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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY GORDON ROBINSON FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE DEPARTMENT OF INFRASTRUCTURE

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The Applicant, Gordon Robinson, appeared in person
Philip McAteer, of counsel (instructed by Department Solicitor's Office) for the Respondent

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SIMPSON J

Introduction

[1] Those of us who drive around the roads of Northern Ireland will have seen, from time to time, the centre islands of roundabouts or the verges of roads planted out in attractive schemes. Such work is generally done in one of two ways. Either a business (or other organisation) arranges to plant out the area and carries out the work itself, or it is carried out by local council employees and the business (or, sponsor) pays for the work. Either way the sponsor will frequently want to have some recognition of its work or its financial contribution to the work. This will usually be marked by a small sign erected at the planted area carrying the name, and sometimes the logo, of the sponsor which carried out or paid for the planting in the area. This judicial review challenge arises from the presence of those signs.

[2] The applicant is a now-retired self-employed events organiser. In 2017 he had an issue with the Department for Infrastructure because he placed a sign, relating to his own business, on a roundabout. He was forced to remove the sign. This led him to research the legal position and as a result of that research he initiated judicial review proceedings against the Department ("the respondent") in October 2018. Those

proceedings challenged a policy document issued by the respondent's predecessor on 1 March 2000, namely the Roads Service Policy & Procedure Guide (RSPPG) E004, entitled "Privately Funded Planting of Roundabouts, Road Verges and DfI Car Parks."

[3] The reason behind that policy was explained as follows (para 1.3.1):

> "As part of the Department's overall objective to enhance the living environment, Roads Service will encourage improvement to the appearance of public roads and car parks by permitting controlled planting of roundabout central islands, road verges and suitable spaces within public car parks which are within the Department's ownership. As the funding of such planting is not currently a priority within the road authority's responsibilities, its provision can most readily be accommodated by sympathetic consideration of proposals presented by District Councils and privately funded sources…"

[4] At para 2.6 it was stated, under the rubric "Acknowledgement signs" — "Advertising per se will not be permitted. In order to encourage private sponsorship, however, acknowledgement signs will be permitted."

[5] It was (and is) the applicant's case that all such 'acknowledgement signs' constitute advertisements.

[6] On 19 December 2019 Keegan J (as she then was) gave judgment in the challenge to that policy (see *Robinson's (Gordon) Application* [2019] NIQB 104). At para 2 of that judgment she identified the two questions to be answered by the court as being:

> "(a) Can acknowledgement signs form part of a package of road improvement works carried out under Article 43 of the [Roads (Northern Ireland) Order 1993] such as to be lawful pursuant to the provision? and
>
> (b) In any event can the Department grant authority for such signs under Article 87 of the 1993 Order?

[7] Article 43 of the 1993 Order provides:

> "**General power of improvement**
>
> 43.—(1) Subject to the provisions of this Order, the Department may carry out any work for the improvement

> of a road where it appears to the Department expedient to do so for the purposes of facilitating road traffic.
>
> (2) In this Article "improvement" (without prejudice to the generality of that expression) includes—
>
> (a) the widening, re-aligning and re-shaping of roads; and
>
> (b) the laying out, planting, maintenance and protection of trees, shrubs and grass margins in and beside roads."

[8] The relevant part of article 87 reads:

> **"Advertisements, pictures, signs, etc**.
>
> 87.—(1) Any person who, without lawful authority—
>
> (a) paints or otherwise inscribes or affixes any picture, letter, sign or mark; or
>
> (b) displays any advertisement,
>
> upon the surface of a road or upon any tree, structure or other works in or on a road, shall be guilty of an offence and liable on summary conviction to a fine …"

[9] Keegan J answered question (a) in the affirmative and question (b) in the negative. In relation to question (a) she said (para 27):

> "… I consider that Article 43 should be given a wide and purposive interpretation. It is clear to me that the improvement of roads encapsulates the scenario of planting at roundabouts, and incidental to that is the erection of an acknowledgement sign which I do not see as problematic at all…In my view Article 43 does provide legal authority for acknowledgement signs."

[10] Noting that the Department "accepts that the policy [RSPPG E004] is old and needs revision" she made the point that any "revised policy will obviously have to properly define what an acknowledgement sign means, as opposed to advertising. That is a matter for the policy makers…"

[11] She dealt with the disposal of the judicial review challenge in the following way:

> "[29] … I will follow the suggestion of Mr McAteer and stay these proceedings to allow a new policy to be devised and the formal application of this ruling will be suspended to allow for that to happen. The benefit of allowing the policy change to progress is that it will be open to consultation. That is in the public interest…"
>
> [30] … the policy needs to be adapted and the law needs to be clear and transparent for all."

