Neutral Citation No: [2021] NIQB 90	*Ref:* HOR11591
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*ICOS No:* 2021/55410/01
	Delivered: 21/09/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY JR169
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

_____

Mr Sean Devine (instructed by Eoin Murphy of O Muirigh, Solicitors) for the Applicant
Mrs Neasa Murnaghan QC with Mr Tom Fee (instructed by the Departmental Solicitor's Office) for the Department for Infrastructure and Department for Communities
Dr Tony McGleenan QC with Mr Kennedy (instructed by the Crown Solicitor's Office) for the Chief Constable

_____

HORNER J

A. INTRODUCTION

[1] This was an emergency application which I heard on 8 July 2021. It was brought by AB who lives in the vicinity of the bonfire which had been constructed at Adam Street, Belfast. The respondents are the Department for Communities ("DfC"), the Department for Infrastructure ("DfI") and the Chief Constable of the PSNI ("the police"). However, the relief sought by AB before me was an order of mandamus and/or an injunction compelling the police to remove the bonfire materials which had been assembled at Adam Street, prior to the 11th July night bonfire. Claims against the Chief Constable were initiated by the Minister for Communities and Minister for Infrastructure and were considered in a related application for judicial review before another judge. I was neither asked nor required to adjudicate on the claims made by the Ministers and I received no oral or written submissions relating to the relief which was ostensibly sought by them in this judicial review.

[2] The thrust of this application was against the police and their unwillingness to act against those responsible for constructing the bonfire and to ensure that the materials to be used for the bonfire were removed from the site before they could be

ignited. The Order 53 statement also included a claim for a declaration that the respondents should not have allowed bonfire material to accumulate and that the ongoing failure to remove that material was unlawful. However, the focus of this application was on the requirement of the police to remove the bonfire material which had accumulated on the peace line. I had assumed that the alleged failure to prevent material accumulating at the outset was a matter to be resolved in the other proceedings initiated by the Minister for Communities and Minister for Infrastructure whose departments controlled the land where the material for the bonfire was deposited.

[3] I granted applicant AB anonymity because, while recognising the importance of the principle of open justice, I was satisfied that the publication of the applicant's real name would place her at physical risk of injury and even put her life in danger. In the balancing exercise between securing the proper administration of justice and protecting the interests of the applicant, the scales came down heavily in favour of protecting her physical well-being by permitting her to proceed as "AB."

[4] Both sides accepted that the whole application would become academic if interim relief was refused because the bonfire would then inevitably be ignited on the 11th July and AB's claim for relief would be rendered nugatory. This is in fact what happened.

[5] I would like to thank both legal teams for their assistance in what was a controversial matter and one that in one form or another seems to provide each year a prelude to the 12th of July celebrations.

[6] I rejected the application for interim relief on an *ex tempore* basis. However, I said that I would provide a written judgment which, I hoped, would provide some guidance as to how the recurring problem of bonfires in general in Northern Ireland, and bonfires on the peace line, in particular, might be resolved.

[7] There were related proceedings initiated by the Minister for Communities and Minister for Infrastructure which were heard by another judge. As I have already said, I intend to concentrate on the case made by AB against the police.

B. BACKGROUND CIRCUMSTANCES

[8] A substantial bonfire was constructed at the Adam Street peace interface on property which belonged to the DfC and which was adjacent to land owned by the DfI. There is fencing and gates at the locality which is controlled by the Department of Justice ("DoJ"). There was no reliable information as to who was responsible for the construction of the bonfire which was large and imposing and was comprised, inter alia, of pallets and old tyres. It had been constructed in the weeks running up to July and was intended to form part of the eleventh night's celebrations which precede the twelfth of July parade held each year to celebrate King William's triumph at the battle of the Boyne. The bonfire was, as per tradition, due to be lit on

the eleventh night at the same time as similar bonfires across the whole of Northern Ireland.

[9] The bonfire had been constructed on the peace line which separates loyalist Tiger's Bay from the nationalist New Lodge. It is and has been an area fraught with sectarian tensions over the years. AB complains that the construction of the bonfire had been accompanied by increasing anti-social and unlawful behaviour and criminal conduct such as the hitting of golf balls from the bonfire and the throwing of bricks into the adjacent nationalist properties. Effectively it put the gardens of these adjoining houses out of bounds. Further, those living in houses adjacent to the bonfire had no option but to ensure that their houses were airtight, if they did not want to inhale noxious fumes which would inevitably be given off by the ignition of rubber tyres which had been placed on the pyre. AB lived in one of those houses which were so affected. In addition, those constructing and guarding the bonfire, played loud music late at night, often of a sectarian and upsetting nature, to which the neighbours were forced to listen and which kept them awake.

