Neutral Citation no. [2007] NIQB 20 | *Ref:* **GILC5765**

Judgment: approved by the Court for handing down | *Delivered:* **22/03/07**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY COLIN ARMSTRONG FOR LEAVE TO BRING JUDICIAL REVIEW

GILLEN J

APPLICATION

[1] In this matter the applicant seeks an Order of Certiorari to quash the decisions made by the Assistant Director of the Assets Recovery Agency ("ARA") to refuse to remove from the ARA website a report of 25 March 2005 in which the Assistant Director of the ARA issued a statement naming the applicant and referring to drug related applications involving him.

BACKGROUND

[2] The background to the report on the website was an Interim Receiving Order made on 16 March 2005 in the High Court under which an Interim Receiver was appointed over the applicant's property and businesses. The application for the order had been grounded on the affidavits of a financial investigator for the ARA sworn on 14 March 2005 in the course of which, inter alia, he referred to evidence of alleged involvement by the applicant in drug related criminal activity and paramilitary association based on information received from the Police Service of Northern Ireland ("PSNI"). In the course of the website report, the Assistant Director was quoted as saying:

> "In its case to the High Court, the Agency has alleged that Mr Armstrong was linked to drug trafficking between Belgium and Northern Ireland in 1994 and was involved in importing and selling drugs in Northern Ireland over a period of years. We have further alleged that Mr Armstrong has had links with

> the UVF, and then the LVF following the split between those organisations."

[3] In an affidavit from the applicant dated 15 November 2006, he denies all allegations that he had been involved in drug related criminal activity or that he had links with paramilitary organisations. The applicant goes on to allege that he had received a notice from the PSNI on 17 August 2005 that he was subject to a paramilitary threat and that paramilitaries intended to target him with immediate effect. It is the applicant's belief that the threat was attributable to the allegations made by the ARA in these ongoing proceedings as published on the Agency's site.

[4] In the course of a report of 3 November 2005, the Interim Receiver had made a report to the court by way of affidavit in which she said, inter alia, that:

> "The ground on which I am unable to find sufficient evidence to support is that of drug dealing although my investigations are not completed."

The Interim Receiver advised the court on 3 November 2005 that she had identified no evidence of drug trafficking, "nor would I have expected to."

LEGISLATIVE CONTEXT

[5] Section 2 of the Proceeds of Crime Act 2002 defines the Director's functions in the following terms:

> "2. Director's Functions: General
>
> (1) The Director must exercise his functions in the way which he considers is best calculated to contribute to the reduction of crime.
>
> (2) In exercising his functions as required by sub-section (1) the Director must:
>
> (a) act efficiently and effectively, ….
>
> (3) The Director may do anything (including the carrying out of investigations) which he considers is –
>
> (a) appropriate for facilitating, or

(b) incidental or conducive to, the exercise of his functions."

[6] Section 245(5) which deals with the application for an Interim Receiving Order states:

> "The first condition is that there is a good arguable case –
>
> (a) that the property to which the application for the order relates is or includes recoverable property, and
> (b) that, if any of it is not recoverable property, it is associated property."

[7] Section 251(3) states:

> "The court may at any time vary or set aside an Interim Receiving Order."

THE LEAVE APPLICATION

[8] I invited counsel to address me on the appropriate test to be applied at the leave stage in judicial review. Mr McMillen on behalf of the proposed respondent, in a written submission, acknowledged that the test has been variously described. He submitted that the court should be guided by the judgment of Campbell J (as he then was) in Re Gary Jones for Judicial Review (Unreported) where he described the test as follows:

> "(The applicant) must show that he has a case sufficiently arguable to merit investigation at a substantive hearing. Leave should only be granted if on the material then available the court thinks, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant. In R v Secretary of State for the Home Department ex parte Rukshanda Begum [1990] COD the Court of Appeal held that the test to be applied in deciding whether to grant leave to move for judicial review is whether the judge is satisfied that there is a case fit for further investigation at a full inter partes hearing of a substantive application for judicial review."