[12] On 12 August 2022 the respondent published the revised policy RSPPB E004.

[13] On 23 August 2022 the applicant issued the present judicial review challenge to the revised policy. The Order 53 Statement seeks:

> "A quashing order [that the policy] is unlawful, ultra vires and of no force or effect" (para9(i)) and
>
> "A declaration that the decision by the [respondent] not to consider an Acknowledgement Sign as an Advertisement as defined by the Planning Act (Northern Ireland) 2011 … is unlawful, ultra vires and of no force or effect" (para 9(ii)).

[14] In para 7 he seeks the relief "in that the Department have failed to differentiate between acknowledgement signing and advertising signage" and in para 8 he asserts that such a failure renders the policy "unreasonable, illegal, unjust and unfair."

[15] I wish to take this opportunity to commend Mr Robinson for the respectful way in which he made his succinct and focused submissions. He clearly had gone to a great deal of trouble carrying out research, all of which proved to be very helpful to the court. As a lay person, in the sense of having no legal training, he presented his case to an impressively high standard. I am also grateful to Mr McAteer for the way in which his submissions were made and I express my gratitude to those who instructed Mr McAteer - as, very courteously, did Mr Robinson - for the way in which they assisted Mr Robinson, who, perforce, has only limited administrative resources, in the preparation of the case.

The applicant's case

[16] Mr Robinson makes the case that of all the jurisdictions in the UK, and compared with the position in the Republic of Ireland, Northern Ireland is out of kilter. All those jurisdictions consider any such signage similar to the signage discussed in this case as advertisements and, therefore, there is a requirement for planning approval for the erection of such a sign. Only in Northern Ireland is there a species of sign known as an 'acknowledgement sign.'

[17] He made the point that article 87 of the Road Traffic (Northern Ireland) order 1993 ("the 1993 Order") makes it an offence to display any advertising sign without lawful authority, and notes that the Department has no power to grant authority for advertising signs on the public road or verges. In one of his skeleton arguments he records the respondent as admitting that it has no such power.

[18] He took the court to a number of definitions of advertising in various statutory provisions, particularly in the field of planning, and also to various aspects of road traffic signage. While I have read all of these, it is not necessary to set out all the definitions for the purposes of this judgment — but they included section 250 of the Planning Act (Northern Ireland) 2011; The Planning (Control of Advertisements) Regulations (Northern Ireland) 2015, Regulation 4 and Schedule 1; the definition of 'Traffic Signs' in article 28 of The Road Traffic Regulation (Northern Ireland) Order 1997; the Traffic Signs Regulations (Northern Ireland) 1997; and the Traffic Signs Manual.

[19] Mr Robinson also referred to a number of legal authorities dealing with the definition of advertising and associated concepts. He referred in particular to the judgment of the Divisional Court in *Butler v Derby City Council* [2005] EWHC 2835 (Admin). In that case the appellant (by way of case stated) had been convicted in the magistrates' court of displaying an advertisement without appropriate consent. The issue before the Divisional Court was whether a banner, with its wording (as set out in para 3(c) of the judgment) constituted an advertisement. Between paras 18 and 23 the court dealt with what amounted to an advertisement, and held that the banner was an advertisement. Again, although I have read the entirety of the judgment, it is not necessary to set out the whole of those paras.

[20] Mr Robinson also drew the court's attention to the decision in *Taylor v Secretary of State for Scotland and Another* [1997] SCLR 43 (an appeal to the Inner House following a finding that the flying of national flags at the appellant's showroom constituted an unauthorised display of advertisements) and a decision of the Worcester Consistory Court [2019] ECC Wor 4 (whether a proposal to erect an illuminated cross on a church during Holy Week would require planning approval).

[21] All of these submissions were designed to demonstrate to the court that whatever they may be called by the respondent, acknowledgement signs are advertisements, no more and no less. As the court in *Butler* said:

> "One knows an elephant (or advertisement) when one sees it because it is in the nature of an elephant (or advertisement)."

That is a sentiment with which Mr Robinson would wholeheartedly agree.

