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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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

Mr John Larkin QC and Mr Joseph O'Keefe (instructed by Phoenix Law Solicitors) for Amanda Duffy
Mr John Larkin QC and Ms Laura King (instructed by Phoenix Law Solicitors) for Sharon Jordan
Mr John Larkin QC and Mr Plunkett Nugent (instructed by Phoenix Law Solicitors) for Damien McLaughlin
Mr Mark Robinson QC and Mr Michael McCartan (instructed by the PSNI Legal Services Branch) for Police Service of Northern Ireland

Glossary

BMC:	Belfast Magistrates' Court
HMT:	HM Treasury
LMP:	London Metropolitan Police Service
Police Service:	Police Service of Northern Ireland
WMC:	Westminster Magistrates' Court.

Before: McCloskey LJ, Maguire LJ and Horner J

<u>McCLOSKEY LJ</u> (*delivering the judgment of the court*)

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] Amanda Duffy, Sharon Jordan and Damien McLaughlin ("the appellants") appeal to this court against the judgment and order of Colton J whereby, following a so-called "rolled up" hearing, leave to apply for judicial review was granted and the substantive applications were dismissed. It is convenient to highlight at the outset that there were five public authorities involved in the matrix giving rise to these proceedings. These are, respectively, HM Treasury ("HMT"), the London Metropolitan Police Service ("LMP"), Westminster Magistrates' Court ("WMC"), the Police Service of Northern Ireland (the "Police Service") and Belfast Magistrates' Court ("BMC").

[2] The central target of the appellants' challenge has at all times been the Police Service. Only this agency was represented at first instance and continues to be represented.

The judicial review challenges

[3] The relevant chain of events began with an application by LMP to WMC for orders freezing certain credit union and bank accounts held by the appellants. On 6 May 2021 WMC acceded to these applications. Some two weeks later LMP conveyed to WMC that the orders had been made without jurisdiction, in consequence whereof they were set aside by that court. Next on 19 May 2021 the Police Service applied ex parte to BMC for comparable orders. BMC made the orders sought on the same date. By a further order dated 17 September 2021 an extension of the operative period was ordered by BMC.

[4] These judicial review proceedings were initiated on 11 October 2021. The target of the appellants' challenges was framed, in each case, in these terms:

> "Decisions of (i) the Police Service of Northern Ireland made on 19 May 2021 and 17 September 2021 and (ii) Belfast Magistrates' Court made on 19 May 2021 and 17 September 2021."

The orders made by BMC on the two dates in question related to specified First Trust Bank and Credit Union accounts. The effect of the orders was to freeze these accounts. As of today they remain frozen.

[5] The impetus for the Police Service applications and the ensuing orders of BMC was a joint Police Service/LMP investigation into terrorist finances. In consequence of the impugned orders of BMC altogether eight accounts remain frozen. Colton J, commendably, processed the first instance hearings and his resulting judgment with considerable expedition. He did so having been informed that it was the intention of the Police Service to apply for orders forfeiting the monies in the several accounts concerned. The Police Service undertook not to proceed with the forfeiture applications. This court has been informed that this undertaking continues.

Statutory framework

[6] Under the Anti-Terrorism, Crime and Security Act 2001 (the "2001 Act") an elaborate regime has been devised with the overarching purpose of depriving those engaged in terrorism of assets. The specific provisions in play in the present case are contained in paragraph 10Q and paragraph 10S of Schedule 1 to the 2001 Act. Paragraph 10Q 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."

Paragraph 10Q(7) defines the officer designations:

> ""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."

[7] The powers exercisable by the court to which the foregoing application is made are specified in paragraph 10S, Schedule 1 to the 2001 Act:

"**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 …"

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

"**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."

[9] Provision is made for a code of practice by paragraph 6(1) of Schedule 14 to the Terrorist Act 2000. We elaborate on this in para [54] ff. The Code of Practice ("COP") regulates, inter alia, the making of applications for freezing orders. The interplay between the statute and the COP is illuminated by, amongst other provisions, paragraph 5 of Schedule 14:

> "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."

Next it is necessary to consider paragraphs 30 and 31 of Schedule 14:

> **"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 impugned orders

[10] In common with the judge, at this juncture we turn to consider the impugned orders of BMC. It is trite that the orders must be considered in conjunction with the

Police Service applications which stimulated them. We gratefully borrow from the judgment of Colton J what is set forth in the ensuing paras [11]–[13].

[11] On 18 May 2021 the LMP via a Detective Sergeant emailed HMT in the following terms:

> "…
> 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 [Detective Constable in the Police Service of Northern Ireland (PSNI), hereinafter described as the Detective Constable] cc'ed. I have also cc'ed their line manager [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. …"
>
> 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." 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. The applications were brought by the [Detective Constable], (see above). The impugned orders of BMC resulted, on the same date."

[12] On 17 September 2021 BMC 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. At the hearing counsel for one of the appellants cross-examined the Detective Constable in the course of which they confirmed that the senior officer for the Police Service 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 the "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.

