Neutral Citation No: [2024] NICC 24 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **[2024] NICC 24** *ICOS No:* *Delivered:* **06/09/2024**

IN THE CROWN COURT FOR THE DIVISION OF BELFAST
SITTING AT LAGANSIDE COURTHOUSE

THE KING

v

DUNFORD and OTHERS

Mr Kinnear KC, Mr MacCreanor KC and Mr Steer KC (instructed by the PPS) for the Crown
Mr Csoka KC with Mr Devine (instructed by Carlin Solicitors) for the Defendant

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SECTION 8 CPIA 1996 APPLICATION AND RULING

HHJ NEIL RAFFERTY KC

Facts/Background

[1] This ruling relates to the hearing of an application pursuant to section 8 of the Criminal Procedure and Investigation Act 1996 ("the CPIA") brought on behalf of the defendant, Mark Dunford for disclosure of prosecution material. Before moving to give the ruling in relation to that application it is necessary to set the scene with respect to cases brought under Operation Venetic from which many of the "EncroChat" cases originate. Significant case law has been generated in England and Wales where the CPIA provides for the holding of Preparatory Hearings ("PHs") where the admissibility of evidence can be decided upon, and, if necessary, appealed to the Court of Appeal. The PH process allows a convenient way of deciding upon the admissibility of evidence pre-trial and for novel points of law to be examined by the Court of Appeal expeditiously. Sadly, the drafters of the CPIA failed to extend those provisions to this jurisdiction despite the CPIA being a United Kingdom-wide Act of Parliament. For the want of this provision, no clear statement of the law as it relates to EncroChat cases currently exists in Northern Ireland. Without an understanding, and statement of, the current state of case law it is impossible to understand where the section 8 application brought on behalf of Dunford fits into the overall framework of these cases. Accordingly, I will briefly review what I understand to be the current case law relating to the central issues. I

emphasise that I will be brief, or as brief as I feel that I can, in reviewing extensive case law mindful that one can always be criticised for failing to bring in every nuance. I will focus upon the broad themes and conclusions rather than catalogue every twist and turn in over two years of developing case law.

Background - EncroChat/Operation Venetic/Emma etc

[2] By way of background, between 2016 and 2020 EncroChat offered telephonic devices which were "end to end" encrypted. The EncroChat handset allowed the user through a username to communicate with other users of the platform. In or about early 2020, the French and Dutch authorities, apparently concerned with the criminal use of such technology, set up a Joint Investigation Team ("JIT") tasked with obtaining access to the encrypted EncroChat material. Gendarmerie Sargeant Major Decou was placed in charge of the team and, to place a neutral term on it, the JIT used an uploaded code, an "exploit", to infect the EncroChat telephones so that the messages could be accessed by law enforcement. Thereafter, the de-encrypted messages were shared with law enforcement agencies across many jurisdictions Including, of central relevance to this jurisdiction, the National Crime Agency ("NCA"). On foot of the materials received by the NCA a number of prosecutions across the three jurisdictions of the United Kingdom have been commenced. Unsurprisingly, defendants have sought to question the admissibility or undermine the reliability of the EncroChat material and this has taken a number of forms of legal challenge which I will briefly set out, insofar as it is necessary, in order to set the scene for this application.

***R v A, B, C & D* [2021] EWCA Crim 128**

[3] This appeal was heard by a full court including the then Lord Chief Justice Lord Burnett of Maldon. It was an appeal from the PH conducted by Dove J into the admissibility of the EncroChat material. Dove J conducted a hearing into the mechanisms and technical aspects of how the EncroChat network operated and importantly how the exploit obtained the information retrieved. This was of central importance. The Investigatory Powers Act 2016 ("IPA") at Section 56 states:

> "Section 56(1) provides for the exclusion of, among other things, evidence in legal proceedings: "…….which (in any manner) —
>
> (a) discloses, in circumstances from which its origin in interception-related conduct may be inferred—
>
> (i) any content of an intercepted communication, or
>
> (ii) any secondary data obtained from a communication, or

(b) tends to suggest that any interception-related conduct has or may have occurred or may be going to occur."

