

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

Delivered: 2/10/2012

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

McIntyre's Application [2012] NIQB 65

IN THE MATTER OF APPLICATION BY ANTHONY McINTYRE FOR LEAVE
TO APPLY FOR JUDICIAL REVIEW

and

IN THE MATTER OF A DECISION OF THE POLICE SERVICE OF NORTHERN
IRELAND TO REQUEST THE UNITED STATES GOVERNMENT TO SEEK ON
ITS BEHALF CONFIDENTIAL MATERIAL HELD BY BOSTON COLLEGE,
MASSACHUSSETTS, USA PURSUANT TO THE TREATY BETWEEN THE
UNITED STATES AND THE UNITED KINGDOM ON MUTUAL ASSISTANCE
IN CRIMINAL MATTERS

TREACY J

Introduction

[1] The applicant is an oral historian who seeks to prevent the Police Service of Northern Ireland ("PSNI") from obtaining confidential archived material provided to the custody and possession of the Trustees of Boston College, Massachusetts, USA. This case is not concerned with protection of journalistic sources.

[2] The applicant seeks, inter alia, an order restraining the PSNI from receiving the material. The applicant's challenge is predicated on the contention that disclosure of the material will give rise to a materially increased risk to his life. This arises, he says, because the release of the material, gathered for academic or historical purposes, to the PSNI for investigative purposes is likely to be perceived as a betrayal of the IRA's code of silence by militant republicans resulting in his murder.

Background

[3] In 2001 the applicant became involved in an academic archiving project known as the "Belfast Project" with the journalist and author Ed Maloney who was the project director. The project was sponsored by Boston College, Massachusetts, USA. The object of the project was to collect and preserve for academic research the recollections of members of republican and loyalist paramilitary organisations. The methodology was to gather first hand testimony by way of voice recordings from participants.

[4] The project lasted from 2001 until May 2006. It began with interviews of former members of the Provisional IRA and was subsequently expanded to include interviews with former members of the Ulster Volunteer Force. The applicant is a former member of the IRA whose role in the project was that of a researcher. He interviewed past participants in the conflict recording their personal recollections. His experience as a journalist, who had previously been involved in the republican movement, he says, gave him access to these people and enabled them to repose a degree of trust in him which they might not otherwise have had.

[5] Each participant gave the content of their recordings into the possession of Boston College for preservation. Access to the tapes was to be restricted until after the interviewee's death except where they provided prior written authority for their use otherwise.

[6] The applicant avers that it was always understood that the contents of the interviews might be accessible after death - primarily for academic purposes. He says that what was never envisaged was that the contents would be accessed by the PSNI for the purposes of criminal investigation or prosecution. Nor, indeed, that this would happen whilst interviewees were still alive. He says that it is the attempt by the PSNI to obtain the material in these circumstances which he believes places his life at risk.

The Murder of Jean McConville

[7] Jean McConville was abducted on 7 December 1972 and subsequently murdered. In March 1999 the IRA admitted that it had killed Mrs McConville. On 26 August 2003 remains, subsequently identified to be those of Mrs McConville, were found on a beach in Co Louth.

[8] Mrs McConville's murder was investigated by the Historical Enquiries Team, as a result of which the matter was referred back for investigation by the PSNI's Serious Crime Branch.

[9] The PSNI is currently conducting a live investigation in an attempt to identify offenders relating to Mrs McConville's abduction and murder, secure admissible evidence against them and instigate prosecutions. The Boston College material represents a significant line of enquiry in the PSNI investigation. The PSNI has become aware that various former members of the IRA, including Brendan Hughes and Dolours Price, participated in the Belfast Project regarding their activities in the IRA. In 2010, following the deaths of two of the contributors to the archive, Mr Brendan Hughes and Mr David Ervine, a book "Voices from the Grave" was

published based on the contents of their interviews. The applicant avers that none of the interviews with former IRA members were approved by that organisation's hierarchy and that the fact of the interviews and the existence of the Belfast Project was not revealed until the publication of Mr Maloney's book. That book includes an account of the abduction and murder of Mrs McConville and names others as members of the IRA who were involved.

