

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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McNamee and McDonnell's Application [2014] NICA 13

IN THE MATTER OF AN APPLICATION BY MCNAMEE AND  
MCDONNELL LLP FOR JUDICIAL REVIEW

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Before: Morgan LCJ, Coghlin LJ and Sir John Sheil

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**MORGAN LCJ (delivering the judgment of the court)**

[1] This is an appeal by the PSNI against the judgment of Mr Justice Treacy granting the respondent firm's application for judicial review on the ground that the PSNI acted unlawfully in breach of Art 59 of the Police and Criminal Evidence (Northern Ireland) Order 1989 ("PACE") in denying a detained person permission to consult with his chosen solicitor as soon as practicable. The respondent's notice contends that the decision to prevent the detained person from having access to the respondent firm while in custody was taken in a procedurally unfair manner, that it was in breach of the respondent's Convention rights under Article 8, Article 1 Protocol 1 and Article 14 and that, in any event, it was based on irrelevant considerations.

**Background**

[2] Operation Radix was a police investigation into the corrupt practice of a number of financial professionals who allegedly conspired to steal money from the financial institutions in which they were employed and use the stolen money to purchase property for their own and each other's benefit. A statement of complaint dated 16 October 2009 by the head of financial crime prevention in AIB Group (UK) plc described investigations into the conduct of Peter Creegan, the manager of the Newry branch of First Trust Bank. Those investigations raised concerns about improper lending, conflicts of interest, an undisclosed business relationship with a customer and suspected fraudulent activity against First Trust Bank covering a period from 2003 to 2009.

[3] The alleged fraud concerned a total sum in excess of £3 million. The statement of complaint identified a series of transactions a number of which involved monies being transferred into accounts held by Tiernan's, a firm of solicitors with offices in Newry and Crossmaglen. The complaint also identified the involvement of Peter Brassil, a solicitor and ex-employee of Tiernan's, in the financing of a number of the allegedly fraudulent loans. It was also contended that a loan in excess of £1.2 million was transferred into a Tiernan's account and thereafter the whereabouts of the money was unaccounted for.

[4] Peter Creegan was arrested at 14:55pm, on 27 October 2009. He was brought to Antrim Custody Suite at 17:00pm and his detention was authorised at 18:25pm. At 18:45pm he indicated that he wanted Thomas Tiernan, solicitor, informed of his arrest as soon as practicable. He was advised that there may be a conflict-of-interest if this solicitor were used. When Mr Creegan indicated that he did wish to use that solicitor he was informed that the PACE Superintendent would be contacted to attend to decide. At 19:35pm Supt Kee who was covering the Serious Crime Suite at Antrim on that evening spoke to Detective Inspector Clements of Organised Crime Branch. Mr Clements explained the background to the investigation and indicated that he had reason to believe that Tiernan's solicitors' practice in Newry was involved in some of these transactions. Mr Clements explained that there was a sum of £1.2 million which had gone into a Tiernan's account which could not be traced any further. He stated that it would be necessary to search the offices of Tiernan's or obtain a Production Order. He did not have the capacity to do this on 27 October 2009 but this would form part of the second phase of the investigation.

[5] Mr Clements advised Superintendent Kee that Tiernan's had "fragmented somewhat in recent months" and that two solicitors previously working for the company during the period that the alleged fraud took place were now working independently. He identified them as Mr McNamee of the respondent firm and Mr Brassil. It appears that Mr Brassil left in December 2007 whereas Mr McNamee and his partner both left in February 2009 to establish their practice. Mr Clements believed that they would be unsuitable to represent the detained person. He also indicated that Tiernan's and another firm of solicitors who had dealings with Mr Creegan were unsuitable. He considered that in light of the documents available some of the solicitors linked to Tiernan's could be potential suspects. Secondly, if a solicitor later became a suspect, his admission to the interviewing process could compromise any subsequent criminal trial or undermine the Article 6 rights of Mr Creegan. Thirdly, it would be detrimental to a complex and on-going investigation to question Mr Creegan concerning the movement of monies through Tiernan's with a member or former member of that firm being present.

[6] Having considered this information Superintendent Kee informed the custody sergeant that he considered that solicitors from Tiernan's, the other firm mentioned, Mr McNamee and Mr Brassil were unsuitable to represent the detained person. Superintendent Kee believed that, in light of the information provided, to

allow legal representation by a solicitor who might be a suspect or defendant in the case could compromise an extensive criminal investigation or interfere with Mr Creegan's right to a fair hearing.