Mr Doran on behalf of the applicant, also in a written submission, drew my attention to an extract from Supperstone Goodie & Walker at paragraph 18.14.2 which states:

> "The precise test as to when permission should be granted has been variously stated but there is no doubt that at bottom the question is as to whether there is an arguable case, which merits full consideration at a substantive hearing."

He also relied upon the judgment of Kerr J (as he then was) in Cookstown District Council (Unreported 10 June 1996, Northern Ireland) at page 10 where the judgment states:

> "The requirement to raise an arguable case is a modest one. It need only be shown that if the assertions made by the applicant prove to be correct it would be tenable to claim that he may be entitled to judicial review of the decision challenged."

Recently in Application by John Hill for Leave to Apply for Judicial Review, Neutral Citation Nos (2007) NICA 1 at para 23 Kerr LCJ said:

> "It is well settled that, in order to be permitted to present a judicial review application the applicant must raise an arguable case on each of the grounds on which he seeks to challenge the impugned decision – see, for instance, R v Secretary of State for the Home Department ex parte Cheblank [1990] 1 WLR 890."

I am bound by that ruling of the Court of Appeal in Northern Ireland and accordingly that is the test that I intend to apply in this case.

[9] I pause to observe however that I do not understand that judgment to effectively rule out other circumstances where an enhanced arguability threshold may be imposed even at the leave stage. In Mass Energy Limited v Birmingham City Council [1994] ENV LR 298, the Court of Appeal adopted a deliberately heightened threshold of whether the claim was "strong", ie "likely to succeed" rather than it was merely arguable because it had seen extensive material and heard detailed argument and speed reasons applied. I consider there is much merit in the views expressed by Keene J in R v Cotswold District Council ex parte Barrington [1998] 75 P and Cr 515 where he said:

> "Where the court seems to have all the relevant material and have full argument at the (permission) stage on an inter partes hearing, the court is in a better position to judge the merits than as usual on a (permission) application. It may then require (a claimant) to show a reasonably good chance of success if he is to be given (permission). In the present case this court has heard arguments stretching over 1½ days from all three parties, each represented by leading counsel, and with substantial skeleton arguments from all three parties, and with all the documentation which those parties have been able to assemble over the period of almost four months since this application was lodged. This is very different, therefore, from the ordinary 20 minute ex parte (permission) hearing".

[10] Indeed in immigration cases leave hearings are routinely the only hearing and full argument takes place. However in the instant case the test which I am applying is that referred to in paragraph 8 above.

THE APPLICANT'S CASE

[11] Mr Doran made the following arguments:

(1) the publication by the ARA on its website of details of evidence presented at ex parte hearings is unreasonable in the Wednesbury sense and an abuse of power. The applicant has no opportunity to meet the allegations being submitted and in particular the ARA is under a duty to take corrective action with reference to publicity particularly when, as in this case, an independent investigator, namely the Interim Receiver, has come to the conclusion referred to in paragraph 4 of this judgment;

(2) the statutory framework of the 2002 Act is to ensure that property is recovered on behalf of the State. The ARA is in a position to publish details of the activities involving such recoverable property without necessarily identifying or targeting individuals based on what amounts to hearsay evidence presented at an ex parte hearing;

(3) whilst the Director does have a wide discretion under Section 2 of the 2002 Act, it must be subject to normal public law

restraints and in this instance the use of that power was in Mr Doran's submission unreasonable;

(4) that there was a breach of the applicant's rights under Article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). Counsel relied on the affidavit made by the applicant on 15 November 2006 wherein he outlined the alleged impact that this website publication had had on his private and family life. Counsel submitted that as a result of a paramilitary threat – a consequence of the publication the applicant believed - and in order to ensure the safety of his family, the applicant had been constrained to move out of his family home, the relationship with his partner had broken down in the wake of the death threat, his children had become more distant from him, and he had been named in press reports, in particular the Sunday World on 19 March 2006. As a result he alleged he had suffered stress. Mr Doran argued that all of this could have been obviated by a recognition that this was an early stage of the investigations and that at the very least the account of the Interim Receiver should have been published to balance the reporting. He rejected the proposition that Section 251(3) was of assistance to the applicant ie he had a power to vary the Receiving Order, because the Order did not entail a finding of fact on the evidence and was directed at the property and the freezing of assets;

