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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **13/12/2021**

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 APPLICATIONS BY AMANDA DUFFY, SHARON JORDAN AND DAMIEN McLAUGHLIN FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE POLICE SERVICE OF NORTHERN IRELAND AND BELFAST MAGISTRATES' COURT

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Mr Joseph O'Keefe (instructed by Phoenix Law Solicitors) for the applicant Amanda Duffy
Ms Laura King (instructed by Phoenix Law Solicitors) for the applicant Sharon Jordan
Mr Plunkett Nugent (instructed by Phoenix Law Solicitors) for the applicant Damien McLaughlin
Mr Michael McCartan (instructed by the PSNI Legal Services Branch) for the respondent

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COLTON J

Anonymity

The court has acceded to an application by two Police Service of Northern Ireland (PSNI) officers for anonymity and, following its promulgation in draft, has edited this judgment accordingly. There will be no publication of any kind of the officers' identity or anything which could give rise to their identity being ascertained.

Introduction

[1] The PSNI Terrorist Investigation Unit and the National Terrorism Financial Investigations Unit (NTFIU) at the Metropolitan Police Service ("MPS") had been conducting a joint investigation as part of an operation under the codename Op Arbacia. An element of the operation involves investigation into the finances of

terrorism in this jurisdiction and in England and Wales. It appears the investigation in respect of the finances went under the codename Op Chalcidic.

[2] As part of that investigation on 6 May 2021 the MPS applied for what are known as Account Freezing Orders ("AFOs") to Westminster Magistrates' Court in respect of a number of bank accounts. These included the following bank accounts in the name of the applicants:

(i) Amanda McCabe (Duffy)

(a) Ulster Bank account
(b) ISA Account
(c) Lurgan Credit Union Member's Account

(ii) Sharon Jordan

(a) Bank of Ireland Account
(b) Torrent Credit Union Member's Account

(iii) Damien McLaughlin

(a) First Trust Bank Account
(b) A further First Trust Bank Account
(c) Ardboe Credit Union Member's Account

[3] AFOs were granted in respect of each of the accounts by District Judge Ikram on 6 May 2021.

[4] On 17 May 2021 the MPS, via a para-legal, emailed Westminster Magistrates' Court to inform the court that legal advice had been received that the orders in respect of the above accounts should have been applied for in Northern Ireland. As a result the orders were set aside.

[5] On 19 May 2021, the PSNI applied to Belfast Magistrate's Court for AFOs in respect of each of the accounts set out above.

[6] On that date the District Judge granted the orders. The orders in respect of the Bank of Ireland, First Trust Bank and Ulster Bank were for a period of six months. The orders in respect of the Credit Union accounts were for three months.

[7] The applications were made on an ex parte basis and the applicants were therefore not represented in the proceedings before the Belfast Magistrates' Court.

[8] On 6 August 2021, the solicitor acting on behalf of the applicants received notification that the PSNI intended to apply for a variation of the AFOs in relation to the Credit Union accounts.

[9] The application for variation was listed for 17 September 2021.

[10] In the course of the variation hearing the applicants challenged the validity of the orders. The court will refer later in this judgment to what took place at the hearing, which is not in dispute.

[11] After hearing some evidence in relation to the applications and having received submissions from counsel the District Judge varied the AFOs in respect of the Credit Union accounts with the effect that they were extended until 19 November 2021 to align with the other accounts also the subject matter of the original orders.

[12] By these proceedings the applicants seek leave to apply for judicial review in respect of:

(i) The decision of the PSNI:

(a) to authorise applications for account freezing orders;

(b) to apply for account freezing orders in respect of the relevant accounts;

(c) to apply for an extension of the account freezing orders in respect of the Credit Union accounts.

(ii) The decision by the District Judge sitting at Belfast Magistrates' Court to:

(a) Grant account freezing orders in respect of the relevant accounts; and

(b) Grant an extension of the account freezing order in respect of the Credit Union accounts.

