

Judicial Communications Office

1 May 2019

COURT DELIVERS DECISION ON DISCLOSURE

Summary of Judgment

The Court of Appeal¹ today held that a District Judge (Magistrates' Courts) was not correct in deciding to refuse to hear an application made by the PPS asserting public interest immunity of a document and to find that the case should be stayed as an abuse of process.

Background

Shane Devine ("the respondent") is the owner and operator of a vehicle which operates out of the Republic of Ireland under the title "Devine's Chauffeur Services" ("DCS"). The Driver and Vehicle Agency ("DVA") was investigating an allegation that taxis which were not lawfully licensed were operating at the SSE Arena during a One Direction concert on 23 October 2015. The respondent was spoken to at the SSE Arena by two vehicle examiners from the DVA after he dropped off a passenger. He said his understanding was that the vehicle was booked as a continuous services which originated in the Republic of Ireland and had multiple pick up and drop offs within Northern Ireland. He confirmed he did not have a Northern Ireland PSV licence, a Taxi Operator's licence or a Taxi Driver's licence ("the tax documents"). He claimed to have all the necessary accreditation in the Republic of Ireland including a PSV driver's licence.

The respondent was subsequently summonsed in respect of two offences under the Taxis Act (Northern Ireland) 2008 and one offence under the Road Traffic (Northern Ireland) Order 1981. The PPS relied on the evidence of the vehicle examiners. Following the service of the summonses there was correspondence between the respondent's solicitors and the PPS seeking disclosure of documents including who made the complaint about him and all material which disclosed any information that may have been communicated by the DVA examiners at any time relevant to the case ("the defence statement").

On 13 February 2017, the respondent served an application under section 8 of the Criminal Procedure and Investigations Act 1996 ("the 1996 Act") (application by accused for disclosure) seeking disclosure of all the materials previously requested in the defence statement together with full details of any surveillance or monitoring of the respondent on 23 October 2015 or prior to this date, the authorisation permitting any surveillance and confirmation if any commercial or other relationship existed between the DVA and/or PPS and the person/organisation which initiated the complaint.

On 9 May 2017 the matter came before a District Judge (Magistrates' Courts) ("DJMC"). The respondent claimed that "department officials were essentially watching Mr Devine on the night in question following what they say was a complaint. No details of this complaint or details as to how department officials were lying in wait for him have ever been produced". During the hearing the DJMC asked the PPS counsel to provide him with materials in the prosecution possession which the respondent sought but which the Crown asserted did not meet the test for disclosure. The DJMC

¹ The Court of Appeal panel was Lord Justice Treacy and Mr Justice Horner. Mr Justice Horner delivered the judgment of the Court.

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ruled that the materials, together with items that were unused, fell to be disclosed but did not give any reasons for his decision. At that stage, no application was made pursuant to section 8(5) of the 1996 Act in respect of the sensitive material ordered by the DJMC to be disclosed. The unused material that was not deemed to be sensitive and an edited version of the sensitive material was disclosed to the respondent on 19 May 2017. The PPS contended that in the absence of any clear rationale from the DJMC as to the relevant nature of the material ordered to be disclosed, it was not clear whether the redacted form of the document would be sufficient.

On 6 June 2017, the respondent made an application pursuant to section 8(5) of the 1996 Act which, as required, identified an important public interest. The DJMC recused himself from hearing the application and the matter came before another DJMC ("the second DJMC"). The second DJMC felt the appropriate way forward was to bring a disclosure application pursuant to Article 158A of the Magistrates' Courts (Northern Ireland) Order 1981 ("the 1981 Order") and refused to hear a PPS application pursuant to section 8(5) of the 1996 Act as he regarded the PPS's application which was not pursued before the first DJMC as being "an abuse of process". The PPS stated that no application had been made pursuant to section 8(5) of the 1996 Act and in order to prevent a stay invited the court to consider such an application. On 13 December 2017, the second DJMC indicated that it had not been his intention to suggest he was minded to stay the proceedings and that there was no need to state a case for the Court of Appeal. The second DJMC, having considered the application pursuant to section 8(5) of the 1996 Act, refused to entertain a public interest immunity application ("PII application") and said it amounted to "harassment of the court". The second DJMC, taking into account the amount of time which had passed since commencement of the proceedings, ruled on 31 January 2018 that they should be stayed.

