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*(subject to editorial corrections)*

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

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**IN THE MATTER OF AN APPLICATION BY ANNA McCONWAY FOR**

**JUDICIAL REVIEW**

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**KERR J**

*Introduction*

**[1]** The applicant pursues two applications for judicial review. The first challenges a decision of the Northern Ireland Prison Service made on 22 June 1999 whereby it refused to provide her with security clearance for the purpose of providing counselling services to prison officers. The second judicial review challenge is to three separate decisions of the Chief Constable. The three decisions are respectively: (i) a decision "to generate and maintain private and confidential information about the applicant"; (ii) a decision to inform the Prison Service on 14 June 1999 that the applicant "… is held on record in December 1986 when it was reported that she had passed details of a member of the RUC to the Provisional IRA"; and (iii) a decision of 3 October 2000 whereby the applicant's request for access to information was refused.

*Factual Background*

**[2]** The applicant is a counselling psychiatrist with a degree in psychology from the Open University and a Masters degree in counselling from the University of Ulster. Since 1996 she has been a professional counsellor. From 1999 onwards she has received professional engagements from a company known as 'Corecare' which provides counselling services and employee assistance programmes to various agencies throughout Northern Ireland.

**[3]** In April 1999 the applicant was informed that Corecare had been awarded the contract to supply counselling services to the Northern Ireland Prison Service. She was asked to complete a security questionnaire, which she did. In May 1999 she was told that she would be counselling two prison officers. She contacted them and made arrangements to begin counselling sessions with them. On 15 June 1999 the first of these was held.

**[4]** On 22 June 1999 the clinical director of Corecare informed Mrs McConway that she had been refused security clearance by the Northern Ireland Prison Service and that the further sessions that she had arranged with the two prison officers were cancelled.

**[5]** The applicant's solicitors wrote to the Prison Service about her failure to receive security clearance. A number of letters were exchanged; the gist of the information given was to the effect that security clearance had been withheld in the interests of national security and that no further elaboration on this could be provided.

**[6]** An application for judicial review of the Prison Service decision elicited an affidavit from Ronald Barry Wallace of 11 May 2000. In it Mr Wallace, the assistant director of the Prison Service, stated that he had received confidential information from the police on the basis of which he decided that the applicant should be refused security clearance. He also stated that, as a result of the applicant's solicitor's representations police were asked to double check the information that they had provided and they confirmed that the information had come from a reliable source and was considered to be accurate.

**[7]** After the confirmation was received from the police the matter was considered by an official within the Prison Service who had not been involved in the original decision and he reached the same conclusion *viz* that security clearance for the applicant could not be provided.

**[8]** Mr Wallace also deposed that the Prison Service considered whether the information that they had received from the police could be released to the applicant or her advisers. After consulting the police on this question they concluded that "disclosure of the information in substance or summary could not be made without real harm being done to the public interest as it [was] necessary to protect the source of the information and the information itself".

**[9]** In a second affidavit, however, Mr Wallace stated that following further consideration of the matter by the police it had been decided that the information that had been relayed to the Prison Service could be revealed without real harm being done to the public interest and he therefore exhibited to this affidavit a copy of the letter that the Prison Service had received from the Royal Ulster Constabulary. This was dated 14 June 1999 and stated: -

> "Dear Sir,
>
> With reference to the attached [the security questionnaire completed by the applicant] the information given below is for your consideration.
>
> We have on record a person whose details are identical with those of your subject. She is held on record in December 1986 when it was reported she had passed details of a member of the RUC to the Provisional IRA.
>
> The above information given in this report is extremely sensitive and as such it should be treated accordingly."

**[10]** The disclosure of this information prompted a further affidavit from the applicant. In it she roundly denied the allegation contained in the letter from RUC to the Prison Service. She said that she had tried to think of any circumstances that might have given rise to the allegation and had been unable to do so. She did, however, recount an incident in September 1996 involving a Detective Constable Donald Douglas. She had become acquainted with this officer when he visited her home in relation to joyriding incidents in which her brother had been involved. According to Mrs McConway, this officer had frequently asked her to go out with him but she had refused. In September 1996 as she was leaving her daughter to school the detective constable approached her and told her that two men wanted to speak to her. She got into a police car and spoke to two men she believed were police officers in plain clothes. They asked her to keep an eye on what was happening in bars in Andersonstown and to report to them. She refused. About a week later Detective Constable Douglas approached her again with two plain clothes officers. She asked him to leave her alone.

