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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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McVeigh's (Sean) Application [2014] NIQB 57

IN THE MATTER OF AN APPLICATION BY SEAN McVEIGH FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS BY:

(1) A LAY MAGISTRATE OF THE COUNTY COURT DIVISION OF CRAIGAVON TO ISSUE A SEARCH WARRANT UNDER SCHEDULE 5 SECTION 1(2) OF THE TERRORISM ACT 2000 ON 1 NOVEMBER 2012 AND

(2) THE POLICE SERVICE OF NORTHERN IRELAND:

(i) TO SEEK A SEARCH WARRANT ON 1 NOVEMBER 2012

(ii) TO SEARCH THE APPLICANT'S PROPERTY ON 2 NOVEMBER 2012 AND TO SEIZE AND RETAIN THE APPLICANT'S GOODS

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Before: Morgan LCJ, Coghlin LJ and Weatherup J

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COGHLIN LJ (delivering the judgment of the court)

[1] This is an application on behalf of Sean McVeigh ("the applicant") for leave to apply for judicial review of decisions taken, respectively, by the Police Service of Northern Ireland ("PSNI") and a Lay Magistrate in the County Court Division of Craigavon to apply for and to grant a search warrant in respect of the applicant's property on 1 November 2012 in accordance with the provision of Schedule 5 of the Terrorism Act 2000 ("the 2000 Act"). For the purposes of the application the applicant was represented by Mr Barry Macdonald SC QC and Mr Malachy McGowan while Mr Paul McLaughlin represented the PSNI and Mr Peter Coll appeared for the Lay Magistrate. This court is grateful to all three sets of counsel for their helpful and constructive written and oral submissions.

The factual background

[2] (*i*) On 1 November 2012 Mr David Black, a serving prison officer was shot dead while driving to work on the M1 motorway.

(*ii*) At approximately 11.00 pm on 1 November 2012 members of the PSNI attended before a Lay Magistrate in the County Court division of Craigavon and applied for a warrant to search the applicant's premises at 169 Victoria Street, Lurgan in accordance with Schedule 5 Part 1 section 1(1) of the 2000 Act. The Lay Magistrate granted a warrant in accordance with section 1 (2) of Schedule 5 to the 2000 Act.

(*iii*) At approximately 12.30 am on 2 November 2012 the applicant was arrested at his premises at 169 Victoria Street, Lurgan in accordance with the provisions of Section 41 of the Act of 2000 on suspicion of membership of the IRA and the murder of Mr David Black. At approximately 1.33 am on 2 November 2012 PSNI Officers executed the search warrant at the said premises at 169 Victoria Street, Lurgan and, as a consequence, seized and retained a number of items of property belonging to the applicant. A significant number of those items have subsequently been returned to the applicant.

(*iv*) Between the 2cnd and 4th November 2012 the applicant was interviewed on a number of occasions by police officers. On 4 November 2012 the PSNI made an application for the period of detention of the applicant to be extended for a further seven days. That application was partially conducted upon a 'closed' basis in accordance with the provisions of paragraphs 33 and 34 of Schedule 8 of the Act of 2000 before Her Honour Judge Loughran. At the conclusion of the hearing Judge Loughran indicated to the PSNI the minimum disclosure about the intelligence leading to the arrest which she considered would be required to be disclosed to the applicant's legal representatives in order to vindicate the rights of the applicant afforded by Article 5(3) and Article 6 of the ECHR. The PSNI indicated that they were unwilling to make any additional disclosure to that already made during the course of the 'open' session, namely, that they were in possession of intelligence indicating that the applicant was a member of the IRA and involved in the murder. In the circumstances, Judge Loughran was not persuaded that the arrest of the applicant had been lawful and refused the extension application. The applicant was thereupon released from PSNI custody.

