Judicial Communications Office

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COURT DELIVERS REASONS FOR QUASHING LOUGHINISLAND SEARCH WARRANTS

Summary of Judgment

The Court of Appeal[1] today delivered its reasons for quashing the search warrant obtained by the PSNI in respect of the investigation by Durham Constabulary into the theft of documents from the Police Ombudsman relating to Loughinisland. It said the conduct of the hearing to obtain the warrant fell "woefully short" of the standard required to ensure that the hearing was fair.

Background

In January 2012, the families of the six men murdered by the UVF at the Heights Bar in Loughinisland approached Trevor Birney, the Chief Executive Officer of Fine Point Films, to examine the prospect of making a documentary about their experience. Barry McCaffrey, a journalist, began an investigation and Mr Birney approached Alex Gibney, a film producer, about the documentary. Production finance was secured in 2015 and Alex Gibney interviewed the then Police Ombudsman ("PONI"), Dr Michael Maguire, who was carrying out an investigation into Loughinisland at the time. Dr Maguire agreed that he would not talk about his ongoing investigation and the interview would not be broadcast until after he delivered his report, which was published in June 2016.

The investigation carried out by Mr McCaffrey established that in February 1995 an SDLP councillor had received a letter identifying persons allegedly responsible for the murders. The production team decided that they would name the suspects in the documentary as well as a fourth person who was a police informant. Mr McCaffrey indicated to a senior officer in the PSNI that the production team had concluded there was no risk to any of the three suspects as their names had been in the public domain since 1995 but that they would not name the informant. No action was taken by the PSNI to prevent the production team from naming the suspects.

Dr Maguire and some of his staff were shown the documentary at a private screening on 3 October 2017. One of the directors of PONI, Paul Holmes, identified that the production team had acquired sensitive documents relating to its investigation (an undated seven page executive summary and a 55 page investigation report dated 3 June 2008 market "Secret"). In the film Mr McCaffrey said he received the material from an anonymous source in 2011. Mr Holmes alerted the PSNI to the disclosure of the material in the documentary. The PSNI then commissioned a criminal investigation by Durham Police led by Peter Ellis, a retired Detective Superintendent, with the objective of establishing the means by which the film's production team had secured access to the material, whether by theft or other unauthorised disclosure.

The application for the search warrant

[1] The panel was the Lord Chief Justice, Lord Justice Treacy and Mrs Justice Keegan. The Lord Chief Justice delivered the judgment of the Court.

In his Policy Book, Mr Ellis was clear that the purpose of the searches was not only to recover stolen material but also to identify and recover evidence of contact or communication between individuals from the Office of the PONI and the production team and journalists. This was to identify possible suspects or corroborate evidence that may already exist. Mr Ellis also noted the balance to be struck in the pursuit of his investigation between public interest driven by freedom of speech and a pro-media community who are "free" to provide informative product around topics which can help hold to account state organisations.

On 8 August 2018, the PNSI and Durham Constabulary ("the respondents") provided a County Court judge ("the trial judge") with a set of papers to ground the application for the search warrant. The appendix to the warrant indicated that the articles sought included journalistic material consisting of all broadcast material together with unedited and un-broadcast footage relating to the documentary. The trial judge asked whether the respondents were seeking the two documents and whether "it's the actual stolen documents you seek". The trial judge then asked whether there was reasonable belief that persons were still in possession of the documents and the warrant was required in order to further the investigation into that. It was confirmed that that was the essence of the case.

Counsel for the respondents explained to the trial judge the reason for not proceeding by way of an *inter partes* hearing stating that Mr McCaffrey had previously been invited to cooperate with police regarding a similar case involving an excerpt of a draft report by the Criminal Justice Inspectorate and had declined to do so citing journalistic privilege. Counsel said that if they had gone for a production order rather than an *ex parte* search warrant opportunities within the police investigation would be lost as there was a risk that steps may be taken to frustrate securing the information. The trial judge was told that the two documents had never been distributed outside of PONI and one objective of the search was to help police to identify that contact within PONI as they would be guilty of serious offences. The public interest was asserted to be the benefit to the investigation from the retrieval of the information which would help protect life, prevent and deter crime and restore and maintain public confidence within law enforcement.

The trial judge said he was satisfied that it was proper and proportionate and necessary for him to grant the warrant. He suggested that Article 2 weighed heavily and that without access to the material the investigation could go no further.

Discussion

The Court of Appeal said it is a fundamental principle of any *ex parte* hearing that it also be a fair hearing. That is particularly the case where the object of the application is to significantly intrude into the private and family lives of those affected:

> "No matter how sensitively done the unannounced arrival of several police vehicles and 7 or 8 uniformed officers exercising the power to enter and search one's home while young children were wakening up preparing for school and guests were bemused to see their host being arrested constituted such an intrusion."

Courts have imposed a heavy onus on those seeking to pursue *ex parte* proceedings to take all reasonable steps to ensure that the proceedings are fair. Part of that obligation is that the applicant for the warrant should put on a defence hat and ask himself, what, if he were representing the defendant or a third party with a relevant interest, he would be saying to the trial judge. The

applicant must then proceed to tell the judge what those matters are. The Court said it was against that standard that it had reviewed the conduct of the application and hearing in this case.

The Court referred to the governing jurisprudence dealing with the right to freedom of expression of journalists under Article 10 of the ECHR and the associated protection for journalistic sources and press freedom in a democratic society. It said that although there was some acknowledgement of the importance of journalists in a democratic society in the course of the hearing, the trial judge was not advised that Article 10 ECHR rights were engaged, nor was he provided with any of the relevant jurisprudence nor was it made clear to him that a warrant such as the one being sought could only be justified by an overriding requirement in the public interest. The Court said this issue was absolutely fundamental to whether or not a warrant should be issued and the failure to address it meant that it could have no confidence that the trial judge applied the right test.

