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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Morrison's (Elizabeth) Application (Judicial Review) [2016] NIQB 72

IN THE MATTER OF AN APPLICATION BY ELIZABETH MORRISON FOR JUDICIAL REVIEW

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MAGUIRE J

Introduction

[1] This application for judicial review was filed on 11 April 2014. It was the subject of a hearing in respect of the issue of leave before Treacy J on 20 May 2014. Following some argument, the judge decided to adjourn the hearing pending the publication of an independent review of the "On the runs" administrative scheme which was to be carried out by Rt Hon Dame Heather Hallett (the "Hallett Review"). That review was published on 17 July 2014. For reasons unknown to the court, the application for leave seems to have been much delayed. It was moved by Mr Kane QC (who appeared with Mr Donaghy BL) on behalf of the applicant on 10 June 2016. At the hearing the intended respondents – the Secretary of State for Northern Ireland, the Chief Constable of the Police Service of Northern Ireland and the Director of Public Prosecutions – were represented by Mr McGleenan QC and Mr McLaughlin BL. The court convened a short further hearing in respect of the matter on 1 July 2016.

[2] The Order 53 statement raises wide issues in respect of the establishment and operation of the "On the Runs" administrative scheme established by the Northern Ireland Office. This is a scheme developed from in or about 2000 for which the Secretary of State was responsible. However the other respondents, it is alleged by the applicant, were complicit in it. In essence, the scheme was devised by the Government as a means of giving comfort to persons who were on the run from the processes of justice that they were not being sought by not only the PSNI but other police forces in the United Kingdom. Such persons under the scheme in appropriate cases could receive letters from the Northern Ireland Office indicating their "not being sought" status. The effect of these letters was to give comfort that they would

not be the subject of arrest or prosecution for any offence committed on behalf of a terrorist organisation prior to the Good Friday Agreement, unless new evidence came forth.

[3] The history of the scheme need not be dealt with in this leave judgment. However it is well documented both in the judgment of Sweeney J in R v Downey (EWCC 21 February 2014) and in even more depth in the Hallett Review.

[4] The essential thrust of the applicant's case for judicial review is that the scheme was unlawful for many reasons. It is suggested that the scheme was discriminatory in that it conferred an advantage on republican paramilitaries only; that it lacked any proper legal pedigree; that it was prepared in bad faith; that it breached Convention rights; that it interfered with the independence of the Chief Constable and the DPP; and that it offended against international standards in this area. This is not intended as a comprehensive statement of everything included in the Order 53 statement but it indicates, at least broadly, the nature of the challenge.

[5] The applicant's concern about the scheme is based on the loss of her son, his partner and a grandchild in a notorious bomb explosion in Belfast, known colloquially as the "Shankill Bomb". This occurred on 23 October 1993. The Provisional IRA or another republican paramilitary organisation was responsible for this explosion.

[6] The applicant in her grounding affidavit says that she expected that the police would do their best to bring those responsible for the bomb to justice. However, her confidence that this would happen, she says, was shattered when she learnt in late February 2014 the outcome of the case of R v Downey. In this case the defendant was prosecuted for very serious terrorist offences which arose out the of the Hyde Park bomb explosion which occurred in central London on 20 July 1982. Mr Downey had for long been suspected by the Metropolitan Police of complicity in this atrocity but could not be arrested as he resided in the Republic of Ireland. This changed on 19 May 2013 when he was apprehended at Gatwick Airport en route to Greece. Charges were then preferred against him. At trial, the defendant made a successful application that the proceedings against him should be stayed. This was because he had been able to show that he had been in receipt of an OTR letter from the Northern Ireland Office ("NIO"). This letter dated back to 2007 and had indicated (factually wrongly) that he was not wanted by police in Northern Ireland or elsewhere in Britain. The defendant had travelled to London in reliance on the letter. In the course of his abuse of process application at the trial, it emerged that there had been a "catastrophic" error made in connection with the issue of whether the defendant was wanted in London. The defendant's name had always been posted as wanted on the relevant computer database but, inexplicably, this had been overlooked by the Police Service of Norther Ireland ("PSNI") which had carried out the research on which the letter had been based. Moreover, to compound matters, it also emerged that the error had been discovered by the PSNI in 2008 but that no step to rectify the error had been taken prior to the defendant being arrested at Gatwick. In these

circumstances, the trial judge, Sweeney J, held that it would be an abuse of process for the trial to take place. To continue with the prosecution, he held, would offend against the court's sense of justice.

