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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 KEVIN VALLIDAY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE POLICE SERVICE OF NORTHERN IRELAND

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Nick Jones (instructed by McCrudden & Trainor Ltd, Solicitors) for the applicant
Philip Henry (instructed by the Crown Solicitor's Office) for the respondent

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SCOFFIELD J

Introduction

[1] By this application the applicant seeks to challenge the conduct of a police interview, in which he was questioned as a suspect, on 1 September 2023. He further seeks to challenge (what he understands to be) a policy or approach on behalf of the police which involves a 'summary' of the police case being put to a suspect at the end of an interview conducted under the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE). The applicant contends that this is in breach of PACE Code of Practice C (the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers issued by the Department of Justice) and unlawful.

[2] Mr Jones appeared for the applicant; and Mr Henry appeared for the respondent, the Police Service of Northern Ireland (PSNI). I am grateful to both counsel for their written submissions and focused oral submissions.

Factual background

[3] The factual background to this case is relatively straightforward. The applicant was arrested in the early hours of 1 September 2023 and questioned in

order to obtain evidence by questioning in relation to alleged offences of burglary, assault and theft of vehicles. The applicant made no comment throughout the interview. After a number of questions had been put, the applicant's case is that the interviewing officer confirmed that her questions were concluded and that she would then proceed to summarise the police case. The applicant's solicitor objected to this course and the interview was then paused. The solicitor then made representations to the interviewing officer, the custody sergeant and in due course the PACE Superintendent. There was a dispute about whether the interviewing officer's proposed approach of putting the police case to the applicant at the end of the interview would or would not comply with PACE and/or the codes of practice issued under it. Evidence from the applicant's solicitor suggests that he was told that putting a police summary at the end of an interview was in line with PACE and the relevant police training.

[4] In the event, the interview resumed. The applicant contends that the interviewing officer then 'changed tack', as she stated that the interview was resuming as she had "a duty to re-evaluate the interview and put the allegations to [the applicant] and any further questions that [she] may have…" The further interview lasted around three minutes in total, with five questions put to the applicant. He again made no comment. The issue raised in this judicial review is the propriety of that process. The additional questions were as follows:

> "Q: So, Mr Valliday, I put it to you that you assaulted [name]. Do you wish to make any comment regarding that?
>
> A: [Remains silent] …
>
> Q: I put it to you that, after, you have entered five homes in the vicinity of [name] with the intent to steal money or a car to help you leave the area; that you have entered those properties without any permission and with the intent to steal. Do you have any comment to make on that?
>
> A: [Remains silent]
>
> Q: And having entered the home of [name] you have taken the keys of her [make of car], driven it into the wall of No 24 and made off from that location. Do you want to make any comment on that?
>
> A: [Remains silent]
>
> Q: You've then entered [further address], took the keys of a [make of car], you've stole the car without

permission and crashed it on [location] where you were arrested nearby. Do you have anything to say about that – being located nearby that crashed vehicle?

A: [Remains silent]

Q: After your arrest your clothing was seized by police, namely [description of various clothes], all of which are described as the clothing used by the suspect in the burglaries and of the police witnesses of what they seen of the driver of the vehicle. What do you have to say about that?

A: [Remains silent]"

[5] The applicant is currently on remand. In the meantime, however, he has taken issue with the way in which the reconvened interview had been dealt with. This led to pre-action correspondence in which he indicated an intention to challenge the decision to continue interviewing him "past the permissible point" and the underlying training or policy which results in interviewing officers providing a summary of the police case at the end of an interview. He contended that this approach falls outside the scope of Code C, paragraph 11.6. The PSNI responded denying any illegality. The applicant relies upon the following portion of the PSNI response:

> "The Applicant was interviewed by a police constable on 1/9/23. During the course of the interview the solicitor asked the interviewing officer whether she had any more questions. She said no. This was not strictly correct. She had put all the evidence she wanted to put but intended to sum up by putting the police case to the suspect."

[6] The applicant suggests that this corroborates his case that the questions in the additional interview were not additional or further questions and were not asked for the purpose of clarification. Rather, he contends, they were simply to put on record a summary of the police case. Moreover, he contends that these questions were pointless because it was clear he was not providing any comment in the earlier phase of the interview. The applicant's solicitor has also confirmed his experience that it is a regular occurrence for the police to conclude an interview by summing up the police case which is put to the suspect.