The Court noted that counsel for the respondents drew the trial judge's attention to the fact that there was an *inter partes* process for the obtaining of such information under paragraph 4 of Schedule 1 of the Police and Criminal Evidence (NI Order 1989 ("PACE"). He did not, however, discuss its terms and conditions in any detail. In particular he did not draw the trial judge's attention to the fact that once notice of an application for an order under paragraph 4 had been served on a person that person is prohibited from concealing, destroying, altering or disposing of the material to which the application relates except with the leave of the trial judge or the permission of a constable. Any failure to observe that requirement would constitute a contempt of court. The respondents' case in essence was that the service of a notice under paragraph 4 was not practicable or would seriously prejudice their case because any relevant material would be disposed of after service of the notice by the journalists. Counsel for the respondents, however, advanced no material in relation to Mr Birney or Fine Point Films upon which they relied as justification for that conclusion.

The Court said the justification appeared to rely solely upon the fact that Mr McCaffrey, a person of good character, had declined to voluntarily provide the Metropolitan Police Service with material about a source in an earlier investigation. It commented that Mr McCaffrey had, however, responded expeditiously to the request through his solicitors and indicated that he was relying upon the National Union of Journalists Code of Practice ("the Code") which places an obligation on journalists to protect their sources. The Court said that this action on the part of Mr McCaffrey was presented to the trial judge in support of the proposition that a journalist adhering to the Code was likely to commit contempt of court by destroying relevant material if notice of an application was served upon him. The Court rejected that submission and said that, if correct, it would completely undermine the important role that journalistic sources play in our democratic society.

One of the matters pressed upon the trial judge was the importance of Article 2 ECHR on the basis that publication gave rise to a risk to the life of those named. The Court said there was no evidence of an assessment having been carried out in relation to that risk. It noted the journalists had met with the PSNI in April 2017 and raised the issues in respect of risk in case there was anything of which they were unaware. The journalists were not asked by the PSNI to refrain from identifying the suspects and made the point that in any event this information had been in the public domain since the letter naming the suspects had been received by an SDLP councillor in February 1995. The journalists did, however, refrain from publishing the identity of an alleged informant. The Court noted that all of this was easily accessible by the respondents and if the matter had been investigated by them would have come to light: "None of it suggests that there was an Article 2 point of substance".

In order to satisfy the second set of access conditions under Schedule 1 of PACE the respondents had to demonstrate that but for the statutory prohibition in Article 11(2) of PACE a search for the material could have been authorised by the issue of a warrant under a statutory provision other than the Schedule and the issue of such a warrant would have been appropriate. In order to satisfy that test the respondents relied upon the Theft Act (Northern Ireland) 1969 ("the 1969 Act") and the Official Secrets Act 1989 ("the 1989 Act"). Section 25 of the 1969 Act provides that a warrant may be issued authorising a search of premises for stolen goods where there is reasonable cause to believe that any person has in his custody or possession or on his premises any stolen goods. The respondent's case was that there was reasonable cause to believe that the two documents were stolen. Any warrant which was issued could only relate to those paper documents. It could not possibly include the taking of electronic and other digital material. The Court said this should have been made absolutely clear to the trial judge and the failure to do so was inexplicable.

The second basis for satisfying the requirement in paragraph 3(b) of Schedule 1 of the second access conditions was section 5 of the 1989 Act. The Court noted that sections 1 to 3 of the 1989 Act deal with disclosures by persons broadly who have been lawfully provided with access to material and that disclosure of the material in the prescribed circumstances constitutes an offence. In the course of the hearing before the trial judge, however, reliance was placed upon section 5 of the 1989 Act which deals with disclosures of documents obtained by third parties from those subject to sections 1 to 3 of the Act. Section 5(2) provides that the person into whose possession the information, document or article has come is guilty of an offence if he discloses it without lawful authority knowing, or having reasonable cause to believe, that it is protected against disclosure. That provision is subject to section 5(3) which provides that in the case of information or a document or article protected against disclosure by the earlier sections a person does not commit an offence under subsection (2) unless the disclosure by him is damaging and he made it knowing or having reasonable cause to believe that it would be damaging.

The Court commented that the question as to whether a disclosure is damaging is determined for the purpose of the statute as it would be in relation to the earlier sections of the Act which deal with security and intelligence, defence and international relations. It said it was difficult to see any basis upon which the disclosure of this information in this case could have been damaging in respect of any of those sections:

> "The terms of this legislation were not opened to the trial judge. Certainly there was not a shred of evidence to suggest that the disclosure represented a danger to PONI. It seems unlikely that this condition was satisfied."

The Court also referred to the material obtained by the respondents as a result of the execution of the warrants. This consisted of email traffic in which there was discussion by Mr Birney and Mr McCaffrey about the risk of steps being taken by the police to try to establish the source of the leak. Unsurprisingly both of them were anxious to ensure that they should take all steps to try to protect the identity of the source including the deletion of material. The Court said there was nothing suspicious or inappropriate about this:

> "It is exactly what one would expect a careful, professional investigative journalist to do in anticipation of any attempt to identify a source. It does not lead to any inference that such a journalist would commit a contempt of court."

Conclusion

The Court concluded that the conduct of the hearing for the search warrant "fell woefully short of the standard required to ensure that the hearing was fair". That was sufficient for the Court's decision to quash the warrant. It said it wished to make it clear, however, that on the basis of the material that was provided to the Court it could see no overriding requirement in the public interest which could have justified an interference with the protection of journalistic sources in this case.

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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