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

Delivered: 28/06/2016

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

Between:

**SIMONE KATHLEEN HIGGINS AND
ANTHONY LEE**

Plaintiffs;

-and-

**THE CHIEF CONSTABLE OF THE POLICE SERVICE
OF NORTHERN IRELAND**

Defendant.

STEPHENS J

Introduction

[1] Simone Kathleen Higgins ("the first plaintiff") and Anthony Lee ("the second plaintiff") have each commenced separate actions against the defendant, the Chief Constable of the Police Service of Northern Ireland. Yesterday and in each of the actions, I heard applications on behalf of the defendant for declarations pursuant to Section 6 of the Justice and Security Act 2013 ("the 2013 Act") and Order 126 Rule 21 of the Rules of the Court of Judicature (Northern Ireland) 1980 that both of these proceedings are proceedings in which a closed material application may be made to the court. The proceedings in question involve claims by the plaintiffs that on 5 February 2005, in anticipation of a subsequent search operation by armed police officers and at an address in Fisherwick Gardens, Ballymena, Patrick Murray, whilst under the direction and control of the defendant, provided incendiary devices to Anthony Lee in DVD cases, wrongly informing him that the cases contained counterfeit DVDs. That in the subsequent police search operation the DVD cases, which contained incendiary devices, were found. Both the first and second plaintiffs, with

others, were present at the address in Fisherwick Gardens, they were arrested and charged with criminal offences.

[2] In essence the plaintiffs allege that the incendiary devices were “planted” at the instigation of the police by an agent of the police.

[3] The applications for declarations involved both an open statement of reasons dated 16 December 2014 and a closed statement of reasons. The Advocate General for Northern Ireland pursuant, to Section 9 of the 2013 Act, appointed a Special Advocate to represent the interests of the plaintiffs in that part of this application from which the plaintiffs and their legal representatives are excluded. The two actions have been partially consolidated in that an order has been made that they should be tried before the same judge at the same time. I give this open judgment in relation to both applications giving my reasons for my decision. In the event it is unnecessary to produce a closed judgment in addition to this open judgment for which see paragraph [3] of *McCafferty v Secretary of State for Northern Ireland* [2016] NIQB 47.

[4] Dr McGleenan QC and Mr McEvoy appeared on behalf of the defendant. Mr Lannon appeared on behalf of Ms Higgins. Mr White appeared on behalf of Mr Lee. Mr Scoffield QC was the Special Advocate appointed by the Advocate General for Northern Ireland to represent the interests of the plaintiffs in those parts of these applications which were closed. I am grateful to all counsel for their assistance.

Factual Background and Pleadings

[5] I set out in summary form a description of the factual background based on the material presently available to the court. It is not meant to be definitive nor is it necessarily accurate given that this is an interlocutory application at which stage I have heard no evidence. The purpose of setting out the background is to illustrate the issues that arise in these actions.

[6] On 5 February 2005 the plaintiffs were at an address in Fisherwick Gardens, Ballymena, County Antrim, together with Pearce O’Neill, Liam Lynas, Christopher Smylie and Aisha Sloane when armed police entered and searched the premises. Liam Lynas and Christopher Smylie who were in the premises were found to have the DVD cases which transpired to contain incendiary material. The DVD cases had been provided to Anthony Lee by Patrick Murray. The plaintiffs allege that Patrick Murray was an agent of the defendant and in that capacity he had deliberately “planted” the devices so that they could be discovered by the police. Both the plaintiffs were arrested, they were detained at Antrim Police Station and were released on bail, although there is confusion as to the date of release which was either 7 February 2005 or 9 February 2005 or 28 October 2005. They were charged with possession of explosives and membership of a proscribed

organisation. At this stage of these civil proceedings the course of the criminal proceedings is somewhat unclear. There was a no bill application by the second plaintiff but the second plaintiff's statement of claim alleges that criminal charges were pursued against him until January 2008 which would suggest that the application was either unsuccessful or only partially successful. What is clear is that the prosecution eventually offered no evidence.

[7] The position as far as the first plaintiff is concerned is that she asserts that on 28 January 2008 she was acquitted at a hearing in Belfast Crown Court when the prosecution offered no evidence against her and all her co-accused. The first plaintiff asserts that this was in response to a defence statement submitted by her co-accused Liam Lynas in which he asserted, amongst other matters, that:

- (i) Mr Murray was an active participating informant on behalf of the police; and
- (ii) Mr Murray manufactured or may have manufactured the devices.

[8] It is the case of both plaintiffs that the prosecution should never have been brought or in the alternative that if the prosecutions were legitimately commenced, that they were continued for an inappropriate period of time. The exact basis upon which the plaintiffs were prosecuted and the exact reasons for the prosecution offering no evidence, will be the subject of detailed analysis at the trial of these proceedings. I anticipate that this will involve consideration not only of the information and documents available to the defendant but also the information and documents available to the Public Prosecution Service.