Relevant provisions of the Code

[7] The treatment of arrested persons is governed by PACE and the accompanying codes of practice. Article 65 of PACE requires that codes of practice

be issued, including in connection with the practice of police officers exercising statutory powers to question persons. The code which deals with police interviews is Code C ("the Code"). Paragraph 11.1A defines an interview in this context as "the questioning of a person regarding his/her involvement or suspected involvement in a criminal offence or offences which, under paragraph 10.1, must be carried out under caution…"

[8] The key provision of the Code for present purposes is paragraph 11.6, which is in the following terms:

> "The interview or further interview of a person about an offence with which that person has not been charged or for which they have not been informed they may be prosecuted, must cease when:
>
> (a) the officer in charge of the investigation is satisfied all the questions they consider relevant to obtaining accurate and reliable information about the offence have been put to the suspect, this includes allowing the suspect an opportunity to give an innocent explanation and asking questions to test if the explanation is accurate and reliable, e.g. to clear up ambiguities or clarify what the suspect said;
>
> (b) the officer in charge of the investigation has taken account of any other available evidence; and
>
> (c) the officer in charge of the investigation, or in the case of a detained suspect, the custody officer, see paragraph 16.1, reasonably believes there is sufficient evidence to provide a realistic prospect of conviction for that offence. See Note 11B…"

[9] Note 11B is in the following terms:

> "The Criminal Procedure and Investigations Act 1996 Code of Practice, paragraph 3.4 states 'In conducting an investigation, the investigator should pursue all reasonable lines of enquiry, whether these point towards or away from the suspect. What is reasonable will depend on the particular circumstances.' Interviewers should keep this in mind when deciding what questions to ask in an interview."

[10] The applicant accepts that there is very little commentary or guidance available on the point which he has raised. He has relied upon Zander, *The Police and Criminal Evidence Act 1984* (9th edition, Sweet & Maxwell) at para 6-47:

> "A basic principle of the English system has been that when a person was charged, questioning about that offence should cease… The principle, which pre-dated PACE, is reflected in Code C, paras 11.6 and 16.5. Paragraph 11.6 provides that the interview must cease when the officer in charge of the investigation, taking into account any other available evidence, is satisfied that all the questions relevant to obtaining accurate and reliable information about the offence being investigated have been put to the suspect – and that the suspect has been allowed an opportunity to give an innocent explanation and that questions to test whether such an explanation is accurate and reliable have been put…
>
> Code C, para. 16.1. (para. 6-93) requires a person to be charged when the officer in the case reasonably believes that there is enough evidence for a successful prosecution, and para 16.5 still provides that subject to some caveats, after being charged, questioning about that offence must basically cease.
>
> The previous admonition that the interviewer should ask the suspect if he has anything else to say was dropped in the 2003 revision. Note 11B reminds interviewers that the Code of Practice under the Criminal Procedure and Investigations Act 1996 states (para 3.4), "In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect."

[11] In a footnote, Professor Zander comments that paragraph 11.6 is a significant re-draft of what, in the English Codes until 2003, was paragraph 11.4. The earlier provision required that questioning cease when the officer believed that there was enough evidence for a successful prosecution and the suspect, having been asked, indicated that he had nothing further to say. The newer provision appears to allow for a greater level of questioning than had previously been the case, leaving it to the interviewing officer to determine whether all relevant questions have been put and the suspect has had a proper opportunity to reply. It appears to have been the removal of the trigger set out in the previous guidance for questioning to cease which resulted in the removal of the related warning that the suspect should be asked if he or she had anything else to say. Plainly, the Code does not preclude a suspect being asked if he or she has anything else to say at the end of an interview.

[12] The commentary in the Zander text relates principally to the separate question of whether there should be questioning about an offence once the suspect has been charged. The overarching obligation in Code C in relation to the conduct of interviews, which finds expression in paragraph 11.5, is that the interview must not be oppressive. The enjoinder in paragraph 11.6 that the interview should cease once the officer is satisfied that all the questions they consider relevant have been put is a facet of this overarching obligation. Interviewees should not be subjected to repetition of the same question as a means of brow-beating them, wearing them down or simply prolonging the interview. At the same time, there is obviously some scope for asking similar questions or questions which overlap but which have a different emphasis. Another overarching obligation is that the suspect has a fair opportunity to comment upon evidence or information which the police wish to put to them, particularly in circumstances where, having been cautioned, inferences may later be drawn in respect of matters which they rely upon in their defence which were not mentioned in interview. The propriety or otherwise of particular questions will be fact and context specific.

Summary of the parties' positions

[13] For the applicant, Mr Jones suggests that there was a clear breach of Code C in this case and, moreover, that there is an issue of principle to be determined in this case because there appears to be a settled or widespread practice on the part of the police to sum up at the end of an interview even after all relevant questions have been asked. He submits that this amounts to a deliberate disregard of the requirements of the Code.