[13] These matters came before the court on an emergency basis because after the expiration of the orders on 19 November 2021 the PSNI intended to apply for forfeiture applications under the relevant legislation.

[14] At the hearing on 17 and 18 November the PSNI confirmed that the forfeiture process had been initiated. It was agreed that these applications would proceed by way of a "rolled-up" hearing. Furthermore, the PSNI gave an undertaking not to proceed with the forfeiture process pending the court's judgment and the parties agreed that in the meantime the AFOs would remain in place.

The statutory background

[15] The power to apply for freezing orders is contained in the Anti-Terrorism, Crime and Security Act 2001 ("the 2001 Act").

[16] In general terms the 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.

[17] For the purposes of these proceedings the relevant provisions are set out in paragraph 10 of Schedule 1 to the 2001 Act.

An application for an account freezing order

[18] The application to freeze the accounts of these applicants was brought pursuant to paragraph 10Q of Schedule 1 to the 2001 Act.

[19] It provides:

> "10Q(1) This paragraph applies if an enforcement officer has reasonable grounds for suspecting that money held in an account maintained with a bank or building society—
>
> (a) is within subsection (1)(a) or (b) of section 1, or
>
> (b) is property earmarked as terrorist property.
>
> (2) Where this paragraph applies the enforcement officer may apply to the relevant court for an account freezing order in relation to the account in which the money is held.
>
> (3) But—
>
> (a) an enforcement officer may not apply for an account freezing order unless the officer is a senior officer or is authorised to do so by a senior officer, and
>
> (b) the senior officer must consult the Treasury before making the application for the order or (as the case may be) authorising the application to be made, unless in the circumstances it is not reasonably practicable to do so."

[20] Paragraph 10Q(7) provides the definition of the officer designations referred to as follows:

"enforcement officer" means—

(a) a constable, or

(b) a counter-terrorism financial investigator;

"senior officer" means a police officer of at least the rank of superintendent.

Making of account freezing order

[21] A court can make an Account Freezing Order under paragraph 10S, Schedule 1 to the 2001 Act. It provides where relevant:

"***Making of account freezing order***

10S(1) This paragraph applies where an application for an account freezing order is made under paragraph 10Q in relation to an account.

(2) The relevant court may make the order if satisfied that there are reasonable grounds for suspecting that money held in the account (whether all or part of the credit balance of the account)—

(a) is within subsection (1)(a) or (b) of section 1, or

(b) is property earmarked as terrorist property.

(3) An account freezing order ceases to have effect at the end of the period specified in the order (which may be varied under paragraph 10T) unless it ceases to have effect at an earlier or later time …"

Variation or setting aside of account freezing order

[22] Paragraph 10T of Schedule 1 to the 2001 Act provides for the variation and setting aside of an account freezing order.

[23] It provides as follows:

"**Variation and setting aside of account freezing order**

10T(1) The relevant court may at any time vary or set aside an account freezing order on an application made by—

(a) an enforcement officer, or

(b) any person affected by the order.

…

(3) Before varying or setting aside an account freezing order the court must (as well as giving the parties to the proceedings an opportunity to be heard) give such an opportunity to any person who may be affected by its decision."

Code of Practice

[24] Also of relevance is the **Code of Practice for officers acting under Schedule 1 to the Anti-terrorism, Crime and Security Act 2001** (January 2018). The Code of Practice details the obligations of all officers involved in making an application for a freezing order.

[25] Paragraphs 5 and 6 of Schedule 14 to the Terrorism Act 2000 explains the effect of the Code, stating:

"5(1) An officer shall perform functions conferred on him by virtue of this Act or the terrorist property provisions in accordance with any relevant Code of Practice in operation under paragraph 6 …

(3) A Code –

(a) Shall be admissible in evidence in criminal and civil proceedings; and

(b) Shall be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant."

[26] The Code confirms the procedural requirements for the senior officer when an application for an account freezing order is made.