**[11]** Later after receiving advice from a friend who had been a police officer Mrs McConway spoke to a senior officer of RUC who said that he would speak to Detective Constable Douglas and would make sure that she was not harassed further. Although he cannot specifically remember having done so, it appears that the superintendent did speak to the detective constable and Mrs McConway was not approached again.

**[12]** In response to the second affidavit from the applicant, an affidavit from Detective Superintendent Kenneth Gamble of RUC special branch was filed in which he stated that he had been able to identify the source of the information provided in the security report and that this person had supplied reliable information to special branch for almost 20 years.

*The judicial review challenge*

**[13]** For the applicant Mr McCloskey QC submitted that the Prison Service had taken a decision on the applicant's case on information that was self evidently incomplete; it was also misleading. In making the decision it did not take account of the behaviour of Detective Constable Douglas nor the repeated attempts by the special branch to recruit the applicant as an informer. The Prison Service was under an obligation, Mr McCloskey said, to make at least some inquiry about the reliability of information on the applicant that was some 13 years old at the time that it was used to deny her security clearance.

**[14]** He also argued that the procedure by which the decision was taken was unfair. The applicant was not given an opportunity to make representations on the information that the Prison Service had received. This was particularly reprehensible because the information that Mr Wallace gave as to the reasons that she had not been given security clearance was sparse and unenlightening.

**[15]** Finally, in relation to the Prison Service, Mr McCloskey submitted that their reaction was to impose a blanket prohibition on her engagement as a counsellor. This was not the only option available to them. They could have dealt with the matter in a less harsh way and allowed the applicant to engage in counselling albeit subject to conditions.

**[16]** Mr McCloskey advanced four criticisms of the Chief Constable's dealings with the applicant's case. He suggested that the record relating to her should never have been created because the information was too vague and imprecise; he claimed that the record should not have been maintained – a properly held review ought to have ensured that it was expunged; the information contained in the record should not have been conveyed to the Prison Service; and, finally, the Chief Constable was wrong to refuse to disclose to her all the information that he held about the applicant.

*The Prison Service decision*

**[17]** It was not disputed that the Prison Service was entitled to carry out a security check on the applicant. Indeed, she had willingly complied with this requirement. Equally, it was not suggested that the Prison Service was in a position to dispute the information given to it by RUC. The essence of the applicant's complaint is that the Prison Service ought not to have accepted the information at face value.

**[18]** The applicant's case on this point resolves to the proposition that the Prison Service acted unreasonably in failing to commission further inquiries

into the matter. It is difficult to discern how the Prison Service can be criticised, however. The information that they were given was clear. If correct (and the Prison Service had no reason to doubt its accuracy) no further inquiries were required in order to decide that the applicant represented a security risk. In any event, the Prison Service made a series of checks on the information supplied by the police and when it had been confirmed they had the material evaluated by an official who had not previously been associated with the case. In the circumstances there is nothing more that they could have reasonably been required to do.

**[19]** The suggestion that the Prison Service should have informed the applicant of the nature of the information that had been received and that they should have given her the opportunity to comment on it fails to reflect the instruction that the Prison Service had been given as to the manner in which they should use the material that the police had supplied. It had been made clear that the information was extremely sensitive and required to be treated in confidence. When the police had given permission subsequently to release the material, the Prison Service was not dilatory in disclosing it. Again I find nothing untoward about the Prison Service's treatment of the applicant on this aspect of the case.

**[20]** The claim that the applicant should not have been subject to a blanket ban but should have been allowed to continue counselling subject to conditions does not appear to me to be realistic. The information provided by the police clearly identified the applicant as a security risk. It would not have been feasible to allow the applicant to continue counselling while that information was considered reliable.