[14] For the proposed respondent, Mr Henry contends that the issue in this case is not justiciable by way of judicial review (since the Code itself imposes no legal obligation); that, in any event, what occurred in this case was not in breach of the Code; and that the applicant has alternative remedies which he could, or should, pursue. On these bases, he invites the court to refuse leave to apply for judicial review.

Discussion

[15] I have decided that leave should be refused in this case for a number of the reasons advanced by the proposed respondent.

[16] In the first instance, I do not consider that it is an appropriate use of the judicial review process to seek to regulate the precise content of questions asked in the course of a police interview. It is likely no coincidence that neither party was able to cite a previous instance of the Judicial Review Court or Administrative Court having done so. There may well be a number of reasons for this:

(a) First, as is well known, the judicial review process is ill-suited to resolving disputed issues of fact. (This is unlikely to be problematic where, as here, the

relevant exchanges in the course of the police interview have been tape-recorded. There may, however, be instances where this has not occurred or where there is a dispute of fact in respect of what was or was not said between interviews.)

(b) Second, there are other means by which complaints about the content of police questioning can and should be pursued. Principally, this is likely to be in the course of any criminal proceedings which follow upon the arrest and interview process. The purpose of police questioning of suspects is to gather evidence to be used in criminal proceedings and it is part of the role of the trial judge to determine whether the content of police interviews is or is not admissible. Where, in an extreme case, it is suggested that the content of questioning (or the conduct of the interview more generally) constitutes a tort, ordinary civil remedies are available. Where, as here, the primary complaint is that the police approach was inappropriate and in breach of PACE Codes of Practice, a complaint to the Police Ombudsman for Northern Ireland is a further effective remedy, well-suited to addressing the issue.

(c) Third, it is also correct to note that a breach of a PACE code of practice is not in and of itself unlawful (as emphasised by section 66(9) of the 1989 Order in this jurisdiction). Something further will be required to establish a public law wrong.

[17] In the circumstances of this case, therefore, I am satisfied that the applicant could and should have pursued one or other of the above means (or some combination of them) for complaining about his questioning in the recommenced interview. He may yet be able to do so. I also accept the submission that the High Court's supervisory jurisdiction cannot, or ought not to be permitted to, be invoked in response to every action on behalf of a public official about which a citizen may wish to complain. The action must have sufficient legal effect to warrant the court's intervention. In the present case, the contentious questions have been asked and, in the event, not answered. Whether or not those exchanges are admissible in any subsequent criminal proceedings is not a matter for this court. An order purporting to 'quash' the questions would beat the air. The additional questions do not constitute decisions with concrete legal effects. Looking at the circumstances of this case in isolation, it seems to me that the dispute is now essentially an academic one; or one which would lack utility if leave to apply for judicial review were to be granted, having regard to the intensely practical nature of the judicial review jurisdiction.

[18] The only reservation I have about that arises from the applicant's contention that the approach of which he complains is widespread and, in fact, reflects a conscious approach on the part of the police (now incorporated into its training materials) which is at odds with the PACE Code. In such circumstances, the grant of declaratory relief may have an educative effect for future cases. In its response to pre-action correspondence, the proposed respondent has declined to provide any

further information supporting the applicant's understanding in this regard or, in particular, to disclose any relevant training materials. It declined to do so "for obvious reasons", that is to say because it did not wish to unduly advantage suspects in criminal cases by means of disclosure of internal guidance as to investigative techniques. However, on the basis of the limited evidence there is before me, including Mr Henry's concession from the Bar that this type of approach is common, I proceed on the basis that there is a wider issue of contention here going beyond the mere facts of the applicant's case.

[19] Notwithstanding that, I still consider that it is appropriate to refuse leave to apply for judicial review in this case. That is because each case will turn on its own individual facts and, aside from the basic guidance given below, I do not consider that it is possible to rule on this issue in a way which will cater for all circumstances. As I have found below, I do not consider that there was a breach of Code C in the particular circumstances of this case, as it turned out. Whether or not questioning amounts to a breach of the Code in any given case will depend upon the particular circumstances and the precise content of the police questioning and of the suspect's answers at various points in the interview process. Since it is in my view possible (as occurred in this case) for a summary to be put to a suspect for the purpose of response at the end of an interview *within* the terms of the Code, I cannot accept Mr Jones' submission that this practice represents a clear and obvious breach of its provisions. As noted above, since breach of the Code alone does not give rise to illegality in public law terms, something more is required. Although the case was not pleaded in this way, if there was a systemic error of law on the part of the police (in that they had misconstrued the meaning or legal effect of the Code) that may have been a basis for granting leave. However, I do not consider that the applicant has raised an arguable case with a realistic prospect of success in this regard for the reasons given below.