(*v*) The applicant's solicitor subsequently entered into correspondence with the PSNI seeking return of the items seized during the course of the search of the applicant's premises at 169 Victoria Street, Lurgan

submitting that such items had been seized as part of what had been subsequently found to be a wrongful arrest which thereby removed any lawful basis for their continuing retention. The response from the PSNI on 20 November 2012 advised that some of the items had been already returned but that others would remain in PSNI custody pending the completion of forensic examination. The exchange of correspondence was followed by telephone conversation between the applicant's solicitor and the PSNI in which the latter invited legal proceedings in the event that the solicitors were dissatisfied with the response.

(*vi*) On 21 February 2013 the applicant's solicitors wrote a pre-action letter to the PSNI, the Department of Justice and the Departmental Solicitors. It would appear that the period between 19 February and 21 August 2013 was taken up by discussions between the applicant and his solicitors about how to complete legal aid forms and, latterly, an appeal from an initial refusal of legal aid by the Legal Services Commission ("LSC"). That appeal was ultimately successful and a legal aid certificate was granted. According to the affidavit filed by the applicant's solicitor following the grant of legal aid there were difficulties in getting in contact with the applicant and the first consultation did not take place until 3 September 2013. This consultation took place via telephone and was for the purpose of "confirming his instructions and clarifying a number of details that needed to be addressed for the purpose of finalising his affidavit". Thereafter, it appears that there were further difficulties in maintaining contact with the applicant and the solicitor was unable to arrange the applicant's attendance at his office in order to sign and swear the affidavit until 16 October 2013. On the following day, 17 October 2013 the applicant's solicitors formally lodged the leave application.

(*vii*) The application was initially listed before Treacy J on 22 November 2013 when it was adjourned to be heard by this court. On 18 December 2013 the applicant's solicitors issued a civil bill claiming damages for unlawful arrest, assault and unlawful detention, arising out of the applicant's arrest on 1 November 2012.

(*viii*) On 3 February 2014 the applicant was re-arrested on suspicion of the murder of David Black and membership of a terrorist organisation and taken to Antrim Custody Suite for questioning. A further search of his premises was carried out on that date. On 4 February 2014 the applicant was charged with the murder of David Black and on 5 February 2014 he appeared before the Magistrates' Court and was remanded in custody on foot of the charge. Subject to any direction from the Public Prosecution Service ("PPS") the PSNI has advised that there is at least one item seized during the search on 1 November 2012

which is likely to be relied upon in evidence at the trial of the charges against the applicant. Directions may be given in relation to additional items in due course.

Should these proceedings be struck out or adjourned as constituting satellite litigation?

[3] This was the central issue upon which the parties concentrated their submissions before this court.

[4] On behalf of the applicant Mr Macdonald advanced the following submissions:

(a) The issue and execution of a search warrant constitutes a serious interference with the individual's right to privacy and home life as well as the right to peaceful enjoyment of his possessions protected, respectively, by Article 8 and Article 1 of Protocol 1 ECHR. Paragraph 1(*e*) of the Order 53 statement seeks "a declaration that Schedule 5 paragraph 1 of the Terrorism Act 2000 is incompatible with the European Convention of Human Rights." Under Section 4(5) of the Human Rights Act 1998 the Crown Court has no power to make such a declaration. The application for judicial review should be properly seen as a challenge to the lack of safeguards and basic legality of the relevant statutory provisions, matters which could not be determined within the framework of a criminal trial in a Crown Court.

(*b*) In addition, the return to the applicant of a substantial number of items seized during the course of the impugned search clearly indicates that those items will not be relevant in the criminal trial. In such circumstances, the criminal trial will not provide a forum for deciding whether those items were seized and retained in contravention of Article 8 and Article 1 of Protocol 1 and, consequently, the applicant would be left without a remedy contrary to Article 13 of the ECHR. Mr Macdonald relied upon paragraphs 24 to 27 and 35 of the decision of the Court of Appeal in England and Wales in Bell v Chief Constable of Greater Manchester Police [2005] EWCA Civ. 902. He rejected the argument advanced on behalf of the PSNI that the incompatibility challenge was without merit because materially identical provisions of PACE have already been found to be compatible by both the Divisional Court and Strasbourg. Mr Macdonald argued that the decision in Cronin v UK (Application 15848/03) could be distinguished insofar as, in that case, information had been sworn and lodged with the court. Mr Macdonald conceded that the definition of what exactly constitutes satellite litigation is presently unclear but submitted that the case law supports the proposition that the principle only applies where:

(*i*) The judicial review application depends on the initiation of a criminal prosecution; and

(*ii*) The entirety of the relief sought can be obtained within the trial and appeal process.

[5] By way of response on behalf of the PSNI Mr McLaughlin identified three alternative remedies to judicial review by means of which the applicant could obtain compensation for the alleged trespass, declaratory relief, return of property seized and, in the context of criminal proceedings, exclusion of incriminating evidence. These were:

(a) A civil action seeking damages and a declaration that the search of the applicant's premises was unlawful. Mr McLaughlin argued that such an action would be a perfectly effective means by which to examine the grounds upon which the lay magistrate had granted the warrant and to challenge the legality of the search.

(b) The applicant could seek return of any personal property seized by the PSNI by making an application to a court of summary jurisdiction under Section 31 of the Police (Northern Ireland) Act 1998.

(c) In the course of a criminal trial the applicant could apply to the trial judge for the exclusion of evidence relating to any items seized during the impugned search upon the ground that, having regard to the circumstances in which the evidence had been obtained, the admission of that evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it in accordance with Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989. Mr McLaughlin emphasised that if such an application was to be made during the course of the criminal trial the trial judge would be aware of all the circumstances surrounding the evidence in question and would be in a position to conduct the statutory balancing test of probative weight against prejudicial value.

[6] With regard to the applicant's argument that the incompatibility of the relevant provisions of the 2000 Act could not be challenged in a criminal trial, Mr McLaughlin submitted that the power of a lay magistrate to grant a search warrant under Schedule 5 of the 2000 Act was materially similar to powers under PACE. Such powers, he argued, had been acknowledged by the Strasbourg Court to be capable of being operated in compliance with Article 8 in Cronin. In order to grant a warrant the lay magistrate had to be satisfied by the constable that he, the constable, had reasonable grounds for believing that there was relevant material on the premises and he, the magistrate, had to be satisfied that the warrant was sought for a terrorist investigation, that there were reasonable grounds for believing that there was material on the premises that was likely to be of substantial value to the investigation and that the issue of the warrant was likely to be necessary in the

circumstances of the case. Mr McLaughlin also relied upon the ECHR decision in Robathain v Austria (Application 30457/06) 3 July 2012.

[7] On behalf of the lay magistrate Mr Coll submitted that the case made on behalf of the applicant could be usefully condensed to two basic issues which were:

(*i*) The compatibility of the relevant provisions of the 2000 Act.

(*ii*) The adequacy of the material/submissions placed before and acted upon by the lay magistrate. In dealing with those two issues Mr Coll relied upon the existence of the effective alternative remedies of civil action and/or an application pursuant to Section 31 of the Police (Northern Ireland) Act 1998.

Satellite litigation

[8] In R v Director of Public Prosecution ex parte Kebilene [2000] 2 AC 326 the House of Lords held that a decision of the DPP to consent to a prosecution was not amenable to Judicial Review in the absence of dishonesty, *mala fides* or an exceptional circumstance. Lord Steyn concluded his speech by stating:

> "While the passing of the Human Rights Act 1998 marked a great advance for our criminal justice system it is in my view vitally important that, as far as the courts are concerned, its application in our law should take place in an orderly manner which recognises the desirability of all challenges taking place in the criminal trial or on appeal. The effect of the judgment of the Divisional Court was to open the door too widely to delay in the conduct of criminal proceedings. Such satellite litigation should rarely be permitted in our criminal justice system. In my view the Divisional Court should have dismissed the respondent's application."