"**Applying for an Account Freezing Order**

30. As for paragraph 10Q(3)(b) of Schedule 1 to the Act, an enforcement officer who is a senior officer or authorised by a senior officer can make an application for an account freezing order. Prior to making this

application he/she must consult with the Treasury, unless in the circumstances it is not reasonably practicable to do so.

31. The senior officer should contact the Counter Terrorist Sanctions (CTS) Team in the Treasury's Office of Financial Sanctions Implementation (OFSI). The CTS Team can be contacted via the OFSI helpline or email address…This will assist the senior officer to consider whether an account freezing order is the most suitable order to pursue or whether another order (e.g. a designation order under the Terrorist Asset Freezing etc Act 2010) would be more appropriate. The senior officer will ensure that a record of this consultation is recorded."

The applications

[27] It is necessary to go into a little more detail about the factual circumstances in which the applications were (a) made and (b) granted. It will be recalled that the orders made by the Westminster Magistrates' Court were set aside on the application of the MPS on 17 May 2021. The application was made by email in the following terms:

"Dear Sir/Madam

I write in relation to several Account Freezing Orders, granted by Chief Magistrate Ikram on 06 May 2021.

Following this hearing, we have received legal advice that in fact these Orders should have been applied for under the jurisdiction in Northern Ireland. For this reason, we are seeking to have these Orders (attached to this email) set aside. Following this, our partners will reapply for the same…"

[28] On 18 May 2021 the MPS via a Detective Sergeant emailed HM Treasury in the following terms at 15:47:

"…
Further to our previous consultation with you can I please notify you in respect of the 19 AFOs, we are/have sought in respect of this matter, due to legal considerations, 12 are now being sought in NI by PSNI. The information relied on for the orders and the accounts to which the orders will apply remain the same as previously detailed to you.

> For your reference the applicant will be a [Detective Constable in the Police Service of Northern Ireland (PSNI), hereinafter described as the Detective Constable]. I have also cc'ed their line manager a [Detective Inspector in the Police Service of Northern Ireland (PSNI), hereinafter described as the Detective Inspector] and the concerned parties from the NTFIU. Find below a list of the orders to which this change will effect…"

[29] Three minutes later at 15:50 on 18 May 2021 the Detective Constable emailed a solicitor employed by the PSNI apparently informing them of the "change of application."

[30] It will be noted that the applications are said to be part of Operation Chalcidic.

[31] On the following day, 19 May 2021, the PSNI applied for account freezing orders under Schedule 1 to the 2001 Act in relation to the relevant accounts.

[32] The applications were brought by the Detective Constable (referred to above) who is a Detective Constable in the PSNI. The applications were considered and the Orders made by a District Judge under paragraph 10S of Schedule 1 to the 2001 Act on the same date.

[33] As set out above, on 17 September 2021 the District Judge dealt with the application brought by the PSNI in the name of the Detective Constable to vary the applications in respect of the Credit Union accounts.

[34] At the hearing counsel for one of the applicants cross-examined the Detective Constable in the course of which they confirmed that the senior officer for the PSNI application for the account freezing orders was Detective Superintendent Campbell. They confirmed that Detective Superintendent Campbell had authorised them to make the application. They were asked about the document confirming their "authorisation to apply for account freezing orders." The document set out the relevant accounts and confirmed that authorisation was provided by Detective Superintendent Campbell. The final paragraph of the authorisation document contained the following sentence:

> "I am satisfied that HM Treasury has been notified of this application by the Metropolitan Police Service."

[35] On the basis of this evidence submissions were made on behalf of the applicant that the applications had not been properly brought before the court as required by paragraph 10Q(3), in particular that the "Senior Officer" who authorised the application had not consulted with HM Treasury.

[36] Further submissions were made in relation to the Orders being unduly restrictive and disproportionate but this issue is not relevant for these applications.

[37] Having heard submissions the District Judge was referred to an email from a Superintendent in the MPS to HM Treasury. The applicant's counsel was informed that it reflected the fact that HM Treasury had been consulted by a senior officer of the MPS for the purpose of the Westminster Magistrates' Court applications. Due to the sensitive material said to be contained in the email it was not disclosed to the applicant nor was it examined by the District Judge.