[20] Paragraph 11.6 of Code C sets out three conditions which must be met before and interviewing officer is, within the terms of the Code, subject to the obligation to cease the interview. The first is that the officer in charge "is satisfied" that "all" of the questions "they consider relevant" to obtaining accurate and reliable information have been put to the suspect. This involves an element of judgement on the part of the officer concerned. Questions which are relevant to obtaining information about the offence can take a variety of forms. These can include questions about where the suspect was or what they were doing at the time the offence is alleged to have occurred; and questions which involve requiring the suspect to account for matters which are established by other evidence. Paragraph 11.6 also indicates that relevant questions will include allowing the suspect an opportunity to give an innocent explanation and then testing that explanation. It is plain that, within this provision of the Code, there is a recognition of the need to put matters to the suspect and the suspect being given a fair opportunity to reply.

[21] For my part, I see no prohibition within these provisions against an interviewing officer concluding an interview by asking 'rounding up' questions

summarising the nature of the police case with a view to allowing the suspect a final opportunity to comment upon them either by way of admission, denial or other answer. Indeed, as Mr Henry submitted, in many cases this may be the fairest way to conclude the interview, or may in fact be required as a matter of fairness to the suspect, if there is a risk that he or she has failed in the course of the earlier questioning to understand the precise nature of what is being alleged against them. It may also be the case that the suspect has failed to appreciate the strength of the case against them, or the connections or inferences arising from various pieces of evidence which have been put to them earlier, where the earlier questioning has addressed strands of evidence in a piecemeal or non-sequential way (and perhaps legitimately so for the purposes of investigative effectiveness). In general, providing a further and final opportunity to comment on the police case once it has been drawn together appears to me to promote fairness to suspects rather than undermine it. Put another way, it does not seem to me irrational, nor oppressive, for the interviewing officer in this case to have been satisfied that these rounding-up questions were relevant.

[22] That is not to say that there may not be circumstances where such questioning at the end of an interview is inappropriate or oppressive, for instance where the same question or summary is simply repeated unnecessarily for the purpose of seeking to wear down the suspect. There is also some force in Mr Jones' submission that the purpose of the interview process is to pose questions and not merely for the investigating officer to make a speech or deliver a soliloquy. Again however, these are matters which are generally to be policed by the trial judge having regard to the purpose of the process overall.

[23] I was not at all persuaded by the suggestion that, where a suspect has adopted a 'no comment' stance, this materially affects the level of questioning which the interviewing officer may permissibly pursue (on the basis that it will have become clear that the suspect is intent on not answering any questions). Suspects can, and do, change their mind in the course of interviews as to whether they will answer questions, or which questions they might selectively answer. It is conceivable that, where a case being made by police is summed up in a way which emphasises the strength of the totality of evidence against a suspect, he or she will choose to comment where, at earlier points, they preferred to remain silent until the full extent of the evidence against them had been disclosed.

[24] In the present case, the contentious questioning lasted only for a very short period of time (less than three minutes when one disregards the opening and closing formalities of the recommenced interview). In each instance the officer put a very brief summary of the alleged offence and asked the applicant whether he had any comment to make on it. She then also, in brief terms, recounted the clothing which had been seized from the applicant which was consistent with the evidence of the clothing worn by the suspected offender and asked the applicant if he had anything to say about that. Whether or not, at the end of the first interview, the officer intended to pose questions in this way, or simply make a statement, is

unclear. The applicant's solicitor appears to believe that it was the latter that was proposed. The proposed respondent's response to pre-action correspondence suggests that the officer may have said (in response to a question from the applicant's solicitor) that she had no further questions but, in fact, that was "not entirely right." In any event, what transpired did involve the putting of further questions to the applicant and I consider that this was within the legitimate discretion available to the interviewing officer. In my view, there was nothing oppressive about this, nor approaching oppression, and it was within the legitimate discretion of the interviewing officer to conclude the interview in this way.

Conclusion

[25] For the reasons given above, I conclude that the applicant has not raised an arguable case with a reasonable prospect of success that the proposed respondent has acted unlawfully in his case. Breach of the Code does not, of itself, mean that the police have acted in an unlawful fashion but, in any event, I do not consider that there was a breach of the Code in this case. Nor do I consider that the approach adopted in this case – if replicated in others – would represent a breach of the Code as a matter of generality. Put another way, I am not persuaded that there is an arguable case that the proposed respondent has generally misunderstood the purpose or effect of the relevant provisions of the Code or has adopted a deliberate approach of disregarding or breaching it. Where there is an issue about the content of police questioning, there are other methods by which this can and should be pursued rather than by recourse to judicial review, which is a remedy of last resort.

[26] Leave to apply for judicial review is accordingly refused.