[9] In Re Alexander and Others Applications for Judicial Review [2009] NIQB 20 this court had to consider claims brought by a number of applicants that they had been wrongfully arrested. In the course of giving the judgment of the court Kerr LCJ observed at paragraph [21] that an examination of what motivated a police officer to decide that an arrest was necessary was self-evidently better conducted in proceedings where the opportunity arose for the constables to give oral evidence. The learned Lord Chief Justice went on to state at paragraph [27]:

> "[27] It will be clear from the foregoing that we consider that a challenge to the lawfulness of an arrest should in virtually every conceivable instance be pursued by way of a conventional lis inter partes. There are two obvious reasons for this. In many cases

> (Bull's is an obvious example) a challenge by way of judicial review is an unacceptable type of satellite litigation which not only distracts from the proper conduct of the criminal proceedings but seeks to remove a discrete issue from the criminal court which is its natural home. The second reason is that in almost all cases, the issues which arise are far more comfortably and satisfactorily accommodated in a form of proceeding which involves the giving of oral testimony and the testing of claims and counterclaims under cross-examination."

[10] The concept of "satellite litigation" may be seen as one aspect of the general public interest principle and, as such, it has been recently considered in this court in the case of Re Officer C [2013] NI 221 which concerned applications for judicial review of rulings by the coroner in the Jordan inquest conferring anonymity upon certain police witnesses. At paragraph [16] of his judgment Morgan LCJ observed as follows:

> "The overriding objective in Rule 1A of the Rules of the Court of Judicature requires the court to deal with cases justly. What is just in any case will depend upon the context but it clearly includes avoiding, if possible, a proliferation of litigation which is likely to cause delay in the vindication of substantive rights and considerable cost to the participants or the public purse. In criminal proceedings this principle is the basis for the strong presumption against a judicial review application to the Divisional Court where the issue can be raised in the substantive criminal proceedings (See R v DPP ex p Kebilene, R v DPP ex p Rechachi [1999] 4 All ER 801, [2002] 2 AC 326)."

The learned Lord Justice then referred to the application of that principle to inquests quoting from the judgment of Higgins LJ in McLuckie v The Coroner for Northern Ireland [2011] NICA 34 at paragraph [26] and, having done so, he continued his judgment at paragraph [18] in the following terms:

> "I accept that there can be exceptions to the general rule against satellite litigation. It may be that a particular point will give guidance generally on a fundamental issue as to the manner in which inquests should proceed without interruption to the timescale for the hearing. If there is a compelling case that the course proposed by the Coroner is highly likely to lead to a requirement for a fresh inquest it might be appropriate to entertain a challenge. Re McCaughey

> [2011] UKSC 20, [2011] NI 122, [2011] 3 All ER 607 is an example of a case that could have required determination under either test. I also accept that this rule cannot inhibit the entitlement of those whose rights, whether under the convention or common law, would be immediately infringed by the ruling to pursue a challenge. I consider, however, that absent some exceptional circumstance of this nature leave should not be granted to issue judicial review proceedings in relation to procedural or preliminary matters relating to the conduct of an inquest. It follows, of course, that the same principle applies with even greater force where the issue arises in the course of the inquest. If there is any defect in the procedure which affects the integrity of the outcome that can be assessed at the end of the inquest where all relevant factors can be taken into account. The next-of-kin will have every entitlement to vindication in any challenge, if necessary, at that stage."