[38] It was accepted by counsel for the applicants that HM Treasury appeared to have been consulted by a senior officer of the MPS prior to the applications to Westminster Magistrates' Court. It was contended that this did not remedy the failure to comply with the provisions of para 10Q(3) in the applications made to Belfast Magistrates' Court.

[39] Having considered the matter the District Judge determined that the consultation with HM Treasury by MPS was sufficient for the purpose of the 2001 Act in circumstances where there had been a joint MPS and PSNI application. The court then granted a variation extending the freezing orders in respect of the Credit Union accounts until 19 November 2021.

Preliminary issues

[40] Before examining the substance of the applicants' complaint there are a number of preliminary matters to be considered.

Delay

[41] The respondent contends that the application for judicial review is out of time.

[42] Order 53 Rule 4(1) provides:

> "4—(1) 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 within which the application shall be made."

When did the grounds for the application first arise in this case?

[43] Order 53 Rule 4(2) is relevant. It provides:

> "(2) Where the relief sought is an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding."

[44] Since what is being sought here is in effect an order quashing the applications and orders of 19 May 2021 the court concludes that the grounds for the applications for judicial review first arose on that date.

[45] Is there "good reason" for extending the period in which the applications for judicial review have been made?

[46] The applicants only became aware of the failure by the senior officer in the PSNI to consult with the MPS when they received the "authorisation document" along with the variation applications on 6 August 2021.

[47] In terms of any extension of time the court takes the view that this was the first date on which it would realistically have been open to the applicants to challenge the impugned decisions by way of judicial review. The applicants say that they acted reasonably by first of all agreeing to an extension of time with the respondent (for the purposes of obtaining legal aid) and that it was reasonable to seek to challenge the order in the course of the hearing on 17 September 2021. The applicants argue this was the appropriate course of action before issuing judicial review proceedings. A pre-action protocol letter was sent to the respondent on 21 September 2021 and these proceedings were issued on 13 October 2021.

[48] "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?

[49] There are a number of concerns I have about the delay in this case. The first relates to the fact that any challenge was confined to the Credit Union accounts. It seems from the affidavit evidence 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. It is also clear that neither the PSNI nor the court were given any notice of this issue and my sense is that either the PSNI was "ambushed" in relation to the point or alternatively the point only crystallised in the course of cross-examination of the Detective Constable. A related issue which I discuss further below is 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 is available to them under paragraph 10T.

[50] On balance the court has decided that there is good reason for extending the time beyond the three month period from the date upon which the grounds arose (which would be 19 August 2021). The matter was canvassed at the next available date in the District Judge's court and thereafter the matter was promptly brought before this court. The issue that arises has been crystallised as a result of the subsequent affidavit filed on behalf of the PSNI by the Detective Inspector. They have direct knowledge of the background to the application. Ultimately, the court does not consider that there is any prejudice to the proposed respondent or the good administration of justice by extending time so that this issue can be determined. The court understands that this is the first time this issue has been raised in the context of such applications, which is a factor that weighs with the court in extending time.

Alternative remedy

[51] The respondent contends that there is a more appropriate and effective alternative remedy available to the applicants.

[52] The respondent is justified in complaining about the way in which this issue was raised at the Magistrates' Court hearing on 17 September 2021. As a result the District Judge did not have the benefit of direct evidence on the point, in particular, from the relevant authorising officer.

[53] More importantly, the respondent points out that under paragraph 10T of Schedule 1 the applicants can still bring an application to set aside the freezing orders. Any argument that this could not be done beyond the expiry date of 19 November is no longer valid in view of the concessions made at the hearing that these orders would continue in place pending this judgment. In any event, it seems this is also the position having regard to para 10Z2(1), (6), (7)(b) and (8) of Schedule 1 to the 2001 Act.

