Neutral Citation no. [2008] NIQB 7

Ref: **WEA7036**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **21/01/2008**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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AN APPLICATION BY ANNE NEILL FOR JUDICIAL REVIEW

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WEATHERUP J

[1] The Police Service of Northern Ireland (PSNI), as respondent on this application for judicial review, applies for an Order setting aside the grant of leave to the applicant to apply for judicial review of decisions on the PSNI. Leave was granted to the applicant 13 February 2007 in respect of the decisions of the PSNI (i) not to prosecute Patrick McCann in respect of allegations of assault and making a threat to kill the applicant and (ii) refusing to provide any or adequate reasons for the decision not to prosecute Patrick McCann. Mr McMillen appeared for the respondent and Mr Sayers for the applicant.

[2] By the affidavit filed on behalf of the applicant she was involved in an incident with Patrick McCann at the Castle Bar, Coleraine on 18 March 2006. As a result of that incident the applicant received summonses alleging assault and criminal damage, although the matters did not proceed. The applicant complained to police that she had been the subject of an assault and threat to kill made by Patrick McCann. The applicant became aware that Patrick McCann was not to be prosecuted for any offences arising out of the applicant's complaint.

[3] The applicant's solicitor wrote to the PSNI indicating a belief that Patrick McCann had made formal admissions, during interview, of having threatened to kill the applicant and that the threats had been witnessed by police officers attending the scene. In those circumstances the applicant's solicitors asked for the reason that there would be no prosecution of Patrick McCann. Correspondence from PSNI indicated that the decision to take no further police action was directed by the Central Process Office at Strandtown

and that there was no obligation to inform the applicant's solicitor why police had decided not to pursue a prosecution against Patrick McCann.

[4] The Court may set aside the grant of leave to apply for judicial review under Order 32 Rule 8 or the inherent jurisdiction of the Court. The authorities indicate that this is a jurisdiction which should be exercised very sparingly and only in a very plain case and only where the respondent is able to deliver some clean knock out blow. In Ballyedmond Castle Farms Ltd's Application [2000] NI 174 Carswell LCJ adopted the observations of Bingham LJ in Chinoy v. Secretary of State for the Home Department [1991] 4 Admin LR 457 at 462 that the procedure to set aside is one that "should be invoked very sparingly" and only in a "very plain case", of Simon Brown J in Sholola v. Secretary of State for the Home Department [1992] Imm AR 135 at 138 that it was not sufficient to show merely that the judicial review application was distinctly unpromising and most likely to fail but rather it was "necessary to deliver some knock out blow to justify invoking this procedure" and of Laws J in Leam v. Environment Agency [1997] (unreported) that such an application "is not to be brought merely on the footing that a respondent has a very powerful, even an overwhelming, case."

[5] In Savage's Application (1991) NI 103 Carswell J set aside the grant of leave where a determination of a pure point of law was able to dispose of the applicant's challenge to a certificate issued by the Foreign Secretary under section 40(3) of the Crown Proceedings Act 1947. In Ballyedmond Castle Farms Ltd's Application the Divisional Court refused to set aside the grant of leave to apply for a judicial review of a Resident Magistrate's decision. The respondent contended that the applicant had the alternative remedy of a case stated on a question of law to the Court of Appeal. It was found to be far from clearly established that the Court hearing the application for judicial review must exercise its discretion against the applicant because it was not sought to proceed by way of case stated. In the Secretary of State's Application (26 March 2002) Kerr J refused to set aside the grant of leave to apply for judicial review of the decision of the Senior Costs Judge Hurst, based in England, in relation to the payment of fees to Counsel appearing in the Bloody Sunday Inquiry. The grounds advanced for the setting aside of leave were first that the decision was not susceptible to judicial review, a matter conceded as being at least arguable during the hearing and secondly that the appropriate forum for adjudication of any judicial review challenge was England and Wales. The central plank of the applicant's argument was that the determination by Judge Hurst of the amount of fees to be paid was made in the discharge of his office, a matter which Kerr J found to be plainly wrong as his power to determine the matter was derived from the agreement or acquiescence of the parties to submit to his adjudication.

[6] When leave to apply for judicial review was granted on 13 February 2007 the application was adjourned pending the decision of the Divisional

Court in Kincaid's Application, which was delivered on 19 April 2007 with neutral citation [2007] NIQB 26. Kincaid applied for judicial review of a decision of the Public Prosecution Service (PPS) not to prosecute a Trevor Dowie for shooting Kincaid and a failure of the PPS to provide reasons for the decision not to prosecute. Kerr LCJ set out the policy of the PPS as to the giving of reasons whether or not to prosecute, the upholding of that policy by the Court of Appeal in Adams' Application [2001] NI 1 and the following of that decision in Boyle v. DPP [2006] NICA 16. Kincaid contended that his rights under Article 2 of the European Convention were engaged and the decision in Adams Application could not be regarded as a binding authority and in the alternative Kincaid contended that the application of the policy on the giving of reasons was irrational. Kerr LCJ accepted that Article 2 rights may be engaged where the risk to life arose from those other than state agents and further accepted that the applicant's Article 2 rights were engaged as the shooting involved a life threatening attack upon the applicant. Further it was stated that the procedural requirements of Article 2 did not automatically require the PPS to supply reasons for a decision not to prosecute. The question was whether the effective implementation of the domestic law in protecting the right to life and ensuring the accountability of the person responsible for the life threatening attack on an applicant required that reasons or further reasons be given for the decision not to prosecute.

