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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **09/03/12**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY GARY HAGGARTY FOR JUDICIAL REVIEW
AND IN THE MATTER OF A DECISION OF THE POLICE SERVICE OF NORTHERN IRELAND

Haggarty's (Gary) Application [2012] NIQB 14

Before: Morgan LCJ, Higgins LJ and Treacy J

MORGAN LCJ

[1] The applicant challenges the refusal of the Police Service of Northern Ireland (PSNI) to provide him and his solicitor with tapes of police interviews conducted with him as an assisting offender following the making of a written agreement with a specified prosecutor pursuant to section 73 (1) (b) of the Serious Organised Crime and Police Act 2005 (SOCPA). The applicant contends that the refusal is unlawful for three principal reasons: –

(A) The PSNI failed to provide the interview tapes in accordance with its obligation under the Police and Criminal Evidence Act 1984 (PACE) Code of Practice E;

(B) The applicant had a legitimate expectation that the tapes would be provided to his solicitor because:

(i) he was advised that the interviews were being carried out in the spirit of PACE;

(ii) he was supplied after the interviews with a notice under PACE telling him that he or his solicitor could arrange to listen to the tapes if he was prosecuted; and

(iii) his solicitor indicated that the usual practice of the PSNI was to provide tapes immediately and in any event no later than two weeks after the conclusion of the interviews.

(C) The reasons given by the PSNI for the refusal to provide the tapes are concerned with confidentiality and are irrational since the applicant was present at all of the interviews, his solicitor was also present and free to take notes, the refusal will result in delay to criminal proceedings against the applicant and portions of the interviews have already been disclosed to the defendants in another case.

Background

[2] On 25 August 2009 the applicant was arrested for the murder of John Harbinson on 18 May 1997 pursuant to section 41 of the Terrorism Act 2000. He was interviewed in respect of that offence in the presence of his solicitor and charged on the same date. The interviews were recorded in accordance with the relevant Code of Practice under the Terrorism Act 2000. On the following day he was remanded in custody at Belfast Magistrates' Court. The PSNI accept that these tapes should be disclosed pursuant to the relevant Code of Practice and this application is not concerned with them.

[3] Section 73 (2) of SOCPA provides that in determining what sentence to pass on a defendant the court may take into account the extent and nature of the assistance given or offered by him if the conditions set out in section 73 (1) are satisfied.

> "(1) This section applies if a defendant—
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> (a) following a plea of guilty is either convicted of an offence in proceedings in the Crown Court or is committed to the Crown Court for sentence, and
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> (b) has, pursuant to a written agreement made with a specified prosecutor, assisted or offered to assist the investigator or prosecutor in relation to that or any other offence."

In accordance with its SOCPA debrief policy the PSNI conducted a series of scoping interviews with the applicant with his agreement between 6 and 8 October 2009. On 13 January 2010 the applicant entered into an agreement with a specified prosecutor pursuant to s.73 of SOCPA as part of which he agreed to engage in a tape-recorded debriefing process conducted following a caution, to fully admit and to give a truthful account of his own involvement in criminal conduct in which he played a

part or of which he had knowledge and to give truthful evidence in any court proceedings arising from the prosecution of any offences disclosed.

[4] The PSNI did not have a suitable debriefing facility in Northern Ireland so it was arranged that the applicant should be taken from prison to a suitable police station in England and Wales pursuant to the powers contained in paragraph 3 (1) of Schedule 1 of the Crime (Sentences) Act 1997. The debriefing interviews were conducted by Northern Ireland police officers between 13 January 2010 and 10 May 2011 over the course of 12 separate deployments. Further clarification or challenge interviews took place between 9 June 2011 and 7 December 2011. A custody record was maintained in respect of each deployment, the applicant was cautioned prior to each interview and each interview was tape-recorded. Throughout the course of these interviews the applicant was accompanied and represented by Wendy Lewis, an accredited police station representative, who therefore fell within the definition of "solicitor" in PACE Code E of the Code of Practice on Tape Recording Interviews with Suspects. The Northern Ireland PACE Code E does not contain this definition but nothing turns on this. During the interviews the applicant disclosed criminal conduct by him and criminal conduct by others, including police officers. The material in respect of criminal conduct allegedly involving police officers was provided to the Police Ombudsman's office for investigation.

