

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND  
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

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**Torney's (John Joseph) Application [2003] NIQB 36**

**IN THE MATTER OF AN APPLICATION BY JOHN JOSEPH TORNEY  
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

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**KERR J**

**Introduction**

[1] This is an application by John Joseph Torney for leave to apply for judicial review of the decision of the Criminal Cases Review Commission not to refer his conviction to the Court of Appeal. Mr Torney also seeks leave to apply for an order of mandamus requiring the Commission to further consider and adjudicate on his application seeking the referral. He claims that the Commission has failed to properly investigate certain aspects of the case which, if fully explored, might have led to a different conclusion on the decision whether to refer.

**Background**

[2] At 12.38am on 20 September 1994 the applicant telephoned Cookstown police station asking for police and an ambulance to come to his house urgently. Police arrived there four minutes later. They found the applicant's two children, thirteen-year-old John Alexander and eleven-year-old Emma in their beds. Both had been shot in the head and were dead. The applicant's wife had also been shot in the head but was still alive. Like the children she had been shot while in bed. She died within minutes of the police arriving at the scene.

[3] The applicant was charged with the murder of his wife and two children. In interview and at his trial he maintained that his son had killed his mother

and sister and then committed suicide. Mr Torney was convicted of the three murders by majority verdict of ten to two at Belfast Crown Court on 4 March 1996.

[4] In the course of the trial there had been a dispute as to the admissibility of evidence from two school friends of Emma Torney that she had told them that her brother had been sexually abusing her. The trial judge allowed this evidence to be given for the purpose of showing that Emma had made the allegation to her friends but ruled that it could not be proffered as supporting the truth of the allegations made.

[5] The post mortem examination of Emma's body revealed that she was virgo intacta but the pathologist who carried out the autopsy, Dr Derek Carson, gave evidence that the appearance of the hymen did not exclude sexual interference falling short of complete penetration.

[6] The applicant appealed against the verdict of the jury. The Court of Appeal dismissed his appeal on 18 April 1997. In respect of the evidence from Emma's school friends the Court of Appeal said that the trial judge had been correct to allow it to be given for the limited purpose that it was received. Indeed, Mr Torney could have had no complaint if the judge had excluded it.

[7] On 24 April 1998 the applicant applied to the Commission asking it to review his case. Subsequently a videotape of a programme broadcast by the BBC on 31 October 2000 was sent to the Commission by his solicitors. The programme was about Mr Torney's case. It contained a reconstruction of the evidence given by the school friends of Emma about the sexual abuse she claimed to have suffered at the hands of her brother.

[8] Dr Samuel McGuinness had been the headmaster of the school that both Torney children had been attending before their deaths. He had given evidence at the applicant's trial. After seeing the BBC programme he contacted the applicant's solicitors to inform them that he had been informed by a senior police officer that evidence had been found of sexual activity between John Alexander Torney and his sister, Emma, on the night of the shooting and that semen had been found on the girl's body. Dr McGuinness made an affidavit about this matter and two supporting affidavits from his wife and a family friend, Rev Ivor Smith, (in which they confirmed that Dr McGuinness had confided in them about the conversation with the police officer) were also furnished. All three affidavits were supplied to the Commission.

[9] The applicant and his defence team were unaware of any suggestion that semen had been found on Emma's body until Dr McGuinness approached his solicitors the day after the programme. As a result of this discovery the

applicant's solicitors on his instructions made a complaint to the Police Ombudsman about the withholding of information by the police. Part of the information that the police were said not to have disclosed related to the conversation that Dr McGuinness said he had with the police officer.

[10] On 11 June 2002 the Police Ombudsman wrote to Mr Torney's solicitors informing them that their inquiry into the complaint had been completed and that there was no evidence to substantiate any allegation of misconduct on the part of a police officer. All police officers who had spoken to Dr McGuinness had been identified and all denied having had a conversation with him about any evidence of sexual activity between John Alexander and Emma on the night of the shootings. The Police Ombudsman's office informed the applicant's solicitors that the forensic science service had not been asked to undertake any tests on any exhibits in the case but that the Ombudsman had undertaken a thorough search of Cookstown police station and all relevant exhibits found were submitted for forensic examination but no semen was found.

