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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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McAuley's (Robert) Application [2014] NIQB 31

IN THE MATTER OF AN APPLICATION BY ROBERT McAULEY FOR JUDICIAL REVIEW

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Before: Morgan LCJ, Girvan LJ and Treacy J

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MORGAN LCJ (giving the judgment of the court)

[1] The applicant was arrested on 27 October 2012 on suspicion of being involved in the murder of Daniel McKay which had occurred on 25 October 2012. An application was made by police to extend the detention period pursuant to paragraph 32 of Schedule 8 of the Terrorism Act 2000 (the 2000 Act) in relation to the applicant and a co-accused. His Honour Judge Sherrard decided to exclude the applicant and his representatives from the hearing so that he could receive evidence from a police officer dealing with intelligence information and certain forensic tests, the results of which were anticipated, in exercise of the power contained in paragraph 33 of Schedule 8 of the 2000 Act. This judicial review application is a challenge to the decision to grant the extension application authorising the continued detention of the applicant until 12 noon on Thursday 1 November 2012. The principal ground of challenge was that the exclusion of the applicant and his representatives was unlawful.

Background

[2] Daniel McKay was alone in his living room at Longlands Road, Newtownabbey, when he was shot at 8.30pm on 25 October 2012. The victim's partner had been in a shop adjacent to the premises when she heard gunfire. On exiting the shop she saw two masked men running from the house one of whom

shouted 'that will put an end to the drugs in Longlands'. She described both men as being armed, with the taller one carrying a long barrelled gun over his shoulder and the other carrying a handgun. She also stated that one of the gunmen was wearing a hat with his face covered by a scarf. The gunmen were seen to escape in a silver Volkswagen Bora car. The car had been hijacked a short time earlier by a number of masked and armed men who had held the owner of the car and others hostage and claimed to be members of the IRA. About fifteen minutes after the shooting the car was reported to be on fire at Ardmillan Place, Belfast.

[3] On the evening of 26 October 2012 DI McGuinness was made aware of intelligence reports relating to the murder which suggested that the applicant was involved. Background checks were then conducted which revealed that the applicant may have had connections with dissident republican groupings. He was arrested at 1.08am on Saturday 27 October 2012 pursuant to s 41 of the 2000 Act. He was taken to Antrim Serious Crime Custody Suite. Another suspect was arrested at the same time. The respondent asserted that the interviews with the two suspects were coordinated. The applicant was passed as fit for interview at 10.28am and interviews commenced at 11.53am, 3.32pm and 7.35pm. On 28 October 2012 he was further interviewed at 11.30am and 3.00pm. At 12.30pm on 28 October the applicant's solicitor made representations regarding the absence of any substantive allegation being put to the applicant.

[4] DI McGuinness stated that the applicant was interviewed in relation to three separate areas on Saturday 27 October and two further areas were addressed during interviews on Sunday 28 October. The interview strategy involved questioning him in relation to 7 separate areas. A total of 12 premises had being searched during the period of the applicant's detention. Items were submitted for forensic examination. Two items from the crime scene were fast tracked with results guaranteed by 6pm on Monday 29 October 2012. On the afternoon of 28 October three further items were submitted for fast track analysis. The results of these tests were not guaranteed until 6pm on Wednesday 31 October.

[5] DI McGuinness stated that it became clear on 28 October that it would be necessary to seek a warrant of further detention in respect of the applicant and a co-accused to obtain and secure relevant evidence by questioning the applicant on the two areas which remained outstanding from the interview strategy. He also considered that it may be necessary to question him on one or more of the items which were fast tracked for forensic analysis and he considered the applicant to be a flight risk if he were released pending the results of the forensic examinations.

[6] The decision to seek a warrant of further detention for both suspects was made by DCI McVea. DI McGuinness then briefed Superintendent Cordner about the progress of the investigation and the reasons why he believed a warrant of further detention was necessary. At 9.40am on 28 October Superintendent Cordner signed an application for a warrant for further detention seeking an extension for a

period of 24 hours. It is apparent, therefore, that the decision to seek the warrant was made before the two interviews which took place that day. Written notification of the application was duly given to the applicant.

[7] Arrangements were put in place to hear the application at approximately 5pm on the evening of Sunday 28 October. At the start of the hearing of the application counsel for the police indicated that the application was now to detain the applicant until midday on Thursday 1 November. The application was amended without objection. Counsel for the police also indicated that the basis for the application was the need to obtain evidence by questioning and to await the outcome of the forensic tests which may give rise to further questioning. Although the notice had relied upon the need to obtain evidence other than by questioning and the need to preserve evidence no reliance was placed on those matters at the hearing. DI McGuinness gave evidence indicating that it was believed that four men including the applicant and his co-accused were involved in the shooting. A third man had been arrested that morning and the fourth was at large. He explained that there were two further stages of interview outstanding and that the outcome of forensic examinations was guaranteed by 6pm on 31 October 2012. He noted that the murder weapons had not been found. He declined to identify the items which were seized for fast-track forensic examination because he did not wish to provide the applicant with advance notification of his lines of enquiry. He was unable to indicate the nature of the source of intelligence. He indicated that he believed the applicant was a flight risk pending the forensic examination.

