Judicial Communications Office

13 December 2021

COURT DISMISSES CHALLENGE TO ASSET FREEZING ORDERS

Summary of Judgment

Mr Justice Colton, sitting today in the High Court in Belfast, dismissed an application for judicial review challenging the validity of asset freezing orders made in respect of bank accounts held by Amanda Duffy, Sharon Jordan and Damien McLaughlin.

Background

On 6 May 2021, as part of a joint PSNI and Metropolitan Police Service ("MPS") investigation into the finances of terrorism in Northern Ireland and in England and Wales, an application was made by MPS to Westminster Magistrates' Court for Account Freezing Orders ("AFOs"). The AFOs were in respect of a number of bank accounts including accounts in banks and Credit Unions held by Amanda Duffy, Sharon Jordan and Damien McLaughlin ("the applicants"). AFOs were granted but on 17 May MPS contacted the court to say that the orders should have been applied for in Northern Ireland and, as a result, the orders were set aside. On 19 May, the PSNI applied to Belfast Magistrates' Court for AFOs in respect of the applicants' accounts. These were granted (the AFOs for the bank accounts were for a period of six months and the AFOs for the Credit Union accounts were for three months).

On 17 September 2021, the PSNI applied for a variation of the AFOs in relation to the Credit Union accounts to extend them until 19 November 2021, to align with the expiry date of the AFOs in relation to the bank accounts. In the course of the variation hearing, the applicants challenged the validity of the AFOs. On 13 September 2021, the applicants lodged an application for leave to apply for judicial review.

The Statutory Background

The Anti-Terrorism, Crime and Security Act 2001 ("the 2001 Act") provides extensive powers enabling the authorities to seize assets used by terrorists or for terrorist purposes. This includes powers to freeze accounts and obtain forfeiture orders in respect of monies held in such accounts. Paragraph 10 of Schedule 1 to the 2001 Act sets out the process for applying for, making and varying and setting an AFO. There is also a Code of Practice for Officers Acting under Schedule 1 to the 2001 Act detailing the obligations of all officers involved in making an application for an AFO.

The Applications

When the PSNI brought an application on 17 September 2021 to vary the AFOs in respect of the Credit Union accounts, counsel for the applicants submitted that the applications had not been properly brought as the 2001 Act required "the senior officer" who authorised the application to consult with HM Treasury. Counsel for the applicants accepted that HM Treasury appeared to have been consulted by MPS prior to the applications to Westminster Magistrates' Court but contended that there had been no consultation by PSNI with HM Treasury in advance of the applications to

Belfast Magistrates' Courts. The District Judge, however, determined that the consultation with HM Treasury by MPS was sufficient as there had been a joint MPS and PSNI application under the terms of Operation Chalcidic.

Delay

A preliminary matter in these proceedings was whether the application for judicial review was out of time. Order 53, rule 4(2) of the Rules of the Court of Judicature (NI) 1980 provides that an application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending the period. The date when the "grounds for the application first arose" shall be taken to be the date of any judgment, order, conviction or proceeding. In this case, the applicant was seeking to quash the applications and orders of 19 May 2021 and the court concluded that the grounds first arose on that date. It then went on to consider whether there was "good reason" for extending the period in which the applications for judicial review have been made:

> "Good reason" is a context driven criterion. Is there reasonable and objective justification for the delay in making these applications? Would dealing with the substantive issue be prejudicial to any third party or the interests of good administration? "

The court said it had a number of concerns about this case. The first related to the fact that the challenge was confined to the Credit Union accounts. The court said it seemed that a focus of the application related to whether or not the orders were proportionate, which would be classic grounds for a person in the applicants' position to seek to vary an order as they are entitled to do under paragraph 10T of Schedule 1 to the 2001 Act. The court also said it was clear that neither the PSNI nor the Magistrates' Court was given any notice of this issue and that either the PSNI was "ambushed" in relation to the point or alternatively the point only crystallised in the course of cross-examination of police officer. A further related issue was the fact that at no stage did any of the applicants bring applications to vary or set aside the orders, a course of action which was available to them under paragraph 10T of Schedule 1 to the 2001 Act.

On balance, the court decided that there was good reason for extending the time beyond the three month period from the date upon which the grounds arose. It did not consider that there was any prejudice to the proposed respondent or the good administration of justice by extending time so that the issue, which has not been raised previously in the context of such applications, can be determined.

Alternative Remedy

The respondent contended that there was a more appropriate and effective alternative remedy available to the applicants. The court considered that the respondent was justified in complaining about the way in which the issue was raised at the Magistrates' Court hearing on 17 September 2021 and, as a result, the District Judge did not have the benefit of direct evidence on the point. The court also noted that the respondent had pointed out that under paragraph 10T of Schedule 1 the applicants can still bring an application to set aside the freezing orders under paragraph 10Z2(1), (6), (7)(b) and (8) of Schedule 1 to the 2001 Act.

The court pressed the applicants on this issue during the hearing. It noted that an application to the District Judge under paragraph 10T of Schedule 1 to the 2001 Act has the benefit of enabling the court to hear evidence on the points at issue and can be both an alternative and effective remedy to seeking a judicial review. The applicants, however, pointed out that that a declaration by the judicial review court that the applications and the orders were void *ab initio* was a much more effective remedy than the remedy available to the Magistrates' Court of setting aside the order. The applicants also argued that if an application was brought under paragraph 10 and was unsuccessful then it would likely return to the High Court by way of judicial review. The court concluded that, in terms of costs and convenience, it was better that the matter be determined by the judicial review court:

> "It is argued that all the relevant material is available before this court to make a determination on the undoubted public law issue which has arisen. On balance in exercising the court's discretion and judgment, and having regard to the need for expedition the court takes the view that the better course of action is to determine the issue between the parties in these applications."