[11] There followed an exchange of correspondence in which, inter alia, the applicant's solicitors suggested that Dr McGuinness could identify the police officer who had spoken to him if he was supplied with photographs of the officers. The Police Ombudsman refused to do this since it would "breach PACE". In the course of the correspondence the Police Ombudsman's office pointed out that no semen could have been found on the body because it had not been swabbed.

[12] In its provisional statement of reasons issued on 19 July 2002, the Commission referred to the Police Ombudsman's investigation of the complaint that the police had not disclosed that semen had been found on Emma's body. It noted that the Ombudsman's officers had established that Dr McGuinness had been seen by three non-uniform police officers. None of these had a higher rank than detective constable. It was Dr McGuinness's memory that he saw three plainclothes officers and this was confirmed by the crime database completed in the course of the murder investigation. All three officers denied having said to Dr McGuinness that semen had been found on Emma's body or making any reference to sexual activity between the children on the night of the shooting.

[13] The Commission also noted that the forensic science agency for Northern Ireland had not been asked in the original inquiry to carry out testing for the presence of semen. Forensic testing of bed clothing and other materials undertaken by FSANI at the request of the Ombudsman's office did not detect the presence of semen. The Ombudsman had concluded therefore that there was no evidence to show that semen was present on Emma or any clothing or material with which she or her brother had been in contact.

[14] In its provisional statement of reasons the Commission dealt with this issue in the following paragraph: -

“10.12 In view of its own investigations and considerations, coupled to the findings of PONI [the Ombudsman], the Commission has reached the view that this issue does not raise a real possibility that the Court of Appeal NI would not uphold Mr Torney’s conviction, were the Commission to refer his case.”

This paragraph was repeated in the Commission’s final statement of reasons issued on 3 December 2002. The Commission decided that it should not refer the applicant’s case to the Court of Appeal.

### **The application for leave**

[15] The Order 53 statement seeks an order of certiorari to quash the decision not to refer and an order of mandamus requiring the Commission to adjudicate on the application for a referral “in a lawful and proper manner”. In particular the applicant claims that the Commission should take all steps necessary to identify the police officer who spoke to Dr McGuinness and that it should interview Dr Derek Carson in relation to the post mortem examination of Emma. It is also asserted that the Commission should take all steps necessary to trace the night attire of Emma and the underwear of John Alexander so that these may be examined for the presence of semen.

[16] Mandamus was also sought in the Order 53 statement to require the Commission to have further examinations carried out concerning the findings relating to firearms discharge residue, the interpretation of blood distribution and the theory promoted by the prosecution on trial about the removal of incriminating material by the applicant by washing. This claim was not pursued on the application for leave to apply for judicial review.

### **The relevant statutory provisions**

[17] Section 10 (1) (a) of the Criminal Appeal Act 1995 provides: -

#### **“10 Cases dealt with on indictment in Northern Ireland**

(1) Where a person has been convicted of an offence on indictment in Northern Ireland, the Commission –

- (a) may at any time refer the conviction to the Court of Appeal ...”

The Commission may not refer a case to the Court of Appeal where the conditions laid down in section 13 apply, however. It provides: -

**“13 Conditions for making of references**

(1) A reference of a conviction, verdict, finding or sentence shall not be made under any of sections 9 to 12 unless –

- (a) the Commission consider that there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made,

(b) the Commission so consider –

- (i) in the case of a conviction, verdict or finding, because of an argument, or evidence, not raised in the proceedings which led to it or on any appeal or application for leave to appeal against it, or

- (ii) in the case of a sentence, because of an argument on a point of law, or information, not so raised, and

- (c) an appeal against the conviction, verdict, finding or sentence has been determined or leave to appeal against it has been refused.

(2) Nothing in subsection (1)(b)(i) or (c) shall prevent the making of a reference if it appears to the Commission that there are exceptional circumstances which justify making it.”

[18] Thus although section 10 contains a permissive provision whereby the Commission *may* refer a case to the Court of Appeal where it deems it appropriate to do so, in general it may not refer a case unless the conditions in section 13 are satisfied. Even where the conditions contained in section 13 (1) (b) (i) or (1) (c) are not satisfied, however, the Commission may refer a case when it considers that there are exceptional circumstances that justify the

referral. But it must always be satisfied, before referring a case, that there is a real possibility that the outcome of the reference would be that the conviction would not be upheld.