[4] The prohibition on the use of intercepted communications is, it appears, a policy-based position predicated upon the "Public Interest need" to avoid interception techniques being disclosed. Be that as it may, the IPA at section 56(1) is subject to exceptions under Schedule 3 to the Act which, *inter alia*, creates an exception where section 6(1)(c) applies:

"**Section 6. Definition of "lawful authority**"

(1) For the purposes of this Act, a person has lawful authority to carry out an interception if, and only if—
…

(c) in the case of a communication stored in or by a telecommunication system, the interception—

(i) is carried out in accordance with a targeted equipment interference warrant under Part 5."

[5] The issue before the court was both technical and legal. If the material was intercepted then it was inadmissible. If, however, it was "stored" material then, subject to a Targeted Equipment Interference Warrant, it was admissible. The Court of Appeal in its consideration of the Appeal set forth the technical findings of Dove J in para 14 of its judgment and it is not necessary to replicate those here as I am merely setting the scene for the consideration of this section 8 application. Suffice to say, the court endorsed Dove J's finding that the material was from the REALM storage in the telephones and that it was "stored" information which was admissible.

[6] To date, *R v A, B, C & D* remains the position in England and Wales and whilst not binding in this jurisdiction is of highly persuasive weight in my view. A recent commentary in Arch Rev 2024 1, 5-7 pithily noted:

"Inevitably significant arguments followed about the admissibility of this evidence and how it was obtained. They were roundly rejected in *A, B, C and D* [2021] EWCA Crim 128; [2021] 2 WLR 1301 in which the court concluded that the communications were lawfully intercepted and were admissible in evidence under para 2 of Schedule 3 to the Investigatory Powers Act 2016; that there had not been a requirement to obtain a European

> Investigation Order; and that the prohibition under section 9 of the 2016 Act (restriction on requesting interception by overseas authorities) did not apply.
>
> It is, frankly, difficult to imagine that the position in respect of the admissibility of EncroChat evidence will change, although given the sentences that often follow for EncroChat cases it is not surprising that some defendants would rather take that risk and run a trial to preserve their ability to appeal in due course."

[7] That, however, was not the end of the matter as defendants sought to impugn the legitimacy of the warrants issued and the matter went before the Investigatory Powers Tribunal ("IPT"). In addition, other lines of defence, such as objections to hearsay, were deployed

Objections to Hearsay/Section 78 (Article 76) – R v Atkinson [2021] EWCA Crim 1447

[8] One of the early central issues involved what can loosely be called the provenance of the EncroChat material emanating from the JIT. The central involvement of Gendarmerie Sargeant Major Decou in the JIT and the material emanating from the JIT was the subject of several hearsay applications. The French authorities have indicated, and maintained, that GSM Decou will not be permitted to leave France and that any request for him to give oral evidence was "unreasonable." At para [49] of *R v Atkinson*, in which Mr Csoka KC appeared, the EWCA set out the factual state and thereafter provide a critique of Dove J's application of the tests set out in *R v Riat* [2012] EWCA Crim 1509. From paras [55] to [60] (which I need not set out herein but which I commend to be read) their Lordships endorsed the processes of Dove J with respect to both his application of *Riat* and his rejection of an application to exclude the material as unfair under section 78 of the Police and Criminal Evidence Act 1984 (Article 76 of the PACE (NI) Order in Northern Ireland). Once again, whilst not binding, it is my view that *R v Atkinson* is likely to be of highly persuasive value in the courts in Northern Ireland when faced with similar applications though minds must remain open, and each case may require an individual examination.