[7] It was found that Kincaid was aware of the statements that Dowie had made during interviews after his arrest, that Kincaid had been informed that the case had been considered by independent leading Counsel, that Kincaid knew that Senior Counsel had advised that the evidence was insufficient to afford a reasonable prospect of convicting Dowie for the offence of attempted murder, that the conclusion had been reached because Senior Counsel considered that there was no reasonable prospect of refuting Dowie's claim that he was acting in self defence when he discharged his firearm in the direction of the applicant, that the PPS was not required to supply details of the reasoning that underlay the decision not to prosecute as that would not assist Kincaid's understanding of the decision, much less assist the effective implementation of the laws protecting the right to life or make Dowie accountable. The refusal to provide further reasons for the decision not to prosecute was held not to be a violation of Article 2 and not to be unreasonable. Further it was held that the decision not to prosecute could not be characterised as irrational.

[8] The respondent contends that the right to life under Article 2 is not engaged in the present case. Article 2 concerns a real and immediate threat to life. Patrick McCann issued a threat to kill the applicant, a matter which the respondent characterises as mere vulgar abuse. That may or may not be the present case. Making a threat to kill is a serious criminal offence. If the criminal offence of making a threat to kill was committed then I am satisfied that it is arguable that Article 2 will be engaged. In the absence of a basis for

concluding that the words uttered to the applicant were not capable of amounting to the criminal offence of making a threat to kill I am satisfied that it is arguable that Article 2 is engaged in the present case.

[9] On the basis that it is arguable that making the threat to kill engaged Article 2, the "Kincaid question" arises as to whether the effective implementation of the domestic law in protecting the right to life and assuring the accountability of the person responsible for the threat to life require that reasons be given for the decision not to prosecute. In the present case the applicant is aware of the statements made by Patrick McCann and believes that they support the threat to kill. Further the applicant is aware of other witness statements that support the threat to kill. No reasons have been offered for the decision not to prosecute Patrick McCann. Unlike Kincaid the response of the prosecutor is to state that there is no obligation to inform the applicant why the police have decided not to pursue a prosecution against Patrick McCann. The applicant expresses suspicions about the reasons for no prosecution of Patrick McCann, based on his former status as a police officer. Mr McMillen for the respondent contends that the threats to kill uttered by Patrick McCann would have been regarded as vulgar abuse in the heat of the moment in the context of aggressive behaviour by the applicant against Patrick McCann. That may be the view of the police and may be the basis on which the decision was made not to prosecute but I have no evidence that that was so. The reasons for no prosecution in the present case are unknown. Unlike Kincaid's Application there is no information about the basis of the decision not to prosecute. I am satisfied that it is arguable that the effective implementation of the domestic law in protecting the right to life and ensuring the accountability of the person responsible for the threat to life requires that reasons be given for the decision not to prosecute Patrick McCann.

[10] Further, the applicant challenges the decision not to prosecute Patrick McCann. While the decision not to prosecute and the decision as to the reasons that should be given for not prosecuting are to be treated as separate matters, there are common policy considerations behind both matters. In Dennis v. DPP (2006) EWHC 3211 (Admin) the Divisional Court considered an application for judicial review of the decision of the Crown Prosecution Service Gwent Area not to bring prosecutions for gross negligence manslaughter arising out of the death of the applicant's son in an industrial accident. In explaining the decision not to prosecute, the prosecutor set out the factors that influenced his conclusion that the degree of negligence exhibited was not such as to amount to criminal negligence. Waller LJ's approach was that if it could be demonstrated on an objective appraisal of the case that a serious point or serious points supporting a prosecution had not been considered that would give a ground for ordering reconsideration of the decision. Further if it could be demonstrated that in a significant area a conclusion as to the evidence to support a prosecution was irrational that

would provide a ground. The points would have to be such as to make it seriously arguable that the decision would otherwise be different but the decision was one for the prosecutor and not for the Court. The Divisional Court found that certain matters should have been taken into account and referred the matter back to the CPS on the basis that it was seriously arguable that a different decision might have been made once account was taken of those matters.

[9] It is arguable that the circumstances of the present case are such that the absence of a prosecution requires an explanation. This cannot be said to be a very plain case or one where the respondent has delivered some clean knock out blow such as would justify setting aside the grant of leave to apply for judicial review. The application by PSNI to set aside the grant of leave to apply for judicial review is refused.