[5] In January 2011 the applicant's present solicitors took over the conduct of his defence in relation to the murder with which he was charged in August 2009. On 15 March 2011 the applicant was charged with eight further offences including directing terrorism, membership of the UVF, conspiracy to murder and various firearms and explosives offences. By letter dated 5 April 2011 his solicitors questioned whether his admissions justified two of the charges laid against him and further requested that they be provided as soon as possible with the tapes of all of their client's interviews under caution. By letter dated 20 April 2011 the Public Prosecution Service indicated that the interview tapes would not be provided at that juncture as the debrief process was incomplete and the matters raised therein remained the subject of continuing investigation. By letter dated 13 May 2011 the Public Prosecution Service provided redacted copies of the interviews in relation to the two charges with which the solicitors had taken issue. The applicant's solicitors renewed their request for the interview tapes by letter dated 24 June 2011 and by letter dated 7 July 2011 Detective Chief Supt Hanley advised that it was not practicable for the PSNI to provide the tapes at that stage as to do so would be likely to impede an ongoing serious crime investigation. That position was confirmed in answer to subsequent correspondence by Detective Inspector Childs on 23 September 2011.

[6] The principal replying affidavit on behalf of the respondent was sworn by Asst Chief Constable Harris. He stated that he had been advised by the solicitor for the respondent that there was a measure of uncertainty as to whether PACE Code E applied. He considered the position first on the basis that the interviews were

unregulated by any of the Codes. He noted that the applicant had been told that the interviews would be conducted in the spirit of PACE. He drew a distinction between tapes of interviews relating to the applicant's own criminality and those relating to the criminality of third parties. He noted that there was a need to consider the disclosure required where charges had been preferred. He accepted that in this case the applicant sought disclosure of the tapes in order to enable his solicitor to advise him in respect of the case against him and the preparation of his defence. ACC Harris acknowledged that an argument had been made on the applicant's behalf that any disclosure of interview tapes would be likely to facilitate speedier preparation for any trial. He concluded that the disclosure of transcripts of the SOCPA interviews relating to the applicant's own criminality could be provided in principle as soon as practicable after the charging of the applicant with offences.

[7] He considered, however, that it was not necessary or appropriate to provide tapes or transcripts of the interviews other than in those circumstances. He set out the reasons for that approach at paragraph 30 of his affidavit.

> "30. In particular, where the tapes (or transcripts) contain evidence of the criminality of others I would not be prepared to recommend or authorise disclosure. Issues concerning the criminality of others currently relate to ongoing police investigations into serious crime by third parties. I am satisfied that the release of tapes (or transcripts) of SOCPA interviews of this nature would be likely to create prejudice to ongoing police investigations. There is a vital public interest in ensuring that such investigations are carried out in as efficacious a way as possible and, in my opinion, absent compelling reasons to the contrary, it is vital that confidentiality should be preserved and that material in relation to ongoing investigations is protected and safeguarded as far as possible. Additionally, I am satisfied that to release tapes of SOCPA interviews (or transcripts) relating to the potential criminality of third parties would be inappropriate, as to do so would be likely to create, or accentuate, risks to the safety and security of a range of persons mentioned in that material including the applicant. In this context it is inevitable that SOCPA tapes will include sensitive materials from a human source; will include allegations against third parties of serious criminal conduct; and will be likely to create circumstances in which the safety and security of persons may be imperilled if its contents are disseminated or further disseminated. All of this is

> especially so where, as currently would be the position, police investigations are not yet complete and where third parties may be unaware that they are under suspicion and have not yet been interviewed or arrested. In all the circumstances the provision of material in this category to the applicant in tape or transcript form would create an unnecessary risk that it could enter the public domain and place persons at risk and/or prejudice ongoing and future police investigations thereby undermining the fundamental purpose and objective of the SOCPA scheme."

