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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Alexander (Silvana), Bull (Clive), Farrelly (Eamonn) and Fox (Damien) Application's [2009] NIQB 20

AN APPLICATION FOR JUDICIAL REVIEW BY SILVANA ALEXANDER, CLIVE BULL, EAMONN FARRELLY and DAMIEN FOX

Before Kerr LCJ, Higgins LJ and Girvan LJ

KERR LCJ

Introduction

[1] These applications have some common issues and were heard together. Each of the applicants claims that he or she was wrongfully arrested. It is asserted that the arresting police officers either failed to consider whether it was necessary to arrest (as is now required by article 26 (4) of the Police and Criminal Evidence (Northern Ireland) Order 1989, as amended by the Police and Criminal Evidence (Amendment) (Northern Ireland) Order 2007) or concluded that the arrests were necessary on grounds that were insufficient or unsustainable. It is also claimed that the authorisation of the applicants' detention by custody officers was wrong in law.

[2] The respondent, the Police Service of Northern Ireland, resists each of the applications, arguing that the decisions to arrest were properly taken on sufficient grounds. It also argues that all of the applications should be dismissed on the ground that, if the arrests were unlawful, all the applicants enjoy a perfectly adequate remedy in the form of an action for wrongful arrest and unlawful imprisonment.

General background

[3] Before the 2007 Order introduced a new article 26 to the PACE Order 1989, offences were classified as arrestable and non-arrestable. With the enactment

of the new provision this classification ceased to exist for all practical purposes and the concept of an arrestable offence was abolished. A constable now has the power to arrest without warrant anyone who is, or whom he has reasonable grounds for suspecting to be, about to commit, or in the act of committing, an offence. Where an offence has been committed, or the constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without a warrant anyone who is or whom he has reasonable grounds for suspecting to be, guilty of that offence. All offences, therefore, are now arrestable without warrant, subject to the requirement that the arresting officer must have reasonable grounds for believing that the arrest is necessary for any of the reasons specified in article 26 (5).

[4] The relevant provisions in article 26 are these: -

> "26. — (1) A constable may arrest without a warrant—
>
> (a) anyone who is about to commit an offence;
>
> (b) anyone who is in the act of committing an offence;
>
> (c) anyone whom he has reasonable grounds for suspecting to be about to commit an offence;
>
> (d) anyone whom he has reasonable grounds for suspecting to be committing an offence.
>
> (2) If a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds to suspect of being guilty of it.
>
> (3) If an offence has been committed, a constable may arrest without a warrant—
>
> (a) anyone who is guilty of the offence;
>
> (b) anyone whom he has reasonable grounds for suspecting to be guilty of it.
>
> (4) But the power of summary arrest conferred by paragraph (1), (2) or (3) is exercisable only if the constable has reasonable grounds for believing

that for any of the reasons mentioned in paragraph (5) it is necessary to arrest the person in question.

(5) The reasons are—

(a) to enable the name of the person in question to be ascertained (in the case where the constable does not know, and cannot readily ascertain, the person's name, or has reasonable grounds for doubting whether a name given by the person as his name is his real name);

(b) correspondingly as regards the person's address;

(c) to prevent the person in question—

(i) causing physical injury to himself or any other person;

(ii) suffering physical injury;

(iii) causing loss of or damage to property;

(iv) committing an offence against public decency (subject to paragraph (6)); or

(v) causing an unlawful obstruction on a road (within the meaning of the Road Traffic (Northern Ireland) Order 1995 (NI 18);

(d) to protect a child or other vulnerable person from the person in question;

(e) to allow the prompt and effective investigation of the offence or of the conduct of the person in question;

(f) to prevent any prosecution for the offence from being hindered by the disappearance of the person in question."

[5] The reasons listed in paragraph (5) are exhaustive. The arresting officer must therefore relate his decision that the arrest is necessary to at least one of

those grounds. The existence of reasonable grounds for belief that, for one of the reasons in paragraph (5), the arrest is necessary is a jurisdictional pre-condition. In other words, unless the constable has reasonable grounds for believing that it is necessary to arrest the person in question, he does not have power to arrest.