[10] As I have said, the thrust of the application was against the police. As I have noted I did not consider, nor was I asked to consider, the potential liability of the land owners and their duty to abate a nuisance or potential nuisance. As I have recorded, separate proceedings had been issued by the Minister for Communities and Minister for Infrastructure where no doubt the responsibilities and liabilities of both departments would have been discussed. Essentially the court was asked to force the police to act and stop the bonfire going ahead by physically dismantling the bonfire, using force if necessary to do so.

[11] The Minister for Infrastructure, Nichola Mallon and the Minister for the Communities, Deirdre Hargey had met with residents and the local police to discuss their problems. A memorandum of understanding had been drawn up dated 3 December 2020 between the Departments and the police which it was hoped would prevent a confrontation at this location.

[12] Minister Mallon had received a letter from the well-known loyalist figure, Jamie Bryson, stating that he represented the Tiger's Bay Bonfire Group ("TBBG") and that he wanted a meeting with the Minister. This was arranged for 8 July but no resolution was reached. These matters were played out against a background that significantly added to the normal tensions present at this location, namely Brexit, the Northern Ireland Protocol under the EU Withdrawal Agreement and the way the police had handled Bobby Storey's funeral. These all combined to create a truly toxic mix. The DfC had requested the police to provide support to contractors to remove this bonfire. By letter of 7 July 2021, Assistant Chief Constable Alan Todd set out in some considerable detail, the reasons why the police should not and would not intervene.

[13] The police gave, *inter alia*, the following reasons as to why it was not advisable for them to attempt to dismantle the bonfire:

(i) the bonfire was constantly occupied by children in or on the pyre and the police considered that there would be insuperable difficulty in removing them safely when trying to dismantle the bonfire;

(ii) intelligence suggested that police intervention would be resisted by the local community and in particular by women and children. The use of force would be required, resulting in the risk of casualties;

(iii) there was intelligence that a significant number of petrol bombs had been assembled and it was likely the use of force by the police would result in these being thrown at the police and any contractors used by the police. There was also untested intelligence that there was a risk of firearms being discharged. In any event the likelihood of significant disorder was high. This was a highly charged situation ready to ignite.

[14] It seemed to the court that the different parties involved relied on different "rights" to try and impose their solution. This inevitably involved them getting their own way. No one was prepared to compromise. Months of seeking to find some way forward under the memorandum of understanding had failed. But it was not disputed that the police given their experience over many years had considerably greater experience than the courts on how best to manage these operational matters. It was impossible not to conclude from all the evidence that the bonfire constituted a powder keg on the peace line, primed to explode, if it was mishandled by the police.

C. LEGAL CONSIDERATIONS

[15] All sides raised the European Convention on Human Rights ("ECHR"). AB relied upon Article 8. It states:

> "8(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for protection of disorder or crime, for protection of health or morals, or the protection of the rights and freedoms of others."

[16] It will be noted that Article 8(1) is qualified by Article 8(2). So while it is recognised that the right to respect for private and family life is protected that is qualified by Article 8(2) which permits a public authority to interfere with the right if:

> "(a) it is in accordance with the law; and
>
> (b) if it is necessary in a democratic society in the interests of …, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals …"

Of course in interpreting the Article the court should strive to give effect to the general principle of a fair balance between the individual's rights sets out in Article 8(1) and the community's general rights as set out in Article 8(2). Any decision taken by an authority must be proportionate and fairly balance those interests if they are in competition.

[17] Similarly, Article 11(1) provides that everyone has the right to freedom and peaceful assembly. But this personal freedom is circumscribed by Article 11(2) which makes it subject to "the prevention of disorder or crime." Once again any decision by the authorities has to fairly balance the competing interests and be proportionate.

[18] Article 2(1) provides "everyone's right to life should be protected by law. No one should be deprived of his life intentionally save in the execution of a sentence of the court following his conviction of a crime for which this penalty is provided by law." The right to life is unqualified. There is no balancing exercise, there can be no proportionality as everyone's life is sacrosanct.

[19] The applicant relies on section 32 of the Police Act (Northern Ireland) 2000 which provides:

> "(1) It shall be the general duty of police officers –
>
> (a) to protect life and property;
> (b) to preserve order;
> (c) to prevent the commission of offences;
> (d) when an offence has been committed, to take measures to bring the offender to justice."

