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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

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Montgomery's (Neil) Application [2011] NIQB 134

IN THE MATTER OF NEIL MONTGOMERY FOR JUDICIAL REVIEW

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TREACY J

Introduction

[1] Following the inter partes leave hearing in this case I refused leave, dismissed the application and reserved the delivery of reasons.

Background

[2] The applicant challenges the decision of the Police Ombudsman for Northern Ireland finding the applicant's complaint not substantiated. His complaint arose out of the entry to his home at Kansas Avenue in Belfast by the police without a warrant or consent on Saturday 19 December 2009.

Ombudsman's Position

[3] The present position of the Ombudsman is contained in its letter of 13 June 2011 notifying the applicant of the outcome of a further consideration and review of his complaint. The letter of 13 June was addressed to the applicant's solicitors and, so far as material, is in the following terms:

> **"On Saturday 19 December 2009 the police responded to a report indicating a concern for welfare of juveniles allegedly drinking in your client's premises and playing music loudly.**
> **The police account is that on arrival at your client's premises they found the front door ajar. An officer said he knocked the door loudly and this caused the door to open fully. The officer stated he then**

> **shouted that it was police and asked for someone to come to the door.**
> **His colleague officer states that at this stage he looked in the front window and observed what he considered to be a person lying on the sofa in the room. He states that he knocked a window loudly in an attempt to get this person's attention. He informed his colleague who was at the doorway that he believed there was a person unconscious in the room. This officer then moved from the doorway to the window and states that he also observed a male lying very still. Despite his colleagues knocking loudly on the window this person failed to rouse or make any attempt to get up.**
> **The officer who had initially been at the doorway then states that 'due to the nature of this call being concerned for welfare I believed this male may need medical attention' he then entered the premises. ..."**

The officer who had been at the window in his statement states:

> **"I believed there was a person unconscious in the living room and due to the nature of the original call ..... entered through the unlocked front door as I was concerned for the safety of this person."**

[4] There then follows a synopsis of some of the material, the Statement of Complaint, from the applicant and his son as a result of which the Ombudsman then said:

> **"It would appear therefore that all parties who are in a position to do so confirm that the first notification of police arrival was a banging on the front door.**
>
> **Despite the fact that this banging on the door was audible through a closed door in the dining room of the premises by both your client's son and his friend, it is apparent that it was not sufficient to wake your client. It would seem therefore that your client was in a deep sleep which tends to corroborate the police officers' account that their knocking failed to rouse him."**

[5] At interview both officers elected to read their duty statements at the commencement of the interview and thereafter on legal advice indicated an intention to make no comment in response to any questions by the Ombudsman's investigator. Despite this however one officer further stated:

> **"My duty statement covers exactly why I went into the house and I was in the house lawfully. I entered the house under Article 19 of PACE to protect life. I believed I was going in to offer medical attention as it states in my statement."**

[6] The letter of 13th June continues:

> **"On consideration of the duty statements of both officers it is apparent that their stated reasons for entering were a belief that your client may need medical attention and a belief that he was in fact unconscious. The Police Ombudsman's investigation uncovered no evidence that any contrary intention existed on the part of the responding police officers and I therefore consider that in the absence of any objective evidence to the contrary, the officers in fact entered due to concerns for the *welfare* of your client in terms of their subjective analysis of the situation existing at the time."** [Emphasis added]

I interpose at this juncture that the reference to welfare must be seen in the context of the police officers contention that they were going to offer medical attention to an individual who they believed was unconscious and that took place in the context of a previous report indicating concern for the welfare of unsupervised juveniles drinking at these premises. The letter continues:

> **"On consideration of the apparent circumstances existing at the time I consider that their subjective belief was objectively reasonable due to the nature of the original call to the police and the position which existed on police attendance at the premises. I consider therefore the actions of the police in entering your client's premises were in all the circumstances lawful and their entry was due to a belief that something 'serious was otherwise likely to occur or perhaps had occurred'. [Per Collins J Syed v DPP]"**

Statutory Framework

[7] The statutory power relied upon by the police to justify their entrance to the applicant's home is contained in Art 9(1)(e) of the Police and Criminal Evidence (Northern Ireland) Order 1989 ("PACE") which, so far as material, provides that a constable may enter and search any premises for the purposes of saving life or limb or preventing serious damage to property. Art 19(3) provides that the power of search conferred by this article is only a power to search to the extent that is reasonably required for the purpose for which the power of entry is exercised.