The Substantive Application

The first question for the court was whether the PSNI had failed to comply with its obligations under the 2001 Act. The court said that, in its view, the answer was yes:

> "The wording [of the 2001 Act] could not be clearer. Para 10Q imposes an express obligation on the senior officer, who in this case was [an officer in the PSNI]. He did not consult with HM Treasury prior to authorising the application, or at any time. The obligation is on the senior officer who is authorising the application. The fact that HM Treasury was "notified" about the application is not sufficient so as to be considered a consultation under the Act."

Counsel for the PSNI argued that the PSNI had complied with the statute on the basis that the requirement imposed by paragraph 10Q(3) was qualified by the phrase "unless in the circumstances it is not reasonably practicable to do so." He submitted that given the background and history to the matter the PSNI correctly considered that it was not "reasonably practicable" to consult with HM Treasury on the basis of the previous consultation carried out by MPS in respect of the applications that were brought before Westminster Magistrates' Court. The court said that in assessing this averment it was important to distinguish between an investigation and an application. The application which was the subject of this challenge was a separate application from that brought before Westminster Magistrates' Court and was therefore subject to the requirements of paragraph 10Q(3):

> "In the court's view the concept of practicability means what it says, namely that it was impracticable to carry out a consultation. Thus, for example, if there was a particular urgency and perhaps a concern that assets were to be dissipated one can see why an application could be brought without the necessary consultation. That is not the case here. In truth the real basis for the failure to consult again was the opinion of [a Detective Inspector] that such a consultation was "unnecessary." In the court's view practicality is a different matter from necessity.

The next question for the court then was what were the consequences of the failure to comply? The court said it seemed that ultimately the real issue was what were the consequences from the failure by the PSNI to comply with the obligation in question before making the application for the AFOs? The applicants contended that the legislation is stated in mandatory terms in that "a senior officer must consult the Treasury before making the application for the order". They also contended that the procedure had been laid down by primary legislation and should therefore strictly enforced. Given the breach in this case, the applications should be treated as invalid from the outset. The applicants therefore submitted that the authorisation and the applications were *ultra vires* and unlawful.

The court said that a review of the jurisprudence on this issue suggested that in determining the consequences of a breach of a requirement it must look not only to the words but also to the object of the statute in which the requirement appears. The court noted that the legislation provided sweeping and "arguably draconian" powers to the authorities and that it should be vigilant to ensure there is no undue interference with the rights of those who are subject to such orders, be they common law rights, or rights protected by Article 8 and A1P1 of the ECHR. In the context of the challenge in these proceedings the court considered the statutory language favoured the applicants. It said the legislation did not provide for any consequences of a failure to consult which contrasted with the words elsewhere in paragraph 10 of Schedule 1 to the 2001 Act which provided that an officer "may not apply" for an AFO unless the officer is a senior officer and is authorised to do so by a senior officer. The court said the intention of the legislature in imposing the obligation was clear. The purpose of the consultation was to enable the Treasury to consider whether an alternative to an AFO application was appropriate and, in particular, whether it should be exercising its powers under the Terrorist Asset-Freezing Act 2010. This was clear from both the Minister's statement on the Bill which introduced Schedule 1 to the 2001 Act, from the explanatory notes, and from the Code of Practice, in particular, paragraph 31. The court said the obligation did not seek to restrict the making of an application for an AFO nor would the PSNI be obliged to follow any advice given in the process of the consultation.

In terms of the degree and seriousness of the non-compliance in this case, the court said this must be seen in the context of the fact that the authorising officer was aware that the Treasury had been consulted in respect of an application which was identical to that which he was authorising. That consultation had not resulted in any change to the application that was brought in Westminster Magistrates' Court. Furthermore, the Treasury were informed by MPS that an identical application would be made to the Northern Ireland courts. The court said that in terms of the actual or possible effect on the parties it could not identify any real prejudice arising from the failure to consult again with HM Treasury:

> "Undoubtedly, the making of the applications is prejudicial to the applicants. However, the failure to consult has had no identifiable prejudicial effect on the substance of the applications and the subsequent orders of the court. This is not a case where the applicants are saying the substantive grounds for the making of the order have not been made out, as a result of a failure to consult."

The court accepted that there had not been precise compliance with the requirement of paragraph 10Q(3)(b) of Schedule 1 to the 2001 Act, however, it concluded that there had been substantial compliance, sufficient to establish the lawfulness of the authorisation, the applications and the subsequent orders of the court. It said this judgment was not to be taken to say that an absence of

consultation in the circumstances of authorising and applying for an AFO would not invalidate the authorisation, application or any subsequent order:

> "This case has to been seen in the context where there clearly was a statute compliant consultation, admittedly not in relation to this specific application (and hence the lack of precise compliance) but in relation to an identical application in all respects a short time beforehand when no case could be made in relation to any change of circumstances in the interim. In these circumstances notification by both the MPS and the PSNI in the terms referred to earlier to HM Treasury was appropriate. "

Conclusion

The court granted leave in respect of each of the applications as the threshold was clearly met, however, for the reasons set out the applications for judicial review were all dismissed.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

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