

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

Delivered: 23/11/2012

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

MacMahon's (Aine) Application [2012] NIQB 93

**IN THE MATTER OF AN APPLICATION BY AINE MacMAHON FOR
JUDICIAL REVIEW**

and

**IN THE MATTER OF DECISIONS MADE AND POLICIES IMPLEMENTED BY
THE PUBLIC PROSECUTION SERVICE AND THE POLICE SERVICE OF
NORTHERN IRELAND**

TREACY J

Introduction

[1] In its judgment of 9 July 2012 [2012] NIQB 60 the Court concluded that the respondent PPS had breached its Victims and Witnesses Policy in that the decision to accept the Defendants' guilty pleas on 24 October 2008 was not explained to the family members by the representatives of PPS prior to being announced in Court. Following delivery of the judgment the Court invited written submissions on the question of whether the failure amounted to a breach of Article 8 of the European Convention on Human Rights ('ECHR').

Article 8

[2] Article 8 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.”

Case law

[3] Article 8 not only protects the individual against arbitrary interference by public authorities but imposes positive obligations inherent in an effective respect for private and family life: Marckx v Belgium (1979) EHRR 330, para 31; Airey v Ireland (1979) 2 EHRR 305, para 32; McGinley and Egan v UK (1998) 27 EHRR 1; Gaskin v UK (1989) 12 EHRR 36 at para 42; M v SoS for Work and Pensions [2006] UKHL 11, para 62.

[4] In Lester, Pannick and Herberg’s *Human Rights Law and Practice* 3rd Ed it states at para 4.8.2:

“Of all the Convention rights, Article 8 has by far the widest scope...it demands respect for a broad range of loosely allied personal interests”

[5] In R (Razgar) v SoS for the Home Department (2004) UKHL 27, [2004] 2 AC 368 at para 9, Lord Bingham said:

“It is plain that “private life” is a broad term and the court has wisely eschewed any attempt to define it comprehensively...Elusive though the concept is, I think one must understand “private life” in Article 8 as extending to those features which are integral to a person’s identity or ability to function socially as a person”.

[6] Article 8 includes the right to respect for ‘physical and psychological integrity’: Botta v Italy (1998) 26 EHRR 241, paras 32-34; R (on the application of Bernard and Another) v London Borough Council of Enfield [2002] EWHC 2282, para 32; and R (on the application of N) v Secretary of State for the Home Department [2003] EWHC 207, paras 106 and 111.

[7] Assault in any form constitutes an interference with the right to physical privacy: see generally Lester, Pannick and Herberg, *op. cit.* para 4.8.15). Failure to protect individuals from assault and to provide adequate sanctions and remedies against personal abuse, including the right to bring a prosecution, can amount to a breach of Article 8 (*ibid*, para 4.8.17).

[8] Article 8 also requires the state to desist from conduct which would have an adverse impact on an individual's mental health (Bensaid v UK (2001) 33 EHRR 205, para 47).

[9] Many of the positive obligations recognised under Article 8 are procedural and concern the provision of information or rights to be consulted on matters affecting private or family life. For example, there is an obligation on the state to allow parents sufficient involvement in decisions taken by public authorities in relation to fostering and access arrangements and taking children into care: W v UK (1987) 10 EHRR 29, R v UK (1988) 10 EHRR 74 and T and KM v UK (2002) 34 EHRR 2. A natural father who did not have custody of his child has been held to be entitled to an opportunity for consultation before the child was placed in adoptive care (Keegan v Ireland (1994) 18 EHRR 342) or granted a passport (Zawadka v Poland (2007) 44 EHRR 44). In domestic law, the High Court in England has held that it is arguable that the police may be under an obligation to inform citizens of information that indicates that respect for their private life is potentially threatened (Bryant v MPC [2011] EWHC 1314(Admin) at [54]). The House of Lords has held that barring individuals suspected of misconduct from work without the right to make representations violates Article 8 (R v SoS for Health [2009] UKHL 3).

Applicant's Arguments

[10] The murder of a family member is clearly a particularly grave violation of the right to respect for private and family life and thus, the applicant submits, imposes a positive obligation on the state under Article 8 to prosecute and punish the culprits and generally to deal with the matter in a manner which provides her with effective respect for her private and family life, which was directly affected not only by the murder itself but by the manner in which the state dealt with those responsible for it.

[11] This, it was contended, required the state to allow her sufficient involvement in the prosecution process and at the very least to be kept informed of significant developments and decisions in the prosecution including the reasons why the murder charges that the PPS assured the applicant would be pursued were going to be abandoned. These decisions, the applicant submitted, had an obvious impact on the applicant's private and family life. However, having been reassured by the PPS that the murder charges would be pursued against all the defendants, the applicant heard at the same time as members of the public that the charges of murder were to be abandoned. This conduct, the applicant says, constitutes a failure on the part of the respondent to discharge its positive obligations to her under Article 8.

Respondent's Arguments

[12] The respondent contended that the case pleaded by the applicant and met by the respondents prompted no specific finding of Article 8 breach by the Court but rather a finding of what Mr McGleenan QC characterised as a single public law flaw that the respondent had not adhered to an aspect of the policy.

[13] If, contrary to the respondent's primary submission, this matter was to be further ventilated, they submitted that the key issue was whether the specific breach of the policy identified by the Court at paragraph 105 also amounts, in law, to a breach of Article 8 ECHR warranting a declaration by the Court.