[9] The plaintiffs bring these proceedings alleging that the defendant is liable for various torts including negligence, assault, trespass to the person, false imprisonment, unlawful arrest, malicious prosecution, and breaches of Articles 2 and 8 ECHR. The defence in both actions denies liability but does not set out any positive case. Rather the defence states that Mr Murray did not supply the devices as part of a police but rather as part of a terrorist, operation. The defendant also puts in issue the status of Mr Murray neither confirming nor denying that he was a police informant.

The Legal Principles

[10] At paragraphs [16]-[31] of the decision in *McCafferty* I summarised the applicable legal principles and I seek to apply those principles in relation to these applications.

[11] I set out parts of Section 6 of the 2013 Act as follows:

“(1) The court seized of relevant civil proceedings may make a declaration that the proceedings are proceedings in which a closed material application may be made to the court.

(2) The court may make such a declaration –

(a) on the application of ... (ii) any party to the proceedings,

(3) The court may make such a declaration if it considers that the following two conditions are met.

(4) The first condition is that ... (b) a party to the proceedings would be required [to disclose sensitive material in the course of the proceedings to another person (whether or not another party to the proceedings)] were it not for one or more of the following –

(i) the possibility of a claim for public interest immunity in relation to the material,

(ii) the fact that there would be no requirement to disclose if the party chose not to rely on the material,

(iii) section 17(1) of the Regulation of Investigatory Powers Act 2000 (exclusion for intercept material),

(iv) any other enactment that would prevent the party from disclosing the material but would not do so if the proceedings were proceedings in relation to which there was a declaration under this section.

(5) The second condition is that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration.

(6) The two conditions are met if the court considers that they are met in relation to any material that would be required to be disclosed in the course of the proceedings (and an application under subsection (2)(a) need not be based on all of the material that might meet the

conditions or on material that the applicant would be required to disclose).

(7) ...

(8) A declaration under this section must identify the party or parties to the proceedings who would be required to disclose the sensitive material (“a relevant person”).

(9) ...

(10) ...

(11) In this section—

“closed material application” means an application of the kind mentioned in section 8(1)(a),

“relevant civil proceedings” means any proceedings (other than proceedings in a criminal cause or matter) before—

(a) the High Court,

(b) ...,

“sensitive material” means material the disclosure of which would be damaging to the interests of national security.”

Open Submissions on behalf of the Plaintiffs

[12] Mr Lennon on behalf of the first plaintiff and Mr White on behalf of the second plaintiff made a number of submissions opposing a declaration which I will now address. It was submitted that there has been widespread speculation about Patrick Murray, which is in the public domain, so that any information about him could no longer cause any damage to national security. It is submitted that:

“Any and all persons having any dealings with the identified person are likely to be suspicious about whether he compromised them by relaying information to the Security Authorities, whether true or not, and whether or not they believed him to be an agent of the Security Services”.

That given the speculation in the public domain there will be no loss of information from Patrick Murray as quite simply his position was compromised regardless as to whether he was or was not a police agent.

[13] In support of the assertion that speculation about Patrick Murray was already in the public domain I was referred to three press articles as follows:

- (a) An article dated 26 July 2009 in the Belfast Telegraph entitled "My Man is not a Police Informer". This article quotes Tish Murray, the wife of Patrick Murray, who rubbished reports that her husband is a high level Special Branch informant saying that if he was she would "leave him in the morning."
- (b) An article in An Phoblacht dated 28 January 2008 entitled "The Trial Collapses over Role of British Agent". This article refers to the collapse of the prosecutions against, amongst others, the plaintiffs. The article asserts that "the abandonment of the trial is understood to centre on *claims* that Paddy Murray was being protected from prosecution because he was a State Agent". (emphasis added).
- (c) An article in the Derry Journal dated 23 October 2007 entitled "Informer Accusation Total Lies – Dissident Republican, Paddy Murray". As the title suggests the article reports Mr Murray saying "I am no MI5 tout" and "anyone who knows me would know for a fact the claims are all lies".

It can be seen that these articles amount to claim and counterclaim and are to be distinguished from the facts in *McGartland v Secretary of State* [2015] EWCA C686. There is a very strong public interest in protecting the anonymity of and obtaining information from what are termed covert human intelligence sources in Section 29 of the Regulation of Investigatory Powers Act 2000 and more colloquially referred to as "informers." The policy of neither confirming nor denying whether a particular individual is an informer is to secure the welfare of a range of specific individuals and to encourage the supply of information to the police by people who are unlikely to come forward unless they can be confident that their confidentiality will be protected. In *Re Scappaticci* [2003] NIQB 56 at paragraph [15] the rationale for a NCND policy in relation to informers was explained in the following terms:

"The reasons for adopting and adhering to the NCND policy appear from paragraph 3 of Sir Joseph Pilling's affidavit. To state that a person is an agent would be likely to place him in immediate danger from terrorist organisations. To deny that he is an agent may in some cases endanger another person, who may be

under suspicion from terrorists. Most significant, once the Government confirms in the case of one person that he is not an agent, a refusal to comment in the case of another person would then give rise to an immediate suspicion that the latter was in fact an agent, so possibly placing his life in grave danger (a comparable proposition may be found in paragraph 35(3)(a) of the decision of the Information Tribunal in *Baker v Secretary of State for the Home Department* (2001), a copy of which was furnished to me). If the Government were to deny in all cases that persons named were agents, the denials would become meaningless and would carry no weight. Moreover, if agents became uneasy about the risk to themselves being increased through the effect of Government statements, their willingness to give information and the supply of intelligence vital to the war against terrorism could be gravely reduced. There is in my judgment substantial force in these propositions and they form powerful reasons for maintaining the strict NCND policy.”

[14] It can be seen that there are a number of reasons for the application of the NCND Policy. The plaintiffs have concentrated on speculation in relation to one of those reasons. National security can be affected in relation to all of the reasons including the one about which the plaintiffs refer to speculation. I reject the submission that due to speculation occurring in relation to one of the reasons that the closed material information cannot be sensitive material.

[15] It was also submitted on behalf of the plaintiffs that the events in question go back over 11 years and that security procedures and processes will have changed considerably in that time and the need to protect them will have been severely weakened with time. This was a submission that the closed material is not now sensitive. There can be situations in which procedures and processes become outdated and I have taken this submission into account together with all the other open submissions when considering the closed material.

[16] The plaintiffs also submitted that the closed material procedure would not be in the interests of the fair and effective administration of justice in these actions in that a Special Advocate cannot consult with the plaintiffs once he has had sight of the closed material. Insofar as this is a submission that there can never be a closed material procedure I reject that submission. A closed material procedure is a serious departure from the fundamental principles of open justice and natural justice but it is a departure that Parliament has authorised by the 2013 Act in defined circumstances for the protection of national security. If it is a submission

that I should give consideration to the difficulties faced by the Special Advocate in responding to the sensitive material in circumstances in which he cannot take instructions from the plaintiffs then I confirm that those are appropriate considerations to be taken into account, not only at this stage but also throughout any closed material procedure. If the gateway is opened then the fairness and effectiveness of the proceedings is to be kept constantly under review. However I do not consider that the difficulties faced by the Special Advocates are a reason for not making a Section 6 declaration. I will keep those difficulties under review.

Consideration of the Statutory Provisions

[17] This court is seized of these proceedings and they are relevant proceedings.

[18] *The first statutory condition.* The reasons and the evidential basis for the search of the premises and for the arrest and prosecution of the plaintiffs are directly in issue of these proceedings. I have considered the material which has presently been made available by the defendant which informed those decisions. I consider that the material is sensitive. I have no doubt that its disclosure will be required in the course of these proceedings were it not for the possibility of a PII claim. In my judgment the first condition is met.

[19] *The second statutory condition.* I consider that the detail contained in the sensitive material is essential to an evaluation of the substantive issue in these civil proceedings. I have given consideration to alternatives to a closed material procedure; see *Sarkandi* at paragraphs [34] and [61]. Alternatives would include:

- (a) The holding of certain hearings or parts of hearings in chambers or in camera;
- (b) The grant of anonymity to certain witnesses and the use of cyphers;
- (c) The imposition of reporting restrictions;
- (d) The employment of tightly confined and strictly regulated confidentiality rings; and
- (e) A PII certificate.

[20] There are difficulties with all of these alternatives. Holding certain hearings in camera would not be different from a closed material procedure except that the plaintiff and his open legal advisors would have access to the closed material. It is obvious that material affecting national security should not be disseminated in that way. Granting anonymity to witnesses would not protect

sensitive information in this case. A reporting restriction would prevent wider dissemination of information through the Press but would not be in the interests of national security in this case. The confidentiality ring if it excluded the plaintiffs would effectively be the same as the role of the Special Advocates as the plaintiffs' open lawyers even if security cleared could not take instructions from the plaintiffs about the closed material. PII would lead to all the evidence being excluded.

[21] I have weighed in the balance the difficulties faced by the Special Advocates.

[22] On the basis of the present information I consider that there is no practical alternative to Section 6 proceedings if the civil proceedings are to be fairly tried. I consider that the second condition is met.

Discretion

[23] I have considered the exercise of discretion and given that I have concluded that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration I exercise discretion in favour of making a declaration.

Conclusion

[24] I make declarations pursuant to Section 6 of the Justice and Security Act 2013 and Order 126 Rule 21 of the Rules of the Court of Judicature (Northern Ireland) 1980 that both of these proceedings are proceedings in which a closed material application may be made to the court and the party to the proceedings who would be required to disclose the sensitive material is the defendant.

[25] I will hear Counsel in relation to directions. The parties are to produce a draft of the proposed directions.