Judicial review – discovery of documents – documents referred to in affidavit – relevance – Convention rights in issue – proportionality – relevant principles for discovery in judicial review case involving proportionality

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(subject to editorial corrections)

2004 No. 0107

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY DAVID TWEED ON HIS OWN BEHALF AND ON BEHALF OF ALL OTHER MEMBERS OF DUNLOY LOL 496 FOR JUDICIAL REVIEW

AND

IN THE DECISIONS OF THE PARADES COMMISSION FOR NORTHERN IRELAND

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GIRVAN J

[1] In judicial review proceedings brought by the applicant David Tweed, suing on his own behalf and on behalf of members of the Dunloy Loyal Order Lodge 496, the applicant seeks to quash a determination of the Parades Commission for Northern Ireland ("the Parades Commission") made on or about 5 April 2004 concerning the public procession organised by Dunloy LOL 496 for Easter Sunday 11 April 2004. The applicant also seeks a declaration of incompatibility pursuant to section 4(2) of the Human Rights Act 1998 in respect of section 8(6)(c) of the Public Processions (Northern Ireland) Order 1998; a declaration that para 4.4 of the Parades Commission Guidelines is unlawful, ultra vires and of no force and effect; and a declaration that para 3.3 of the Parades Commission's Procedural Rules is unlawful, ultra vires and of no effect. The current application is an application for specific discovery of the documents set out in the schedule to the summons, the application being expressed to be made pursuant to order

24 r.7, order 24 r.12 and r.13, order 53 r.8 and or Article 6, 9, 10 and 11 of the ECHR in conjunction with section 3 and or 6 of the Human Rights Act 1998. The documents in question are all referred to in paragraph 6 of the affidavit of Sir Anthony Holland the Chairman of the Parades Commission ("the Chairman") swore on 29 July 2004.

[2] In paragraph 6 of his affidavit the Chairman sets out the chronology of the impugned decision and purports to give a summary or synopsis of the relevant documents taken into account by the Parades Commission in the decision making process. The documents in question are referred to in paragraphs (i) to (vi) of paragraph 6. It is common case that the document referred to in paragraph 6 (i) (the applicant's application form 11-1 in respect of the proposed procession) is the Lodge's own document and therefore no order for discovery is required. The other documents referred to are:

(ii) a police fax transmission accompanying the form 11-1 sent to the Parades Commission. According to the affidavit the note indicated that the parade was an annual one that has previously been contentious and that had been the subject of previous determinations by the Commission;

(iii) a police report in respect of the proposed procession compiled by the Ballymoney District Commander, Superintendent Corrigan. It contained a section dealing with recent parading history beginning with a parade on 21 May 2000 working forwards. The affidavit purports to give a summary of the Superintendent's view as to the impact on community relations in the area of the proposed parade if it took place without local agreement;

(iv) a situation report received from the authorised officers of the Commission who worked in the areas, the authorised officers being self-employed and performing a range of functions for the Commission. The report records the range of views which have been expressed to the authorised officers. The affidavit states that inter alia it records the view being expressed that as there had been no engagement between the Loyal Orders and the Dunloy residents over the winter and that the status quo regarding parades ought to continue;

(v) a Commission secretariat note to members concerning the proposed parade summarising the documents referred to;

(vi) a situation report dated 2 April 2004 recording contacts by the authorised officers with a variety of persons from a range of backgrounds with views being expressed to the effect that any parade without residents' acceptance would be likely to lead to deterioration in community relations and that the communication strategy of the Loyal Order fell short of meaningful engagement.

[3] The applicant complains that his rights under Articles 9, 10 and 11 of the Convention have been violated by being restricted in pursuance of an aim which is not an legitimate one under Articles 9(2) and 10(2) and 11(2) of the Convention. Mr Hanna QC on behalf of the applicant contended that in the substantive application the court would be called on to determine whether the restrictions imposed by the Parades Commission were necessary in a democratic society in the interests of preventing disorder and/or protecting the rights and freedoms of others. Where the court is being asked to decide whether a Convention right has been breached it should conduct a searching review of the legality of the public authority's actions and this requires the court to assess the proportionality of the restrictions imposed by the Commission. It is, therefore, unarguably necessary in order to determine the legality of the Commission's decision that the court should be in a position to scrutinise the documents. The court might itself be acting incompatibly with the Convention rights if it failed to put itself in the best position to determine whether or not the allegations of a violation of those rights has been established.

[4] Mr McCloskey QC in resisting the application on behalf of the Parades Commission contended that the fundamental rule in judicial review proceedings is that discovery of documents is neither made nor ordered as a matter of right and the court's jurisdiction is circumscribed by a series of well established tests and criteria. He referred to the decisions in *Re McGuigan's Application* [1994] NI 43, *Re Rooney* [1995] NI 398 and *Re Belfast Telegraph Newspapers Application* [2001] NICA 20.