Code of Practice G

[6] This code was introduced to provide guidance to police officers on the exercise of the statutory power to arrest. At paragraph 1.3 it is stated that the use of the power had to be fully justified and that officers exercising it should consider whether the necessary objectives could be met by other, less intrusive means. Paragraph 2.4 declares that the question whether the necessity criterion is satisfied is an 'operational decision' and this is amplified in paragraph 2.7 which stipulates that the circumstances that may satisfy this requirement remain within the 'operational discretion' of individual officers. Paragraph 2.8 provides that, in considering the individual circumstances, the constable must take into account the situation of the victim, the nature of the offence, the circumstances of the suspect and the needs of the investigative process.

[7] On the reason specified in sub-paragraph (e) of article 26 (5) (the need for a prompt and effective investigation) the code offers the following guidance in paragraph 2.9: -

> "This may include cases such as:
>
> (i) Where there are reasonable grounds to believe that the person:
>
> - has made false statements;
> - has made statements which cannot be readily verified;
> - has presented false evidence;
> - may steal or destroy evidence;
> - may make contact with co-suspects or conspirators;
> - may intimidate or threaten or make contact with witnesses;
> - where it is necessary to obtain evidence by questioning; or
>
> (ii) when considering arrest in connection with an indictable offence, there is a need to:

> • enter and search any premises occupied or controlled by a person
> • search the person
> • prevent contact with others
> • take fingerprints, footwear impressions, samples or photographs of the suspect
>
> (iii) ensuring compliance with statutory drug testing requirements."

Voluntary attendance at a police station

[8] An obvious alternative to arrest for the purpose of interview is to invite a suspect to attend a police station voluntarily. Where this happens, article 31 (1) of PACE deals with the circumstances in which the suspect may leave the police station and the powers of arrest if he seeks to do so. It provides: -

> "*Voluntary attendance at police station etc.*
>
> 31. - (1) Where for the purpose of assisting with an investigation a person attends voluntarily at a police station or at any other place where a constable is present or accompanies a constable to a police station or any such other place without having been arrested-
>
> (a) he shall be entitled to leave at will unless he is placed under arrest;
>
> (b) he shall be informed at once that he is under arrest if a decision is taken by a constable to prevent him from leaving at will."

Authorisation of detention and continued detention by custody officers

[9] When a suspect is arrested and taken to a police station or arrested at the police station, his detention must be authorised by a custody officer. The conditions in which this may take place are outlined in article 38. The relevant parts of this are: -

> "**38.** — (1) Where—
>
> (a) a person is arrested for an offence—
>
> (i) without a warrant; or

(ii) under a warrant not endorsed for bail,

the custody officer at each police station where he is detained after his arrest shall determine whether he has before him sufficient evidence to charge that person with the offence for which he was arrested and may detain him at the police station for such period as is necessary to enable him to do so.

(2) If the custody officer determines that he does not have such evidence before him, the person arrested shall be released either on bail or without bail, unless the custody officer has reasonable grounds for believing that his detention without being charged is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him.

(3) If the custody officer has reasonable grounds for so believing, he may authorise the person arrested to be kept in police detention.

(4) Where a custody officer authorises a person who has not been charged to be kept in police detention, he shall, as soon as is practicable, make a written record of the grounds for the detention.

(5) Subject to paragraph (6), the written record shall be made in the presence of the person arrested who shall at that time be informed by the custody officer of the grounds for his detention.

…

(10) The duty imposed on the custody officer under paragraph (1) shall be carried out by him as soon as practicable after the person arrested arrives at the police station or, in the case of a person arrested at the police station, as soon as practicable after the arrest."

Reasonable grounds for believing

[10] For the respondent Mr Maguire QC argued that the requirement that the power of arrest should only be exercised when it is necessary to do so did not connote a test of necessity in the sense that it must be irrefutably established that there is no alternative to arrest. He pointed out that the statutory condition was that there should be *reasonable grounds for believing* that the arrest was necessary. What a supervising court was required to do, therefore, was to focus on the grounds that actually motivated the constable in his decision to arrest and to assess whether those grounds could properly be regarded as reasonable. In this context the court should have "the highest degree of respect" for operational decisions of police officers.

[11] In examining the court's capacity to review the decision that the arrest was necessary, Mr Maguire drew an analogy with the suspicion that a constable must have about the guilt of the person to be arrested. In that context, he suggested, the court was required to concentrate on what was in the constable's mind, rather than have regard to different considerations that might have influenced others. It was for the constable, and not for the court, to decide which factors were relevant to such a suspicion.

