

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

BEFORE A DIVISIONAL COURT

IN THE MATTER OF AN APPLICATION BY THOMAS JOHN PAUL
TOLAN FOR JUDICIAL REVIEW

Before: Campbell LJ and Higgins J.

Campbell LJ

Introduction

[1] Thomas John Paul Tolan is charged with three criminal offences arising out of an incident that occurred in Belfast on 20 February 2004. He brought this application for judicial review in order to prevent the issue of a report to the Secretary of State by the International Monitoring Commission into this and a number of other incidents and for a declaration that it would be unlawful for the Secretary of State to lay the report before Parliament before his trial on these offences takes place. Among his concerns is that his trial may be prejudiced by the contents of the report.

[2] As the report was due to be laid before Parliament on the day after the hearing of the application the Court announced its decision to refuse the application at the conclusion and indicated that it would give the reasons at a later date. We now give the reasons.

The Independent Monitoring Commission

[3] On 25 November 2003 an Independent Monitoring Commission ("the Commission") was established under an agreement made between the

Government of Great Britain and Northern Ireland and the Government of the Ireland. Under the terms of this agreement the Commission is

- (a) to monitor any continuing activity by paramilitary groups including
 - i. attacks on the security forces, murders, sectarian attacks, involvement in riots and other criminal offences;
 - ii. training, targeting, intelligence gathering, acquisition or development of arms or weapons and other preparations for terrorist campaigns;
 - iii. punishment beatings and attacks and exiling.
- (b) to assess:
 - i. whether the leadership of such organisations are directing such incidents or seeking to prevent them;
 - ii. trends in security incidents.
- (c) to report its findings to the two governments at six-monthly intervals and at the joint request of the two Governments or if the Commission sees fit to do so, produce further reports on paramilitary activity on an ad hoc basis.

[4] This international agreement was incorporated into domestic law by the Northern Ireland (Monitoring Commission) Act 2003 ("the Act") where the functions of the Monitoring Commission are stated to include:

- “(a) monitoring activity by paramilitary groups,
- (b) monitoring security normalisation, and
- (c) reporting on claims relating to commitment to the observing of terms of the pledge of office set out in Schedule 4 to the Northern Ireland Act 1998 (c.47).”

[5] In section 2 (1) of the Act it is provided that:

“(1) The Monitoring Commission shall not do anything in carrying out its functions which might-

- (a) prejudice the national security interests of the

United Kingdom or Ireland,

(b) put at risk the safety or life of any person, or
(c) have a prejudicial effect on any present or future legal proceedings.

(2) The duty under subsection (1) is owed to Her Majesty's Government in the United Kingdom."

[6] Section 3 of the Act states that:

"Where a report of the Monitoring Commission, or a report made by members of the Commission under the agreement establishing the Commission, is delivered by the Commission, or by members of the Commission, to Her Majesty's Government in the United Kingdom, the Secretary of State shall lay a copy of the report before each House of Parliament."

[7] By the Northern Ireland (Monitoring Commission etc.) Act 2003 (Immunities and Privileges) Order 2003 ("the Order") the Commission is given the legal status of a body corporate and except in so far as in any particular case any privilege or immunity is waived by the Commission, and subject to section 2 of the Act, the Commission, or in the case of article 6(2) of the Agreement the relevant Members of the Commission, are given immunity from suit and legal process.

The events of 20 February 2004

[8] The British and Irish Governments issued a joint statement on 24 February 2004 following the incident that occurred in Belfast on 20 February 2004 resulting in the charges against the applicant. In the statement they said that they had asked the Commission to report in May on a number of incidents that had taken place since the Commission was established. Subsequently the Taoiseach and the Prime Minister indicated that it would be helpful if the report could be made available sooner. As a result the Commission said that they intended to report in early April 2004.

[9] The applicant is at present charged with three offences. It is alleged that on 20 February 2004 he caused grievous bodily harm to a person called Robert Tohill with intent to do him grievous bodily harm and that he assaulted Robert Tohill and unlawfully and injuriously imprisoned him and detained him against his will. It is also alleged that the applicant had in his

possession a van containing disposable clothing, a pepper spray and two metal cudgels in circumstances that gave rise to a reasonable suspicion that possession of these articles was for a purpose in connection with the commission preparation or instigation of an act of terrorism contrary to section 57 of the Terrorism Act 2000.