> 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."

[13] Having heard submissions the District Judge was referred to an email from a LMP superintendent to HMT. The appellants' counsel were informed that it reflected the fact that HM Treasury had been consulted by a senior officer of the LMP for the purpose of the WMC applications. Due to the sensitive material said to be contained in the email it was withheld from the appellants and BMC. It was accepted by counsel for the appellants that HMT appeared to have been consulted by a senior officer of LMP prior to the applications to WMC. It was contended that this did not remedy the failure to comply with the provisions of para 10Q(3) in the applications made to BMC. Having considered the matter the District Judge determined that the consultation with HMT by LMP was sufficient for the purpose of the 2001 Act in circumstances where there had been a joint LMP and Police Service application. The court then granted a variation extending the freezing orders in respect of the Credit Union accounts until 19 November 2021.

Judgment of Colton J

[14] The judge first addressed the issues of (a) delay under Order 53, rule 4 of the Rules of the Court of Judicature and (b) alternative remedy. He determined each in favour of the appellants. There is no respondent's notice before this court.

[15] The central issue to be formulated by the judge is found in para [55] ff of his judgment. The judge made the following findings. First, in contravention of paragraph 10Q(3)(b) of Schedule 1 to the 2001 Act, the Police Service senior officer, Detective Superintendent Campbell (see para [12] above), in authorising the application to BMC, had failed to consult HMT. Second, the consultation in which LMP had engaged with HMT prior to making the misconceived applications to WMC had not discharged the Police Service duty under paragraph 10Q(3)(b). Third, there was no basis for holding that the dispensing clause – "…unless in the circumstances it is not reasonably practicable to do so…" – was engaged. Fourth, the requisite consultation had not been undertaken because of the Detective Superintendent's assessment that it was "unnecessary" (per his affidavit).

[16] Colton J then addressed the consequences of the consultation failure diagnosed by him. The answer to this question, he reasoned, required the court to identify the intention of the legislature. Specifically, what were the consequences which the legislature intended to follow upon the breach of the statutory consultation requirement? He considered the paramount objective of this requirement to be that of consideration by HMT of whether an alternative to the contemplated freezing order application should be pursued – specifically, whether its powers under the Terrorist

Asset Freezing Act 2010 should be exercised instead. The judge then adverted to two particular factors, namely (a) the LMP/HMT consultation which had taken place and (b) the absence of any "real prejudice" flowing from the consultation failure. Next he highlighted that the consultation failure had had no adverse impact on the substance of the applications to BMC, the satisfaction of the statutory conditions for making the orders pursued or the ensuing impugned orders themselves.

[17] At para [74], Colton J made the following key conclusion:

> "The court…concludes that there has been substantial compliance, sufficient to establish the lawfulness of the authorisation, the applications and the subsequent orders of the court."

The judge was careful to confine his conclusion to the fact specific matrix of the applications under scrutiny. This is clear from several passages in his judgment, particularly para [75].

Evidential matrix

[18] Given the nature of the appellants' challenges and the statutory provisions in play there is, inevitably, a sharp focus on the evidence adduced by the Police Service. This consists of a single affidavit, without exhibits, sworn by a Detective Inspector describing himself as the deputy senior investigating officer in the terrorist investigation concerned. The purpose of his affidavit is expressed in para 3:

> "I swear this affidavit to outline the procedure adopted by PSNI in applying for the account freezing orders which are the subject of this judicial review challenge. I do so based on my own knowledge, except where I expressly state otherwise."

The detective inspector avers that they and another officer, the Detective Constable (see para 12 above), briefed DS Campbell for the purpose of procuring his authorisation of the applications to BMC.

[19] This briefing included inter alia "…the consultation procedure which had taken place with HM Treasury about the facts of the applications in this case…" As the ensuing averments make clear, this is a reference to the LMP/HMT consultation preceding the applications to WMC on 6 May 2021. The deponent describes the fact, but not the content, of this consultation. The Detective Superintendent, in signing the requisite authorisations, was persuaded by the fact of this consultation. The Detective Inspector considered Police Service/HMT consultation "unnecessary." DS Campbell, by implication, adopted this assessment.

[20] The Detective Inspector also makes certain averments about the variation hearing conducted at BMC on 17 September 2021. Observing that there was no application to the court to set aside the freezing orders under paragraph 10T of Schedule 1 to the 2001 Act, they aver:

> "Had PSNI been placed on notice of [such an application] …a suitable witness, who could speak authoritatively about the consultation procedure that was adopted in this case and the reasons for authorising the application would have been made available to allow the matter to be comprehensively addressed."

The author, notably, is not identified as the "suitable witness." Nor do they provide any hint of the employment, rank or identity of this person.

New evidence?