(5) Finally Mr Doran relied on Article 2 of the European Convention which provides that everyone's right to life shall be protected by law. The Agency in this case ought to have done something more to deal with the death threat. He relied on the general principles set out in paragraphs 115 and 116 of Osman v United Kingdom [1998] 29 EHRR 245("Osman's case") where the European Court of Human Rights stated as follows:

> "115 The court notes that the first sentence of Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is

thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.

116 For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.

In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk … For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could

> be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case …"

In this instance he submitted that the ARA did not need to take the steps that they had taken, it should have made further enquiries about the threat and thereafter acted in a manner that would have protected the life of the applicant.

The Proposed Respondent's Case

[12] (1) Mr McMillen drew my attention to the wide discretion vested in the Director of the Agency under Section 2(1) of the 2002 Act reminding me that the Director must exercise his functions in a way that contributes to the reduction of crime. He urged the court to consider the wider public purpose of the Act.

(2) It was his submission that the references in the website were factual statements arising out of the court order which the ARA had obtained. He specifically referred to the fact that the website made it clear that the matters set out were allegations and were couched in a factual and balanced manner. It was his submission that in light of the statutory duty placed on the Director under the terms of the 2002 Act, it is highly appropriate that website should publish the work of the ARA provided of course it is fair and balanced.

(3) There was a remedy open to the applicant whereby under Section 251(3) he could ask the court to vary and set aside the order.

(4) The case involving the applicant appears in court lists, the press have got the right to report the matter and the Director has also a duty to exercise his powers in order to reduce crime. The heading of the website release "Making Sure Crime Doesn't Pay" was highly significant in the submission of Mr McMillen evidencing the role of the Director and the ARA when exercising powers under Section 2 of the Act.

(5) Turning to the Interim Receiver's report, Mr McMillen submitted that the Interim Receiver takes an independent view but her function is not to advise on the evidential basis of the case but rather to say if certain assets can be linked to criminal behaviour. Whilst the report did say there was no evidence of

drug dealing, there was in the possession of the respondent evidence of drug dealing for example fingerprints of the applicant found in a drug warehouse in Belgium. However counsel asserted that whilst the Interim Receiver had made it clear she had not found evidence indicative of a drug lifestyle with money coming in and out of accounts for that purpose it was necessary to distinguish her role from that of the statutory duties of the Director.

(6) So far as the alleged breach of Article 2 rights under the European Convention were concerned, Mr McMillen submitted that there was no evidence to establish a factual basis for connecting the entry on the website in March 2006 with the death threat in August 2006. He said it was mere speculation on the part of the applicant that there was any connection whatsoever.

CONCLUSIONS

[13] I have come to the conclusion in this case that the applicant has failed to raise an arguable case for the following reasons:

(1) The concept of legislative purpose has a central role in judicial reviews. Identifying relevant statutory objectives is crucial to the operation of grounds for judicial review. The crucial test here is whether the ARA and the Director have acted within the powers conferred on them by Parliament. The Court's task, within permissible bounds of interpretation, is to give effect to Parliament's purpose (see Lord Bingham in R (Quintavalle v Secretary of State for Health [2003] 2 AC 687 at paragraph 8). At paragraph 21 in that judgment Lord Steyn described "a shift towards purposive interpretation", citing US Justice Hand:

> "Statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning".