[7] At 20:24pm the custody sergeant advised Mr Creegan that Mr Tiernan was not suitable. Mr Creegan then requested the attendance of Mr McNamee but was informed that he also was not suitable as he worked or had worked for Tiernan's. The custody sergeant informed Mr Creegan that access to a solicitor was not denied or delayed but he was advised to select another solicitor, either a solicitor on the list or the duty solicitor. At 21:11pm Mr Creegan requested Mr Mallon. The custody record states that this was referred to Mr Clements who noted that the solicitor was the brother of a further person held in custody in relation to these matters and the brother had stated in interview that he had discussed these matters with Mr Mallon. Accordingly Mr Clements felt that he was unsuitable. At 21:50pm Mr Creegan stated that he wished Mr Rafferty to be contacted. Mr Rafferty subsequently attended the police station and consulted with Mr Creegan. At 01:32am on 28 October 2009 the circumstances concerning legal representation were explained to him. Mr Rafferty is noted on the custody record as having no representations to make. No interviews were conducted with Mr Creegan prior to the attendance of Mr Rafferty and his consultation with his client. Mr Creegan was charged on 31 October 2009 and became a client of the respondent firm in early November 2009.

### **Statutory background**

[8] Article 59 of PACE deals with access to legal advice.

“59. - (1) A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time....

(4) If a person makes such a request, he must be permitted to consult a solicitor as soon as is practicable except to the extent that delay is permitted by this Article.

(5) In any case he must be permitted to consult a solicitor within 36 hours from the relevant time, as defined in Article 42(2).

(6) Delay in compliance with a request is only permitted-

(a) in the case of a person who is in police detention for an indictable offence; and

(b) if an officer of at least the rank of superintendent authorises it.

(7) An officer may give an authorisation under paragraph (6) orally or in writing but, if he gives it orally, he shall confirm it in writing as soon as is practicable.

(8) Subject to paragraph (8A) an officer may only authorise delay where he has reasonable grounds for believing that the exercise of the right conferred by paragraph (1) at the time when the person detained desires to exercise it-

(a) will lead to interference with or harm to evidence connected with an indictable offence or interference with or physical injury to other persons; or

(b) will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it; or

(c) will hinder the recovery of any property obtained as a result of such an offence.

(8A) An officer may also authorise delay where he has reasonable grounds for believing that-

(a) the person detained for the indictable offence has benefited from his criminal conduct, and

(b) the recovery of the value of the property constituting the benefit will be hindered by the exercise of the right conferred by paragraph (1)....

(9) If the delay is authorised-

(a) the detained person shall be told the reason for it; and

(b) the reason shall be noted on his custody record.

(10) The duties imposed by paragraph (9) shall be performed as soon as practicable.

(11) There shall be no further delay in permitting the exercise of the right conferred by paragraph (1) once the reason for authorising delay ceases to subsist.”

[9] This Article is supplemented by Code C issued pursuant to Article 65 of PACE dealing with the detention, treatment and questioning of persons by police officers. Article 66(10) of PACE makes the Code admissible in evidence where any of its provisions are relevant. Paragraph 6 of Code C deals with the right to legal advice. Paragraphs 6.1 and 6.4 provide that, unless Annex B applies, all detainees must be informed that they may at any time consult and communicate with a solicitor and that the right of access to a solicitor must not be delayed. Paragraph 6.5 sets out the general rule that a detainee who wants legal advice may not be interviewed until he receives that advice. There is an exception where the solicitor nominated by the detainee or selected from a list cannot be contacted or has declined to attend.

[10] Annex B of Code C deals with delay in allowing access to legal advice. Authority to delay a detainee’s right to consult privately with a solicitor may be given only if the authorising officer has reasonable grounds to believe the solicitor the detainee wants to consult will, inadvertently or otherwise, pass on a message from the detainee or act in some other way which will have any of the following consequences:

- (i) - interference with, or harm to, evidence connected with an indictable offence; or
  - interference with, or physical harm to, other people; or
- (ii) lead to alerting other people suspected of having committed an indictable offence but not yet arrested for it; or
- (iii) hinder the recovery of property obtained in consequence of the commission of such an offence.
- (iv) hinder the recovery of criminal property.