[11] In the course of giving judgment in the same appeal Girvan LJ referred to longstanding concern about the excessive delay, complexity and public expense consequence upon satellite litigation with particular regard to the conduct of inquests in comparison to the approach adopted in the criminal law context. In a passage echoing the concerns expressed by Lord Steyn in Kebilene the learned Lord Justice said at paragraph [31] of his judgment:

> "[31] The question arises as to how and why the law has developed in this way. One of the reasons is that the law of inquest and coroners has developed in an unstructured and piecemeal way, particularly following the incorporation of the European Convention of Human Rights and a need to ensure that inquests comply with the State's Article 2 obligation to ensure proper investigation into deaths involving State agencies. The underlying statutory provisions and rules governing inquests are outdated and were clearly not drafted with the Convention in mind and they have not been properly updated to be made fit for purpose in the new Convention world. The State authorities have effectively allowed costly litigation to take the place of sensible, rational and structured reform of coronial law. Another reason for the problem lies in the fact that coroners and the courts have been unable to grapple with the inevitable problems engendered by allowing free

> reign to be given to satellite litigation around the coronial process. In the field of criminal law and procedure the courts have quite properly set their face against satellite litigation recognising, as they do, the self-evident dangers of such litigation – the consequent delays to the criminal process, the unacceptable interruptions in the normal court process, the encouragement of technical points which have the tendency to divert attention from the real or central issues, and the waste and dissipation of public funds in the pursuit of issues which may well turn out to be of little of no practical relevance in the case when properly viewed at the end of the process. While in some jurisdiction such satellite litigation has been permitted in the criminal law context, the resultant problems that this creates have been recognised. English law has gone down a different and more wisely chosen route."

Discussion

[12] The public interest principle from which the presumption against satellite litigation is derived must, of necessity, be considered and applied in a balanced and flexible manner taking into account all the relevant interests concerned and the fact specific context of the particular case. Despite the eloquence of his submissions, we are not persuaded that such an approach can be easily reconciled with the specific restrictions advanced by Mr Macdonald.

[13] There will of course be exceptional circumstances, as the authorities confirm, but such circumstances are to be found in the factual context of the cases rather than external restrictive limitations. For example, in Re O'Connor and Broderick's Application [2005] NIQB 40 Weatherup J considered that the issue of apparent bias went to the "very essence of the system for the conduct of disciplinary proceedings" which were the subject of the application. Re JR 42's Application for Judicial Review [2010] NI 34 also concerned disciplinary proceedings upon that occasion brought by the Law Society against an applicant's solicitor who sought to prevent the Disciplinary Tribunal from relying upon evidence obtained from the applicant during the discovery process in contentious divorce proceedings. It was the provision of that material that grounded the charges preferred against the applicant. At paragraph [15] of his judgment Treacy J, after referring to the decision in O'Connor and Broderick, dealt with a submission that the judicial review application was an impermissible form of satellite litigation in the following terms:

> "[15] … I consider this is also an exceptional case since the disputed issue goes to the very core of the viability and justicability (i.e. before the Tribunal) of

> allegations based on allegedly out of bounds or prohibited material. If the applicant is right he should not be subject to this process at all. Given the public importance of issues at stake I am satisfied that it would not be proper to refuse leave on this ground."

[14] There are a number of factors to be taken into account in determining this aspect of the application. Those include:

(*i*) The pre-application protocol letter was written on 21 February 2013 and the legal aid application was lodged on 22 February 2013, both actions being outside the three month period specified in Order 53 Rule 4 of the Rules of the Court of Judicature. There appears to have been a lack of communication between the applicant and his solicitors for which no real explanation has been provided and, even after legal aid was obtained, there was a delay of almost two months in filing the proceedings on 17 October 2013. The applicant has now been arrested and formally charged with murder and membership of a terrorist organisation.

(*ii*) Considerable police time and public resources have already been committed in anticipation of the criminal trial. That trial will provide an effective forum in which the applicant may challenge the lawfulness of the search and, as a consequence, may seek to exclude any evidence obtained during the course of that search. The officer/officers concerned with the decision to apply for the impugned search warrant and those concerned in the submissions to the lay magistrate will give oral evidence and may be cross-examined thereon. At present there is one item which it is said that a prosecution is likely to rely upon in the trial, although other items may be the subject of further directions. There is no suggestion that the item concerned goes to the heart of the criminal prosecution or that its exclusion from evidence would bring that prosecution to a halt. Even were it established that the search warrant was unlawful the item/items might still be admitted in evidence (Jeffrey v Black [1978] QB 490) subject to the discretion of the trial judge exercised in accordance with Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989. In exercising their discretion and in conducting the statutory balancing test of probative weight against prejudicial value in the interests of fairness the learned trial judge will be able to take into account all of the circumstances surrounding the evidence in question, any other relevant evidence and the submissions of counsel. Proceeding with the judicial review at this stage might produce an adverse impact upon the public interest in the integrity of the criminal proceedings.