[21] We draw attention to the foregoing for the following reason. Before this court there is an application to admit a further affidavit sworn by the same Detective Inspector. It is suggested that in the course of oral argument on behalf of the appellants at first instance an issue arose concerning the Police Service/HMT consultation. Colton J observed that this was not one of the specified grounds of challenge in the Order 53 pleading. In response counsel canvassed the possibility of a drafting error. The possibility of a further affidavit from the Detective Inspector was ventilated. This did not materialise and the issue evidently vanished without more.

[22] In this court the single skeleton argument on behalf of the appellants contains inter alia an <u>assertion</u> that none of the three Police Service protagonists noted above consulted with HMT at any stage. Arising out of the foregoing an application to receive a further affidavit of the Police Service Detective Inspector is made to this court.

[23] In its interlocutory ruling promulgated one week in advance of the hearing the court determined that it would consider the affidavit on a provisional, de bene esse basis, deferring its final ruling on reception until completion of the hearing.

[24] In this further affidavit the Detective Inspector expands their extant affidavit in this way. They aver that on 28 April 2021 they and a named Detective Chief Inspector (presumably of the Police Service – though unspecified) participated in a remote hearing also attended by certain HMT and LMP representatives as "… a continuation of the consultation process which had been commenced by [a LMP Detective Superintendent] on 15 April 2021." They continue:

> "The purpose of the meeting was to further discuss operational options arising from the last consultation meeting on 15 April 2021 …

> The purpose of the meeting was achieved. It was agreed from a PSNI perspective that, following this consultation process, no further meetings would be required in regard to these [freezing order] operations. PSNI were clear that the applications which had been discussed could not be vetoed by HM Treasury."

In his final averments the detective inspector suggests that what they describe in this further affidavit was included in their briefing of Detective Superintendent Campbell.

[25] The ruling of this court on whether to receive this further affidavit has the following components. First, at first instance the Police Service owed a duty of candour to the High Court. This required disclosure in its affidavit evidence of all facts having the potential to bear on the court's consideration and determination of the combined legal challenges. The appellants' challenges were directed to both the applications made by the Police Service to BMC and the ensuing BMC orders. One of the grounds of challenge was formulated in the following terms:

> "The [Police Service] has acted unlawfully by making applications…without the…senior officer…who authorised the applications having consulted HM Treasury, contrary to paragraph 10Q(3)…"

Having regard to paragraph 10Q(3)(b) of Schedule 1 to the 2001 Act, we consider that the additional facts now brought to the attention of this court for the first time were of unmistakable materiality from the outset of the proceedings.

[26] The second component of our ruling is the following. This court is unimpressed by the language "consultation process", repeated and "consultation meeting" in the Detective Inspector's further affidavit. These terms have a distinct flavour of the self-serving seasoned with sworn argument. Third, the statutory obligation to consult HMT prior to applying for the impugned orders rested on the <u>senior officer</u>, as Colton J emphasised, in this instance DS Campbell. The further affidavit of the Detective Inspector does not speak to this issue. We consider this affidavit incapable evidentially of establishing, in whole or in part, compliance with this statutory requirement.

[27] For the reasons given, this court declines to admit the further affidavit of the Detective Inspector. Our resolution of this appeal will therefore be undertaken on the basis of the evidential matrix extant at first instance.

Governing principles

[28] The court will address infra Mr Larkin's argument that within the statutory text under scrutiny, the consequences of a failure of the relevant senior police officer to consult HMT before applying for an account freezing order or, as the case may be,

before authorising the application to be made, are specified. Subject thereto, the phenomenon which the court must confront and resolve is the familiar one of a statute commanding in imperative form that something be done without expressly prescribing the consequences of non-compliance.

[29] Self-evidently it is necessary to construe paragraph 10Q (3) of Schedule 1 to the 2001 Act. Authoritative guidance on the judicial exercise which this requires is not lacking. Doctrinally, the kind of statutory requirement which one finds in paragraph 10Q(3)(b) of Schedule 1 to the 2001 Act was formerly viewed through the prism of *mandatory or directory*? This is illustrated in decisions such as *Re ED's Application* [2003] NI 312. However, this is no longer the prevailing approach.

[30] First there is the decision of the House of Lords in *Wang v IRC* [1994] 1WLR 1286. There Lord Slynn, delivering the unanimous decision of the House, formulated the following approach at 1294:

> "The distinction between "mandatory" and "directory" or between "imperative" and "mandatory" the latter in that context being the same as "directory" has a long history and has led to much litigation and on occasion to somewhat refined distinctions."

Following consideration of the relevant case law, his Lordship formulated the following approach, at 1296:

> "Having reviewed the authorities cited by the taxpayer in this appeal, not all of which are referred to in this opinion, their Lordships consider that when a question like the present one arises — an alleged failure to comply with a time provision — it is simpler and better to avoid these two words "mandatory" and "directory" and to ask two questions. The first is whether the legislature intended the person making the determination to comply with the time provision, whether a fixed time or a reasonable time. Secondly, if so, did the legislature intend that a failure to comply with such a time provision would deprive the decision maker of jurisdiction and render any decision which he purported to make null and void?"