The Proceeds of Crime Act (PCA 2002) provides a single model for the making of Confiscation Orders following conviction in criminal cases. The basic framework is a merger and extension of the two similar but separate schemes contained in the Drug Trafficking Act 1994 for drug offences and in the Criminal Justice Act 1988 as heavily amended by the Proceeds of Crime Act 1995 for other offences. Inter alia, the Act introduces the notion of a "criminal lifestyle which triggers an unlimited review of the proceeds of the defendant's general criminal conduct". It is clearly an Act which is calculated deliberately to function in a way that contributes to the overall reduction of crime. Hence I agree with the argument advanced by Mr McMillen that the

discretion vested in the Director of the Agency under Section 2.1 of the Act is deliberately couched in broad terms to reflect the extent of the remit vested in the Director. I accept his submission that the heading of the website "Making Sure Crime Doesn't Pay" does accurately reflect the purpose of this legislation. I have no doubt therefore that the introduction of a website to publish the work of the ARA is a measured and apposite step to take at the behest of the Director exercising his functions in a way that he considers appropriate to reduce crime. Hence I consider that he has been given such a discretion "to exercise his functions in the way in which he considers is best calculated to contribute to the reduction of crime". I have concluded that it is unarguable to suggest that this could not involve the use of a website particularly in the modern era and that allegations of the kind raised in this case cannot be published as part of the function of the ARA to reduce crime .

(2) Equally so, his discretion must be exercised by reference to relevant and not irrelevant considerations and in a manner which is not unreasonable, in the Wednesbury sense. (See Lord Keith in R v Secretary of State for Trade and Industry, ex parte Lonrho plc [1989] 1 WLR 525 at 533d). In my view the use of the website in this instance is not Wednesbury unreasonable. I consider that the contents referred to in this case are relevant to the function of the ARA and could not be argued to be an irrational use of resources or an abuse of the powers vested in that body . The website has been careful to make clear that the facts contained are only allegations and thus subject to subsequent proof.

(3) I consider that the reference to the Interim Receivers Report by the applicant amounts to a misconception of the nature and purpose of that report. It is not the Interim Receiver's duty to unearth or determine in a definitive way whether or not the applicant has engaged in drug trafficking. Her comments reflect this confined role.

(4) I am satisfied that the applicant has ample opportunity to deal with these matters under Section 25(3) in that the Interim Receiving Order may be set aside at any time. I am satisfied that this could provide an appropriate remedy for any concern that the applicant has.

(5) A decision-maker exercising public functions who is entrusted with a discretion may not, by the adoption of a fixed rule of policy, disable himself from exercising his discretion in individual cases: de Smith, Woolf and Jowell Judicial Review of Administrative Action, 5th edition, para 11-001. That does not prevent him from adopting and following a policy that all cases of a certain type will be dealt with in a particular way so long as he does not follow it so rigidly that he fails to entertain the possibility of admitting an exception in an appropriate case. (See In the Matter of an Application by Freddie Scappaticci for Judicial Review Neutral Citation No [2003] NIQB 56 at paragraph 8 per Carswell LCJ). I consider that the policy of reporting such

matters on a website is an appropriate policy and I see nothing that indicates that it is so fixed that the Director has disabled himself from exercising his discretion in appropriate cases. I see no basis for this being such an exceptional case given the facts put before me.

[14] I find no basis for the argument that there has been a breach of Article 2 of the Convention or Section 6 of the Human Rights Act 1998 in this case. Osman's case makes it clear that not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. It has not been established to my satisfaction, even on an arguable basis, that the ARA knew or ought to have known at the time of the impugned website publication that there existed a real and immediate risk to the life of any individual including this applicant arising out of the contents of the website. For my own part I find no evidence connecting the threat which emanated several months after the website had been in operation to the impugned publication. Accordingly I remain unpersuaded that it is arguable in this case that the authorities did not do all that could be reasonably expected to avoid a real and immediate risk to the life of this applicant.

[15] I find it an unarguable proposition that the use of this website is an unjustified or disproportionate interference with the Article 8 rights of the applicant. Given the purpose behind this legislation to which I have already referred (see paragraph 13(1) of this judgment), I consider that the use of a website in this manner is proportionate and for a legitimate aim namely to ensure that crime is reduced.

[16] In all the circumstances therefore I consider that leave should not be granted in this case.