[10] The applicant's solicitors became aware from reports in the media that the Commission was investigating the circumstances surrounding this matter. This prompted them to write to the Secretary of State on 9 March 2004 expressing concern that a Commission appointed by him was going to investigate the incident before any trial of their client had taken place as this could prejudice a fair trial. They asked that the Attorney General be alerted to this concern.

[11] The solicitors also wrote to the Commission to say that proceedings would be issued if they did not halt their inquiries. The Commission responded by drawing attention to the requirement in section 2 of the Act that they should not do anything that might have a prejudicial effect on any present or future legal proceedings and confirming that they were fully apprised of this section.

[12] The solicitors wrote again to the Commission on 7 April 2004 seeking confirmation that they would halt their inquiry into the incident of 20 February 2004 and stating that if they did not receive a response by 14 April they would apply to the High Court. Despite the efforts of the applicant's solicitors to ensure prompt delivery by post and possibly due to the Easter holiday the Commission did not receive this letter until 14 April 2004 by which time it had already reported to the two Governments.

[13] Lord Alderdice, a member of the Commission has stated in an affidavit that there is no basis for saying that the Commission has acted in breach of its duty under section 2 of the Act and that it has not done so. He also confirms that the Commission has not waived its immunity under Article 4 of the Order.

The proceedings

[14] On 15 April 2004 Higgins J. (sitting as vacation judge) granted the applicant leave to bring this application for judicial review.

[15] At the hearing on 19 April 2004 the applicant was granted leave to file two further affidavits. In one of these the applicant states that he is married with two young children and that he is well known in the local community. He expresses concern for his life and for the lives of his wife and children, as there are loyalist and dissident republican paramilitary groups that are not on ceasefire.

[16] In the other affidavit his solicitor draws attention to news reports on 18 April 2004 about the contents of the Commission's report and in particular to a BBC news item. This item which appeared on Ceefax under the headline "Commission Backs Police Chief On Tohill" went on to state that the report will support the police belief that the IRA was behind the alleged abduction of a dissident republican from a Belfast bar. It stated that "The International Monitoring Commission's report will back the Chief Constable's assessment on the Bobby Tohill affair. The Commission is understood to have recommended financial sanctions against Sinn Fein rather than exclusion..."

[17] Mr Barry Macdonald QC (who appeared with Mr Brolly) submitted on the applicant's behalf that his Convention rights under articles 2, 3, and 6 of the European Convention on Human Rights had been breached as had his rights under section 2 (1) (b) and (c) of the Act.

Article 2

[18] Mr Macdonald referred to the positive duty as well as the negative obligations placed on the state by article 2 of the Convention- see *McCann v United Kingdom* (1995) 21EHRR 97. He relied on the threshold test applied by Lord Phillips MR in delivering the judgment of the Court of Appeal in *The Lord Saville of Newdigate & ors v Widgery Soldiers* [2001} EWCA Civ 2048 where he said;

"The search for a phrase which encapsulates a threshold of risk which engages Article 2 is a search for a chimaera... Of one thing we are quite clear. The degree of risk described as 'real and immediate' in *Osman*, as used in that case, was a very high degree of risk calling for positive action from the authorities to protect life. It was 'the real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party' which was, or ought to have been, known to the authorities. Such a degree of risk is well above the threshold that will engage Article 2 when the risk is attendant upon some action that an authority is contemplating putting into effect itself ..."

[19] Mr Macdonald submitted that the degree of risk to the applicant was such that article 2 was engaged and that the need for publication of the report of the Commission could not outweigh the right to life of the applicant and the members of his family.

Article 5

[20] The applicant has a prima facie right to bail pending trial under article 5(3) of the Convention. It was submitted on his behalf that the publication of a report by the Commission may prejudice this right if it is stated by the Commission that the offences with which he is charged were connected with the IRA.