[8] This power has been recently considered in two English Divisional Court cases ***Baker v CPS*** **[2009] EWHC 299 (Admin)** and ***Syed v The DPP*** **[2010] EWHC 81 (Admin)** each of which considered the equivalent English provision Section 17(1)(e) of PACE 1984. Both decisions arose by way of case stated from the Magistrates' Court. In both cases the appellants had been found guilty of assault on a police officer in the execution of his duty and the issue arose as to whether the police had been acting in the execution of their duty when they purported to exercise their powers under 17(1)(e) to enter premises without warrant. Collins J stated in ***Syed*** at paras10-12 as follows:

> **"[10] That particular paragraph has been considered in the case of Baker. Baker involved the possible use of a knife and so the entry was held to have been justified, but Lord Justice May, in giving a judgment concurring in the main judgment given by Mr Justice Silber, said this at para 25:**
>
> > **'The expression "saving life or limb" is a colourful, slightly outmoded expression. It is here used in close proximity with the expression "preventing serious damage to property". That predicates a degree of apprehended serious bodily injury. Without implicitly limiting or excluding the possible types of serious bodily injury, apprehended knife injuries and gunshot injuries would obviously normally be capable of coming within the subsection.'**
>
> **[11] It is plain that Parliament intended that the right of entry by force without any warrant should be limited to cases where there was an apprehension that something serious was otherwise likely to occur, or perhaps had occurred, within the house, hence the adjective 'serious'**

> **applied to any question of damage; and, although I entirely agree with Lord Justice May that the expression 'danger to life or limb' is somewhat outmoded, it again indicates a serious matter – that what had happened in the premises, or what might happen in the premises, would involve some serious injury to an individual therein.**
>
> **[12] The test applied by the officers, and accepted by the justices in this case, was a concern for the welfare of someone within the premises. Concern for welfare is not sufficient to justify an entry within the terms of s 17(1)(e). It is altogether too low a test. I appreciate and have some sympathy with the problems that face police officers in a situation such as was faced by these officers. In a sense they are damned if they do and damned if they do not, because if in fact something serious had happened, or was about to happen, and they did not do anything about it because they took the view that they had no right of entry, no doubt there would have been a degree of *ex post facto* criticism. But it is important to bear in mind that Parliament set the threshold at the height indicated by s 17(1)(e) because it is a serious matter for a citizen to have his house entered against his will and by force by police officers. Parliament having set that level, it is important that it be met in any particular case."**

Discussion

[9] Founding on those passages the applicant in the present judicial review submits that in addressing his complaint the Ombudsman applied an incorrect test. It was contended that the Ombudsman had expressly directed itself with reference to the test of concern for welfare disallowed in ***Syed*** as altogether too low a test. That reference to welfare was to the evidence given by the police before the Magistrates' Court that the right to enter existed if they were in fear for the welfare of a person or persons within the house.[see para 5 of ***Syed***]

[10] Before turning to consider the applicant's submission it is important to say a little more about the context in which the present application for leave is made. The background to the further consideration and review by the Ombudsman is set out in detail in the applicant's grounding affidavit. Following an earlier review by the Ombudsman communicated on 18 August 2010 confirming that no police misconduct had been identified the applicant lodged an application for leave to apply for judicial review in which the ground of challenge included the alleged error

of the Ombudsman in applying a test of concern for welfare in determining the legality of the impugned entry. Those proceedings resolved and the Ombudsman undertook to have the matter reviewed by a more senior official. That reconsideration was communicated by letter of 5 May 2011 again confirming the Ombudsman's analysis that the police had entered the premises lawfully. In their pre-action letter of 23 May 2011 the applicant contended the Ombudsman had erred again in law as to the threshold to be met. That prompted the further reconsideration and review contained in the letter of 13 June 2011 set out above and which represents the present impugned position. The applicant also challenges that decision on the basis that the Ombudsman applied the wrong test. From this background it is apparent that the issue of the legality of the applicant's arrest has been the subject of consideration since the applicant's complaint was first introduced to the Ombudsman on 6 January 2010. This is the second application for judicial review.