[31] This is precisely the situation which arose in *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32. There the statutory provisions in play were section 16(1) and (8) and section 32E of the Northern Ireland Act 1998. In accordance with these provisions the Northern Ireland Assembly was required to elect persons to the offices of First Minister and Deputy First Minister within six weeks of the vacancies arising, while the Secretary of State was required to propose a date for a new Assembly election in the event of the six week period elapsing without the vacancies having been

filled. These provisions did not spell out in detail all of the consequences to flow from the latter situation. Nor did they require the Secretary of State to act within a specified period. The issue which arose was the legality of the election to the two offices two days following expiry of the six week statutory period. By a majority the House held that these posts had been lawfully filled. As appears particularly from para [13]ff of the opinion of Lord Bingham of Cornhill, the resolution of the issue was undertaken by applying the test of the consequences which the legislature had <u>by implication</u> intended to follow from non-election within the six week period. Notably the exercise undertaken entailed consideration of the key provisions in their full statutory context, to include the Belfast Agreement.

[32] The central tenets of the exercise carried out are particularly clear in para [30] of the opinion of Lord Hoffmann, rejecting the narrower construction advanced by the appellants:

> "In my opinion the rigidity of the first alternative is contrary to the Agreement's most fundamental purpose, namely to create the most favourable constitutional environment for cross-community government. This must have been foreseen as requiring the flexibility which could allow scope for political judgement in dealing with the dead locks and crises which were bound to occur."

In thus deciding, the House cited with approval the approach espoused in *Wang.*

[33] The doctrinal approach emerging so clearly from *Wang* and *Robinson* resurfaced soon afterwards in what has come to be recognised as the leading authority on this subject, *R v Soneji* [2006] 1 AC 340. There the issue was whether confiscation orders made some three months following expiry of the maximum period permitted by the statute for postponement of such orders (six months) were nonetheless lawful. In substance, their Lordships decided unanimously that the fundamental failure of the trial judge had been to neglect making a postponement order having first satisfied himself, by making appropriate findings, that the exceptional circumstances dispensation whereby the statutory maximum period (of six months) could be extended was fulfilled.

[34] There are five opinions of the five judge Judicial Committee. That which is cited with most frequency and has received most attention throughout these proceedings is the opinion of Lord Steyn. As the judgment of Lord Steyn, with whom the other members of the House agreed, highlights at paras [13] and [14] in every instance where a statutory requirement is formulated in imperative terms without specification of the consequences to follow from non-compliance it is the task of the court first to identify with precision the nature of the non-compliance and, second, to ascertain the unexpressed parliamentary intention concerning the consequences to follow. We consider it of some importance to draw attention to para [13]:

> "There is an initial difficulty. Before one can consider the legal consequences of failures under [the relevant statutory provision] it is necessary to identify those failures."

As Lord Steyn noted in para [14]:

> "A recurrent theme in the drafting of statutes is that parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply."

At para [15], Lord Steyn adverted to the:

> "…more flexible approach of focusing intensely on the consequences of non-compliance and posing the question, taking into account those consequences, whether parliament intended the outcome to be total invalidity."

[35] As appears from para [15] of his opinion, Lord Steyn formulated the governing test in simple terms: did parliament intend that the consequences of the non-compliance with the statutory requirement in play should be "total invalidity"? The mandatory/directory enquiry received its quietus in unequivocal terms, at para [23]:

> "…the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead,…the emphasis ought to be on the consequences of non-compliance and posing the question of whether parliament can fairly be taken to have intended total invalidity."

Notably at para [24], Lord Steyn considered that any prejudice to the two accused persons resulting from the non-compliance in question, which was a failure to observe a statutory time limit, was:

> "…decisively outweighed by the countervailing public interest in not allowing a convicted offender to escape confiscation for what were no more than bona fide errors in the judicial process."

The "total invalidity" case was rejected unanimously by the House.

[36] Three of the other four members of the committee – Lords Rodger, Carswell and Brown – agreed unequivocally with Lord Steyn. Furthermore Lord Steyn referred approvingly to the further reasons given by Lords Rodger and Brown. The fifth member of the committee, Lord Cullen, did not expressly agree with any of the others.

Before this court there was some debate about certain passages in the opinion of Lord Carswell. In our view there is no issue of substance in this respect for the following reasons.