[8] He then considered the question of disclosure on the assumption that Code E of the PACE Codes applied. He exhibited an internal police document, Audio Recording of Interviews, dealing with the procedures to be used by police for the disclosure of tapes. In most cases a copy of the tape is provided to the interviewee immediately after the interview in the case of a voluntary attender. That accords with the experience recounted by the solicitor on behalf of the applicant. There is, however, a specific prohibition within the document on the release of a tape containing sensitive material without the authority of a Chief Inspector. Sensitive material relates to matters concerning state security, security of premises or high-value goods, details of informants, allegations against third parties who have not been charged with related offences or any other subject considered sensitive. He concluded, for the reasons set out in paragraph 7 above, that the disclosure outcome would be the same if Code E applied. Prior to its disclosure in this application the internal police document had not been published.

PACE Code E

[9] Pace Code E is issued pursuant to the duty imposed on the Secretary of State by s. 60 of PACE to issue a code of practice in connection with the interviews by police officers at police stations of persons suspected of the commission of criminal offences. By the time of the hearing the parties had reached some common ground on the applicability of PACE Code E to the interviews of the applicant. The questioning with which this application is concerned was taking place in a police station in England and Wales under the supervision of police officers from that jurisdiction. Were it carried out by police officers from that jurisdiction Code E would certainly have been engaged because it applies to voluntary attenders like the applicant as well as to those who are arrested, brought to the police station and detained (see R v Drury [2001] EWCA Crim 975). The detectives from Northern Ireland who were carrying out the questioning were under the general duty in s. 32(1)(a) of the Police (Northern Ireland) Act 2000 (the 2000 Act) to take measures to bring the offender to justice but s.32(2) of the 2000 Act limited their powers as constables to Northern Ireland and adjacent coastal waters. They were not entitled to

exercise the powers and privileges of constables in England and Wales and were not, therefore, police officers for the purposes of PACE.

[10] Section 67(9) of PACE makes supplementary provisions in relation to the Codes of Practice.

> "(9) Persons other than police officers who are charged with the duty of investigating offences or charging offenders shall in the discharge of that duty have regard to any relevant provision of . . . a code. "

It is apparent that the general duty under s.32(1)(a) of the 2000 Act includes the duty of investigating offences and it follows, therefore, that the Northern Ireland detectives were required to have regard to any relevant provision of any code. In this case that included the provisions of Code E which is concerned with the practice on tape recording interviews with suspects. The relevant portion of Code E dealing with the disclosure of tapes is paragraph 4.19 which provides:

> "4.19 The suspect shall be handed a notice which explains:
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> (i) how the audio-recording will be used,
>
> (ii) the arrangements for access to it,
>
> (iii) that if the person is charged or informed they will be prosecuted, a copy of the audio recording will be supplied as soon as practicable or as otherwise agreed between the suspect and the police or on the order of the court."

The submissions of the parties

[11] For the applicant Ms Quinlivan QC contended that in order to interpret the statutory obligation to have regard to Code E it was also necessary to take into account that the applicant was informed by those carrying out the interviews that they were being conducted in the "spirit of PACE". The interviews were being conducted in a designated police station, a custody record was being maintained in relation to the applicant, he was cautioned before each interview, he had a legal representative available to take notes throughout the interview, the interviews were tape-recorded and in every other respect the manner in which the interviews were carried out was as if Code E applied. Against that background the proper inference was that the applicant was at all material times entitled to the protections of Code E.

[12] Paragraph 4.19 of Code E provided that a copy of the audio recording should be supplied as soon as practicable if the person is charged or informed that he will be prosecuted. It was submitted that the provisions of the Code required the production of the entirety of the audio recording. The applicant accepted that there had to be some relationship between the audio recordings and the charges or information that a prosecution would proceed but submitted that it was sufficient in this case that all of these interviews proceeded in the aftermath of the applicant's interview in August 2009 for murder. If wrong on that as a result of the eight charges which were put to him in March 2011 the applicant submitted that all of the interviews from January 2010 subsequent to the applicant's entry into the assisting offender agreement should be disclosed as a matter of entitlement. In those circumstances no proper distinction could be drawn between interviews relating to the applicant's own criminality and others relating to the criminality of third parties. There was no evidence to support the conclusion that it would not be practicable to provide the audio recordings or transcripts.