[8] At the end of his evidence the judge indicated that he wished to hear further evidence in the absence of the applicant and his representatives on the outstanding forensic tests and the intelligence which had been relied upon in determining whether to arrest the applicant. Despite the applicant's objections that was the course which was followed. Evidence was also given by the arresting officers and the application concluded with evidence from Supt Cordner. He indicated that as a result of his briefing he believed that the investigation had been pursued expeditiously and diligently and that it was necessary to detain the applicant further in order to obtain evidence by questioning, to preserve evidence and to await the outcome of forensic tests.

[9] The learned trial judge made an order extending detention until midday on 1 November 2012. It appears that there was no recording of the hearing and the fullest note of the decision is contained in notes made by Mr Ellis, the solicitor attending on behalf of the respondent.

> "Having heard all evidence reasonable grounds for continued detention. Interview strategy. Outstanding forensic evidence. Some importance. Wednesday available. Questioning. Necessary for preservation of evidence. Analysing application article 2 not engaged.

> Article 8 arguments. Anxious another course. But not. Exceptionally serious investigation context. All persuade me flight risk, further offending and weapons is live and will make order extending detention till 12 PM on 1 November 2012."

[10] The judicial review proceedings were initiated on the evening of 29 October 2012. The applicant was released later that evening. The police indicated that the forensic examinations had been provided earlier than expected and were negative.

The relevant statutory background

[11] Part III of Schedule 8 to the 2002 Act deals with applications for warrants of further detention. A judicial authority can extend the period of detention from the 48 hours from the date of arrest provided for in section 41(3) of the 2000 Act to seven days and a subsequent extension application can be made for a further period of up to seven days. Paragraph 31 of the Schedule imposes a requirement to give notice of the application to the person to whom it relates and paragraph 32 sets out the conditions on which such a warrant can be issued.

> "32 – *Grounds for Extension*
>
> (1) A judicial authority may issue a warrant of further detention only if satisfied that—
>
> (a) there are reasonable grounds for believing that the further detention of the person to whom the application relates is necessary as mentioned in sub-paragraph (1A) , and
>
> (b) the investigation in connection with which the person is detained is being conducted diligently and expeditiously.
>
> (1A) The further detention of a person is necessary as mentioned in this sub-paragraph if it is necessary—
>
> (a) to obtain relevant evidence whether by questioning him or otherwise;
>
> (b) to preserve relevant evidence; or
>
> (c) pending the result of an examination or analysis of any relevant evidence or of anything the examination or analysis of which

is to be or is being carried out with a view to obtaining relevant evidence."

[12] Paragraph 33 requires that the person to whom the application relates shall be given an opportunity to make oral or written representations to the judicial authority and provision is made to ensure that the person has an adequate opportunity to obtain legal representation. Paragraph 33(3) states that a judicial authority may exclude from any part of the hearing the person to whom it relates or anyone representing him. That was the paragraph under which the learned trial judge proceeded in this case.

[13] Paragraph 34 enables an applicant for a warrant to apply to the judicial authority for specified information to be withheld from the applicant and his representative.

"34 – *Information*

(1) The person who has made an application for a warrant may apply to the judicial authority for an order that specified information upon which he intends to rely be withheld from—

(a) the person to whom the application relates, and

(b) anyone representing him.

(2) Subject to sub-paragraph (3), a judicial authority may make an order under sub-paragraph (1) in relation to specified information only if satisfied that there are reasonable grounds for believing that if the information were disclosed—

(a) evidence of an offence under any of the provisions mentioned in section 40(1)(a) would be interfered with or harmed,

(b) the recovery of property obtained as a result of an offence under any of those provisions would be hindered,

(c) the recovery of property in respect of which a forfeiture order could be made under section 23 or 23A would be hindered,

(d) the apprehension, prosecution or conviction of a person who is suspected of falling within section 40(1)(a) or (b) would be made more difficult as a result of his being alerted,

(e) the prevention of an act of terrorism would be made more difficult as a result of a person being alerted,

(f) the gathering of information about the commission, preparation or instigation of an act of terrorism would be interfered with, or

(g) a person would be interfered with or physically injured."