[7] It was in the aftermath of the judgment in Downey, amidst considerable public outcry, that the Hallett Review was established on 12 March 2014. Dame Heather Hallett was (and is) a judge of the Court of Appeal in England and Wales and she was asked to produce a full public account of the operation and extent of the administrative scheme for OTRs, including a determination of whether any letters sent through the scheme contained errors. She was also asked to make recommendations in the light of her investigation. The timescale for her review was stated to be short.

[8] What is said to have been the precipitating factor in the launch of these proceedings by the applicant was a newspaper article which appeared in the "Irish News" on 27 February 2014. This article alleged that a suspect in respect of the investigation of the Shankill bomb had been in receipt of an OTR comfort letter. This man, who is not named in the article, allegedly had fled Northern Ireland after the bomb as "he believed he was wanted for questioning by police who suspected that he was part of the IRA unit responsible". Allegedly, he had received the letter after his case had been put forward for consideration under the scheme by Sinn Fein as he wished to return to Northern Ireland. In the light of the letter received, saying that he was not wanted by the authorities in Northern Ireland, he returned to Northern Ireland in 2007.

[9] It is clear from the applicant's affidavit that she felt let down both by the approach which came to light in the Downey case and by the particular impact of that approach revealed in the Irish News article.

The outcome of the Hallett Review

[10] The Hallett review was published as a House of Commons paper on 17 July 2014. It extends to some 273 pages and has chapters dealing substantively with the background to and the origins of the administrative scheme; Operation Rapid; the case of R v Downey; an analysis of the administrative scheme and identification of errors; the public knowledge of the administrative scheme; legal issues; and conclusions and recommendations.

[11] The conclusions of the review are set out most simply in a press release which accompanied the publication of the report as follows:

> "In her report Dame Heather concluded:
>
> - The administrative scheme evolved as part of the peace process in Northern Ireland. It was unprecedented and flawed, but was not

unlawful and did not give terrorist suspects an "amnesty".

- The scheme involved an independent review of individual OTRs by police and prosecutors. Only OTRs against whom there was insufficient evidence to justify arrest or prosecution should have been assured that they could return to the UK without fear of arrest.

- Prosecutors and successive Attorneys General continued to take independent decisions on whether the evidence against an OTR justified prosecution, throughout the lifetime of the scheme.

- The flaws in the scheme were mostly systemic.

- There was a lack of structure and strategy to the scheme as well as inadequate liaison between the Departments and organisations responsible. All of this contributed to the scope for error.

- Under the scheme properly administered John Downey should not have been sent a letter of assurance by the Northern Ireland Office.

- The error that led to the sending of a letter of assurance to John Downey was the result of a mistake by the Police. That mistake was itself caused, in part, by a lack of understanding of all aspects of the scheme. The error was subsequently identified but not rectified by the police and nothing in law or logic explains these failures.

- The ruling in John Downey's case was made on its own facts and would not necessarily prevent the prosecution of others who have received letters of assurance.

- The Review uncovered two more occasions where it appears a letter of assurance was sent as a result of errors.

- The Government did not publicise the scheme, but nor did it deliberately obscure it. There was considerable material in the public domain on the general issue of OTRs and a limited amount of material in the public domain about the administrative scheme itself before the Downey ruling.

- Of the 228 names put forward by Sinn Fein, the Irish Government and the Northern Ireland Prison Service, 156 people received letters of assurance that confirmed they were not wanted, another 31 were told they were "not wanted" [in] some other way, 23 were told they were wanted and 18 have not been told their status.

- The Royal Prerogative of Mercy was not used to pardon any of the OTRs but it was used to remit the sentences of 13 convicted OTRs".

[12] It is clear to the court that the Hallett Review represents a thorough public analysis of the matters she was asked to investigate.