The respondent's case

[22] The respondent says, first, that in light of the decision of Keegan J in relation to article 43 of the 1993 Order there is a lawful basis for the carrying out of such schemes, including the associated signage. Secondly, that while some acknowledgement signs may, indeed, be advertising, that is not the question which this court is called upon to decide.

[23] This is a challenge to the lawfulness of the revised policy, and the respondent submits that in light of the decision of the Supreme Court in *A* (with which I deal in detail below) there is no basis for the court to hold that the policy is unlawful.

The approach to a challenge to a government policy document

[24] Mr Robinson's challenge, as articulated in the Order 53 Statement, is that the policy is "unlawful, ultra vires and of no force or effect.'

[25] In 2021 the Supreme Court took the opportunity in two cases, heard by the same constitution of the court, to provide guidance to courts as to the standards which a court should apply when faced with a judicial review challenge to the lawfulness of a government policy document. The cases are *R(A) v Secretary of State for the Home Department* [2021] UKSC 37 and *R(BF) (Eritrea)) v Secretary of State for the Home Department (Equality and Human Rights Commission intervening)* [2021] UKSC 38.
It was in the decision in *A* that the court set out the principles governing the matter. It is those principles which I have to apply when considering Mr Robinson's challenge to the policy. It will be necessary to deal in some detail with *A* in the course of this judgment.

[26] At para 3 the Supreme Court noted that: "Policies are different from law. They do not create legal rights as such."

[27] The policy document in *A* was the Child Sex Offender Disclosure Scheme Guidance issued in 2010 by the Secretary of State, in exercise of common law powers. The appellant in *A* brought a challenge to the Guidance in 2012. The Divisional Court held that the Guidance was unlawful because it did not include a requirement that the police consider whether any person about whom disclosure might be made should be asked if he wished to make representations. As a result of the court's decision, the Guidance was revised in 2013. The challenge which made its way to the Supreme Court was to the revised policy document. To that extent there are similarities with this case.

[28] The appellant's challenge in *A* (see para 29) was that the Guidance was "not sufficiently specific in the directions it gives regarding when the subject of a disclosure request should be given an opportunity to make representations before a decision is made to give disclosure." The appellant's counsel submitted "that this creates a risk that a decision-maker may not provide such an opportunity when required in law to do so. This is unacceptable and means that the Guidance is unlawful. Also, by reason

of its general lack of specificity, [counsel] says that some statements in the Guidance could be regarded as positively misleading."

[29] The Court of Appeal (see para 30) had "applied a test of inherent unfairness as illustrated by *Tabbakh*" [*R(Tabbakh) v Staffordshire and West Midlands Probation Trust* [2014] EWCA Civ 827]. However, the Supreme Court considered that "it is appropriate to begin the analysis with the earlier decision of the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112."

[30] Between paras 30 and 37 the Supreme Court discussed various passages in the decision in the House of Lords in *Gillick*.

[31] At para 33 the Supreme Court noted Lord Scarman as saying in *Gillick*: "the House must be careful not to construe the guidance as though it was a statute or even to analyse it in the way appropriate to a judgment."

[32] In the same para the court described as an "important passage" what Lord Scarman had said at page 181F:

> "It is only if the guidance permits or encourages unlawful conduct in the provision of contraceptive services that it can be set aside as being the exercise of a statutory discretionary power in an unreasonable way."

[33] At para 34 the Supreme Court said that from what Lord Scarman had said it "was explicit that it was not the role of policy guidance to eliminate all uncertainty regarding its application and all risk of legal errors by doctors. It was to be read objectively, having regard to the intended audience." Further, in the same para the Supreme Court, rejecting a submission by counsel for the appellant, said "the drafter of a policy statement is not required to imagine whether anyone might misread the policy and then to draft it to eliminate that risk."

[34] At para36 the Supreme Court noted that Lord Bridge:

> "… was troubled by the basis on which judicial review could be sought of the guidance. He pointed out that it had no statutory force, was purely advisory in character and doctors were, as a matter of law, in no way bound by it; he therefore did not agree that the *Wednesbury* test provided an appropriate framework for the court in this context (pp 192B-193A). Instead, he explained the court's power of review in this way: 'if a government department, in a field of administration in which it exercises responsibility, promulgates in a public document, albeit non-statutory in form, advice which is erroneous in law, then the court …

> has jurisdiction to correct the error of law by an appropriate declaration.'"