In these circumstances the detainee must be allowed to choose another solicitor.

[11] We were also referred to the Notes for Guidance contained within paragraph 6 of Code C. These do not form part of the Code (see paragraph 1.3 of Code C) and therefore can be accorded little weight. Note 6B provides that a detainee who asks for legal advice should be given an opportunity to consult a specific solicitor or

another solicitor from that solicitor's firm. If advice is not available by these means, the detainee should be given an opportunity to choose a solicitor from a list of those willing to provide legal advice. That is consistent with the qualified right under Article 6(3)(c) of the Convention to obtain legal advice of one's choice. Paragraph B3 of the Notes for Guidance on Annex B provides that a decision to delay access to a specific solicitor is likely to be a rare occurrence and should arise only when it can be shown the suspect is capable of misleading that particular solicitor and there is more than a substantial risk that the suspect will succeed in causing information to be conveyed which will lead to one or more of the specified consequences referred to in paragraph 10 above.

### **The submissions of the parties**

[12] The learned trial judge concluded that once a detainee made a request for a solicitor he must be permitted to consult with that solicitor except to the extent that delay was permitted by Article 59 of PACE. He rejected the appellant's submission that permission to consult with the requested solicitor could be refused on the grounds of alleged conflict of interest. The only statutory vehicle for addressing the concerns of the PSNI in respect of the identified conflict was contained in Article 59 (8) and (8A) of PACE. He concluded that the police did not use that mechanism but rather relied upon the Police (Northern Ireland) Act 2000 as an alternative source of the power to delay access to a solicitor.

[13] The appellant points out that at paragraph 49 of its skeleton argument in the court below it submitted that the authorisation for the delay in access to the solicitor in this case complied with Article 59. The only reference to the Police (Northern Ireland) Act 2000 was in relation to the issue of whether their actions pursued a legitimate aim in connection with the claim under Article 8 of the Convention and reliance was placed upon section 32 of that Act which expressed the general statutory duty of police officers to prevent the commission of offences and to take measures to bring offenders to justice.

[14] In its argument before this court, however, the appellant maintained that the issue was one of practicality. It is submitted that at the time of Mr Creegan's detention the PSNI had reviewed the bank's investigation report and examined special procedure material that led to the assessment that criminal property had been placed into a range of Tiernan's bank accounts. The issue raised was whether Mr Creegan was permitted to consult with a solicitor as soon as practicable. The appellant relied upon three reasons given by Mr Clements which informed the decision-making of Superintendent Kee and which it was submitted bore on practicability. These were that the planned investigation of physical and electronic documents could lead to solicitors linked to Tiernan's becoming suspects, that admitting a suspect to the interview process could compromise future proceedings and that the financial investigation could be hindered if members or former

members of Tiernan's attended interviews where transactions involving that firm were discussed.

[15] The appellant submitted that the Article 8 claim did not achieve the level of seriousness that was necessary to engage that Article and in any event the actions of the police were a proportionate response for a legitimate aim. There was no basis for the claim based on Article 1 Protocol 1 because the respondent did not have any property right at the relevant time. Procedural fairness was context specific and in these circumstances consultation with a solicitor who was deemed conflicted as to his attendance was neither appropriate nor necessary.

[16] The respondent accepted that the purpose of Article 59 of PACE is to provide rights to the detained person rather than to his solicitor. The entitlement of the solicitor to maintain this challenge was on the basis that as he was a partner in the applicant firm it had sufficient interest to challenge the decision that he should not be permitted to have access to a detained person. It was submitted that the decision not to provide that access resulted in delay and that the reasons for that delay were other than those set out in Article 59 (8) of PACE. The delay was not, therefore, delay "permitted by this Article" which could fall within Article 59 (4). Practicability refers merely to the practicalities of the relevant solicitor getting to the police station and seeing the client.

[17] The respondent submitted that it had important rights and interests at stake both in economic terms and in terms of reputation having regard to the fact that the client was told that the firm was unsuitable. Where a person is adversely affected by a decision, the presumption is very strong that procedural fairness will apply. In this instance that required consultation with the solicitor who had been requested. It was also submitted that another solicitor was contacted by the police and he indicated that he was affected by a conflict of interest. In any event it was not for the police to determine whether there was a conflict of interest. That was solely for the solicitor.