AB says that the police were obliged to dismantle the bonfire in order to protect property and to prevent the commission of offences. Police say that the dismantling of the bonfire would have provoked widespread unrest, resulting in the commission of offences and endangered both life and property.

[20] As Lord Carswell observed in *Re E (A Child)* [2008] UKHL 66 at [63] such a claim is ancillary to the argument which is made pursuant to the ECHR. This is because, he said, it depends "on the contention" that the police failed to give effect to

Article 3 when complying with their statutory obligation under section 32 of the Act. Accordingly if I conclude that the police did give proper effect to the Article 8, Article 11 and/or Article 2 rights enjoyed by the parties, then as Lord Carswell said "the foundation of the submission under the 2000 Act is removed."

[21] As Lord Carswell said in *Re E* at paragraph [48]:

> "The obligation placed upon the authorities in an article 2 case is to do all that could reasonably be expected of them to avoid a real and immediate risk to life, once they have or ought to have knowledge of the existence of the risk."

[22] The European Court of Human Rights ("ECtHR") stated in *Osman v United Kingdom* [1998] 29 EHRR 245 at [116]:

> "The applicant has to show that the authorities failed to do all that was reasonably to be expected of them to avoid the risk to life. The standard accordingly is based on reasonableness, …"

[23] When looking at whether the police acted reasonably and lawfully it is also important to consider the circumstances faced by the police. In this case, the welfare of children was clearly at stake according to the evidence of ACC Todd and the rights of those children caught up in a disorder which was not of their making, had to be given due consideration. Their safety was, quite properly, a paramount consideration of the police.

[24] The courts do not enjoy the expertise and knowledge which has been acquired by the police handling situations fraught with the risk of widespread civil disorder, which I find was the situation here. As Kerr LCJ said at first instance in *Re E (A Child)* at paragraph [46] and which was quoted with approval on appeal by the House of Lords:

> "Sadly, policing options and decisions do not readily permit such uncomplicated solutions, particularly in such a uniquely fraught situation. Those who had to decide how to deal with this protest were obliged to have regard to the effect that their decisions might have in the wider community. It is not difficult to understand that an aggressive, uncompromising approach to the protest might have been the catalyst for widespread unrest elsewhere. It is precisely because the Police Service is better equipped to appreciate and evaluate the dangers of such secondary protests and disturbances that an area of discretionary judgment must be allowed them, particularly in the realm of operational decisions."

[25] As Lord Carswell observed in *Re E (A Child)* at paragraph [58]:

> "58. Independently of according such latitude of judgment to the police, acceptance of the validity of the course which they adopted is a matter of what Lord Bingham of Cornhill described in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, 185, para 16 as:
>
> > '**performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice.**'
>
> The police had such responsibility and were uniquely placed through their experience and intelligence to make a judgment on the wisest course to take in all the circumstances. They had long and hard experience of the problems encountered in dealing with riotous situations in urban areas in Northern Ireland. The difficulty of catching and arresting malefactors who had means of retreat available through paths and gardens are self-evident. The police had available to them sources of information about what was happening in the community and what was likely to happen if they took certain courses of action, which they were experienced in assessing.
>
> 59. In my judgment the evidence supports the overall wisdom of the course which they adopted. The assertions made by the appellant and Northern Ireland Human Rights Commission that they might possibly have adopted more robust action are in my view quite insufficient to establish that the course adopted was misguided, let alone unreasonable."

[26] These comments deserve careful consideration because AB was seeking through the courts to force the police to take action in a situation where AB had no experience of what the consequences of taking such a course of action was likely to be. Further, it was a situation where the police were resolutely opposed to taking any action to dismantle the bonfire because of the risks to life and limb that such a course of action might precipitate. In such a context, the assertions made by the applicant are likely to carry little weight in circumstances where the police on the basis of what appears to the court to be sound and sensible reasons are opposed to

just such a course of action. The complaints by AB that the police should have acted more robustly, were "quite insufficient to establish that the course adopted" by the police was either misguided or unreasonable or unlawful.

[27] In exercising any statutory power, it also has to be recognised that there are legal limits built in. If the court concludes that a power has been exercised unreasonably or oppressively, then it should not hesitate to find that such an exercise of that power was unlawful.