[10] In and around February/March 2010 newspaper articles in Northern Ireland reported that Dolours Price had been interviewed as part of the Belfast Project and that during the course of the same she had admitted to her involvement in the McConville incident. Both Mr Maloney and the applicant deny that she made any such admissions. In fact, according to Mr Maloney, the subject of Mrs McConville's disappearance "was never mentioned, not even once. Nor ... were the allegations that Dolours Price was involved in any other disappearance carried out by the IRA in Belfast, nor that she received orders to disappear people from Gerry Adams or from any other IRA figure. None of this subject matter was disclosed in her tape interviews with Anthony McIntyre". Mr Maloney avers that the interviews that the applicant conducted with Dolours Price "are notable for the absence of any material that could ever have justified the subpoenas".

USA Court Proceedings

[11] In February 2011 the requisite UK authorities, on behalf of the PSNI, sought mutual legal assistance from the requisite authorities of the USA to obtain certain materials held by Boston College relating to the interviews conducted with Hughes and Price, and with any other participant in the project touching upon the abduction and death of Mrs McConville.

[12] A series of subpoenae were issued by the US District Court requiring Boston College to deliver up these materials. The Applications and the Court Orders were made *under seal*. Boston College brought a motion to quash. There was no challenge, however, to the subpoenae to the extent that they related to the Hughes material which has now been furnished to the PSNI.

[13] The motion to quash was brought publicly rather than *under seal*. In the US Government's opposition to the motion to quash they rejected the claims that the researchers would face retribution as a result of disclosure stating:

"The researchers themselves, and the subject of the interviews, widely publicised their involvement in this oral history project long before the subpoenas in this case were issued. Moreover the respondent's decision to publicise the issuance of the subpoenas – which had been kept *under seal* by the United States – belies any claim of such risk."

[14] The applicant and Ed Maloney sought to intervene in the Boston College challenge. Both raised with the US Court, *inter alia*, the issue of their personal safety and, as we have seen, Boston College also raised the matter of their protection.

[15] On 27 December 2011 the Court, having conducted an *in camera* review of the relevant materials, ordered that the subpoena relating to the Price materials be complied with.

[16] On 20 January 2012 the Court, having considered the materials relating to the second subpoena (the wider materials relating to Mrs McConville) ordered that **some** of the said materials set out in a sealed appendix be provided by Boston College to the authorities.

[17] Appeals against the aforesaid orders have thus far been rejected.

Discussion

[18] As previously pointed out the applicant's challenge to the receipt of these materials by the PSNI is predicated on the contention that their disclosure will give rise to a materially increased risk to his life and that of his family. The Court has before it two affidavits sworn by Detective Chief Inspector Gary Crawford who was, at all relevant times, attached to the PSNI's Serious Crime Branch and undertaking the role of Senior Investigating Officer in the police investigation in respect of the abduction and murder of Jean McConville. He states that the PSNI has extensive experience in the field of identification of risk to the life of individuals and of managing identified risks. He avers that the PSNI considered the question of risk to the applicant and are not aware of any risk to the applicant's life connected to the seeking of the Boston College materials. In his second affidavit he confirms, as was made clear at the leave hearing on Friday 21 September, that the PSNI is not aware of **any** current risk to the applicant.

[19] The second affidavit records that following the granting of interim relief on 7 September 2012 a threat assessment was sought from the Security Authorities. He avers that he was unable to exhibit a full copy of the threat assessment for national security reasons but states that the Security Authorities have assessed that the threat to the applicant from Northern Ireland-related terrorist groups would remain **LOW** in the event that material from the Boston College tapes were released to the PSNI. The definition of LOW is that an attack is unlikely. He confirms that the PSNI position remains that they are not aware of risk to the applicant in connection with the potential disclosure to it of the Boston College material.

Conclusion

[20] In light of the unequivocal response from the PSNI supported by the threat assessment from the Security Authorities I conclude that the applicant has failed to make out an arguable case that disclosure of the Boston College tapes would, as he claimed, materially increase the risk to his life or that of his family.