[14] It was contended that any positive obligations which arise from Article 8 in terms of keeping victims informed of the progress of a criminal trial have been adequately met by the state in the promulgation of the relevant PPS policies.

[15] The respondent submitted that in order for the Court to make a finding of Article 8 breach there had to be an "interference" of sufficient seriousness to engage the protections of the right. He contended that in the present case the Court had not found an interference but had identified an omission which did not meet the necessary threshold of serious interference with the private life of the family. He also submitted that the Court will only grant relief in respect of an apparent breach of Convention rights where to do so is necessary in order to afford "just satisfaction" to the applicant and that it was not necessary in the present case in view of the fact that the applicant had the benefit of a declaration that the PPS failed to adhere to its policy. Accordingly a declaration of an Article 8 breach was not necessary to afford just satisfaction.

[16] Mr McGleenan reminded the Court that appropriate apologies were offered and that in that context it was, he said, neither necessary nor appropriate to attach the extreme stigma of a human rights violation by making a declaration of Article 8 breach.

Discussion

[17] The applicant is entitled to know the reasons why the respondent PPS, which had preferred murder charges against each of the accused, did not proceed with those charges and why this decision was taken without warning or notice to the family and, indeed, contrary to an earlier assurance that the charges would be proceeded with. The decision not to proceed was taken in breach of the PPS Code for Prosecutors. Was it also taken in breach of Article 8 of the ECHR?

[18] Article 8 not only protects the individual against arbitrary interference with private and family life, it also places a positive obligation on the state to demonstrate respect for the individual's private and family life. Mr McGleenan in his submissions suggested that any positive obligation on the state had been adequately met by the *promulgation* of the relevant policies and guidance. He stated that the declaration in the Court's earlier judgment in this case that the PPS failed to adhere to its own policy was sufficient to afford 'just satisfaction' to the applicant for any infringement of her Article 8 rights, and suggested that it would be inappropriate and excessive to visit upon the respondent the 'extreme stigma' of a declaration that they were also in breach of Article 8.

[19] A consistent thread in the jurisprudence of the ECtHR is an insistence that the rights promulgated in and protected by the Convention should be *effective* rights

which are genuinely seen to be operational in the lives of the citizens intended to benefit from them. I am not persuaded that, on the morning she attended court for the murder trial of her husband's killers, this applicant would have felt her Article 8 rights had been effectively protected by the mere *promulgation* of the guidance document which was breached that day. On that morning it appears she felt publicly ambushed by the decision of the accused to plead to lesser offences, and by the previously un-intimated decision of the PPS to accept those pleas. Her public humiliation exacerbated by the reaction of the defendants, happened despite the *promulgation* of the guidance which should have prevented these events from happening as they did. Faced with such facts it is difficult to accept that the mere promulgation of guidance will be sufficient to make the state's conduct convention compliant when, without lawful justification, a state agency fails to follow that guidance.

[20] Many government departments rely on official policies, guidance documents and codes of practice. All these tools are invaluable for promoting consistent best practice across an area of administrative activity, whilst still leaving a margin of discretion to the decision maker to reach an alternative conclusion when there is some strong legal justification for doing so in an individual case. Codes of Practice have a number of purposes and effects. They may codify what should be the aspirations of those delivering public services in relation to the quality of the services they provide. From the perspective of recipients of the service, they often express and embody their legitimate expectations about what the service should do for them, and how it should be delivered to them.

[21] Is it possible for a breach of a Code of Practice to also constitute a breach of a right under the ECHR? As mentioned above the Article 8 right to respect for private and family life is unusually broad and ill-defined: as Lester, Pannick and Herberg have said - 'it demands respect for a broad range of loosely allied personal interests.' In my view the right of the partner of a person whose life is unlawfully taken to be appropriately involved in and informed about prosecutorial decisions concerning that death does properly come within that broad range of interests protected by Article 8.

[22] Adherence to the Code of Practice and Victims Policy which applied in this case could have ensured that the respondent did demonstrate appropriate respect for this victim's protected interest. The PPS chose not to adhere to its own guidance documents and I find that, in the difficult circumstances of this case, that choice did constitute a breach of Article 8. To find otherwise would fly in the face of a long line of Strasbourg jurisprudence which insists that the rights guaranteed by the ECHR should be effective rights. It would be inconsistent with that line of authority for this Court to declare that failure to follow the guidance that would have delivered respect for this victim's Article 8 interest was a matter of no legal consequence.

[23] The right to respect for physical and psychological integrity is included in Article 8. In the case of victims, in my judgment, this requires the state to desist from conduct which would, as here, significantly exacerbate the applicant's understandable feelings of distress and anguish. In my view this is incompatible

with the positive obligation inherent in an effective respect for private and family life and accordingly I find that Article 8 has been breached.

[24] In the present case the PPS materially departed from the Code of Practice and the PPS Victims and Witnesses Policy. As I pointed out at paragraph 106 of my judgment, it may well have been that had the proper procedure been followed at the time the concerns or suspicions of the family could have been allayed or dispelled. The failure to follow that procedure may have fuelled rather than allayed their misgivings. There is little point in having such a policy if it is not conscientiously adhered to particularly in such serious and deeply tragic circumstances.

[25] I consider that the two judgments of the Court constitute just satisfaction and no further order is required.