[13] In the alternative the applicant submitted that his solicitors needed access to the audio recordings or transcripts in order to advise him on the extent of the assistance which he had provided and the consequences that might have for his sentence if he entered a plea of guilty. The transcripts were clearly relevant to this issue and any delay in providing these materials to the applicant's solicitors would inevitably add to the substantial delay which had already occurred in the trial. Since it was the applicant who had given all of the information in the transcripts and his legal adviser made extensive notes during the interviews the provision of the transcripts did not create any additional unnecessary risks of disclosure of sensitive information or cause prejudice to the ongoing investigation.

[14] Mr Maguire QC for the respondent submitted that the object paragraph of 4.19 was to enable the applicant to prepare his defence in relation to the charge preferred. That purpose informed the proper construction of the provision. Only those interviews and recordings upon which reliance was made for the purpose of sustaining the charges which had been brought against the applicant had to be disclosed pursuant to paragraph 4.19. It was accepted by ACC Harris that redacted transcripts of such recordings should be provided. What the applicant sought was disclosure of all recordings of interviews held pursuant to a SOCPA agreement once any charge was preferred. SOCPA did not provide for any such disclosure and such disclosure was not required by Code E. It was accepted that further disclosure may be required to comply with the provisions of the Criminal Procedure and Investigations Act 1996 (CPIA) at a later stage of the trial but there was no reason to address disclosure requirements at this early stage.

[15] The assisting offender interviews had been concerned with serious criminal offences. There was a substantial public interest in ensuring the protection of such investigations. This had been recognised in Re A's Application [2001] NI 335 where Kerr LCJ stated that unless the interests of justice required otherwise compelling

reasons were necessary for the disclosure of the contents of a police investigation file. This was recognised in the internal police document which gave advice to police officers on how to implement the equivalent of paragraph 4.19 in Northern Ireland.

[16] Mr Scoffield QC for the Police Ombudsman supported the submissions of the respondent. He drew attention to the provisions of section 63 of the Police (Northern Ireland) Act 1998 which makes it a criminal offence for the Ombudsman or his officers to disclose information received by them in the course of their investigations other than in the limited circumstances set out in the section. He relied upon Re CAJ's Application [2005] NIQB 25 to support the proposition that the statutory requirement for confidentiality in the Ombudsman's investigation should be material to the disclosure by others of information relevant to that investigation. He submitted that it was only where there was an inescapable statutory obligation to disclose such information that this should override the need for confidentiality in matters concerning an Ombudsman's investigation.

Discussion

[17] Section 60 of PACE imposes a duty on the Secretary of State to issue a code of practice in connection with the tape recording of interviews of persons suspected of the commission of criminal offences which are held by police officers at police stations and to make an order requiring the tape recording of interviews of persons suspected of the commission of criminal offences. It is immediately apparent, therefore, that the Secretary of State has no power to regulate the manner in which police question persons about the involvement of others in criminal offences through the codes of practice. There are, however, many circumstances in which the questioning of a suspect will inevitably involve the identification of others engaged in criminal activity and it is clear that such questioning is covered by the code of practice as it relates to the criminal conduct of the person questioned.

[18] This distinction is recognised in the codes of practice themselves. Paragraph 11.1A of Code C defines an interview as the questioning of a person regarding their involvement or suspected involvement in a criminal offence. Code E is entitled "Code of Practice on Tape Recording Interviews with Suspects". In R v Keenan [1990] 2 QB 54 it was recognised that the importance of the audio recording provisions were twofold; firstly they made it difficult for a detained person to make unfounded allegations against the police which might otherwise appear credible; secondly they provided safeguards against the police inaccurately recording or inventing the words used in questioning a detained person.