Investigatory Powers Tribunal – SF v NCA [2023] UKIPTrib3

[9] The IPT was tasked with determining, *inter alia*, the lawfulness of the warrants and warrant types used by the NCA to obtain the EncroChat material. I will not deal with the entirety of the IPT's judgment in *SF v NCA*. Mr Csoka in his written submissions sets out what is of relevance at para [24]:

> "24. The disclosure of the category of material within the section 8 application was first sought in the

proceedings in the IPT. On 10 February 2022 the IPT ordered that the NCA should cooperate with the claimant's expert (Professor Anderson) in order for the experimentation and emulations to be carried out. The late Professor Anderson had been collaborating with Mr Raheloo before his reports to the IPT were finalised. This February order was suspended within a few weeks after a closed hearing, and on 3 March 2022 the IPT ruled that it would take Professor Andersons reports *as read* (emphasis added). The IPT rejected all defence submissions with regard to the lawfulness and applicability of the warrants. However, at paragraph 144 commented:

> 'It is likely that the Crown Court will determine what conclusions can properly be drawn from Professor Andersons's evidence. The Crown Court has jurisdiction to do so. There is no merit in a parallel trial of expert evidence before this tribunal. It would be inappropriate for us to grant a remedy on the basis of evidence "taken as read" in the knowledge that that evidence will be tested in other proceedings in early course. We defer further consideration of this chapter of the case until the outcome of the criminal proceedings is known, as explained in paragraph 8 above.'"

It is, in essence, this paragraph that Mr Csoka seeks to deploy in his section 8 application before me.

[10] Once again, before commencing this part of the ruling, I emphasis that the foregoing paragraphs are a brief prologue to better understand the context in which this application is made. Again, I emphasize that in setting out various authorities on issues and how they have been resolved in England and Wales I am doing so with an open mind as to how they may ultimately be decided in Northern Ireland.

The section 8 application

[11] I now turn to consider the application before this Court. Mr Csoka both in written submissions and oral argument set out the material sought by him under the section 8 application. He asserts that the technical information, specifications, exploit, and Transport Layer Security certificates ("TLS") are all within the possession of the prosecution/NCA and that disclosure of these materials would allow defence experts to repeat/validate the emulations carried out by Mr Shrimpton and would allow for the issue regarding whether the messages are

intercepted or recovered from memory to be definitively addressed. Mr Csoka asserts that the refusal to disclose the information sought means that the defence experts are hindered in their understanding of this central issue and that the disclosure would resolve the question once and for all and would allow, in terms, the defence to be satisfied about the issue. In the absence of disclosure he asserts that the "proper" route for the Prosecution is to either (i) hold a PII hearing or (ii) discontinue the proceedings. Mr Csoka, and others, have made this argument on a number of occasions and with limited, if any, success. He points out that none of the applications in England and Wales have been subject to consideration by the EWCA and, in any event, are not binding upon me. In addition, he refers me to the Windsor Framework; the Good Friday Agreement; to EU Directive 2014/41/EU and a subsequent referral to the CJEU from the Berlin Landgericht Court for a preliminary ruling on the EIO which was issued to obtain the EncroChat materials in Germany.

[12] Turning firstly to the primary issue under section 8 of the CPIA, Mr Kinnear KC on behalf of the PPS meets this head on. He refers me to sections 3 and 7(A) wherein prosecutorial obligations are contained. They state:

> "3. Initial duty of prosecutor to disclose.
>
> (1) The prosecutor must—
>
> (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, or
>
> (b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).
>
> 7A Continuing duty of prosecutor to disclose
>
> (1) This section applies at all times—
>
> (a) after the prosecutor has complied with section 3 or purported to comply with it, and
>
> (b) before the accused is acquitted or convicted or the prosecutor decides not to proceed with the case concerned.
>
> (2) The prosecutor must keep under review the question whether at any given time (and, in particular,

following the giving of a defence statement) there is prosecution material which—

(a) might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, and

(b) has not been disclosed to the accused."

[13] Mr Kinnear argues that the legal requirements of the disclosure test are clear and he formally on behalf of the prosecution can confirm that a disclosure test has been applied to all materials sought by the defence and that there is nothing which meets the disclosure test and therefore nothing which requires disclosure.