[21] I note, in passing, that at para12 of his second affidavit the applicant seeks to rely on a piece written about him by the former Sinn Fein Director of Publicity (Danny Morrison) on his website entitled "The Making of a Tout". Interestingly the author of the article, notwithstanding its title, characterises the applicant's claimed risk from disclosure as a "red herring". The article states

"Some months ago it emerged that the British Authorities, supported by the US Department of Justice have issued subpoenas to seize the tapes for their alleged evidential worth in unresolved killings, presumably involving the IRA. However, instead of refuting on ethical grounds the attempt to seize the material - which could still be potentially used to indict the interviewees or those they have implicated - Anthony and Ed's (Maloney) first instinct was to run with the *red herring* that if the tapes were handed over they could be killed by the IRA (the IRA that sold out and was infiltrated up to its black berets - according to Anthony when it suited him)! I took umbrage at that nonsense and wrote so."

[22] The applicant also referred in his affidavit to an incident at a neighbour's house in 2010 following the publication of the book "Voices from the Grave" based *inter alia* on the Boston Tapes of Brendan Hughes. It was the applicant who had recorded the testimony from Mr Hughes, a former senior IRA figure which contained allegations regarding the Sinn Fein President Gerry Adams.

[23] The Court was furnished with a copy of a statement made by the applicant's wife to the Irish police on 10 April 2012. In this statement she states as follows:

"The background to my concerns surround the current case in the United States regarding the Boston College Oral History Archives. My husband was the lead researcher for the project and conducted the interviews for the republican half of the interviews. The Historical Enquiries Team of the PSNI have subpoenaed some of the archive material. This subpoena has elevated the risk to our safety. This apparent threat from *loyalists* is a result of that. The matter of the subpoena is currently before the Courts in Boston and may not be resolved for some time. Previously an incident occurred near our home; our next door neighbour's house was attacked and smeared with excrement [this is a reference to the incident in 2010]. This attack happened at the time of the publication based upon part of the archive, Voices from the Grave. We were not at home at the

time of the attack, but the Drogheda Leader reported that the home attack was a mistaken identity. Therefore I conclude that the attack was intended for our home. I asked to have my complaint put into your records concerning the apparent threat from the *loyalist* people.”

[24] I note that the applicant avers as to the IRA’s strict code of silence, breach of which is punishable by death. In 2010 “Voices from the Grave” was published which publication is based *inter alia* on the testimony of Brendan Hughes recorded by this applicant. It appears that it was this publication which alerted the PSNI to the existence of the Boston Archive in the first place.

[25] The US Government, in its opposition to the motion to quash, observed:

“The Researchers themselves, and the subject of the interviews, widely publicised their involvement in this oral history project long before the subpoenas in this case were issued. Moreover, the respondent’s decision to publicise the issuance of the subpoenas, which had been kept *under seal* by the United States, belies any claim of such risk.”

[26] Even if, contrary to my earlier conclusion, a material increase in risk was arguably established by disclosure, it by no means follows that the applicant would have been entitled to relief in the form of an injunction restraining the PSNI from receiving into its custody the Boston College material. Art2(1) of the Convention provides as follows:

“Everyone’s right to life shall be protected by law. No-one shall be deprived of his life intentionally save in the execution of a sentence of a Court following his conviction of a crime for which this penalty is provided by law.”

[27] Art2(1) imposes three different duties on the State – see *Savage v South Essex Partnership NHS Foundation Trust* [2009] 2 WLR 115, at para76 per Baroness Hale. The first is the negative duty to refrain from taking life, save in the exceptional circumstances envisaged by Art2(2).The second is a positive duty properly and openly to investigate deaths for which the State may be responsible.(I shall refer to this as “*the investigatory duty*”).The third duty requires the State not only to refrain from taking life but to take positive steps to protect the lives of those in their jurisdiction in certain circumstances (see *Osman v United Kingdom* [1998] 29 EHRR 245) (“*the protective duty*”).

The Investigatory Duty

[28] The first sentence of Art2(1) enjoins a 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. Thus a State is obliged by Art2 to put 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 punishment of breaches of such provisions (see for example *Killic v Turkey* [2001] 33 EHRR 1357 at para62 and Lester & Pannick 'Human Rights Law & Practice' at para4.2.7).