[19] The codes of practice have no statutory force. They are not subordinate legislation. Breach of the codes by a police officer or other person required to take the codes into account does not give rise to any civil or criminal liability on the part of that person (see s.67(10) of PACE). Compliance or breach of the codes may, however, be relevant to decisions about the admissibility of evidence or aspects of

the fairness of the trial. Section 67 (9) of PACE imposed an obligation on the Northern Ireland police officers involved in the questioning of the applicant for suspected offences to take Code E into account. The purpose of that provision was to provide appropriate safeguards for those interviewed in circumstances such as these. There is no reason why the safeguards for the applicant in the course of the interviews should be different from those which he would have had if police officers from England and Wales had been carrying on the questioning.

[20] The applicant's primary submission is that all of the recordings of interviews conducted with the applicant since August 2009 must now be provided to them because of the terms of paragraph 4.19 of Code E. That would include questioning which was solely related to the issue of the criminality of others. For the reasons set out above we consider that the Secretary of State has no power to regulate such questioning under the codes of practice. In any event we do not accept that such an interpretation could be derived from paragraph 4.19. The obligation under that paragraph is to supply the tape as soon as practicable if the person is charged or informed that he will be prosecuted. In the absence of a charge or intention to prosecute there is no obligation to supply any tape. If a charge is laid or an intention to prosecute communicated paragraph 4.19 clearly applies to an audio recording of any interview with the applicant concerning his involvement in that suspected offence but there is nothing in the language to suggest that it applies to other interviews some of which may not be relevant to the matter charged or intended to be prosecuted.

[21] That construction is also consistent with the purpose of paragraph 4.19. There is no suggestion of impropriety in the conduct of the interviews in this case but there was some difference of view about the actual content of the interviews. The redacted transcripts of interviews concerning two of the charges were provided and the papers disclosed that there was some difference between the note recorded by the accredited police station representative and the transcripts. In our view the supply of tapes of interviews unconnected with the matters charged would not contribute in any way to the safeguards which paragraph 4.19 was designed to provide. There was no distinction drawn between the provision of tapes or transcripts in the course of the hearing and we consider that the provision of transcripts as accepted by ACC Harris represents compliance with the obligation contained in paragraph 4.19 of Code E.

[22] Although the applicant advanced a legitimate expectation argument in the Order 53 statement there was no evidence of a promise or representation to give rise to such a claim and the practice of giving tapes after interviews upon which the applicant's solicitor relied was clearly qualified by the internal document on sensitive information.

[23] The remaining argument advanced on behalf of the applicant was that Article 6 ECHR required the provision of all of the tapes in order to ensure that the

reasonable time guarantee in respect of the matters charged was not breached. It was submitted that the refusal to provide such material was irrational. In light of the complexity of this case derived from the extensive disclosures made by the applicant it was inevitable that there would be substantial delay. One of the reasons for that delay was to enable the applicant to benefit from the SOCPA agreement. It seems to us that the applicant now wants to see material which ought properly to be the subject of a disclosure application under the CPIA 1996. We cannot be satisfied at this stage what if any material will have to be disclosed. We also accept that there are very powerful arguments about the increased risk to ongoing investigations which supply of the tapes or transcripts would create.

[24] We consider, however, that the primary responsibility for ensuring the fair trial rights of an accused lies with the criminal court dealing with the charges. In our view this is a collateral challenge of the type contemplated in R v DPP ex p Kebilene [2002] AC 2 326. The Divisional Court has a supervisory jurisdiction while the case is before the District Judge but there is no decision of that court which is sought to be reviewed in this case. Even if there was a dispute about such a decision it is likely that it would be for the Crown Court to resolve the issue in the course of the trial. In light of the extensive and careful arguments which were advanced in the course of the hearing in respect of the proper interpretation of paragraph 4.19 of Code E we have given our ruling but wish to make it clear that the principle in Kebilene also applies to that issue.

Conclusion

[25] We have provided our ruling on the meaning of paragraph 4.19 of PACE but dismiss this judicial review as a collateral challenge to issues which should be dealt with in the course of the trial of the charges against the applicant.