The submissions of the parties

[14] The applicant relied on the decision of the House of Lords in Ward v PSNI [2007] 1 WLR 3013 dealing with the relationship between paragraphs 33 and 34 of Schedule 8 of the Terrorism Act. In Ward the sole ground for seeking the further detention of the applicant was the necessity to obtain relevant evidence by questioning him. It was submitted that although Ward held that there was no necessity to make an application under paragraph 34 in the event that the sole ground for an extension was the need to complete the interview of the suspect, there was such a need where it was proposed not to disclose details when relying on the other statutory grounds. The police had to set out clearly in the application the specific information relied upon to support those other grounds unless permission has been given pursuant to paragraph 34 to exclude that information from the applicant and his representatives.

[15] The applicant claimed that the information withheld from him related to materials that were the subject of forensic examination and the intelligence that connected him to the offence. The basis of the application included the need to preserve evidence and in particular the need to await the results of the forensic examinations. The information should have been either the subject of an application under paragraph 34 of Schedule 8 of the 2000 Act or set out in the notice required by paragraph 31.

[16] The respondent submitted that the Judge decided to exercise his powers under paragraph 33(3) of Schedule 8 in order to obtain further detail about matters upon which the police were not relying but which may have been of some assistance to the applicant. The notice required by paragraph 31 did not impose an obligation on the police to make disclosure to the applicant of the interview strategy or the forensic exhibits to be tested.

Consideration

[17] Paragraph 34 of Schedule 8 of the 2000 Act provides a closely circumscribed basis upon which a person who makes an application for a warrant or seeks to have such a warrant extended may apply to the judge for an order that specified information upon which he intends to rely be withheld from the detained person. By contrast paragraph 33 (3) of the said Schedule provides an apparently unqualified power given to the judge to exclude the detained person and anyone representing him from any part of the hearing. The relationship between these provisions was considered by the House of Lords in Ward v Police Service of Northern Ireland [2007] UKHL 50.

[18] Ward was a case in which the police were applying for an extension to a warrant of further detention to enable an interview strategy to be completed. The detained person had been interviewed about nine topics and the police wished to question him about five further topics. Lord Bingham noted that there was no rule of law which required the police to reveal to a suspect the questions that they wished to put to him at interview. Advance notice of the topics to be covered was not a pre-requisite of fairness. The context for the exercise of the power to exclude the detained person in paragraph 33 (3) of Schedule 8 was that the judicial authority may want to know what the topics were in order to be satisfied that the warrant or an extension of it should be granted.

[19] Having set that context he then examined the circumstances in which the power could be exercised at paragraphs 27 and 28.

> "[27] ….the procedure before the judicial authority which para 33 contemplates has been conceived in the interests of the detained person and not those of the police. It gives the person to whom the application relates the right to make representations and to be represented at the hearing. But it recognises too the sensitive nature of the inquiries that the judicial authority may wish to make to be satisfied, in that person's best interests, that there are reasonable grounds for believing that the further detention that is being sought is necessary. The more penetrating the examination of this issue becomes, the more sensitive it is likely to be. The longer the period during which an extension is permitted, the more important it is that the grounds for the application are carefully and diligently scrutinised.
>
> [28] As in this case, the judicial authority's need to scrutinise may trespass upon the right of the police to

> withhold from a suspect the line of questioning they intend to pursue until he is being interviewed. If it does, it will not be to the detained person's disadvantage for him to be excluded so that the judicial authority may examine that issue more closely to see whether the exacting test for an extension that para 32 lays down is satisfied. The power will not in that event be being used against the detained person but for his benefit. As Hart J said in his ex tempore judgment, that person's safeguard is the judge, whose function it is rigorously and comprehensively to examine the basis on which the application is being made."

[20] The context and statutory purpose of Paragraph 34 Schedule 8 were set out at paragraph 23 of Lord Bingham's opinion.

> "Paragraph 34 of Sch 8 enables the officer who has made an application for a warrant of further detention or for an extension to such a warrant to apply to the judicial authority for an order that specified information on which he intends to rely be withheld from the person to whom the application relates and anyone representing him. Details of evidence that he wishes to obtain otherwise than by questioning that person or of evidence that he wishes to preserve, and of the reasons why the continued detention of the person to whom the application relates is necessary for that purpose, is information that will fall within the ambit of this paragraph. The grounds for withholding it that are listed in para 34(2) are exactly those that one would expect to find in that context. They include such risks to the public interest as interfering with or harming evidence, making more difficult the apprehension, prosecution or conviction of a person suspected of terrorism and making the prevention of an act of terrorism more difficult as a result of a person being alerted. The person to whom the application relates has the right under para 33(1)(a) to be given the opportunity to make oral or written representations to the judicial authority about the application. It follows that an application under para 34 should ordinarily be made before the hearing begins, so that the amount of the information that the

> detained person is to receive is settled before it starts."

At paragraph 21 of his judgment Lord Bingham indicated that details of evidence that was to be obtained other than by questioning or to be preserved and an explanation as to why the person's continued detention was necessary while this was being done would have to be set out in the application. He also observed that where the power to order that specified information be withheld is available an order to withhold it must be sought under paragraph 34.

