

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

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

McKiernan's Application [2011] NIQB 135

AN APPLICATION BY SARAH McKIERNAN FOR JUDICIAL REVIEW

TREACY J

Introduction

[1] On 3 April 2011 the respondent sought and obtained two warrants to enter and search the applicant's home for material relevant to the terrorist investigation into the murder of Constable Ronan Kerr which had occurred on 2 April 2011. The first of these warrants was obtained at 1.32am on the morning of 3 April 2011 and authorised a search for items likely to be of use to terrorists engaged in operational activity. The searches began at 6.00am on 3 April and concluded at 10.57am and the applicant has confirmed that that search warrant is not the subject of challenge.

Background

[2] These proceedings relate to a search which was authorised by a second search warrant obtained on the evening of 3 April and granted pursuant to Para1 of Schedule 5 of the Terrorism Act 2000. It authorised the search for forensic trace evidence. The warrant states as follows:

"Whereas it appears from the application on oath of Detective Sergeant Monteith, a sergeant of the Police Service of Northern Ireland attached to Omagh police station in the Police Service of Northern Ireland that there is reasonable grounds to believe that certain articles namely forensic trace evidence sought in connection with and likely to be of substantial value to their terrorist investigations and it is necessary to seize them to prevent them

being concealed, lost, damaged or altered or destroyed or on the premises of persons or persons unknown situated at 8 Shergrim Glen, Omagh you and your assistants are authorised to enter and search the said premises for such articles as aforesaid"

The warrant is dated 3 April and it is signed by a lay magistrate for the relevant County Court division.

[3] The respondent Police Service commenced the search authorised by this warrant at approximately 5.30pm on 3 April and at para5 of the applicant's first affidavit she alleges that the police informed her, through her solicitor, that this search would be completed by Wednesday 6 April and that she would be allowed back into her home. She also alleged that on 6 April the police informed her that she would not be allowed back into her home until the tests were completed and following receipt of that information she commenced these proceedings for judicial review in respect of which I granted leave.

[4] The applicant's case is that the respondent has extended its search beyond what was reasonably required under the terms of the relevant warrant. Detective Superintendent Raymond Murray deposed:

"8. During the period of 3 April 2011 and 9 April 2011 a series of scientific support examinations were carried out at 8 Shergrim Glen. A critical factor in the length of the examinations at the house was due to the discovery of a significant arms find at 187a Mountjoy Road, Coalisland. This premise had been searched as part of the murder enquiry on 5 April 2011. This find had been linked by police to the murder of Ronan Kerr. A comprehensive forensic examination was made at this location which could only commence after army technical officers had ensured the area was safe. The forensic examination of 8 Shergrim Glen had to be completely reassessed in light of this find. The police were now not only searching and forensically examining 8 Shergrim Glen in light of the murder but also for materials which may connect the house and its occupants to the arms find. This was an extensive piece of work that could only commence when the examination of 187a Mountjoy Road itself had been fully assessed. This caused a significant extension to the time the house had to be retained by police."

[5] The court was also furnished with a time line of the examinations which were carried out at 8 Shergrim Glen and it appears from that time line that there is an entry at 11.17am on 5 April 2011 which states "examination completed". There are then two further entries. One on 8 April 2011 at 10.45 hours which states that "CSI Blair entered the scene to recover control fibre samples and search for additional items" and those items are not identified. There is a further entry for 8 April at 1340 hours which states "examination completed. CSI out of scene". The document finishes by recording "TSG searches undertaken prior to and on completion of CSI examinations". The applicant was then permitted back into her home on 9 April 2011.

Statutory Framework

[6] The search warrant that was issued under Para1 of Schedule 5 of the Terrorism Act 2000 which provides:

"1-(1) A constable may apply to a justice of the peace for the issue of a warrant under this paragraph for the purposes of a terrorist investigation.

(2) A warrant under this paragraph shall authorise any constable -

(a) to enter premises mentioned in the sub paragraph (2A);

(b) to search the premises and any person found there; and

(c) to seize and retain any relevant material which is found on a search under paragraph (b)."

[7] Para (2A) defines the premises referred to in sub-paragraph (2)(a). Para (3) provides that for the purposes of sub paragraph (2)(c):

"... material is relevant if the constable has reasonable grounds for believing that-

(a) it is likely to be of substantial value whether by itself or together with other material to a terrorist investigation; and

(b) it must be seized in order to prevent it from being concealed, lost, damaged, altered or destroyed.

[8] Para 5 deals with the conditions which must be satisfied before a warrant can be issued and provides:

“Subject to paragraph 2 a justice may grant an application under this paragraph if satisfied -

(a) that the warrant is sought for the purposes of a terrorist investigation;

(b) that there are reasonable grounds for believing that there is material and premises to which the application relates which is likely to be of substantial value whether by itself or together with other material to a terrorist investigation and which does not consist or include accepted material; and

(c) that the issue of a warrant is likely to be necessary in the circumstances of the case; and

(d) in the case of an application for an all premises warrant that it is not reasonably practicable to specify in the application all the premises which the person so specified occupies or controls and which might need to be searched.”