[28] In *GEC v Price Commission* [1985] (ICR1 at pp12) Lord Denning summarised the grounds on which courts can intervene as follows:

> "… the courts will not themselves take the place of the body to whom Parliament has entrusted the decision. The courts will not themselves make the original findings of fact. They will not themselves embark on a rehearing of the matter. But nevertheless, the courts will, if called upon, act in a supervisory capacity. They will see the decision making body acts fairly. The courts will ensure the body acts in accordance with the law. If a question arises on the interpretation of the words, the courts will decide it by declaring what was the correct interpretation … If the decision making body is influenced by considerations which ought not to influence it; or fails to take into account matters which it ought to take into account, the court will interfere. If the decision-making body comes to its decision on no evidence or comes to an unreasonable finding - so unreasonable that a reasonable court would not have come to it - then again the courts will interfere. If the decision-making body goes outside its powers or misconstrues the extent of its powers, then, too, courts can interfere. And, of course, if the body acts in bad faith or for an ulterior object which is not authorised by law, its decision will be set aside. In exercising these powers, the courts will take into account any reasons which the body may give for its decisions. If it gives no reasons – in a case when it may reasonably be expected to do so, the courts may infer there is no good reason for reaching its conclusion and act accordingly."

In the instant case there was no proper basis laid for any challenge as to how the police had exercised their statutory powers.

[29] The general approach to the granting of interim relief was fixed by the House of Lords in *American Cyanamid v Ethicon Limited* [1975] AC 396 when it made clear

that there was no requirement to establish a *prima facie* case. What a plaintiff had to do was:

(a) Prove that there was a serious issue to be tried; and

(b) Establish that it was just and convenient to grant an interim injunction. In doing so the court had to assess the relative risks of injustice in deciding whether there was an adequate alternative remedy in damages either to the plaintiff or the defendant. If it was, then normally that would be 'the' end of the matter. If it was not, then the court had to go on to consider the balance of convenience which would require the court to take a wide look, taking into account the interests of the general public to whom the duties were owed.

[30] In *De Smith's Principles of Judicial Law* (2nd Edition) the author sets out at 15.070-15.075 the principles applied by the court in deciding whether or not to grant interim relief in judicial review cases. The author points out that in an application for interim relief in a judicial review case it is usually necessary to establish a *prima facie* case: see 15-071. Furthermore, the adequacy of damages is not usually an issue. Where the public interest is involved, as here, then the balance of convenience test will be of crucial importance. The balance of convenience will be looked at widely and will also have to take into account the importance of upholding the law of the land and the duty placed on certain authorities to enforce the law in the public interest: see *Factortame (No.2)* [1991] 1 AC 603 at 672.

D. DISCUSSION

[31] The police were placed in an intolerable situation, I find, on the basis of the evidence which has been filed. On the one hand the police had a large bonfire which had been constructed on the peace line adjacent to nationalist residential properties. As I have already recorded earlier in this judgment this bonfire was being used by some members of the Protestant Unionist Loyalist Community (PUL) to intimidate and terrorise those residents in the adjacent properties in the New Lodge area. This intimidation took the form of attacks by hitting golf balls from the bonfire and throwing bricks. These criminal actions were complemented by the singing of sectarian songs late at night. Effectively, those in and on the bonfire prevented or restricted the nationalist residents from accessing and using their back gardens. This was intimidation of the worst kind. It was anti-social. This was criminal conduct. It was designed to incite, to try and produce a visceral reaction. It had nothing to do with the celebration of "Orange" culture and should have had nothing to do with it. It is obviously wrong that members of either community should be permitted to indulge in criminal behaviour or to be seen to escape sanction for such behaviour when they do. However, against that it is also unacceptable that police action against such criminal conduct should endanger the lives of children and result in a real risk of further widespread civil disorder. The police were satisfied that these were real and serious risks. The court is in no position to gainsay the police's conclusions on this issue.

[32] There is no basis for the court interfering with the decision of the police who were best placed to judge the likely consequences of any attempt to dismantle the Adam Street bonfire, namely widespread civil unrest with a particular risk to young children. On the basis of the evidence placed before this court the police's decision was lawful, proportionate, rational and lawful. The consequence of the construction of the bonfire at this location meant that the risks involved in dismantling it far outweighed the risks in letting it remain in place to be ignited on the eleventh night. It has not been demonstrated to this court that this assessment was in anyway unreasonable, oppressive or disproportionate. In fact, it appeared to the court to be logical, evidence based and sensible. None of the arguments advanced by AB undermined or called into question the assessment of the police.