[54] In the course of the hearing I pressed the applicants on this issue. On the face of it paragraph 10T provides the appropriate mechanism for a challenge to the orders. An application to the District Judge under this provision has the benefit of enabling the court to hear evidence on the points at issue. Thus, a combination of the statutory provision and the procedures to be adopted in the Magistrates' Court point to that as being both an alternative and effective remedy. As is the case with the issue of delay the determination of this issue is very much context driven. In terms of effectiveness the applicants point out that a declaration by the court that the applications and the orders were void ab initio is a much more effective remedy than a remedy under paragraph 10 setting aside the order. This could be particularly important in the context of whether or not evidence gathered in the course of the investigation is admissible in aligned criminal investigations. The applicants also argue that if such an application is brought and is unsuccessful then it is probable that the matter will return to the court by way of judicial review. Therefore in terms of costs and convenience it is better that the matter be determined by this 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

Has the first respondent failed to comply with his obligations under the 2001 Act?

[55] In the court's view the answer to this question is 'yes.' The wording could not be clearer. Para 10Q imposes an express obligation on the senior officer, who in this case was Detective Superintendent Campbell. 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.

[56] Mr McCartan argues that in fact the PSNI has complied with the statute on the basis that the requirement imposed by para 10Q(3) is qualified by the phrase "unless in the circumstances it is not reasonably practicable to do so."

[57] He submits that given the background and history to the matter the PSNI correctly considered that it was not "reasonably practicable" to consult with HM Treasury. This is on the basis of the previous consultation carried out by MPS in respect of the applications that were brought before Westminster Magistrates' Court. He relies on the affidavit of the Detective Inspector and, in particular, para [13] when they say:

> "13. In the circumstances of this case, as the officer with responsibility for the conduct of the PSNI applications made as part of this joint terrorist finance investigation, I am satisfied that HM Treasury had an opportunity to consult with a senior officer from NTFIU about the circumstances of all the applications made in this case. I am also satisfied that there was no material change in the circumstances of the applications, about which consultation with HM Treasury had taken place on 15 April 2021. I discussed this matter with D/Superintendent Campbell and was satisfied that the question of whether there was another more appropriate order had been adequately addressed and that further consultation was therefore unnecessary. PSNI then proceeded with the applications through the court on the basis that the authorising officer was satisfied prior to authorising the application that, given a senior officer had consulted with HM Treasury, a further consultation

> would be impracticable, in accordance with the requirement under para 10Q(3)(b) of Schedule 1 to the Anti-terrorism, Crime and Security Act 2001."

[58] In assessing this averment it is important to distinguish between an investigation and an application. The application which is the subject matter of this challenge was a separate application from that brought before Westminster Magistrates' Court and was therefore subject to the requirements of para 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 the Detective Inspector that such a consultation was "unnecessary." In the court's view practicality is a different matter from necessity.

What are the consequences of the failure to comply?

[59] It seems to the court that ultimately the real issue in this case is what are the consequences from the failure by the PSNI to comply with the obligation in question before making the application for the freezing orders? The applicants say that the matter is straightforward. The legislation is stated in mandatory terms. As per sub-para (3)(b):

> "A senior officer must consult the Treasury before making the application for the order or (as the case may be) authorising the application to be made, unless in the circumstances it is not reasonably practicable to do so."

[60] The applicants point out that the procedure in question has been laid down by primary legislation. They say therefore that such a procedure should be strictly enforced and given the breach in this case the applications should be treated as invalid from the outset. The applicants say that it is clear that the power to bring an application is qualified by the mandatory conditions set out in paragraph 10. Thus, it is submitted that the authorisation and the applications were therefore *ultra vires* and unlawful.

[61] A review of the jurisprudence on this issue suggests that in determining the consequences of a breach of a requirement the court must look not only to the words but to the object of the statute in which the requirement appears. As the House of Lords said in *R v Someji* [2005] UKHL 49, para 23:

> "The rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness."

