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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

McNamee and McDonnell's Application (Leave Stage) [2011] NICA 40

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

Before: Morgan LCJ, Higgins LJ and Weatherup J

MORGAN LCJ (delivering the judgment of the court)

[1] On 18 November 2009 the appellants applied for leave to issue judicial review proceedings in relation to a decision of the Police Service of Northern Ireland made on 27 October 2009. On 9 December 2009 McCloskey J granted leave on three grounds but refused leave on the remaining grounds. On 16 December 2009 the appellants lodged a notice of appeal in relation to the grounds on which McCloskey J had refused leave. He then gave a written judgment in which he concluded that leave was required before such an appeal could be pursued and that it followed that the notice of appeal served on 16 December 2009 was a nullity. He subsequently granted leave to appeal in order that this court might reach a final conclusion on whether leave was required in such circumstances. A further notice of appeal was lodged by the appellants on 1 March 2010 in light of McCloskey J's ruling. We allowed the appeal on certain grounds which we dealt with at the end of the hearing on 25 May 2010. This judgment is concerned solely with the issue of whether leave is required in these circumstances. Mr Scoffield appeared for the appellant and Mr McGleenan for the proposed respondent. We are grateful to both counsel for their helpful oral and written submissions.

Is this an interlocutory appeal?

[2] The jurisdiction of the Court of Appeal to hear an appeal is governed by statute. The court has no inherent power to hear an appeal of its own motion. For the purposes of this appeal that power is found in Section 35 of the Judicature (Northern Ireland) Act 1978 (the 1978 Act).

"35. Appeals to Court of Appeal from High Court.

(1) Subject as otherwise provided in this or any other statutory provision, the Court of Appeal shall have jurisdiction to hear and determine in accordance with rules of court appeals from any judgment or order of the High Court or a judge thereof.

(2) No appeal to the Court of Appeal shall lie—

… (g) without the leave of the judge or of the Court of Appeal, from any interlocutory order or judgment made or given by a judge of the High Court, except in the following cases namely:—

(i) where the liberty of the subject or the residence of, or contact with, minors is concerned;

(ii) where an injunction or the appointment of a receiver is granted or refused;

(iii) in the case of a decision determining the claim of any creditor or the liability of any contributory or the liability of any director or other officer under the Companies Acts (as defined in section 2 of the Companies Act 2006) in respect of misfeasance or otherwise;

(iv) in the case of a decree nisi in a matrimonial cause, a conditional order in a civil partnership cause or a judgment or order in an admiralty action determining liability;

(v) [. . . . . repealed]

(vi) in such other cases as may be prescribed being cases appearing to the Rules Committee to be of the nature of final decisions;"

[3] The appellant submitted that an application for leave to issue judicial review proceedings was a free standing application so that the determination of that application was an order of the High Court for the purposes of section 35 (1) of the 1978 Act. Even if successful on a leave application it was a matter of judgment for the applicant as to whether to issue a Notice of Motion to

commence the actual judicial review proceedings. These were separate and distinct proceedings from the leave application.

[4] The distinction between an order which is final and one which is interlocutory is helpfully set out in Salaman v Warner [1891] 1 QB 734.

> *"… a final order is one made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation. Thus the issue of final or interlocutory depended upon the nature of the application or proceedings giving rise to the order and not upon the order itself. I refer to this as the 'application approach'".*

This was the passage on which the learned judge relied in reaching his conclusion that the proceedings for leave were interlocutory. We agree with his reasoning on this issue. The matter in litigation which is in issue in these proceedings is the lawfulness of the decision of the PSNI. The grant of leave to issue judicial review proceedings is a condition precedent to launching a challenge to the legality of the PSNI decision but the grant of leave does not determine the matter in litigation. The order was, therefore, interlocutory.

Is leave required?

[5] We agree with McCloskey J that the leave of the judge or the Court of Appeal is required unless the appellants establish that they fall within one of the exceptions within Section 35 (2) (g). The appellants argue that they fall within Section 35 (2) (g) (vi). They rely upon the provisions of Order 53 Rule 10 (a) of the Rules of the Court of Judicature (RCJ) which provide that leave shall not be required for leave to appeal to the Court of Appeal from an order refusing an application for leave under Order 53 Rule 3 of the RCJ. In this case the applicant applied for leave to issue judicial review proceedings on grounds which the learned trial judge considered unarguable. He accordingly refused the application for leave on those grounds thereby bringing the appeal within the terms of Order 53 Rule 10 (a). The respondent submits that Order 53 Rule 10(a) only applies to a case where the application for leave is refused on all grounds.