[35] In para 38 of the judgment the Supreme Court held that "*Gillick* sets out the test to be applied." The court went on to say:

> "It [the test] is best encapsulated in the formulation by Lord Scarman at page 182F (reading the word "permits" in the proper way as "sanction" or "positively approve") and by adapting Lord Templeman's words: does the policy in question authorise or approve unlawful conduct by those to whom it is directed? So far as the basis for intervention by a court is concerned, we respectfully consider that Lord Bridge and Lord Templeman were correct in their analysis that it is not a matter of rationality, but rather that the court will intervene when a public authority has, by issuing a policy, positively authorised or approved unlawful conduct by others. In that sort of case, it can be said that the public authority has acted unlawfully by undermining the rule of law in a direct and unjustified way. In this limited but important sense, public authorities have a general duty not to induce violations of the law by others."

[36] Two further important paras follow:

> "39. The approach to be derived from *Gillick* is further supported by consideration of the role which policies are intended to play in the law. They constitute guidance issued as a matter of discretion by a public authority to assist in the performance of public duties. They are issued to promote practical objectives thought appropriate by the public authority. They come in many forms and may be more or less detailed and directive depending on what a public authority is seeking to achieve by issuing one. There is often no obligation in public law for an authority to promulgate any policy and there is no obligation, when it does promulgate a policy, for it to take the form of a detailed and comprehensive statement of the law in a particular area, equivalent to a textbook or the judgment of a court. Since there is no such obligation, there is no basis on which a court can strike down a policy which fails to meet that standard. The principled basis for intervention by a court is much narrower, as we have set out above.
>
> 40. There are further reasons which indicate that this is the appropriate standard. If the test were more

> demanding, there would be a practical disincentive for public authorities to issue policy statements for fear that they might be drawn into litigation on the basis that they were not sufficiently detailed or comprehensive. This would be contrary to the public interest, since policies often serve useful functions in promoting good administration. Or public authorities might find themselves having to invest large sums on legal advice to produce textbook standard statements of the law which are not in fact required to achieve the practical objectives the authority might have in view. Also, if the test were of the nature for which [counsel] contends, the courts would be drawn into reviewing and criticising the drafting of policies to an excessive degree. In effect they would have a revising role thrust upon them requiring them to produce elaborate statements of the law to deal with hypothetical cases which might arise within the scope of a policy. Such a role for the courts cannot be justified. Their resources ought not to be taken up on such an exercise and it would be contrary to the strong imperative that courts decide actual cases rather than address academic questions of law."

[37] In para 41 the court concluded that the:

> "… test set out in *Gillick* is straightforward to apply. It calls for a comparison of what the relevant law requires and what a policy statement says regarding what a person should do. If the policy directs them to act in a way which contradicts the law it is unlawful. The courts are well placed to make a comparison of normative statements in the law and in the policy, as objectively construed. The test does not depend on a statistical analysis of the extent to which relevant actors might or might not fail to comply with their legal obligations."

[38] Finally, for the purposes of this judgment, in para 46 the court said:

> "In broad terms, there are three types of case where a policy may be found to be unlawful by reason of what it says or omits to say about the law when giving guidance for others: (i) where the policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way (i.e. the type of case under consideration in *Gillick*); (ii) where the authority which promulgates the

> policy does so pursuant to a duty to provide accurate advice about the law but fails to do so, either because of a misstatement of law or because of an omission to explain the legal position; and (iii) where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position."

The revised policy document

[39] With the above principles and guidance in mind I turn to consider the contents of the policy document under challenge in this case.

[40] In para 1, under the rubric 'Purpose', para (c) states that the policy "sets out the procedures to be followed when approving the planting and maintenance of … DfI land by third parties." Para 1 also includes, *inter alia*, definitions of 'Acknowledgement', 'Acknowledgement sign' and 'Advertisement.' The definition of advertisement is taken from the Planning Act (Northern Ireland) 2011. Third parties are defined as "People or organisations external to the Department, such as individuals, applicants, sponsors, community groups, businesses etc."

[41] Paras 2 to 4 provide the background to the policy.

> "2. In order to enhance the appearance and maintenance of roundabouts, road verges and certain other areas, DfI Roads will allow improvement by third parties to the appearance of public roads and car parks by permitting certain planting and maintenance of roundabout central islands, road verges and suitable spaces within public car parks which are within the Department's control.
>
> 3. Such improvements can most readily be accommodated by sympathetic consideration of proposals presented either by local Councils or privately funded sources directly to the Department. Examples of privately funded sources can include shopping centres, landscaping companies, local businesses and community groups.
>
> 3. In approving such privately funded planting schemes, the procedures that follow shall apply."