[9] The applicant also drew attention to safeguards in relation to the execution of warrants and the conduct of searches which the police must follow. In particular Article 17(1) of the Police and Criminal Evidence (Northern Ireland) Order 1989 (“PACE”) provides:

“This Article and Article 18 have effect in relation to the issue to constables under any statutory provision including a statutory provision passed or made after the making of this order of warrants to enter and search premises and an entry on or search of premises under a warrant is unlawful unless the warrant complies with this Article and is executed in accordance with Article 18.”

See also Blackstone’s Criminal Practice 2011 at D1 89 which deals with the corresponding English provisions.

[10] Article 18(8) of PACE provides that a search under a warrant “may only be a search to the extent required for the purposes for which the warrant was issued”. The applicant submitted that the respondent had acted unlawfully and had breached this safeguard in that the terms of the second warrant allowed the respondent to enter the applicant’s home for the purpose of searching for forensic trace evidence and to seize this evidence. Having completed the necessary forensic examinations,(which begs the question as to whether or not they had in fact been completed), the

applicant submitted that the search should have ended, which it did not, and accordingly the purpose of the search went beyond the extent required for which the second warrant was issued.

[11] The applicant also relied on Article 17(5) of PACE which provides that a warrant shall authorise an entry on one occasion only unless it specifies that it authorises multiple entries. The applicant submitted that the warrant did not specifically authorise a second entry and despite that the respondent entered the premises on a second occasion on 8 April 2011. The applicant submits this further entry was unlawful because it wasn't covered by the relevant warrant.

Discussion

[12] It was accepted by the respondent that if what occurred during the impugned period amounted to a separate and second search it would not have been lawful in the absence of a further warrant authorising such a search. The central issue in this case therefore, perhaps somewhat unusually, turns not on the validity of the forensic trace warrant about which there was no issue but whether in fact the search authorised under that warrant had ended thereby triggering a requirement for a further warrant if the police wanted to re-enter and search. That is to say a further warrant also for forensic trace evidence and in respect of the same terrorist investigation which had generated the original forensic trace warrant.

[13] The applicant's house remained cordoned off at all material times. The applicant had not been told that the search had ended and in fact complained that during the impugned period she and her family remained excluded from the family home. The applicant accepted during the course of submissions that a search warrant for forensic trace evidence authorised the entry and re-entry of various forensic specialists to commence and complete their examinations.

[14] Preservation of scene integrity, thorough and appropriately conducted forensic examinations lie at the heart of most serious crime investigations and in the case of murder represent a vital part of the state's Article 2 positive obligation to investigate, identify and prosecute those responsible. As the present case demonstrates forensic scene examinations are often painstaking and time consuming processes. As I understand it no objection was or could have been taken in respect of the latter part of the relevant search period if it had been covered by the original forensic trace warrant. The complaint is that it is said that the original authorised search had ended and that the discovery of a new and possibly related crime scene generated the need for further forensic examinations which gave rise to a requirement for a second warrant. Everyone is agreed that if the search authorised by the first warrant had ended a further warrant would have been required. That begs the question of when a search comes to an end. The applicant accepted that even after the relevant searches had been completed a reasonable amount of time would be required to formally complete the process.

[15] If the applicant's submissions were right the cordon would have had to have been removed by the police and more importantly the applicant and her family and others would have been entitled to enter the scene ie the house whilst a further warrant was being applied for. This would jeopardise the scene and evidential integrity potentially prejudicing a major murder investigation and frustrating or subverting the very purposes for which the forensic trace evidence warrant had been granted by the magistrate.

[16] Ordinarily relinquishing the scene and informing the applicant that the search had been completed would signify that the search had ended. If that had occurred in the present case the respondent as I understand it would not have disputed that a further warrant would have been required. In fact at no material time was the scene relinquished and the applicant was never told that the search was over. On the contrary, she remained excluded from her home which also remained cordoned. Furthermore the fact that those forensic examiners who had thus far been sent to the house may have on 5 April completed such investigations as had been directed was plainly not the end of the matter. There is a distinction between the forensic examinations and the search. The search warrant authorises such forensic examinations as were considered necessary. The completion of a particular forensic examination or examinations is not to be equated with the end of a search for forensic trace evidence since further such examinations may be directed before the search formally closes. This could happen because of external developments or a further direction before the forensic trace search is formally ended.

[17] This was a fast moving investigation in which the police were examining a number of loci believed to be potentially connected to the murder of Constable Kerr. The discovery of a major arms find was one such locus and this undoubtedly demanded not only the examination of that site but also continuing forensic examination of the applicant's home to identify any potential evidential links. This continuing forensic examination at the house which had never been relinquished and which search the applicant had not been told had ended was not a new search but a continuing forensic search reacting to fast case developments external to the subject scene.

Conclusion

[18] The analogy may be inexact but a detained person may be on the verge of release when new potentially incriminating information requires to be put during interview. If still in custody and not informed of any release the need to address the new information with the detained person is unlikely to trigger the need for a further arrest. In conclusion therefore I am quite satisfied that the forensic trace warrant justified the search complained of. No further warrant is required in the circumstances and accordingly the police search is lawful and the judicial review must be dismissed.