[37] At para [60] Lord Carswell expressed himself to be "in full agreement" with the reasoning and conclusions of Lord Steyn. At para [63] he expressly acknowledged the shortcomings in the mandatory/directory dichotomy, describing "the modern case law cited by Lord Steyn" as a "salutary reminder of the correct approach." Next Lord Carswell observed that this dichotomy nonetheless continued to have "…some value…particularly [relating to] substantial performance." In the passages which follow and, in particular, in paras [67]–[68], Lord Carswell makes explicit reference to the intention of the legislature. Furthermore, he undertakes the exercise of measuring, or evaluating, the extent and gravity of the non-compliance in play. In para [68] he describes this as "small." We consider that Lord Carswell's approach is consonant with that of Lord Steyn. In short, in the exercise of determining objectively the intention to be imputed to parliament and measuring the nature, gravity and extent of the failing on the part of the public authority concerned must be reckoned as it is a legitimate consideration to take into account. This, in our view, follows logically from Lord Steyn's starting point - in para [13] – namely the need to identify with precision the acts and/or omissions constituting the non-compliance under scrutiny.

[38] In our judgement, the following proposition is readily distilled from *Soneji*. In any case where there has been a failure to comply with a statutory requirement in a given process, the court, in the exercise of identifying the intention to be imputed to parliament regarding the consequences of the non-compliance in question, should normally consider and evaluate the nature, gravity and extent of the relevant act and/or omission. The court will consider it more likely that parliament intended total invalidity to be visited upon acts and/or omissions of non-compliance which may properly be considered egregious in nature, deliberate, actuated by impermissible motives or considerations or incompatible with the fundamental rights of affected persons. This, we would emphasise, is not designed to constitute an exhaustive list. While the "substantial compliance" label may no longer be in vogue, we consider that the relevant passages in the opinion of Lord Carswell are to be viewed through the immediately preceding prism.

[39] It follows that we agree with the approach of Burnett J in *North Somerset District Council v Honda Motor Europe* [2010] EWHC 1505 (QB) at paras [43]–[44] and the endorsement which this received in the English Court of Appeal in *Secretary of State for the Home Department v SM (Rwanda)* [2018] EWCA Civ 2770 at paras [50]–[52]. Certain other reported decisions have featured in these proceedings both at first instance and on appeal. These include *Re ED's Application* [2003] NI 312, *Re McCready's Application* [2006] NIQB 60 and *McGrath v Camden London Borough Council* [2020] EWHC 369 (Admin). We would observe that these are all first instance decisions which do not illuminate the correct determination of this appeal. The citation of first instance decisions which in one way or another bear on the application of the *Soneji*

principles will rarely be appropriate. This observation is applicable to most litigation contexts.

[40] We further consider that the law is correctly stated by Professor Gordon Anthony in Judicial Review in Northern Ireland at para 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.'"

To like effect is *Halsbury's Law of England* (Volume 61A) paragraph 27:

> "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."

Our conclusions

[41] Our first conclusion replicates that of Colton J. The judge concluded, in unambiguous terms, that there had been non-compliance with paragraph 10Q(3)(b) of Schedule 1 to the 2001 Act as the Police Service senior officer concerned had failed to consult HMT prior to authorising the applications to BMC giving rise to the impugned orders. While the contrary was argued before this court, we consider the conclusion of Colton J unassailable.

[42] Our second conclusion also entails unqualified approval of what the trial judge decided. In short, the suggestion that, in the statutory language, it was not "reasonably practicable" for the Police Service senior officer to consult with HMT is manifestly unsustainable. To conclude otherwise would require an evidential foundation which is fundamentally lacking. Furthermore, to conclude otherwise would fly in the face of the unequivocal averment on behalf of the Police Service that the police superintendent concerned did not consult with HMT because he considered it "*unnecessary*" to do so. We would add that the procedural mechanism necessary to challenge the foregoing conclusions of the judge, namely a respondent's notice under Order 59, rule 6 of the Rules of the Court of Judicature, has not been observed.

[43] Next, as foreshadowed above, we turn to what is, logically, the primary submission on behalf of the appellants, namely the contention that the *Soneji* test has no application because the consequences of the non-compliance in play are specified in the legislation. The essence of this argument is that in cases where the senior police officer concerned has failed to consult HMT the consequence is that an application to the court for a freezing order is precluded. Paragraph 10Q(3) is reproduced in para [6] above. We reject this argument as we consider that it rests on a construction of paragraph 10Q(3) which the statutory language does not bear. In summary:

(i) Paragraph 10Q(2) confers a superficially untrammelled power to apply to the court for an account freezing order.

(ii) However, an express qualification, namely the requirement of a senior officer's authorisation to do so, follows in subparagraph (3)(a).

(iii) The qualification in subparagraph (3)(b) obliges the senior officer to consult with HMT.

(iv) However, the "may not apply" qualification is confined to the first of the aforementioned requirements and does not encompass the second.

Irrespective of whether this is to be viewed through the prism of the familiar expressio unius est exclusio alterius principle or otherwise, we consider this to be a straightforward exercise in statutory construction.

[44] It follows that this is a paradigm "*unexpressed consequence*" case in which the *Soneji* principles must be applied.