[12] If the analogy with suspicion to ground the arrest holds good, there is certainly authority for the proposition that the scope of the review is confined to the material actually considered by the arresting constable – see, for instance, the remarks of Diplock LJ in *Dallison v Caffrey* [1964] 2 All ER 610, at 619: -

> "The test whether there was reasonable and probable cause for the arrest or prosecution is an objective one, namely, whether a reasonable man, assumed to know the law and possessed of the information *which in fact was possessed by the defendant*, would believe that there was reasonable and probable cause. [emphasis supplied]"

[13] A statement to like effect is found in *O'Hara v Chief Constable* [1997] 1 All ER 129 at 138/9, where Lord Hope of Craighead was dealing with the suspicion necessary to ground a valid arrest under section 12 (1) of the Prevention of Terrorism (Temporary Provisions) Act 1984 (which authorised a constable to arrest a person whom he has reasonable grounds for suspecting to be person guilty of an offence under the Act): -

> "My Lords, the test which s 12(1) of the 1984 Act has laid down is a simple but practical one. It relates entirely to what is in the mind of the arresting officer when the power is exercised. In part it is a subjective test, because he must have formed a genuine suspicion in his own mind that

> the person has been concerned in acts of terrorism. In part also it is an objective one, because there must also be reasonable grounds for the suspicion which he has formed. But the application of the objective test does not require the court to look beyond what was in the mind of the arresting officer. It is the grounds which were in his mind at the time which must be found to be reasonable grounds for the suspicion which he has formed. All that the objective test requires is that these grounds be examined objectively and that they be judged at the time when the power was exercised."

[14] The courts have recognised, however, that there is a distinction between 'belief' and 'suspicion' where powers of arrest are exercised (see, for instance, *Baker v Oxford* [1980] RTR 315). In *Johnson v Whitehouse* [1984] RTR 38, Nolan J accepted that "the dictionary definitions of those words … of course, do show that the word 'believe' connotes a greater degree of certainty, or perhaps a smaller degree of uncertainty, than the word 'suspect'." In the Canadian case of *Gifford v Kelson* (1943) 51 Man R 120, it was stated that "suspicion is much less than belief; belief includes and absorbs suspicion". Belief involves a judgment that a state of affairs *actually exists*; suspicion that a state of affairs *might well* exist.

[15] Of perhaps greater pertinence in the present debate, however, is the question whether having reasonable grounds to believe (just as having reasonable grounds to suspect) restricts the ambit of permissible review by the courts to an examination of the actual grounds considered by the arresting officer. After all, it is to the grounds which the officer *had*, as opposed to those that he might have considered, that the subsection directs one's attention. This suggests that one should concentrate on the specific grounds to which the constable had regard. As against that approach, however, a wilful refusal to take into account factors that might have led unmistakably to a contrary view as to the necessity to arrest surely cannot be ignored in any judgment on the reasonableness of the grounds on which the belief was formed.

[16] We consider that where a police officer is called upon to make a decision as to the necessity for an arrest, the grounds on which that decision is based can only be considered reasonable if all obviously relevant circumstances are taken into account. In particular, it is necessary that he make some evaluation of the feasibility of achieving the object of the arrest by some alternative means, such as inviting the suspect to attend for interview. That is not to say that the police officer may only arrest when no conceivable alternative is possible. For reasons that we will discuss below, we do not consider that

arrest need be in every instance a matter of last resort; that it can only be deemed necessary where there is no feasible alternative.

'Necessary' in its statutory context

[17] In an article in the Criminal Law Review of June 2007, 459-471 entitled, "The new powers of arrest: plus ca change: more of the same or major change?" R.C. Austin has suggested that "necessary" means that there is no alternative to arrest; that enabling or preventing, as the case may be, one or more of the arrest conditions set out in section 24 (5) of the Police and Criminal Evidence Act 1984 (the equivalent of our article 26 (5)), cannot be achieved by any other means short of arrest. Austin also suggests that the more demanding standard of belief (as opposed to suspicion) may require the constable to make fuller inquiries before concluding that arrest is necessary. Mr Maguire challenged these views directly. He contended that 'necessary' meant no more than 'practically required'. It did not mean 'indispensable' or 'unavoidable'. It was not required of a police officer that he make inquiries beyond those required to satisfy himself that there were reasonable grounds to conclude that the arrest was an appropriate practical requirement.