[18] Mr Clements stated that there was evidence that Mr McNamee had some involvement in the transactions which were the subject of the investigation leading to the arrest of Mr Creegan. It was accepted at the hearing that this was wrong. The suggestion that Mr McNamee was a partner or senior member of Tiernan's was also incorrect, as was the implication that he was likely to become a suspect or defendant. All of these were reasons why procedural fairness required that the solicitor should have been contacted.

[19] The failure to contact the solicitor represented an interference with the firm's right to property under Article 1 Protocol 1. The interference resulted in the deprivation of the opportunity to engage in the commercial activity of representing Mr Creegan. In addition, the firm's Article 8 rights, and in particular those of Mr McNamee, had been violated because his professional reputation has been damaged by the decision that he was unsuitable to provide professional services. Any

interference with Convention rights must be in accordance with law and it followed that if the PSNI actions were in breach of Article 59 of PACE any interference would automatically constitute a violation of those rights. In any event, in the absence of consultation the exclusion of the firm was not based on reasons that were either relevant or sufficient.

## **Consideration**

### *Article 59*

[20] It was accepted by all parties that the right of access to legal advice secured by Article 59 of PACE was the right of the detained person and not that of a solicitor. That raised the issue of whether the solicitor had standing in the absence of any Convention claim. Order 53 Rule 3(5) requires that an applicant for judicial review demonstrates a sufficient interest in the matter to which the application relates. Although the right of access belonged to the detained person, the respondent submitted that the solicitor was directly affected by the outcome. We are satisfied that the entitlement to pursue judicial review is not limited to those who are directly affected. We have been assisted by the discussion of this issue in Dr Anthony's *Judicial Review Northern Ireland* at paragraph 3.64 et seq. In Family Planning Association of Northern Ireland v Minister for Health Social Services and Public Safety [2005] NI 188 this court indicated that it would be reluctant to decline jurisdiction to hear an application for judicial review on grounds of lack of standing of any responsible person or group seeking on reasonable grounds to challenge the validity of government action. Applying that test we are satisfied that the applicant has standing.

[21] We agree with the learned trial judge that the statutory provisions and the PACE Code constitute a comprehensive and detailed legislative framework providing for the right of access of the detained person to a solicitor and striking the necessary balance between the interests of the detained person and the interests of the public in the proper investigation of crime. It was common case that the detained person asked for Mr McNamee to consult with him and that he was told that Mr McNamee was unsuitable because he worked or had worked for Tiernan's. The appellant's case was that Supt Kee had reasonable grounds for believing that fraudulently obtained monies had passed through that firm and thereafter could not be traced. It would have been necessary either to carry out a search of the premises or alternatively to obtain a Production Order to establish the extent to which there was involvement in the fraud on the part of those working there. In the absence of the necessary resources it was not practicable to carry out either of these steps and therefore it followed that it was not possible to exclude those working in Tiernan's or who had worked there during the relevant period from the pool of those who might have been involved in the fraud.



[22] The appellant submitted that in those circumstances it was not practicable to permit Mr Creegan to consult with Mr McNamee. We do not accept that submission. The evidence indicates that it was the search of the premises or the obtaining of the Production Order that was not practicable. The refusal of access to the solicitor was not because of the absence of appropriate resources but because the solicitor could not at that stage be excluded from the pool of those who might have been involved in the fraud. Article 59(8) of PACE is plainly designed to specify the circumstances in which delay in access to a solicitor is appropriate where there is the risk of adverse impact on the investigation. We do not consider that Article 59(4) of PACE is intended to widen the circumstances in which access to a solicitor can be refused in order to protect the integrity of the investigation.

[23] The English equivalent of Article 59(8) of PACE was considered in R v Samuel [1988] QB 615. That was a case in which the defendant was being questioned about two burglaries and an armed robbery. Access to legal representation was delayed because there was a likelihood of other suspects to be arrested being inadvertently warned. The defendant admitted the two burglaries in his second interview and was charged. The court held that as a result of being charged he was entitled to access to legal representation and that the questioning about the armed robbery thereafter was in breach of the relevant statutory provision. It went on, however, to indicate that the exclusion of the solicitor could only be justified where the Superintendent believed that the ground relied upon by him would very probably happen. The choice of the word "will" in Article 59 (8) (a), (b) and (c) must have been deliberately restrictive. Where the fear arises as a result of intentional or inadvertent conduct by the solicitor specific evidence as to the person detained or the actual solicitor would be required.