[45] We consider that the first question for the court in this exercise must be: what are the particulars and substance of the non-observance by the Police Service of the requirement to consult with HMT specified in paragraph 10Q(3)(b) of Schedule 1 to the 2001 Act in this particular case? The simple answer is that the senior police officer did not undertake the requisite consultation at all. However, we consider that this cannot be the end of the court's enquiry given that our duty to identify the unexpressed parliamentary intention concerning the consequences to flow from this failure must entail consideration of all material circumstances. This in our view requires an intensely fact sensitive exercise. In this exercise the court must identify all facts and considerations legitimately bearing on the quest to ascertain the unexpressed parliamentary intention.

[46] In conducting this exercise we are guided by our analysis of the governing legal principles in paras [27]–[38] above. It is necessary to address one further discrete question of law, namely the legal meaning and import of the requirement to "consult" specified in paragraph 10Q (3)(b) of Schedule 1 to the 2001 Act. We consider that this must take its colour and thrust from the statutory context in which it is embedded. From this it must follow that judicial elaboration of the legal requirements of consultation must be calibrated accordingly. To fail to do so engenders the risks of distortion, misconstruction and the misapplication of precedent.

[47] Resort to the "why" question provides a useful tool of analysis. Why did parliament prescribe this specific consultation requirement? In one's quest for an evidential answer to this question, the landscape is barren. The available evidence includes a statement by the relevant junior minister that consultation of this kind will:

> "…ensure that the full range of terrorist asset-freezing powers are [sic] considered before exercising the related power…"

The court accepts Mr Larkin's submission that the first of the *Pepper v Hart* conditions which would allow this court to consider this ministerial statement, namely that the statutory provision under consideration is ambiguous or obscure or upon conventional interpretation would give rise to absurdity, is not satisfied. The verb "to consult" and its derivatives are familiar members of the English language, albeit they must always be construed in their particular context. Thus, differing from Colton J on this issue, we decline to consider the ministerial statement.

[48] The soi-disant "Sedley criteria" are traceable to the adoption by a first instance court of counsel's submission in *R v Brent LBC, ex parte Gunning* [1985] 84 LGR 168, at page 189:

> "Mr Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content. First, that consultation must be at time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third, to which I shall return, that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals."

Both the submission advanced and its acceptance by the court must be considered in their particular litigation context, which concerned a public authority's decision to close two schools and an ensuing challenge that this was vitiated on the basis of the authority's failure to acquit its statutory duty to consult. The principles in play were approved by the Supreme Court in *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56, at para [25] by Lord Wilson. Once again, the <u>litigation context</u> must be squarely considered. It concerned a challenge by two ratepayers, both detrimentally affected, by a council's decisions relating to a tax reduction scheme.

[49] In both *Gunning* and *Haringey LBC* the constituency to which the public authority's duty to consult applied comprised persons likely to be detrimentally affected by the course of action proposed. The "Sedley criteria" are readily applicable to this scenario. However, a context specific analysis must in our view be applied to the consultation requirement enshrined in paragraph 10Q(3)(b) of Schedule 1 to the 2001 Act. In this provision the legislature has stipulated that one identified public authority must consult another. It has done so without spelling out the particulars of the requisite consultation or its purpose. Given the dominant and inescapable feature of <u>context</u> we consider that the resolution of this discrete issue is not to be found by slavish recourse to the "Sedley criteria." Rather a more nuanced approach, driven by context, is required.

[50] While, as already observed, the verb "to consult" and its derivatives are unsophisticated members of the English language, we consider it uncontroversial that they do not attract a universal meaning in every context. Thus, a person who consults a medical or other professional person does not equate to a government minister or department or other public authority which consults the public generally or a section of the public in the context of discharging a statutory function or discretion or giving effect to an executive policy or proposing new legislation. In the first illustration, the citizen is seeking advice, of a highly confidential nature. In the second illustration, the context is one of the proposed exercise of public law powers with a consequential

impact upon a particular constituency attracting a series of public law constraints and principles.

[51] Another familiar precept of public law falls to be considered. The duty imposed on every public authority to take into account all material facts and considerations must surely be directed to ensuring that the decision or act in contemplation is as fully informed as possible. In many instances, the duty to consult must have the same aim. In other instances the emphasis may be more firmly on the protection of individual rights. In yet another category, the protection and furtherance of the public interest may be the dominant purpose. This brief exercise illustrates that the "Sedley criteria" must always be calibrated by reference to the legal context in play. Furthermore, the purpose of any requirement of consultation will have a bearing on the kind of consultation exercise to be undertaken. Where, as here, the statute does not describe the purpose, it falls to the court to ascertain this by examining the statutory provisions as a whole. In so doing the court will take into account that the overarching aims of the 2001 Act are the prevention, detection, prosecution and punishment of various types of terrorist related activity.