The current government position in respect of the letters

[13] The Government, in the form of the Secretary of State for Northern Ireland, reformulated its position in respect of the scheme in a statement to the House of Commons on 9 September 2014. The Secretary of State indicated that she had, in the light of the review, considered the fairest, promptest and most effective way to reduce the risk to future prosecutions. She also wished to provide clarity. She stated:

> "There are two key points that it is important that all concerned should be clear about. First, the letters described by the Hallett report, issued in whatever form, or any similar or equivalent statements not made in letters, do not represent any commitment that the recipient would not be investigated or prosecuted if that is considered appropriate on the basis of the evidence available now. Those who received individual or composite letters, or any other form of indication, stating that they were "not wanted" and who derived support from that should cease to derive any such comfort. In short, the

> recipients should cease to place any reliance on those letters.
>
> Secondly, decisions about investigations and prosecutions will be taken simply on the basis of the intelligence and/or evidence relating to whether or not the person concerned committed offences. That means that in any of their cases, and whatever was said in the letters sent to them or in statements made in the past, decisions taken today and in future will be taken on the basis of the views formed about investigation and prosecution by those who now have responsibility for those matters. Their views might be the same as those that led to the letters being sent in the past or they might be different. It is the views of those who take the decisions now or in the future which matter. All the evidence will be taken into account, regardless of whether it was available before the letters were sent or whether it has emerged subsequently".

[14] It seems clear that one reason behind this statement was to give fair and clear warning that such comfort as recipients might have derived from the letters in the past could no longer be taken. In short, as the Secretary of State put it: "the scheme is at an end".

The leave hearing

[15] At the leave hearing the issues crystallised in the following ways:

(i) It was accepted by Mr McGleenan on behalf of the intended respondents that if it was not for the matters mentioned below he would be unable to resist leave in this case, at least in a general sense.

(ii) However he did resist leave because supervening events had effectively rendered the challenge academic.

(iii) If the above was a correct analysis, Mr McGleenan argued, this was not a case where the court should do other than dismiss the judicial review application. While he accepted that the court retained a discretion to hear disputes even in the area of public law notwithstanding that they had become academic between the parties, this was not a case in which the court should exercise its discretion in the applicant's favour. The court was not dealing with a discrete issue of statutory construction which did not involve detailed consideration of the facts and where a large number of similar cases existed or were anticipated so that the

issue would have to be resolved in the near future. Nor, he argued, was it a case where it could be said that there was a strong public interest in hearing it, especially given the fact that there had already been a deep and searching review of the whole scheme by an independent judge of high standing in the form of Hallett LJ.

(iv) In any event, free standing of his other submissions, Mr McGleenan maintained that to justify the grant of leave the applicant would have to establish in evidence that there was a true link between the applicant's desire to judicially review the scheme and events which affected her directly. In his submission the court should not accept that the necessary linkage was created by a newspaper article written in the terms of that described above. Moreover, he argued that the court had evidence before it, in the form of an affidavit from a Superintendent in the Police Service, which demonstrated that on reasonable investigation the PSNI were unable to find a recipient of an OTR letter who had been a suspect or of interest to the police in the investigation of the Shankill Road bombing: see the affidavit of Jason Murphy at pp. 171-174 of the papers.

[16] Mr Kane, for the applicant, answered these arguments in the following ways:

(i) He did not accept that the dispute between the parties had been rendered academic. On the contrary he pointed out that the Hallett report had not held the scheme to be unlawful and neither had the Secretary of State admitted this. It was important, he submitted, that the court should not lose sight of this. A declaration by the court that the scheme was in fact unlawful was of practical importance as this would be likely to defeat the ability of a criminal defendant in similar circumstances to Mr Downey to rely on the doctrine of abuse of process and so obtain a stay of the criminal proceedings.

(ii) In any event counsel submitted the issue under consideration went to the core of the rule of law and involved interference in the operation of the police and prosecution authorities by Government. There was a strong public interest, therefore, in the court hearing this case. This public interest could not be viewed as satisfied by the review of Hallett LJ. In compiling her review the judge had not been sitting in her judicial capacity. Her proceedings, moreover, had been in private and she did not have the power to compel witnesses. In contrast, Mr Kane argued, this court would sit in public and would have the authority to set the scheme aside.

(iii) Mr Kane made the further point that there was a likelihood of similar cases to Downey emerging in the future as investigations into historic deaths were on-going and the fruit of these was coming to light. As an

example he referred to an inquest in which the police had only recently been able to link a palm print to a particular individual.

(iv) Finally counsel contested the accuracy of the Murphy affidavit which was before the court. The court should not be fooled into believing that it gave the full picture. While he accepted the reference in the affidavit to there being six suspects in respect of the Shankill bomb explosion (a figure drawn from a report issued by the Historical Enquiries Team) there were likely to be other persons of interest who may not be viewed as suspects *per se* but may have received an OTR letter. For all sorts of reasons persons of interest may not be treated as suspects, he argued.