(*iii*) In addition to being, prima facie, difficult to reconcile with a concept grounded upon the public interest, which is inevitably dependent upon the factual context and individual circumstances of any particular case, we consider that there are further difficulties with the limitation upon the principle advanced by Mr Macdonald. He has argued that the rule against satellite litigation should only apply where the judicial review application depends on the initiation of a criminal prosecution. He has submitted that criminal proceedings could be regarded as beginning once criminal charges have been brought and that, in this case, the decisions relating to the impugned issue of the warrant were not made "during the course" of criminal proceedings. However, it seems clear that the impugned warrant was sought and granted for the purpose of seeking evidence with regard to the same criminal offences with which the applicant is currently charged and that at least one item recovered during the course of the impugned search is likely to feature in evidence during the course of the criminal trial. In such circumstances, bearing in mind the need for flexibility referred to above, we are not persuaded to accept the proposition advanced by Mr Macdonald.

(*iv*) The second restriction upon the rule advanced by Mr Macdonald is that the rule should only apply where the entirety of the relief sought may be obtained within the trial or appeal process thereby preventing the unnecessary proliferation of litigation. In his helpful supplementary skeleton argument Mr Macdonald has argued that the reference to "*the issue*" in Re Officer C should be interpreted as meaning "*all of the issues, including the remedy sought*", as opposed to "*one of the issues, irrespective of whether the remedy sought can be granted*". In support of that submission he relied, in particular, upon paragraph [21] of the judgment of Lord Kerr in the Supreme Court decision of Re Brownlee [2014] UKSC 4. However in our view Brownlee was very different from the instant case. In the criminal trial it will be open to the applicant to argue that the impugned search was unlawful by reason, inter alia, of infringement of his Convention rights and he will be able to do so with the advantage of the oral examination and cross-examination of the PSNI officers concerned. It will then be a matter for the learned trial judge to carry out a fully informed balancing exercise in order to determine the admissibility of any evidence obtained as a consequence of the search. While it is true, as Mr Macdonald submits, that the Crown Court would not be empowered to make a declaration of incompatibility such an inability, in itself, in our view should not diminish the public interest in proceeding with the criminal trial. In Brownlee, by reason of the decision of the Department of Justice, the appellant was faced with a complex sentencing process involving a pre-sentence probation report suggesting that he was a dangerous offender and that, as a consequence, there was a risk of being made

subject to potentially substantial sentences without the benefit of legal representatives. As Lord Kerr accepted, the appellant was not seeking to restrain completion of the criminal process nor was there was any question of him wishing to manipulate the system. He was simply seeking appropriate legal representation in order to bring the proceedings to a close. It was a case in which the challenge went to the very essence of the proceedings.

(*v*) We have referred earlier in this judgment to the substantial delay on the part of the applicant in lodging the judicial review proceedings and to the absence of a comprehensive explanation therefore. Good administration requires that if a challenge is to be made to the validity of a search warrant it should be made promptly in order that the parties may know where they stand and that any criminal investigation for which the search is required is not hindered.

[15] We have carefully reviewed all of the relevant circumstances in this case with the assistance of the well-researched and helpful submissions of counsel. Having done so, we consider that the public interest would be best served by adjourning this application until after the conclusion of the criminal proceedings. Any matter that has not been appropriately and effectively dealt with during the criminal proceedings may then be revisited and usefully considered.