[52] We consider that the regime established by paragraphs 10Q and 10S of Schedule 1 to the 2001 Act is designed to operate in the typical case in the following way. In the first place, the enforcement officer concerned will make an assessment of the merits and viability of the contemplated application to the court. This will entail consideration of all available material evidence through the prism of the statutory criterion of having "reasonable grounds for suspecting that money held in an account maintained with a bank or building society" falls within either paragraph 10Q(1)(a) or (1)(b). If the outcome of this exercise is positive, the enforcement officer will confer with a "senior officer" for the purpose of obtaining the authorisation required by paragraph 10Q(3)(a). One would expect this discrete exercise to replicate the substance of the first exercise carried out. In determining whether to grant the necessary authorisation the senior officer will exercise a discretion. It will be incumbent on the enforcement officer to ensure that the senior officer does so on the most fully informed basis possible. This will entail bringing to the senior officer's attention all material facts and considerations, while disregarding everything immaterial and extraneous.

[53] The test to be applied by the senior officer in deciding whether to provide the requisite authorisation is not specified in the statute. However, it can be reasonably deduced from the state of mind which the enforcement officer must form prior to proceeding with an application to the court, namely the "reasonable grounds" test noted immediately above. The grant of an authorisation will not be appropriate if the senior officer is not satisfied about this threshold. Where the senior officer is satisfied the next step will entail consulting HMT. This step must precede the grant of an authorisation.

[54] It is at this stage of the analysis that the purpose of the requirement to consult with HMT must be identified. On this issue the statute is silent. However, this does

not betoken the end of the enquiry. By paragraph 6(1) of Schedule 14 to the Terrorist Act 2000 it is provided:

> "The Secretary of State shall issue codes of practice about the exercise by officers of functions conferred on them by virtue of this Act or the terrorist property provisions."

The addition of the words "terrorist property provisions" has the effect of applying the Codes of Practice ("COP") to the exercise of functions by officers under the 2001 Act also. The relevant COP, made by the Secretary of State initially in January 2018, is tailor made for the 2001 Act, being entitled "Code of Practice for Officers acting under Schedule 1 to the Anti-Terrorism, Crime and Security Act 2001." Within the text there is a discrete section entitled "Applying for an account freezing order." Paragraph 30 thereof reiterates the statutory requirement of consulting HMT. Paragraph 31 states:

> "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 e-mail address (020 7270 5454 or OFSI@hmtreasury.gsi.gov.uk). 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."

[55] One learns two important matters from para 31. First, the specific agency within HMT consulted is that specialising in counter-terrorist sanctions and financial sanctions implementation. Clearly, an agency with this presumptive expertise is an appropriate consultee. Second, one specific purpose of the consultation required is clearly spelled out. It is appropriate to juxtapose this with the corresponding averments in the Police Service affidavit. The Detective Inspector avers, *inter alia*:

> "From my experience, the consultation is advisory in nature and does not involve oversight of the police application. For example, the grounds upon which police suspect that money held in an account maintained with a financial institution is intended to be used for the purposes of terrorism, or consists of the resources of a proscribed organisation, or is property ear marked as terrorist property are not scrutinised for the purpose of determining whether they amount to a reasonable basis for proceeding with the application ….

> My experience of the nature of the advice provided by HM Treasury is that it allows for the authorising officer to consider whether [an account freezing order] is the most appropriate measure, or whether another measure might be more appropriate in the circumstances. For example, HM Treasury might advise that a Treasury Designation under the Counter-Terrorist (Sanctions) (EU Exit) Regulations 2019 is a more appropriate measure (or could be considered in addition to the [account freezing order])."

While these averments are unchallenged, the court has nonetheless scrutinised them with care and satisfied itself that they should be accepted.

[56] As observed, the consultation purpose specified in para 31 of the COP is not necessarily the <u>only</u> purpose in play. Other purposes could conceivably arise in individual instances. For present purposes, it suffices to observe that since this specific purpose has been singled out in this way, the inference that this will normally be the <u>main</u> purpose of the Police Service/HMT consultation reasonably follows.

[57] Giving effect to the foregoing analysis we consider that the legislature contemplated that HMT would be an advisory consultee, that is to say a body with presumptive expertise having the capacity to contribute to the advisability of the contemplated application to the court. In this way the quality of the final Police Service decision and the quality of the corresponding decision of the senior officer whether to grant the requisite authorisation will in principle be enhanced. Furthermore, it is conceivable that this consultation exercise could result in the evidence grounding the proposed application being augmented or varied.

[58] This analysis points to the view that HMT qua consultee is to be distinguished from, for example, the residents of an old people's home or the inpatients of a hospital threatened with closure. These are familiar consultation scenarios. The members of these groups are consulted as a matter of fairness because of the impact which the closure of the facility, if it eventuates, will have on them. Their responses are actuated by legitimate self-interest, representing an attempt to preserve the status quo thereby protecting and preserving their life situation and circumstances. Consultation in these contexts is illustrated in one of the seminal public law decisions, *R v North and East Devon HA, ex parte Coughlan* [2001] QB 213.