[33] For the record I find that:

(a) The police did give proper effect and weight to all relevant circumstances and to the Article 2, Article 8 and Article 11 rights which were engaged and in those circumstances having done so it cannot be said there was any breach either of the ECHR or of any statutory duty under the Police Act.

(b) The decision of the police on the basis of the evidence of ACC Todd, which I find to be reliable, was proportionate, lawful and one that fell within the police's margin of appreciation, given their expertise in this operational area of the law.

(c) The decision of the police especially given the risks to small children and of further widespread civil unrest was neither unreasonable nor oppressive.

(d) The decision of the police was not "a crass and cynical assessment of which side of the community will cause most trouble as a result of them carrying out their duties," it was one that was made to try and prevent damage to property, injury to civilians and to remove the risk of possible loss of life.

(e) The balance of convenience came down very heavily in favour of refusing to order the police to take action to dismantle the bonfire.

[34] It is, of course, important that the rule of law is upheld and enforced. Unfortunately, there will be circumstances where that may not be possible. It is however, essential that when such a situation occurs that future plans are put into place to ensure, so far as is reasonably practicable, that the same problem does not recur.

[35] Both sides accepted that given the relief which was being sought from the court, the judgment became academic once the court refused interim relief. While the court in many circumstances will refuse to provide a judgment on what have become theoretical issues, there are cases, and this is one, in which it is appropriate

for the court to give some direction to the decision makers and so help them to exercise their powers lawfully in the future.

[36] Having carefully considered all the materials placed before the court, and in particular the evidence of ACC Todd, the court does not consider that it is arguable that the police decision to refuse to intervene and try and dismantle the bonfire once it had been constructed, was unlawful. Accordingly, leave to apply for judicial review is refused.

E. THE WAY FORWARD

[37] I do think there is particular merit in the court providing some guidance for the future even though this application has failed. It is obviously both unacceptable and unlawful that a bonfire should be constructed at a location where it can constitute both a nuisance to those in the neighbourhood and also act as a catalyst for criminal and anti-social behaviour. It is important that before any bonfire is constructed in any area where there is a likelihood of a dispute between the communities that clear ground rules are agreed for the construction of the bonfire, such as its size, its location and it composition etc. Further, those ground rules should be agreed with responsible, representative members of whichever community is going to build the bonfire and they should accept responsibility for those rules being observed. A failure to agree reasonable ground rules and/or to put forward responsible citizens as representatives of the local community may result in action being taken at the outset to prevent a bonfire from being constructed on public land at all. If the ground rules are agreed but ignored, then those responsible citizens who accepted responsibility for their enforcement should be held to account. If there are no responsible representatives willing to come forward to guarantee observance of the agreed ground rules, then that sends out a very clear message as to what is likely to happen. If the ground rules are not agreed and /or there are no responsible citizens prepared to come forward then the Departments can take the appropriate steps to prevent the bonfires being built at the outset and the police will no doubt have a role to play in the enforcement of any orders the courts may make.

[38] It is entirely proper that the PUL community should be free to celebrate its cultural traditions. But by the same token such celebrations must always be within the law. The PUL community can have no objection to these proposals which represent the minimum necessary to ensure that the rule of law prevails. There can be no place for cultural celebrations in Northern Ireland being used as a cloak for widespread criminal and anti-social behaviour. It would indeed be a sad day for Northern Ireland in general and the PUL community, in particular, if Orange culture could not be fully celebrated without the accompaniment of criminal and anti-social behaviour from a minority who refuse to keep to the rules.

F. CONCLUSION

[39] This application did not proceed because events meant that the refusal to grant interim relief for the reasons set out in this judgment meant that any judicial review was academic, the bonfire having been ignited on 11 July. I have tried to set out in detail the reasons why I refused to grant any interim relief and why I refused to grant leave. I have made some suggestions as to how this annual problem may be avoided in future years. The costs, both financial and to community relations, which these bonfire disputes can engender, are excessive, unreasonable and should be avoided, if at all possible. It is incumbent upon all those who care about their community and who want to celebrate their culture to try and reach consensus as to how this problem can be managed in future years. The absence of any agreement as to clearly defined ground rules for the construction and management of this bonfire on public land at this community interface may leave the authorities with only one option, namely to prevent the construction of any bonfire at the outset.

[40] It is in the interests of both sides that a solution is found which will permit the PUL community to enjoy the bonfire in future years while at the same time eliminating the criminal and anti-social conduct which does so much to poison relations between the two communities.