The Protective Duty

[29] The State's obligation to secure the right to life in certain well defined circumstances may impose a positive obligation on the authorities to take preventative, *operational* measures to protect an individual whose life is at risk from the criminal acts of another individual. When determining the extent of the positive protective obligation, the Court takes into account "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" (see *Osman* at para116). Not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. As established in *Osman* for a violation of the positive obligation to protect the right to life to arise "it must be established 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".

[30] In *Van Colle v Chief Constable of Hertfordshire Police* [2008] 3 All ER 977 Lord Bingham held that the determination of whether or not the police should have taken protective steps does not depend only on what the authorities knew, but also on what they ought to have known - "stupidity, lack of imagination and inertia" are not an excuse when authorities reasonably ought, in light of what they know, to make further enquiries or investigations. The authorities ought to be treated as knowing what further enquiries would have elicited. The first limb of the test concerns the extent of the State's actual or presumed knowledge and the assessment of risk. The second limb concerns the reasonableness of the steps taken.

[31] In this case, if the requisite risk threshold had been (even arguably) surmounted by the applicant (which it wasn't) the question would then have arisen as to whether the State had fulfilled the second limb of the test concerning the reasonableness of the steps taken. The applicant's claim is that the risk threshold has been surmounted and that, in the circumstances, the measures required to be taken necessitate the PSNI being prohibited by the Court from receiving the Boston materials.

[32] Irrespective of the potential probative force or significance to a murder (or other serious criminal investigation) the Court would, on the applicant's argument, be compelled by Art2 to restrain the PSNI from receiving material which could result in the identification, prosecution and punishment of persons.

[33] Art2 does not, in my view, command such a startling conclusion.

[34] The submission, however, exposes a potential conflict between the Art2 investigatory duty on the one hand and the Art2 protective *Osman* duty on the other.

[35] However, the qualified nature of the protective *Osman* duty is such that the potential for any meaningful conflict is more illusory than real.

[36] The second limb of the test requires State authorities, in this case the PSNI (and the Court), to take feasible measures "within the scope of their powers". In the case of the Court this duty is occasionally discharged, for example, by the grant of anonymity, screening or other special measures.

[37] I do not consider that Art2 in this case (or indeed more generally) can have the effect of prohibiting the police from seeking or receiving material relevant to a serious, live criminal investigation. Investigating murder and gathering relevant material is not only a requirement of domestic law but it is also a requirement of the positive investigative duty which Art2 imposes upon contracting States.

[38] I do not consider that it would be Art2 compliant for the PSNI to refuse to receive the Boston material.

[39] Section 6(1) of the Human Rights Act 1998 makes it unlawful for a Court to act in a way which is incompatible with a Convention right. The applicant wants the Court to make an Order preventing the Police from receiving material relevant or potentially relevant to the investigation of the abduction and murder of Jean McConville.

[40] It would not only be extraordinary if the Court were to make such an Order but it would also involve the Court in acting incompatibly with Art2 since the effect of any such Order would be to inhibit the PSNI in the discharge of its Art2 investigatory obligation.

[41] Even if the *Osman* risk threshold were crossed as a result of disclosure of the Boston material the requirement on the PSNI is to take feasible measures within the scope of its powers to protect the persons thereby exposed to any risk. That obligation, however, does not require or authorise the Police to refuse to receive material potentially relevant to a murder investigation in breach of the Art2 investigatory duty.

[42] On the applicant's case the PSNI is prohibited from receiving material no matter how probative (even a confession to murder if it exists) because of the risk from the IRA, dissident or otherwise.

[43] The very notion that a risk generated by the perpetrators or their associates could require the PSNI, or indeed the Court, to effectively suppress material potentially relevant to murder is fundamentally inconsistent with the very nature of the rule of law and Art2 itself.

[44] For the reasons I have already given such a prohibition would violate the Art2 investigatory duty so recently stated in a series of cases from Northern Ireland eg *Jordan v United Kingdom* [2003] 37 EHRR 52.

[45] In Art2 cases the State Agencies must investigate, not suppress, potential evidence and it would be alarming, to say the least, if the Court were, as the applicant invites, to require its suppression.

[46] Accordingly the Court concludes that the applicant has not established, even arguably, that the requisite risk threshold has been reached; and, even if he had, it would not be open to the PSNI or the Court in the circumstances to prohibit the receipt of material relevant, or potentially relevant, to a murder enquiry.