[11] Arising out of the events at his house the applicant and his son have been charged with serious offences. He has been charged with assault on the police, possession of an offensive weapon with intent to commit an offence, threats to kill, assault on police and resisting police. This appears to have arisen out of matters after the police had entered the house matters appear to have deteriorated significantly. His son is also charged with assaults on the police and resisting police. These are being dealt with at Belfast Magistrates' Court and a defence statement has been filed. In order to make good the defence that at the material time the police were not acting in the execution of their duty paras 3-7 of the defence statement explicitly challenges the lawfulness of the police entry under 19(1)(e) relying on the same cases placed before the Ombudsman and this court.

[12] The court was informed by the applicant's counsel that these criminal proceedings have been adjourned pending the outcome of this judicial review. This is a highly undesirable development because it puts the criminal case on hold by attaching it to the judicial reviews of the Ombudsman's conclusions. Once thus linked, decoupling of the cases, if sought, can prove contentious and problematic. So criminal cases may thereby stand adjourned indefinitely until all appeal rights have been exhausted including in some cases to the Supreme Court. Moreover the resolution of the legality of the impugned entry is likely, certainly in the present case, to be fact sensitive. How the evidence will lie at the end of the prosecution case or indeed at the end of the entire criminal case after cross-examination etc. is impossible to predict.

[13] The conspicuous disadvantage which flows from what has so far occurred is that this state of affairs may be incompatible with the Article 6 guarantee of trial within a reasonable time. Undue delay also has obvious ramifications in terms of the ability of witnesses to accurately and reliably recall contentious events. There is a real danger that unchecked judicial review can be exploited by a guilty defendant or defendants to delay to his advantage, perhaps for years, his trial. Aside from witness recall issues it is also generally unfair to witnesses and victims to delay trials

and in this case summary trial for any significant period. Given these conspicuous disadvantages and the Convention incompatibility issue leave will ordinarily be refused in the public interest in such circumstances especially since the issue of the lawfulness of the arrest is in my view more appropriately addressed in the criminal court. In any event notwithstanding these comments I propose to substantively address relatively briefly the contention that the Ombudsman applied too low a test.

[14] The issue under 19(1)(e) is whether the exercise of the constable's discretionary power of entry and search was for the statutory purpose. The statute does not expressly impose a requirement of reasonableness. However in a passage in ***Baker*** the court stated:

> **"26. A Constable contemplating entering premises under 17(1(e) may not of course know for certain that someone's life or limb may be in danger or that serious damage to property will or may occur but it is implicit that his entry will be lawful if he reasonably so believes. ..."**

I will proceed on that basis.

[15] In determining the lawfulness of entry and search under 19(1)(e) what is required is the application of the legal provisions to the facts of the case. The simple question on the facts will be did the constable enter and search the subject premises for the statutory purpose namely of saving life or limb or preventing serious damage to property? The cases relied upon by the applicant were not trying to substitute for the clear words of the statute some alternative judicially formulated test. The judgments sought to emphasise what is apparent from the clear words of the statute namely that the right of entry and search by force if necessary without warrant was limited to cases where, as Collins J put it, there was an apprehension that something serious was likely to occur or perhaps had occurred and that the words saving life and limb connote serious bodily injury.

[16] Article 19(1)(e) may often be exercised in the exigencies of the moment when constables will frequently be acting on incomplete information the reliability of which it may not always be possible to reliably or accurately gauge in compressed response times and moments of urgency. Properly exercised Article 19(1)(e) may be regarded as part of the State's positive obligation to save life or limb. In the present case there is no arguable case that the Ombudsman misdirected himself not least because of the June letter and the express statement on the final page of that letter referring to and purporting to apply what Mr Justice Collins had said in the ***Syed*** case.

Conclusion

[17] In any event there was ample material to support the conclusion that the constables entered for the purpose of saving life. They had been brought to the

premises because of concern for the welfare of juveniles allegedly drinking. On arrival they saw a person believed to be unconscious in the front room who could not be roused by loud knocking. It was believed the person may need medical attention and one of the officers expressly stated he entered to protect life and offer medical attention. They may not have known for certain that serious injury had perhaps occurred but there was ample material to give rise to such an apprehension justifying their entry under 19(1)(e) and accordingly the application must be dismissed.