[5] It was further argued that the onus rested on the application to demonstrate an inaccuracy or inadequacy in the respondent's affidavits and to establish such an inaccuracy or inadequacy by material other than that contained in the respondent's affidavit. Mr McCloskey argued that the affidavit evidence on which the interlocutory application was based manifestly failed to discharge the burden. In this case discovery was unnecessary. Referring to the Court of Appeal decision in *R v Home Secretary ex parte Harrison* he said that properly formulated objections to discovery could not be circumvented by the fortuitous circumstance that reference may be made to a document expressly or impliedly in an affidavit.

[6] Mr McCloskey argued that discovery should not in any event be ordered because to order disclosure would be injurious to the public interest. Confidentiality may be a very material consideration to bear in mind when privilege is claimed on account of public interest. It will be inappropriate for the court to pre-empt its determination of two of the central issues by making a disclosure order which would have the practical effect of rendering those issues mute. Interlocutory orders should be subordinate and ancillary to the main issue.

[7] Under section 4 of the Public Processions (Northern Ireland) Act 1998 the Parades Commission is required to issue procedural rules explaining how it will exercise its functions. Under para (1) of the Rules the Commission may hold formal evidence gathering sessions in order to hear views or clarify issues. Evidence is given on a voluntary basis and each session will be recorded. The method for recording evidence may vary and may include the use of tape recording equipment. Under Rule 3.3 all evidence provided to the Commission both oral and written will be treated as confidential and only for the use of the Commission, those employed by the Commission and authorised officers. The Commission, however, reserves the right to express unattributed general views heard in evidence but only as part of an explanation of its decision.

[8] There are issues as to whether para 3.3 of the Procedural Rules are invalid and or whether the application of the rule involves an unfair procedure for determination of the issue which the Parades Commission had to determine. Discovery of the relevant documents would not be necessary for the determination of that legal issue. Para 3.3, if read as subject to an overriding power of the court to direct disclosure of documents if disclosure is necessary in the interests of justice, would not in itself preclude an order or a disclosure if that is required in the interests of justice. The court would in that event have to determine whether it would be appropriate to direct discovery taking account of the fact that information in evidence was gathered on the basis that it would be treated as confidential. It would, in my view, require clear words to preclude the court from ordering disclosure of documents when hypothesi it considers that the interests of justice so require. Para 3(3) falls to be construed and applied in the context of rules made to explain how the court will exercise its statutory functions. It does not govern proceedings to challenge determinations in which a court is called on to review the legality of the way in which the Commission has exercised its functions, particularly where the court is required to take account of Convention rights. Accordingly, I conclude that there is nothing in para 3(3) which precludes an order for discovery, if otherwise appropriate. Insofar as the documents contain information obtained confidentially the protection of confidentiality may be achievable by limited redaction. Confidentiality, on its own, would not prevent an order for disclosure if the interests of justice are required and there is no public interest which requires that the documents should not be disclosed. In *Re Rooney* [1995] NI 398 at 413-414 Carswell LCJ (as he then was) set out a series of propositions applicable in relation to ordinary judicial review cases in the context of discovery. Applying traditional judicial review discovery principles the applicant in the present case may have failed in his application on the basis that there is no material to suggest that the evidence relied on by the respondent is inadequate. I leave aside for the moment the impact of order 24 r.11 under which in ordinary litigation the normal principle is that the court will direct disclosure of documents referred to in affidavits or pleadings (see below). In this case an

issue arises as to whether the impugned decision violates Convention rights and this depends on whether the limitations on the applicant's rights in question are proportionate. Proportionality involves a more rigorous standard of judicial scrutiny than that required in relation to the common law principle of irrationality (the Wednesbury principle). Lord Steyn in *R (Daly) v The Secretary of State* [2001] 3 All ER 433 said that:

> (a) Proportionality may require the review in court to assess the actual balance which the decision maker has reached, not merely whether it is within the range of rational or reasonably decision;
> (b) the proportionality doctrine may go further than the traditional grounds of review as it may require a tension to be directed to the relative weight accorded to the interests and considerations;
> (c) even the domestic heightened and scrutiny test developed in *R v Ministry of Defence ex parte Smith* [1996] QB 517 to deal with human rights cases cannot necessarily be approximated with the proportionality test employed by Strasbourg (see *Smith & Grady v United Kingdom* [1999] 29 EHRR 493.

Lord Steyn emphasised that proportionality did not mean a shift to merits review. The intensity of the review will depend on the subject matter in hand even in cases involving Convention rights.