[21] From this decision there are a number of principles that can be deduced in relation to the lawful use of paragraph 33. First, the power to exclude is only available where the judge chooses to exercise it with a view to benefiting the detained person. The judge must be assiduous to ensure that the detained person suffers no disadvantage as a result of its use. That reflects the fact that the overarching purpose is to ensure fairness to the detained person. Secondly, the power to exclude includes a power not to disclose the material thereafter since to do so will normally undermine the purpose of the exercise. Thirdly, the judge must determine the issues to which the undisclosed information may be relevant. That will bear upon the decision as to whether the applicant for the warrant should be required to use paragraph 34. Fourthly, the judge should in any event ensure that sufficient details have been disclosed to enable the detained person to make the effective representations that are contemplated by paragraph 33 (1).

[22] In this case the notes of the hearing provided by the solicitor for the respondent indicate that the judge excluded the applicant and his representative from the hearing so that he could examine DI McGuinness in relation to the forensic examinations and the intelligence in ease of the applicant. There is no indication that he examined the witness in relation to the interview strategy and the notes of the hearing indicate that the need to continue questioning the detained person in order to obtain evidence was one of the grounds on which he granted the warrant. The intelligence was only of assistance in determining whether there was any reason to doubt the reliance by the arresting officer on the briefing that the intelligence connected the applicant to the murder. There was no requirement on the police to disclose the intelligence material to justify the arrest and paragraph 34 did not, therefore, arise because the police were not relying on the intelligence material to justify the application for the warrant.

[23] The evidence introduced in respect of the forensic examinations was designed to support the submission that the detained person's detention was necessary pending the result of an analysis of relevant evidence or an analysis being carried out with a view to obtaining relevant evidence. This was a ground which was not discussed in Ward as it was only introduced as a result of the amendment of the 2000 Act by the Terrorism Act 2006. The detained person was advised of the dates on which the forensic exhibits had been submitted, the fact that the exhibits had been

fast tracked and the period within which it was expected that the results would be provided.

[24] It was submitted on behalf of the applicant that the ratio of Ward was that an application under paragraph 34 was required if the judge decided to look at undisclosed material in the absence of the detained person except where the application for the warrant was based on the need to obtain further evidence by questioning. We do not accept that the discretion available under paragraph 33 (3) is so circumscribed. In our view the discretion is circumscribed only by the need to respect the underlying principles set out at paragraph 22 above. At paragraph 21 of his opinion in Ward Lord Bingham stated that the police had to provide sufficient details to enable the judicial authority to be satisfied there were reasonable grounds for believing that further detention of the person to whom the application related was necessary. We consider that there had been substantial and sufficient detail in relation to the forensic examinations provided. The principal advantage of the disclosure of the items being examined was to pre-warn the applicant about the nature of any possible questioning. Advance notice of that information was not a pre-requisite of fairness.

[25] The applicant sought to draw some support for its submission from the decision of the House of Lords in Secretary Of State for the Home Department v AF [2009] UKHL 28. That was a case which was concerned with the procedural rights of those who were subject to applications for control orders. Such orders can have a lengthy and dramatic effect upon the quality of everyday life. Lord Phillips noted at paragraph 65 of the judgment that where the consequences were as severe as those normally imposed under control orders non-disclosure of information cannot go so far as to deny a party knowledge of the essence of the case against them.

[26] The context here is completely different. The applicant was arrested on the basis of a reasonable suspicion of involvement in a murder. He was released within 72 hours. His position was subject to judicial review during that period. The procedural protections available to him were those approved by the House of Lords in Ward. In light of the differing contexts the procedural obligations were clearly different. We note that the same position was taken by the Divisional Court in Sher v Chief Constable of Greater Manchester Police [2010] EWHC 1859 (Admin).

[27] The last point concerned the necessity for detention and in particular whether the judge was entitled to conclude that there was a flight risk. This was an issue which was explored in some detail at the hearing. The evidence indicated that this was a fast-moving investigation in which three people sought in connection with the murder had been arrested but one remained at large. The murder weapon had not been recovered. Forensic examination was taking place in relation to items concerning the involvement of the applicant. The period of detention was limited. In those circumstances we consider that the judge was perfectly entitled to conclude that there was a flight risk.

Conclusion

[28] We conclude that the judge properly exercised his power under paragraph 33 of Schedule 8 to exclude the applicant and his representatives and it follows therefore that the judicial review application must be dismissed. In various parts of this judgment we have relied upon the notes that were available of the hearing. If there had been issues of significant controversy such a course would have been unsatisfactory. It is essential, therefore, that every effort is made to ensure that a recording is made of the open part of such hearings. If, for any reason, a recording is not made of the closed part of the hearing a careful note should be maintained.