[59] The foregoing reflections all highlight the importance of <u>context</u>. They lend support to the view that the Police Service consultation with HMT under paragraph 10Q of Schedule 1 to the 2001 Act is of a distinctive species. We consider that it is primarily designed to protect and further the public interests embedded in the overarching statutory aims identified above. The scenario contemplated by the legislature is that of two public authorities, each possessing presumptive expertise within their respective spheres and having common aims and interests, conferring in the context of the statutory aims and purposes noted. It does not follow from this

assessment that the essential characteristics of the *Sedley* model are excluded wholesale, as one would readily infer a parliamentary intention that the consultation should be undertaken conscientiously and with an open mind, with the Police Service weighing the HMT input prior to making final decisions on pursuit of the proposed application and the grant of the requisite authorisation for that purpose. The institutional and constitutional independence of the two agencies must also be reckoned.

[60] Mr Larkin prayed in aid the celebrated passage in the speech of Lord Reid in *Sweet v Parsley* [1970] AC 132 at 149E:

> "In the absence of a clear indication in the fact that an offence is intended to be an absolute offence, it is necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of parliament. I say, 'must have been' because it is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation that is most favourable to the accused must be adopted."

We consider that this passage does not assist the appellants, for two reasons. First, it relates to the rights of accused persons in the context of criminal proceedings. Second, it is concerned with the construction of statutory provisions. In this appeal, no issue of construing any of the words in paragraph 10Q(3) of Schedule 1 to the 2001 Act arises. In particular, this is not a case about choosing between competing interpretations.

[61] The appellant's challenges do not contain any element of a human rights claim under section 7 of the Human Rights Act 1998. Accordingly, no adjudication of rights under article 8 ECHR and/or article 1 of the First Protocol and, in particular, no determination of the "*in accordance with the law*" stipulation is required of the court. Furthermore, the contention that the <u>court</u> would be acting incompatibly with any Convention rights of the appellants by either dismissing their claims at first instance or dismissing these appeals has at no time been advanced.

[62] We have at para [45] above formulated the central question for the court. At this stage of the exercise it is necessary to identify those facts and considerations informing the answer to the supplied. In this task the court is not without guidance, bearing in mind the material factors identified by the House of Lords in answering this question in *Soneji*: see in particular per Lord Steyn at para 24.

[63] In common with Colton J we consider that the nature and extent of the non-compliance under scrutiny was modest rather than grave. Disregarding the further affidavit, there had been very recent consultation involving LMP and HMT in the specific context of the contemplated applications to WMC for the orders made

(and then set aside) which were later made by BMC. The proposed applications to which that consultation related were identical to those made by the Police Service only some weeks later. So too the BMC orders. In this exercise LMP informed HMT that such applications to the appropriate Northern Ireland court would follow. Furthermore, LMP was not acting on its own. Rather, its interaction with HMT unfolded in the context of an established terrorist investigation being conducted in partnership with the Police Service.

[64] Secondly, there is no basis for concluding that the failure of the Police Service superintendent to consult with HMT prior to authorising the offending applications to BMC had any material consequences for the substance and grounds of those applications and, hence, the ensuing BMC orders.

[65] Thirdly, as elaborated above, we accept the judge's assessment that one of the main purposes of the statutory consultation requirement is to determine whether other kinds of action may be preferable. We can identify no grounds for concluding that Police Service/HMT consultation would have resulted in the identification of some other option.

[66] Fourthly, we consider that the appellants can point to no real prejudice to them flowing from the non-observance of the statutory consultation requirement. As we have observed, this had no material consequences for the substance and grounds of the applications giving rise to the impugned freezing orders or the orders themselves. Furthermore, the appellants have subsequently exercised their due process rights in the forum of the variation applications and they continue to have at their disposal the mechanism of applying to BMC for an order setting aside the freezing orders under paragraph 10T of Schedule 1 to the 2001 Act. Properly analysed, the failure of the Police Service to observe the statutory consultation requirement has generated for the appellants the windfall benefit of deploying this in opposition to the variation applications and in having resort to their judicial review challenges. It has added to their armoury of legal rights.

[67] Fifthly, as in *Soneji*, this court readily accepts that the Police Service personnel concerned were at all times acting in good faith and in furtherance of the overarching statutory aims and objectives. Furthermore, it is not for this court to review the quality of the consultation undertaken with HMT by LMP. That issue lies outwith the contours of these challenges and we decline to entertain a collateral challenge of this kind.

[68] Finally, as in *Soneji*, there is an unmistakable public interest favouring the assessment that total invalidity should not be the consequence of non-observance of the statutory consultation requirement which is under scrutiny in this fact sensitive case. While, in common with Colton J, this court would emphasise the importance of scrupulous adherence to statutory requirements in every context, a judicial assessment that non-compliance with the statutory consultation requirement of the kind which occurred in this case leads to outright invalidity would in our view be

antithetical to the public interest, would constitute an outcome of disproportionate dimensions and, fundamentally, would be antithetical to the presumed intention of the legislature.

[69] For the reasons given, we affirm the order and judgment of Colton J and dismiss the appeal.