[18] In one connotation, 'necessary' can mean indispensable or essential. It can also mean that which is required for a given situation. As always, the meaning to be ascribed to a particular word such as 'necessary' must depend on the context in which it falls to be interpreted. We consider that the requirement that the constable should believe that an arrest is necessary does not signify that he requires to be satisfied that there is no viable alternative to arrest. Rather, it means that he should consider that this is the practical and sensible option. We can illustrate this with an example. If an officer considers that a person's presence at a police station is essential for the purpose of questioning, he may decide that it is necessary to arrest even though it is theoretically possible that the individual would agree to attend voluntarily. Thus, if he concludes that the person to be questioned might initially agree to attend for questioning but is likely to refuse to remain if the questioning becomes difficult for him, he may have reasonable grounds for deciding that the arrest is necessary from the outset.

[19] Given the scope of decision available to a constable contemplating arrest, we do not consider that it is necessary that he interrogate a person as to whether he will attend a police station voluntarily. But he must, in our judgment, at least consider whether having a suspect attend in this way is a practical alternative. The decision whether a particular course is necessary involves, we believe, at least some thought about the different options. In many instances, this will require no more than a cursory consideration but it is difficult to envisage how it could be said that a constable has reasonable grounds for believing it necessary to arrest, if he does not make at least some

evaluation as to whether voluntary attendance would achieve the objective that he wishes to secure.

[20] In general we agree with Mr Maguire's submission that what transpires after arrest cannot be a guide to whether the constable had reasonable grounds for believing that an arrest was necessary. The primary focus of the review must be on the conditions that obtained at the time the arrest was made. But where what happens subsequently can be related back to those conditions in confirming what ought to have been present to the mind of the constable, it may provide some insight into whether the conclusion of the constable that arrest was necessary can be said to have been based on reasonable grounds.

Is judicial review the proper mode of deciding if the arrest was lawful?

[21] An examination of what motivated a police officer to decide that an arrest was necessary is self evidently better conducted in proceedings where the opportunity arises for the constable to give oral evidence. The present cases exemplify that point strikingly. In the case of the applicant, Bull, for instance, the reasons given by the arresting officer, Constable Davey, for his conclusion that it was necessary for the prompt and effective investigation of the alleged offence of assault are the subject of direct challenge. But the efficacy of that challenge and whether the reasons that the constable has given can withstand scrutiny are obviously better assessed on an oral hearing. Likewise, in the case of Fox, the question whether the arrest was made because it was considered to be more convenient in that way to obtain a DNA sample lends itself naturally to a conventional action rather than an assessment on sworn affidavits in which the evidence is not tested. Also in the case of Alexander, whether the arresting officer's experience of the applicant was sufficient to make it necessary to arrest her is much more likely to be confidently decided after a hearing where evidence from both sides is received. In each of those cases the applicant challenges the validity of the decision of the custody officer to authorise their continued detention. Again, it is much more appropriate to examine the reasons that the custody sergeant so concluded in proceedings where oral testimony is given.

[22] Quite apart from the principle that judicial review is a measure of last resort (see, for instance, *R (on the application of Burkett and another) v Hammersmith and Fulham London Borough Council* [2002] UKHL 23 at paragraph 42 *per* Lord Steyn), the nature of the disputed evidence in the cases of Alexander, Bull and Fox makes it wholly unsuitable to deal with them by way of judicial review. The arguments presented on behalf of the applicants to advance the claim that they should be regarded as falling within an exceptional category simply do not avail. The fact that they give rise to important issues of law does not signify in this debate. Such issues can just as conveniently be dealt with either in criminal proceedings before the

magistrates' court or in County Court proceedings with, if necessary, an appeal against any legal ruling by way of case stated to the Court of Appeal. Furthermore, the suggestion that the applications would be dealt with more expeditiously in judicial review proceedings is not borne out by the actual progress of the cases to date. We will therefore dismiss those applications.

The case of Farrelly

[23] Different considerations arise in relation to this application. The applicant had attended the police station voluntarily. He had waited for some time before the investigating officer, Constable Letson, was ready to see him. He was fully co-operative at all times. Significantly, the constable has said that he felt that it was inappropriate to bring an individual in for police inquiries "as a voluntary attender" where, if that person sought to leave before inquiries were completed, he would inevitably be arrested.