Article 6

[21] The applicant has the right to a fair hearing under article 6(1) and he is presumed innocent until proved guilty according to law under Article 6(2). In *Alenet de Ribemont v France* (1995) 20 EHRR 557 the Minister of the Interior and senior police officers named that applicant as one of the instigators of the murder of a member of the French Parliament. The ECt HR held that the presumption of innocence could be violated not only by a court but also by officials of government. The applicant submitted that his rights would be violated by the publication of a report by a body enjoying the status of the Commission if it claimed that the IRA had been connected with the events leading to his arrest.

Section 2 of the Northern Ireland (Monitoring Commission) Act 2003

[22] Section 2(1) of the Act requires the Commission not to do anything in carrying out its functions which might put at risk the safety or life of any person or have a prejudicial effect on any present or future legal proceedings. The Commission enjoys immunity from suit and legal process under article 4 of the Order unless it is waived. As noted earlier it has not been waived. The immunity is however subject to section 2 of the Act and Mr Macdonald submitted that he had only to show that the content of the report *might* put at risk the lives of the applicant and his family or prejudice his trial for the report to be unlawful.

The Commission's case

[23] Mr Larkin who appeared for the Commission argued that the applicant's Convention rights have not been violated. As the applicant is in custody the prison authorities are responsible for his safety and his rights under article 2 are protected. The threshold for a claim that his rights under article 5 have been violated is a high one which has not been met and any suggestion that his article 6 rights have been infringed would be considered in the criminal courts by the resident magistrate or the trial judge.

[24] Mr Larkin went on to submit that the Commission is a legal body in International law with rights and privileges and with threefold immunity from these proceedings. The duty imposed by section 6 of the Human Rights Act 1998 on public authorities to act in a manner compatible with Convention

rights does not apply to the Commission as it is not a public authority. Section 6(3) of the Human Rights Act provides that a 'public authority does not include either Houses of Parliament' or a person exercising functions in connection with proceedings in Parliament. Mr Larkin submitted that as reports delivered by the Commission to the Government must be laid before Parliament the members of the Commission were exercising functions in connection with proceedings in Parliament.

[25] The duty placed on the Commission by section 2 (1) of the Act establishing the Commission is by reason of section 2(2) owed only to Her Majesty's Government of the United Kingdom and not to the applicant. Therefore under the terms of the Order the Commission is immune from legal proceedings brought by the applicant.

[26] If the Commission is susceptible to challenge by judicial review Mr Larkin submitted that it would be only on the ground of bad faith or what is described as 'soft edge' review .

Submission on behalf of the Secretary of State

[27] At the outset of his submission on behalf of the Secretary of State Mr Morgan QC (who appeared with Mr Paul Maguire) referred to the Agreement between the British and Irish Governments and the importance attached in it to the need to generate confidence by giving the Commission access to all information necessary to carry out its functions and by the Governments taking steps to make the reports they receive public. He submitted that this had to be put into the balance when considering whether any of the applicant's rights have been infringed.

[28] He submitted that the duty under section 2 of the Act is owed to the Government and referred to the usual practice for the Attorney General to institute proceedings where an interference with the administration of justice occurs and questioned whether an individual can obtain an injunction to prevent a publication without the intervention of the Attorney General -see *P v Liverpool Post Plc* [1991] 2 AC 370 at 425.

[29] In so far as the applicant sought to prevent the Secretary of State from laying the report of the Commission before each House of Parliament as required by section 3 of the Act, Mr Morgan referred to *Erskine May's Treatise* 22 ed. and to the formal procedure for laying a document before Parliament. He submitted that in so doing the Secretary of State was exercising a function in connection with proceedings in Parliament within section 6(3) of the Human Rights Act and therefore he was not a public authority and subject to section 6(1).

[30] In *R v DPP, Kebeline* [2000] 2 AC 326 Lord Steyn said that it was rightly conceded that once the Human Rights Act was in force it would not be possible to apply for judicial review on the ground that a decision to prosecute was in breach of a Convention right and that the only available remedies would be in the trial process or on appeal. Since the Act came into force this view has been affirmed by the Court of Appeal in *Brockbank v Shannon* [2003] NIJB 125 (at paras. [8] to [10]). Mr Morgan submitted that the applicant's complaints that his rights under articles 5 and 6 had been infringed were being raised in satellite litigation and were issues for the trial judge.