[42] Two of the anticipated benefits deriving from the implementation of the policy are identified in para 6 as - "A standard framework for the management of privately funded planting schemes" and "The effective use of resources and a decision making process that is robust and defensible."

[43] Paras 11 to 15 note the power in article 43 of the 1993 Order and the judgment of Keegan J following the challenge to the original policy. Para 17 states that all "new and renewal applications shall comply with" this policy.

[44] Para 18 states:

> "Responsibility for local planning rests with the local Council. Sponsors should contact the relevant Council to ascertain whether a planning application is required for any improvement works, including associated signage."

[45] Paras 19 and 20 explain how the policy works, noting e.g. that the local council may manage the work on behalf of the sponsor or the sponsor may carry out the work itself.

[46] Para 27 provides (where material to this challenge)

> "Where the local Council wants to manage the private planting … it shall be responsible for managing all the related operational aspects of the function, including:
>
> a. confirming that the scheme proposals are acceptable from a planning perspective.
>
> …"

[47] Para28 provides (again where material)

> "Where the sponsor comes directly to the Department, the sponsor will be responsible for:
>
> a. providing evidence to the Department that the scheme proposals are acceptable from a planning perspective.
>
> …"

[48] Paras 37 to 41 deal with 'Acknowledgement Signs', and appendix A contains a diagram to which such signs must conform.

Discussion

[49] Mr Robinson's challenge as formulated in the Order 53 Statement is to the lawfulness of the policy, essentially because the respondent has failed to define or consider "an Acknowledgement Sign as an Advertisement."

[50] In light of the decision in *A*, and the approach which is to be taken by the court, I do not consider the policy to be unlawful. The policy provides that anyone carrying out such a planting scheme as is permitted by article 43 of the 1993 Order and as provided for in the policy, be they a local council or a third party person or organisation, must ensure that any signage complies with planning regulation. This appears, clearly, from paras 18, 27a and 28a of the policy document. Thus, it will be for the appropriate planning authority to decide whether any particular proposed sign requires planning approval on the basis that it is an advertisement.

[51] As noted above the Supreme Court in *A* identified "three types of case where a policy may be found to be unlawful by reason of what it says or omits to say about the law when giving guidance for others." I will deal with each.

[52] First, "where the policy includes a positive statement of law which is wrong, and which will induce a person who follows the policy to breach their legal duty in some way (ie the type of case under consideration in Gillick)." In my view the policy in the present case does not contain any incorrect statement of the law. The legal authority for the carrying out of such schemes, to include the acknowledgement signage, is correctly identified as article 43 of the 1993 Order, as was found by Keegan J in the judgment in Mr Robinson's initial challenge. A hyperlink to the judgment is provided in the policy document.

[53] Secondly, "where the authority which promulgates the policy does so pursuant to a duty to provide accurate advice about the law but fails to do so, either because of a misstatement of law or because of an omission to explain the legal position." If the respondent in this case had such a duty, which was not specifically addressed before me and which I doubt, it is my view that the reference both to article 43 and the judgment is accurate and constitutes neither a misstatement of the law nor an omission to explain the legal position.

[54] Thirdly, "where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position." Again, in the present case, the reference to article 43 and the judgment provide a full account of the legal position and does not mislead as to the true legal position. Further, the policy makes clear to anyone carrying out such a scheme that the obligation is upon them to ensure that they comply with the law by ensuring that they have the necessary approval from the appropriate planning authority for all aspects of the scheme, including any associated signage.

[55] Mr Robinson has focused on the respondent's failure to deem all acknowledgement signs to be advertising, so that all such signs would fall within the appropriate planning regulation. That, he says, leads to the unlawfulness of the policy.

[56] However, in my view the respondent is under no obligation to define the acknowledgement signs in that way or to identify what is, or what is not, advertising. In my view what the respondent has done in the policy — *viz* provide that it is for the person or body carrying out the scheme to ensure that any signage is acceptable from a planning perspective — is both clear for sponsors and councils, and, is entirely appropriate. It does not fall foul of the test for unlawfulness identified in the decision in *A*.

Conclusion

[57] In the circumstances I dismiss the applicant's application for judicial review of the revised policy RSPPR E004 dated 12 August 2022.

[58] I will hear the parties on the issue of costs.