The court's assessment

[17] The court is of the opinion that the framework for analysis put forward by Mr McGleenan is an appropriate one for the purposes of this leave hearing. It follows that in terms of the substance of the application the court should be prepared to grant leave unless the case has become academic or unless the court considers that the applicant has insufficient standing to pursue the proceedings. While the court is content to deal with the matter in this way it should, however, not be thought that the court does not have reservations about many of the grounds upon which leave is sought.

Have the proceedings been rendered academic?

[18] The court is conscious of the events described above and, in particular, the statement of the Secretary of State in relation to the scheme made on 9 September 2014. It seems to the court that the effect of this statement is to abolish the scheme under which OTR letters of comfort issued and to give notice that those letters which had already been issued can no longer be treated, in the Government's view, as documents which can be relied upon to give comfort to their recipients.

[19] As the applicant's concern relates to the scheme, it is difficult to see why the ending of the scheme on the terms set out in the statement should not be seen as as good a remedy in practical terms as any remedy the court in a judicial review could grant. While the court could declare the scheme unlawful or quash it, it is not easy to see what this would achieve over that which the Government's renunciation of the scheme achieves. Mr Kane's answer to this appeared to be a contention that a successful outcome in this judicial review would defeat the ability of a defendant similarly placed to Mr Downey to rely on the doctrine of abuse of process to obtain a stay in respect of any criminal proceedings against him. The court is unpersuaded that this submission is well made as it seems to the court that there is no relief the court could provide which could abrogate the ability of a criminal defendant to seek to rely on the doctrine of abuse of process if on the facts of the case such reliance may be open to him. For example, if this application for judicial review was

successful and later a criminal defendant situated similarly to Mr Downey relied on abuse of process, it is difficult to see how that application could be determined on other than a fact specific basis. Among the facts which would have to be considered would be those relating to the issuance of any assurance letter and those which relate to the status of that assurance over time. If it is assumed that this court had held that the scheme was unlawful it seems unlikely to the court that this could have the impact of negating any abuse of process application.

[20] It also will follow from the removal of the scheme that the scheme cannot forthwith impinge on the independence of the police or DPP, even if hypothetically that is the correct analysis of what it did in the first place.

[21] On this aspect of the matter the court is satisfied that these proceedings are academic in view of the Secretary of State's statement of 9 September 2014.

Notwithstanding its academic status, should leave nonetheless be granted?

[22] Mr Kane has also argued that notwithstanding the proceedings being rendered academic, if that is the court's view, it should nonetheless hear this judicial review on the basis that to do so would be in the public interest. In this regard he has referred to the importance of the case as demonstrating interference by governmental authorities with the doctrine of the rule of law and the need to protect the criminal justice process from such interference.

[23] The applicable case law in this area was not in dispute and both sides agreed that the classic statement of principle is that of Lord Slynn in R v Secretary of State for the Home Department ex parte Salem [1999] 1 AC 450 that appeals which are academic as between the parties should not be heard unless there is a good reason in the public interest for doing so (see pp. 456-457). Mr Donaghy BL drew the court's attention to the treatment of this issue by Kerr J (as he then was) in Re E's Application [2003] NIQB 39 where in the context of the Holy Cross school dispute he indicated that there was no attempt in the authorities to define what might qualify as a matter of general public interest or a question of fundamental importance but that:

> "An issue may be considered to be one of public law where it involves a matter of public interest in the sense that it has an impact on the public generally and where the outcome of the particular dispute is one in which the public has a legitimate interest"

(see paragraph [7]). In that case the court decided to hear the judicial review, even if academic (*ibid),* but went on to hold that the issue in fact was not academic (see paragraphs [9] and [10]).

[24] Were it not for the review carried out by Dame Heather Hallett, the court might have been persuaded that a hearing of the judicial review would be merited

on public interest grounds. However given the existence of the review and in the light of the substantial report provided by this eminent judge, the court is not of the opinion that the hearing of this judicial review should proceed, if otherwise academic, on public interest grounds. The public interest in the matter is met in substance by the published and accessible review report and the court does not believe it would be justifiable in terms of the expenditure of time and resources for the court to hold a full hearing in respect of this matter. The following considerations have influenced the court to this view:

(i) It can hardly be said that the present case is one in which there is a discrete matter of statutory interpretation involved which would likely have to be resolved in other cases in any event.