On 26 April 2018, the second DJMC stated the following questions for consideration by the Court of Appeal by way of case stated:

- Question 1: Whether, as a matter of law, the court was right to determine that the intelligence document containing information passed to the DVA relevant to the investigation of the respondent was capable of assisting the case for the respondent or undermining the case or the prosecution;
- Question 2: Whether, as a matter of law, the second DJMC was right in the circumstances in refusing to hear and grant the application made on behalf of the PPS to assert public interest immunity of the intelligence document containing information passed to the DVA; and
- Question 3: Whether, in all the circumstances as a matter of law, the court was correct to find that the case against the respondent should be stayed as an abuse of process.

Question 1

The Court of Appeal concluded that it was not necessary to reach any decision on this issue given its conclusions on Questions 2 and 3. It therefore declined to answer this question.

Question 2

The Court of Appeal said that in refusing to hear an application under section 8(5) of the 1996 Act, the second DJMC failed to make a distinction between an application under the 1996 Act and an application for disclosure. It noted that the PPS had resisted disclosure of various documents and categories of documents having considered the defence statement on the basis that they did not meet the test for disclosure pursuant to section 3(1) of the 1996 Act because "none of the materials sought

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might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused”.

The Court said the first DJMC had recused himself after he had made the disclosure order but without considering any PII application under section 8(5) of the 1996 Act. When the hearing came before the second DJMC he described the PPS as seeking “a second bite of the cherry”. It therefore fell to the second DJMC to deal with the application under section 8(5) which was very different to the one made before the first DJMC and one in which there had been no decision:

“There is no doubt that the [second DJMC] fell into error in regarding the application as a reopening of the preliminary point that had already been decided by [the first DJMC] because [the first DJMC] had never been asked to, nor never ruled upon the issue of PII. Further, there is legal authority for the proposition that a court should only become involved in PII applications after the prosecution has met its obligations to determine whether or not the material in dispute satisfies the disclosure test. There was no legal basis for the refusal of [the second DJMC] to hear the section 8(5) application.”

The Court said it may be that the PPS claim for PII in respect of the document relates to the source of the complaint made against the respondent. Accordingly, the second DJMC should have determined the section 8(5) application and in doing so considered, inter alia, whether the failure to disclose the identity of any informer or witness who had supplied information was necessary to avoid a miscarriage of justice. The Court said that on the facts known to it, it was difficult to see who the identity of the person who supplied the information about the respondent could lead to a miscarriage of justice:

“Either [the respondent] had the necessary tax documents (or exemptions) permitting him to drive a taxi in Northern Ireland or he did not. In the circumstances, we do not consider that the court was correct when it refused to hear the application made on behalf of the PPS under section 8(5) of the 1996 Act”.

Question 3

The Court of Appeal said it was clear that this prosecution has been listed many times before different DJMCs. The second DJMC had commented that the approach of the PPS was “harassing both the court and the respondent”. The Court said that cases which are prosecuted summarily should be heard as soon as reasonably possible and that there had undoubtedly been considerable delay in this case. The Court, however, was not persuaded by the evidence or submissions that the delay to date was such that it prejudices a fair trial or that it produces any genuine prejudice or unfairness to the respondent:

“The issue of whether or not [the respondent] had the tax documents (or necessary exemptions) is a straightforward one. Of course, the [DJMC] dealing with this case can take the delay into account in determining what is a fair penalty should [the respondent] be convicted of any of the offences of which he is charged.”

Conclusion

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The Court of Appeal did not reach any final conclusion on the first question. It answered the second and third questions in the negative.

ENDS

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