[14] I have had the benefit of reviewing a number of rulings on this issue originating from the Crown Court in England and Wales. Save for the original ruling ordering disclosure by the Recorder of Manchester which was later rescinded following a PII application it is fair to say that the rulings have followed a very similar theme. It is fair to say without implying any criticism that the learned Recorder appears to have extended the parameters to include a "better understanding" element. In *R v Ferry* HHJ Earl succinctly reviewed the legislative requirements for the CPIA relating to disclosure and concluded at paragraph [59] that, on a proper construal of the relevant provisions, he was unable to accept that the prosecution had failed in its duty of disclosure. Similar exercises were conducted in *R v Strogylos* where HHJ Edmunds KC reviewed the law and arguments and again rejected the application. A similar outcome resulted in *R v Harding* where HHJ Leonard KC, again, reviewed the test for disclosure and came to the same conclusion that the application would be dismissed.

[15] For my own part, I have carefully reviewed the terms of the CPIA with respect to disclosure and conclude that the proper test is the statutory test and that it does not include a "better understanding" or "satisfying the curiosity" provision. Judges in Northern Ireland regularly carry out third party disclosure exercises and it is common that there may be something that the defence are keen to know about. However, when reviewed it does not meet the test for disclosure. I am satisfied in this case Mr Kinnear has formally indicated that following the lodgement of the section 8 application on behalf of the defendant that the material sought has been reviewed and does not meet the disclosure test.

[16] I now turn to the issue of the Windsor Framework/Good Friday Agreement. It would be otiose in this ruling for me to set out the case law in the High Court of Northern Ireland where the ramifications of Brexit, The Windsor Framework, and the constitutional impact of both on the Good Friday agreement have been litigated and, indeed, in some other aspects remain to be litigated. I will accept for the purposes of this ruling a "high water mark" approach that Northern Ireland remains

within, and subject to, EU law. The real question is whether that affects the outcome of this ruling in any way.

[17] Mr Csoka in his fulsome and commendable argument referred me to the referral to the CJEU of an EncroChat related issue by the Landgericht Berlin Regional Court. At para 34 of his written submissions it states:

> "According to the referring court, the prohibition on using the evidence derives directly from the principle of the effectiveness of EU law. That prohibition applied in the case in the main proceedings since the general principle of a right to a fair trial was undermined in several respects, in particular by the fact that the data requested by way of EIO's *could not be examined by a technical expert* because of the "defence secrets" classification conferred on the French Authorities." [emphasis added by the defence]

[18] Mr Csoka argued that the position with respect to Northern Ireland is even more egregious since the German authorities had received nothing other than the messages and were, accordingly, not in possession of any "disclosure." Here, he argues, the authorities actually have the material but won't disclose it. He then refers me to Article 14(7) of the Directive:

> "Article 14(7) of Directive 2014/41 must be interpreted as meaning that, in criminal proceedings against a person suspected of having committed criminal offences, national courts are required to disregard information and evidence if that person is not in a position to comment effectively on that information and on that evidence and the said information and evidence are likely to have a preponderant influence on the findings of fact."

[19] It seems tolerably clear that Article 14(7) is framed as an exclusionary provision relating to the admissibility of evidence. I can entirely understand, though I do not pretend to be an expert on German law, why the court would have concerns regarding evidence that was completely without provenance. If Mr Csoka is correct the EIO in Germany simply obtained the messages and the French authorities refused to share any of the technical data. The position in Northern Ireland far from being "more egregious" is in fact entirely regulated under the CPIA. The issue of admissibility under the IPA has been heard in *R v A, B, C & D*. The NCA and PPS are in possession of the materials and in performance of their duty under the CPIA indicate that there is nothing that meets the disclosure test. This is a disclosure application and not an admissibility hearing. In any event, if am wrong I am equally satisfied that this is an issue which falls within the margin of appreciation extended

to Nation States. I am equally satisfied that that the defendant can and will receive an Article 6 compliant trial. Accordingly, I refuse the application.