*The decisions of the police*

**[21]** The first submission of the applicant was that the police should not have made a record of the information received about her. It is not surprising that this argument was not developed to any extent. In effect it amounts to the proposition that the police were obliged to ignore the information they had received. Clearly that was a difficult case to make. If true, the information was potentially critical in deciding whether the applicant should be permitted to have access to a wide range of employments and situations. It cannot feasibly be suggested that the police should have refrained from making the record.

**[22]** It was faintly argued that the creation of the document represented a violation of article 8 of the European Convention on Human Rights but this claim does not find support in the jurisprudence of the Strasbourg organs. Article 8 of ECHR provides: -

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

**[23]** Article 8 was considered by ECtHR in *Leander v Sweden* [1987] 9 EHRR 433. In that case the applicant had been refused employment in a public post because of secret information held on him which suggested that he was a security risk. He contended that the vetting had involved an attack on his reputation and that he should have had the opportunity of defending himself before a tribunal. The court held that the personnel control system whereby those who sought public employment were subject to a security clearance procedure pursued a legitimate aim, namely, the protection of national security. It then examined the requirement in paragraph 2 of article 8 that the measures be 'in accordance with law'. At paragraphs 50 & 51 the court said: -

> "50. The expression 'in accordance with the law' in paragraph 2 of article 8 requires, to begin with, that the interference must have some basis in domestic law. Compliance with domestic law, however, does not suffice: the law in question must be accessible to the individual concerned and its consequences for him must also be foreseeable.
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> 51. However, the requirement of foreseeability in the special context of secret controls of staff in sectors affecting national security cannot be the same as in many other fields. Thus, it cannot mean that an individual should be enabled to foresee precisely what checks will be made in his regard by the Swedish special police service in its efforts to protect national security. Nevertheless, in a system applicable to citizens generally, as under the Personnel Control Ordinance, the law has to be sufficiently clear in its terms to give them an adequate indication as to the circumstances in which and the conditions on which the public

> authorities are empowered to resort to this kind of secret and potentially dangerous interference with private life.
>
> In assessing whether the criterion of foreseeability is satisfied, account may be taken also of instructions or administrative practices which do not have the status of substantive law, in so far as those concerned are made sufficiently aware of their contents.
>
> In addition where the implementation of the law consists of secret measures, not open to scrutiny by the individuals concerned or by the public at large, the law itself, as opposed to the accompanying administrative practice, must indicate the scope of any discretion conferred on the competent authority with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference."

It was held that no violation of article 8 was established.

**[24]** The European Commission on Human Rights has recognised that police forces are entitled to collect information about individuals in relation to suspected criminal activity on their part, for the purpose of combating crime and terrorism and that provided proper safeguards are in place this will not breach article 8 of the Convention. Intelligence gathering is acknowledged to be a necessary aspect of police work – see *Esbester v UK* 18 EHRR CD 72. That case involved the collection of information in relation to a person's private life by, among others, police special branch. The information was used in relation to security clearance for the applicant in respect of employment. The Commission held that special branches of police forces have the same powers and duties as the ordinary police. These include the common law power to collect and retain information about offenders and information required to preserve public order. The collection of such information pursued a legitimate aim *viz* the interests of national security and it was necessary for states to collect and store this information to assess the eligibility of applicants for posts of importance to national security.

**[25]** Applying these principles to the present case it appears to me that no violation of article 8 arises by the creation of the record in relation to the applicant. It was not disputed that the state was entitled in right of common law to collect material on individuals in relation to suspected criminal activity for the purpose of combating crime and terrorism. The applicant was aware

that security checks would be made. It was entirely foreseeable that if she failed to achieve security clearance she would not be engaged to carry out counselling services for prison officers. The Prime Minister made a statement to that effect to the House of Commons on 15 December 1994.

**[26]** Guidelines on the work of the special branch issued by the Home Office and the Scottish Office in July 1994 for police forces in Great Britain were adopted by the RUC. In addition the Chief Constable issued standing instructions described as General Orders and Regulations for the Government and Guidance of the RUC (known as 'the Code') which govern the use of information by police officers generally. Specific instruction has been given as to the need to protect information in relation to individuals.

