to avoiding an order being made against it (at §61).

16. The Supreme Court also reaffirmed the general position that the fact that a person can complain to an ombudsman does not affect a person's right to bring a judicial review claim (at §63).

ANALYSIS

17. It is important to note that the Supreme Court appeared cautious about the merits of Ms McAleenon's substantive judicial review claim (a matter that was remitted back to the NICA – see §64). However, even bearing this in mind, this decision potentially opens (or widens) the door to an increased use of judicial review proceedings as a route to challenge to the decisions of regulators, including those that act in areas underpinned by scientific and technical expertise. Public authorities are given powers and resources to act in the public interest and this judgment is authority that the availability of private law rights are not a substitute for lawful action by a public regulator.

18. The clear message from the Supreme Court appears to be that public law exists to ensure public decision-making bodies act lawfully. A private remedy, such as damages or an injunction following a successful nuisance claim or a private prosecution, is not a substitute for a lawful decision made by a regulator. Nor is the availability of a complaint to the Ombudsmen. Even where alternative legal remedies exist to claimants, if the decision complained of was unlawful (e.g. unreasonable, irrational, failed to take into account relevant considerations) then the message from the Supreme Court is that the Administrative Court should not shy away from intervening to ensure that regulators are acting within the boundaries of public law.

Tim Green KC

Freya Foster

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