[24] The confidence expressed by the court in Samuel that solicitors would not be used as unwilling channels of communication was not shared by the Court of Appeal in R v Alladice (1988) 87 Cr App R 380 where Lord Lane LCJ indicated that it was the common experience of each member of the court that such things did in fact occur. The exclusion of a particular solicitor was also considered by the Divisional Court in R (Malik) v Chief Constable of Greater Manchester [2007] ACD 15. A suspect was being questioned about the commission, preparation or instigation of an act of terrorism. He asked for a particular solicitor. Police had available a partial video of that solicitor giving advice to a group about police detention methods which had been found in the premises of a co-accused. There was believed to be a possibility that the solicitor might be called as a witness. Although this was dealt with in the context of terrorism, the considerations under the relevant Code were materially identical. The court concluded that the exclusion of the solicitor was lawful. The context in Malik was clearly different from that in Samuel and it appears that the context was sufficient to enable "will" to be interpreted as including "real possibility".

[25] Samuel was considered in R v Cosgrove and Morgan [1994] NI 182. That was a terrorist case in which identical provisions concerning access to legal representation were found in the Northern Ireland (Emergency Provisions) Act 1991 s 45. Access to a solicitor was delayed because of a belief that suspects would be alerted or there would be interference with the gathering of information about terrorist activities. The court rejected the Samuel interpretation of "will". It concluded that the word should take its character from the reference to "reasonable grounds" and "belief". It was sufficient that there was a real risk of information being passed inadvertently even though that deprived the appellant of access to any legal advice.

[26] The context in this case was quite different from that in Samuel. This was a case where, as a result of the briefing from Mr Clements, Superintendent Kee was alerted to the reasonable grounds for suspecting that one or more of the solicitors working in Tiernan's during the period from 2003 to 2009 was involved in the conspiracy. One such solicitor was expressly referred to in the statement of complaint but that did not in any sense undermine the reasonable grounds for believing that others may also have been involved. Mr McNamee was identified as one of those working in the firm during the relevant period although it should be clearly said that there is now no suggestion that he was involved in any way in the conspiracy. If a solicitor who had been involved in the conspiracy were admitted to act on behalf of another alleged conspirator that would unquestionably have compromised the criminal investigation, not least by interfering with the proper gathering of evidence through interview.

[27] That was the real risk identified by Superintendent Kee. On the basis of the briefing by Mr Clements he had reasonable grounds for that belief and on the basis of this court's approach to identical statutory provisions in R v Cosgrove and Morgan we consider that such a belief was sufficient to fall within Article 59(8) of the 2004 Order. It is unfortunate that the learned trial judge was not referred to this case or the earlier decisions reviewed within it in coming to his conclusion. We note that the decision to delay access to a particular group of solicitors did not prevent the suspected person having access to legal advice before any questioning by police took place and that the solicitor representing him was informed of the circumstances in which he was requested by Mr Creegan. The solicitor had no representation to make about that and Mr Creegan has made no complaint about his representation.

### **Other matters**

[28] We do not consider that other matters advanced on behalf of the respondent put the case any further. Mr Clements referred to Mr McNamee as a senior member or partner of Tiernan's. He was in fact an assistant solicitor in the relevant period. Mr Clements wrongly stated on affidavit that Mr McNamee had been involved in a transaction but the essence of the decision to exclude those from Tiernan's was the risk arising from the fact of working there as a solicitor. The decision to delay those

solicitors was not affected by these errors. The reasoning related to the engagement of Mr McNamee as a solicitor in the firm during the period of the alleged fraud.

[29] Even if the Article 8 or Article 1 Protocol 1 rights of the respondent firm were engaged, the decision to exclude the respondent at that stage of the investigation was for a legitimate purpose and in accordance with law. The necessary balance between the interests of the firm and those of the public in the investigation of crime was established by the detailed and comprehensive statutory code under which access to Mr McNamee was delayed. The absence within the statutory code of any requirement to consult a solicitor to whom it was intended to delay access was clearly part of the comprehensive statutory scheme and represented a balance struck by the legislature with which this court should not interfere.

### **Conclusion**

[30] For the reasons given we consider that the delay in providing access to Mr McNamee was in accordance with Article 59 of PACE. We do not accept that there was any breach of the respondent's Convention rights nor was the decision procedurally unfair.

[31] The appeal is allowed.