[6] This issue has come before this court on at least three other occasions. The first of these was Re Downes' Application [2006] NICA 24 where the court granted leave to apply for judicial review on additional grounds despite the fact that no application for leave to appeal had been made to the lower court. It was accepted by all parties in that case that the Court of Appeal could grant leave to appeal in those circumstances if it was required and the arguments on the issue were deferred.

[7] The second case was Re Hills' Application [2007] NICA 1 where again the Court of Appeal granted leave to apply for judicial review on additional grounds although no application for leave to appeal had been made below or to the Court of Appeal. It appears that this issue was not raised in argument. The third case was Re Kirk Session of Sandown Free Presbyterian Church's Application. In that case the Court expressed the view ex tempore that leave to appeal was required. In fact leave was given by the lower court and the Court of Appeal allowed the appeal on some additional grounds.

[8] In light of this rather unsatisfactory range of potentially conflicting decisions this Court heard detailed argument from the parties on this issue. We have concluded that the appellant's arguments are correct for four principal reasons.

[9] First, since an application for leave to apply for judicial review which is entirely rejected by the court is still an interlocutory application it must follow that on any interpretation the provisions of Order 53 Rule 10(a) were made in exercise of the statutory power contained in Section 35(2)(g)(vi) of the 1978 Act. In any application for leave to issue judicial review each ground advanced has to be separately considered by the court. Where the court considers that the ground does not pass the leave threshold the application is refused on that ground. We consider that such a refusal constitutes a refusal of leave under Order 53 Rule 3.

[10] Secondly, Order 59 Rule 14(3) of the RCJ provides that where an ex parte application has been refused by the court below an application for a similar purpose can be made to the Court of Appeal. This provision clearly applies to applications for leave to apply for judicial review. Such an application is in fact an appellate procedure (see Kemper Reinsurance v Minister of Finance [2000] 1 AC 1). This provision must, therefore, also be made in exercise of the Section 35(2)(g)(vi) power. Where an ex parte application to issue judicial review proceedings has been refused on certain grounds it seems to us that Order 59 Rule 14(3) clearly enables the disappointed applicant to appeal without seeking leave in respect of those grounds.

[11] Thirdly, we can see no reason to confine the availability of the remedy under the preceding Rules to cases where every ground has been refused. The fact that an applicant has been successful on one ground ought not to create a leave threshold which would not be in place if he had been unsuccessful on every ground. The respondent accepts that the preceding Rules enable an applicant who has been refused on every ground to pursue an appeal without leave.

[12] The fourth reason relates to the practicality of what would be involved if leave were required. In dealing with the application for leave to issue

judicial review proceedings the judge at first instance will generally apply the test of whether the applicant has demonstrated an arguable case with a reasonable prospect of success. The refusal of leave will generally indicate that the applicant has not been successful on that test. If the judge is then asked to grant leave to appeal the test which he should generally apply in considering whether to grant that leave is exactly the same. As the learned trial judge in this application recognised it almost inevitably follows that leave must be refused.

[13] If leave was indeed required the next step would be for the disappointed applicant to apply to the Court of Appeal. The test which that court would have to consider in deciding whether to grant leave to appeal is again whether the applicant had an arguable case with a reasonable prospect of success. The introduction of a requirement for leave to appeal generally, therefore, has little or no practical impact on the task which the court has to perform either at first instance or on appeal. There cannot be derived from the Rules any object or purpose which explains why the right of appeal should be limited.

[14] We consider, therefore, that the appellants did not require leave to appeal the refusal of leave to issue judicial review proceedings on the additional grounds advanced by them. We should make it clear that this conclusion does not in any way diminish the ability of the High Court to permit an unsuccessful challenge to be revisited at the substantive hearing as set out in Smith v Parole Board [2003] EWCA 1014 and Re Drummond's Application [2006] NIQB 69.