[31] If the applicant does apply for bail as he is entitled to do, his rights under article 5 of the Convention will not be infringed. The decision of Sheil J. in *Donaldson's Application for Bail* [2003] NI 91 shows that any intelligence material on which the Crown wishes to rely must be disclosed to the defence subject to being edited if necessary so as not to disclose the identity of informants.

[32] With regard to the applicant's rights under article 2 of the Convention Mr Morgan referred to the fact that this had not been mentioned in the correspondence and had been raised in the amended Order 53 statement supported by an affidavit that, at that stage had still to be sworn. The implication being that it was more an afterthought than a genuine expression of concern. It was accepted by Mr Morgan that there is a positive duty on the state to protect the article 2 rights of the applicant and the members of his family.

Conclusion

[33] When the Court gave its decision the report of the Commission had yet to be published. At that time it was not known if the material that had appeared in the press and on which the applicant based his concerns was speculation or (as it subsequently turned out) remarkably accurate.

[34] The applicant's anxiety about his rights and those of his immediate family under article 2 of the Convention may have surfaced at a late stage in the application but this is a fundamental right and any suggestion of a possible breach requires to be considered.

[35] When the Commission reports to the Government members of the public cannot be expected to know what is contained in the report. Therefore an individual may only discover that his rights have been infringed after the report has been published. The Government as the recipient of the report has a duty to take appropriate steps to safeguard the lives of those living within its jurisdiction – *Killic v Turkey* (2001) 33 EHRR 1357 para 62. Section 2 of the Act places a duty on the Commission (owed to the Government and not to an

individual) not to do anything which might breach the rights of any person under article 2 and prejudice the right to fair proceedings under article 6. It is for this reason that under the legislation the immunity granted to the Commission is limited.

[36] As Kerr J. said in *Re A's Application* [2001] NI 335 an appropriate level of discretion has to be available to the authorities in deciding what measures are required to afford the applicant adequate protection in fulfilment of his article 2 rights. This discretion has to be exercised not only in the light of the content of the report but also of such other information as becomes available. The rights of the applicant and his family under article 2 of the Convention are protected by the positive duty imposed on the state. It knows what is contained in the report prior to publication and whether the Commission has complied with its duty under section 2 of the Act. It is also in a position to assess any risk that publication of the report may cause to those it has a responsibility to protect.

[37] With regard to the applicant's right to fair proceedings under article 6 of the Convention this issue will fall to be decided in the criminal proceedings. Not only are satellite proceedings to be discouraged but also the criminal courts will be in the best position to decide whether the contents of the report could prejudice the trial of the applicant.

[38] The applicant's prima facie right to bail under article 5 (3) of the Convention cannot be prejudiced by the publication of the report. If the prosecution seeks to show that there are 'relevant and sufficient' reasons to justify his continued detention it must do so in an acceptable form. As noted earlier the decision in *Donaldson's Application* (supra) shows that intelligence information will only be accepted within the limits defined in that decision. The views expressed in the report will fall to be considered on the same basis. The applicant's concern that his rights under this article will be infringed by publication of the report is ill founded.

[39] In the amended Order 53 statement the applicant asked for a declaration that the production, circulation or publication by the Commission or the Secretary of State of such a report would be unlawful within the meaning of section 6 of the Human Rights Act. We accept the submission of Mr Morgan that in complying with his duty under section 3 of the Act by laying the report before Parliament, by reason of section 6(3) of the Human Rights Act, the Secretary of State is not a public authority. It is an example of a person exercising a function in connection with proceedings in Parliament.

[40] Having so concluded we do not find it necessary to consider the power of the Court to declare as unlawful the laying before Parliament of a report in light of Article 1X of the Bill of Rights 1689 which confers on 'proceedings in

Parliament ' protection from being 'impeached or questioned' in any 'court or place out of Parliament.

[41] The applicant asked in his amended Order 53 statement for a declaration that section 2(2) of the Act was incompatible with articles 2,5 and 6 of the Convention. As notice had not been given under Order 121 of the Rules of the Supreme Court this was not considered.