[62] Professor Gordon Anthony puts it this way in his excellent text book "Judicial Review in Northern Ireland" at paragraph 7.18:

> "Where a decision maker fails to act in accordance with the statutory provision, the issue for the courts is whether the legislature intended that any corresponding decision should thereby be unlawful. This, in turn, reduces to an exercise in statutory interpretation in which 'the paramount objective is to ascertain the intention of the legislature in enacting the provision under consideration.' In seeking to identify that intention, the courts have said that 'it is necessary to have regard to the use of mandatory or directory language within the provision, to establish the purpose for the use of such language and to determine from the context of the provision and other aids to interpretation what consequence should flow from any breach. Depending on context, this may also lead the courts to ask whether a substantial compliance with a particular provision is sufficient or whether precise compliance is required given the overall legislative objective.'"

[63] *Halsbury's Law of England* (Volume 61A) paragraph 27 puts the matter in this way:

> "In determining the consequences of breach of a requirement, the court must look to the words and objectives of the statutes in which the requirement appears, the purpose of the requirement and its relationship with the scheme, the degree and seriousness of the non-compliance, and its actual or possible effect on the parties. The court must attempt to assess the importance attached to the requirement by Parliament.
>
> If, in the opinion of the court, a procedural code laid down by a statute is intended to be exhaustive and strictly enforced its provisions will be regarded as invalidating an action taken in breach, but even a mandatory procedural requirement may be held to be susceptible of waiver by a person having an interest in securing strict compliance. Courts have asked whether the statutory requirement can be fulfilled by substantial compliance and, if so, whether on the facts there has been substantial compliance even if not strict compliance. Under some statutes non-compliance with procedural requirements accompanying the exercise of a statutory

> power directly affecting individual rights is expressly declared to have no vitiating effect unless a person aggrieved is substantially prejudiced thereby."

[64] The approach referred to in Professor Anthony's text is to be found in the judgments of the courts in this jurisdiction in cases such as *Re ED's (By his father and next friend DD) Application for Judicial Review* [2003] NI 312 and *Re McCready's Application* [2006] NIQB 60.

[65] The court is also mindful that the legislation provides sweeping and arguably draconian powers to the authorities and the court 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 European Convention on Human Rights.

[66] Turning to the context of the challenge in these proceedings the statutory language favours the applicants.

[67] The legislation itself does not provide for any consequences of a failure to consult. This contrasts with the words set out in para 10Q(3)(a) which provides that an officer "may not apply" for an account freezing order unless the officer is a senior officer and is authorised to do so by a senior officer.

[68] Turning to the "paramount objective" the intention of the legislature in imposing the obligation is clear. The purpose of the consultation is to enable the Treasury to consider whether an alternative to an AFO application is appropriate and, in particular, whether it should be exercising its powers under the Terrorist Asset-Freezing Act 2010.

[69] This is 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 referred to above and, in particular, paragraph 31. The obligation does 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.

[70] In terms of the degree and seriousness of the non-compliance in this case 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 – see para [28] above. Obviously, the case would be very different if no such previous consultation had taken place.

[71] In terms of the actual or possible effect on the parties the court cannot 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.

[72] 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.

[73] Returning to the case of Re ED (referred to above) the court held that:

> "Whilst the word 'shall' was prima facie mandatory, but might often be construed as merely directly, depending on the context in which it appeared. Moreover, a statutory provision which required a public authority, such as the Education Board, to perform a particular function might have mandatory and directory aspects; the same condition might be both mandatory and directory, mandatory as to substantial compliance, but directory as to the precise compliance."

[74] In the court's view this is exactly the position here. The court accepts that there has not been precise compliance with the requirement of para 10Q(3)(b). However, it concludes that there has been substantial compliance, sufficient to establish the lawfulness of the authorisation, the applications and the subsequent orders of the court.

[75] This judgment is not to be taken to say that an absence of consultation in the circumstances of authorising and applying for an AFO will 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

[76] The court grants leave in respect of each of the applications as the threshold was clearly met.

[77] However, for the reasons set out, the applications for judicial review are all dismissed.