**[27]** Moreover, the information that had been supplied was, according to the police, from a reliable source. That information, if true, was highly relevant to suspected criminal activity on the part of the applicant. It is precisely the type of material that was considered by the ECmHR in *Esbester* to be acceptable. I reject the argument that the creation of the record involved a breach of article 8.

**[28]** Mr McCloskey argued strongly, however, that the information should have been subject to review and reconsideration. He suggested that the Guidelines in relation to the treatment of the material had not been observed and referred particularly to paragraphs 19 and 20 of the Guidelines. These provide: -

> "19. Records are maintained in order to discharge effectively the functions listed above. Because of the particular sensitivity of the information concerned it is essential that only information relevant to those functions is recorded. Close attention to the definitions given below is necessary in deciding what information should be recorded. Data on individuals or organisations should not under any circumstances be collected or held solely on the basis that such a person or organisation supports unpopular causes or on the basis of race or creed.
>
> 20. It is also important to ensure that, wherever possible, information recorded about an individual is authenticated and does not give a false or misleading impression. Care should be taken to ensure that only necessary and relevant information is recorded and retained. Each special branch should therefore maintain an effective

> system both for updating information where necessary and for the identification and destruction of information which can no longer be clearly related to the discharge of its functions."

**[29]** Mr McCloskey did not suggest that the material recorded did not come within one of the definitions provided; it would have been difficult to do so since one of these was terrorism defined as 'the use of violence for political ends, including any use of violence for the purpose of putting the public or any section of the public in fear." But Mr McCloskey did suggest that a false and misleading impression had been created about the applicant and insufficient care had been taken to ensure that only necessary information on her had been retained.

**[30]** These submissions are predicated on the unspoken premise that not only is Mrs McConway entirely innocent of the allegation made against her but also that the police had the means of establishing her innocence or, at least, the unreliability of the information that had been given about her.

**[31]** It is inevitable that information obtained from informers will not always – or even usually – be amenable to verification. Unfortunately, this will, on occasions, have adverse consequences for individuals (of whom Mrs McConway may well be one) who are not involved in the matters that have been imputed to them. In her situation it is tempting to make a connection between her rejection of Detective Constable Douglas and her refusal to assist special branch and the surfacing of these allegations. But the fact remains that the person who supplied the information was considered by an experienced police officer to be a reliable source. In these circumstances, the information could not be ignored and, although it does not rest easily with the utter respectability of Mrs McConway's life and professional career, one cannot fault the police for discarding the information.

**[32]** The information clearly remained relevant – indeed, it proved to be highly so when Mrs McConway applied for security clearance. Nothing had been provided to the police which would have prompted a revision of their records. I do not accept therefore that there was a failure to comply with the Guidelines.

**[33]** Mr McCloskey argued that the information should not have been supplied to the Prison Service but the conclusion that it was proper to maintain the records effectively disposes of that particular claim. If it was right to make and keep the record, it was surely right to supply the Prison Service with the information. It was required to allow security clearance and this was clearly in the interests of national security.

**[34]** Finally, the applicant complained that she had wrongly been denied access to special branch information. Also the material that was eventually released to her was in redacted form. As Mr Morgan QC for the respondent pointed out, access to such information is governed by the Data Protection Act 1998. Personal data are exempt from the provisions of the Act if the exemption is required for the purpose of safeguarding national security. Where data are not disclosed a Minister of the Crown must sign a certificate certifying that the exemption was required for this purpose. An appeal against such a certificate lies to the Data Protection Tribunal. The applicant has not made application for the release of information under the Act. Judicial review of the sufficiency of the information disclosed to the applicant could only be entertained where she had availed of all means of obtaining that information under the 1998 Act.

*Conclusions*

**[35]** Although one must have considerable sympathy for the applicant if, as seems likely on the available evidence, she was innocent of any wrongdoing, it appears to me that the police were bound to record the information that they received and equally bound to relay it to the Prison Service when they requested it. Once it was received, the Prison Service had no alternative but to act upon it.

**[36]** The application for judicial review must be dismissed.