(ii) The hearing of the case would, it seems to the court, involve a complex exercise in terms of the preparation of evidence and its consideration in court.

(iii) The background to this litigation and its history points to the issues in this judicial review being *sui generis*.

(iv) In the court's judgment, there is no basis for believing that history is likely to repeat itself.

(v) This case is distinguishable from the E case where there had been nothing comparable to the Hallett review on the facts of the case.

[25] In the above circumstances, the court has reached the clear conclusion that it should not grant leave to apply for judicial review in this case for public interest reasons.

[26] The court has also applied its mind to whether there is any other reason for permitting the hearing of this judicial review. However it is not attracted by Mr Kane's arguments in this regard. Though the court does accept that it is possible that a Downey type situation could develop in a future case or cases, in itself this would not be reason for hearing this judicial review. As already noted, any further Downey type case would fall to be determined in the criminal court on its own facts and merits. Such consideration would relate to abuse of process as a concept developed in criminal law and if at all, only incidentally, with the principles of public law.

[27] The court's conclusion is that it will dismiss this judicial review as the challenge has been rendered academic and in the court's opinion there is no sufficient reason why it should depart from the general approach that it should not hear academic applications.

The applicant's standing

[28] The issue of the standing or interest of an applicant for the purpose of a judicial review application is addressed both in the primary legislation which governs judicial review – the Judicature (Northern Ireland) Act 1978 – and in the Rules of the Court of Judicature: see Order 53 Rule 3(5). At section 18 (4) of the former it is indicated that "the court shall not grant any relief on an application for judicial review unless it considers that the applicant has a sufficient interest in the matter to which the application relates". Rule 3 (5) indicates that the court "shall not, having regard to section 18 (4) of the Act, grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates".

[29] In addition to these provisions a further relevant provision where an applicant for judicial review seeks (as this applicant does) to raise issues of breach of the Human Rights Act 1998 is section 7 of the 1998 Act. This indicates that a person who claims that a public authority has acted in a way which is made unlawful under section 6 (1) may bring proceedings against the authority and may rely on Convention rights "but only if he is (or would be) a victim of the unlawful act" (section 7 (1)). For the purposes of section 7 a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act (see section 7 (7)).

[30] What distinguishes the present case from being simply a general public interest challenge to the OTR scheme is the contention that the applicant is personally affected because of what she read in the news report referred to above to the effect that a suspect in the Shankill Road bombing had received an OTR letter. The intended respondents have challenged this. Their submission is that there is no factual foundation for this claim. To demonstrate this, the intended respondents rely on the affidavit of Detective Superintendent Murphy. He has indicated that there is nothing in the HET review of the case which suggests that any of the six suspects identified by them had been on the run either prior to and after the police investigation. The deponent also avers that the names of those suspected of involvement in the Shankill bomb and who have been arrested and interviewed have been checked electronically against a database of all OTR subjects. The outcome of this was that "none of the individuals who were suspects in relation to the Shankill Bomb and who were arrested and interviewed are recorded as having received letters of comfort". In response to this the applicant's solicitor has engaged in correspondence with the Crown Solicitor making the point that the averment of the deponent did not deal with suspects who were not arrested or interviewed.

[31] While there has been further correspondence between the parties about this issue, the court has concluded that it need not make a determination on this aspect of the case, in view of its conclusion at paragraph [27] *supra*. It takes this view because it is satisfied that the modern approach to the law of standing in judicial review applications points against the refusal of leave on this ground in all but the very clearest of cases, such as where the applicant is deemed to be a busybody, crank or

mischief maker. The progression of the law in this area is well described in Wade and Forsyth's, Administrative Law (Eleventh Edition) at pp. 585-592 and does not need to be set out here. A liberal approach to standing is now well established as much in Northern Ireland (see Re D's Application [2003] NI 295 at 302) as in England and Wales where the House of Lords decision in the case of R v Inland Revenue Commissioner ex parte National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617 remains highly influential. Even if the applicant lacked any direct personal interest of her own (which the court abstains from deciding) the application as a public interest application should not, in the state of the authorities, be refused leave on this account alone.

Conclusion

[32] The court refuses leave for the reason given at paragraph [27] above but not for the reason that the applicant lacks standing.