[19] Section 17 of the 1995 Act empowers the Commission to obtain documents from a person serving in a public body in order to assist it in the exercise of its functions. Under section 19 the Commission may require the appointment of an investigating officer to carry out inquiries to assist it in the exercise of any of its functions. Section 20 (1) provides: -

**“20 Inquiries by investigating officers**

(1) A person appointed as the investigating officer in relation to a case shall undertake such inquiries as the Commission may from time to time reasonably direct him to undertake in relation to the case.”

**The decision not to refer**

[20] It is necessary to distinguish between the decision not to refer the case to the Court of Appeal and the refusal of the Commission to undertake further inquiries in the case. The former decision must be considered on the basis of the material available to the Commission at the time that the decision not to refer was made.

[21] As we have said in paragraph 18 above, the provision relating to the reference of a case to the Court of Appeal is permissive. The power is exercisable only when the Commission is satisfied that there is a real possibility that the conviction would not be upheld. Plainly, that judgment must be made on the basis of the Commission’s evaluation of the information at the time that it takes its decision whether or not to refer the case.

[22] In *R v Criminal Cases Review Commission ex parte Pearson* [1999] 3 All ER 498, 505 Lord Bingham of Cornhill CJ said of section 13: -

“Thus the Commission’s power to refer under s 9 [the equivalent of section 10 in Northern Ireland] is exercisable only if it considers that if the reference were made there would be a real possibility that the conviction would not be upheld by the Court of Appeal. The exercise of the power to refer accordingly depends on the judgment of the Commission, and it cannot be too strongly emphasised that this is a judgment entrusted to the Commission and to no one else.”

This passage highlights the exclusive nature of the Commission's power to refer. To the Commission alone is the judgment entrusted of deciding whether, after appropriate investigation and assessment, a reference should be made. It is for the Commission – and the Commission alone – to decide whether there is a real possibility that the conviction would not be upheld.

[23] In the present case the information available to the Commission included (i) clear evidence that Emma's body had not been swabbed and there was therefore no possibility of producing scientific evidence that there had been semen on her body; (ii) all available items that might have borne traces of semen had been forensically examined and its presence was excluded; (iii) Dr McGuinness's recollection (confirmed by the crime database) that he had spoken to three non-uniform officers; (iv) the denial by those officers that they had told Dr McGuinness that semen had been found on the body or that there was evidence of sexual activity between the children on the night of the shootings.

[24] Mr Treacy QC for the applicant argued strongly that the overwhelming likelihood was that Dr McGuinness was telling the truth about the conversation with a police officer. That may well be so but, even if it is correct, it cannot supply the inevitable answer to whether the Commission should refer the case to the Court of Appeal. Even if one accepts that this conversation took place, the preponderance of the material available to the Commission points clearly to the conclusion that there was no evidence of semen on the body. In the absence of such evidence, it appears to us that the Commission was bound to conclude that there was no real possibility that the Court of Appeal would not uphold the conviction. Whatever an individual police officer may have said, and whatever his motive for saying it, the plain fact is that there is no evidence to support the claim that semen was found on the body. On the contrary all the evidence available at present suggests that semen was not found on Emma. We do not consider that the applicant has an arguable case that the Commission was wrong to decline to refer the case on this issue and we therefore refuse leave to challenge this decision.

### **The refusal to conduct further inquiries**

[25] The applicant makes essentially two complaints about the Commission's failure to investigate the conversation that Dr McGuinness had with the police officer. In the first instance it is claimed that he should have had the opportunity to try to identify the police officer in question. The Commission, the applicant says, is not constrained by the requirements of the Police and Criminal Evidence Order, as is the Ombudsman. If the police officer is identified, he may be challenged on his denial that he spoke to Dr McGuinness in the terms described by him. Secondly, the applicant suggests that Dr Carson should be interviewed and the notes of his post mortem

examination should be inspected in order to discover whether there is any possibility that semen, although not scientifically confirmed, was identified as being present on the body.

[26] It is clear from the nature of the task given to the Commission by the 1995 Act that it must have a measure of discretion as to how it will conduct the investigations necessary to allow it to judge whether to refer a case to the Court of Appeal. At this stage we have not heard the Commission's explanation as to why it considered the investigations requested by the applicant unnecessary or inappropriate. It may well be that there are sound reasons that these inquiries were considered not to be required. At this stage, however, we are unable to say that the Commission's decision not to undertake them is unarguably immune from challenge. We shall therefore grant leave to apply for judicial review of the refusal by the Commission to undertake the further inquiries requested by the applicant.