[9] Mr Hanna QC in his well marshalled submissions referred to the interesting discussion on Blackstone's Guide to the Human Rights Act 1998 in relation to the procedural implications raised by the difference in the standard of review in cases involving a review of proportionality of decisions and legislative provisions on the one hand and a standard review involved in other traditional judicial review cases. As is pointed out in Blackstone at p82 the distinction between the new intense review in proportionality cases and a merits review is a fine one. If the courts defer to the views and acts of public authority so much that they fail to form their own assessment of the proportionality and hence the legality of their actions this has the capacity to undermine the purpose of the 1998 Act itself. If courts are overly active and attempt to replace the primary decision of bodies selected for their expertise they run the risk of making decisions which had been afforded to bodies accountable in other ways. Some have argued that the doctrine of proportionality imposes a duty on the court of assessing whether the infringement of a Convention right is proportionate and hence lawful and there is little or no discretionary area or judgment for the primary decision maker. Others argue that expert matters of judgment and balancing private and public interests are matters for the decision of the democratically elected

legislature or those exercising powers on its behalf on matters of public interest. Blackstone suggests that the two schools of thought are not necessarily irreconcilable. In *R (Williamson) v The Secretary of State for Education and Employment* [2001] EWHC admin. 960 Elias J considered that if there is a live issue of proportionality it would be for the relevant authority to put evidence before the court as to why it was felt justifiable to interfere with the relevant right and without such evidence it is impossible for the court to determine whether the decision was proportionate. In *DPP v Kebilene* [2000] 2 AC 326 Lord Hope confirmed that the margin of appreciation doctrine was not available to national courts but that in difficult cases involving the rights of individuals and society as a whole:

> "In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer on democratic grounds to the considered opinion of the elective body or person whose accurate decision is said to be incompatible with the Convention."

[10] In this case the court is called on to determine whether the Parades Commission's determination was in the circumstances proportionate. When an issue of proportionality arises the decision maker is called on to adduce the relevant evidence relied on by the decision maker in arriving at his decision to enable the court, in carrying out it's more intense review or scrutiny of the decision making by the relevant authority. In this case the Parades Commission have adduced evidence in the form of the affidavit of the Chairman which in paragraph 6 purports to refer to the documents which were clearly taken into account and given weight by the parades commission in its decision making. The affidavit gives a summary or a synopsis of the documents but the documents are not exhibited. In ordinary litigation when a party refers to documents in pleadings or in an affidavit the other party will normally be entitled to call for the production of those documents. As pointed out by Nourse LJ in *Rafidain Bank Limited v Agom Universal Sugar Trading Company* [1987] 3 All ER 859 at 862:

> "The party who refers to document does so by choice usually because they are either an essential part of his course of action or defence or of significant probative value to him."

Referring to the early equivalent rule to Order 24 r.11 in *Quilter v Heatley* [1883] 23 ChD 42 at 50 Linley LJ said:

> "These rules were evidently intended to give the opposite party the same advantage as if the

documents referred to have been fully set out in the pleadings."

[11] While the court retains a discretion even in relation to an application for disclosure of documents referred to in affidavits or pleadings, since a party has sought to incorporate reference to the documents in his pleadings or affidavits because they are essential and/or a probative value then the underlying basis for proper discovery is laid in ordinary cases. Whatever the position may be in judicial review cases where no Convention issue or issue of proportionality arises, in a case where proportionality is in issue I consider that disclosure of the full documents referred to in the affidavit should take place. If the anxious scrutiny by the court or the intense review (whichever term one uses) is to be properly carried out then the court should have had sight of the documents. If this were not so the decision maker's interpretation and synopsis of documents would bind the court and the court would at least in part have surrendered to the decision maker the question of determining weight and the relevance of material before the decision maker when reaching its decision. A decision maker acting in perfectly good faith may put a particular interpretation on documentary material which on a proper analysis turns out in law to be erroneous. It is only by seeing the documents that the court itself can carry out its function properly. It is clear from authorities such as *R (Wilkinson) v Broadmoor Hospital Authority)* [2002] 1 WLR 419 that in judicial review cases the traditional procedural approaches adopted in judicial review cases have to be adapted to deal with situations where Convention rights and issues of proportionality arise. Thus, in that case, the court was prepared to direct the attendance of medical witnesses to give evidence and be cross examined in a judicial review case involving decisions made in respect of enforced treatment of a mental patient.

[12] In the result I hold that the applicant is entitled to call for production of the documents referred to in paragraph (ii) to (vi) in the affidavit of the Chairman unless there is some public interest immunity ground for withholding all or part of the individual documents or some of them. Mr McCloskey indicated that there may be issues as to public interest immunity in respect of some or part of the document. If such a case is to be made out and argued I shall deal with that. It may be necessary for the court to consider the contents of the actual documents themselves. It may be that with a suitable redaction, as I have already indicated, any of these problems can be resolved. I shall hear counsel further on these issues.