[24] It is clear, therefore, that the constable did not consider any alternative to Mr Farrelly's arrest at any stage. It was his intention to arrest, whatever the circumstances. It appears to us that he thereby took up a pre-determined attitude to the arrest of the applicant. No consideration of a possible alternative to arrest was undertaken. The officer's invariable practice was to arrest where he considered that a voluntary attender would have to be arrested if he sought to leave. This inevitably involved a pre-emptive conclusion that all voluntary attenders at the police station would have to be arrested if questioning was to be undertaken. The constable's stance precluded any evaluation as to whether voluntary attendance would achieve the objective that the constable wished to secure. In our judgment this arrest cannot be said to have been based on reasonable grounds for believing that it was necessary. For the reasons that we have given above, we consider that *some* consideration of the feasibility of obtaining the same result by having the suspect questioned as a voluntary attender is a prerequisite to a tenable conclusion that it is necessary to arrest.

Conclusions

[25] In all but Mr Farrelly's case, we consider that the applications for judicial review must be dismissed on the basis that proceedings in this form are not suited to a proper consideration of the issues which arise. In the case of Mr Farrelly, however, it is clear that there was not even a cursory examination of whether the objective to be secured by his arrest might have been accomplished by allowing him to be interviewed as a voluntary attender. Nevertheless, we consider that his case also should have been pursued by way of ordinary action. Rather than deal with the matter on a judicial review footing, therefore, we will exercise our powers under Order 53 rule 9 (5) which provides: -

> "(5) Where the relief sought is a declaration, an injunction or damages and the Court considers that it should not be granted on an application for judicial review but might have been granted if it had been sought in an action begun by writ by the applicant at the time of making his application, the Court may, instead of refusing the application, order the proceedings to continue as if they had been begun by writ; and Order 28, rule 8, shall apply as if the application had been made by summons."

[26] We will therefore treat Mr Farrelly's case as an action begun by writ. For the reasons that we have given, we make a declaration that the arrest in his case was unlawful and remit the matter to the appropriate division of the County Court for assessment of damages.

[27] It will be clear from the foregoing that we consider that a challenge to the lawfulness of an arrest should in virtually every conceivable instance be pursued by way of a conventional *lis inter partes*. There are two obvious reasons for this. In many cases (Bull's is an obvious example) a challenge by way of judicial review is an unacceptable type of satellite litigation which not only distracts from the proper conduct of the criminal proceedings but seeks to remove a discrete issue from the criminal court which is its natural home. The second reason is that in almost all cases, the issues which arise are far more comfortably and satisfactorily accommodated in a form of proceeding which involves the giving of oral testimony and the testing of claims and counterclaims under cross examination.

[28] An interesting debate was engaged by way of postscript to the proceedings on the question whether this court was properly constituted as a Divisional Court. Order 53 rule 2 (1) provides that in a criminal cause or matter the jurisdiction of the court on or in connection with an application for judicial review shall be exercised by three judges sitting together.

[29] This issue has been considered in a number of cases in England and Wales. In *ex parte Alice Woodhall* (1888) QBD 832 Lord Esher MR said that the phrase 'criminal cause or matter' should receive the widest possible interpretation. In *R (Aru) v Chief Constable of the Merseyside Police* [2004] 1 WLR 1697 Maurice Kay LJ noted the use of the phrase rather denoted a "wider ambit" than merely "criminal proceedings". In *Amand v Secretary of State* [1943] AC 147, the applicant was detained by the English authorities pending his removal from England to the Netherlands (on the grounds that he was a deserter from the Dutch army). The applicant applied for a writ of habeas corpus. The House of Lords held the application for habeas corpus to be a criminal cause or matter. In his opinion, Lord Wright said: -

> "The principle which I deduce from the authorities … is that if the cause or matter is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment, such as imprisonment or fine, it is a "criminal cause or matter." The person charged is thus put in jeopardy. Every order made in such a cause or matter by an English court, is an order in a criminal cause or matter, even though the order, taken by itself, is neutral in character and might equally have been made in a cause or matter which is not criminal. The order may not involve punishment by the law of this country, but if the effect of the order is to subject by means of the operation of English law the persons charged to the criminal jurisdiction of a foreign country, the order is, in the eyes of English law for the purposes being considered, an order in a criminal cause or matter …"

[30] An extensive review of the authorities can be found in *Cuoghi v Governor of Brixton Prison* [1997] 1 WLR 1346, where the English Court of Appeal held that extradition proceedings, as well as proceedings ancillary or incidental to those proceedings and including a habeas corpus application, were to be regarded as a criminal cause or matter. Lord Bingham CJ considered that, when determining if proceedings are a criminal cause or matter, three questions were pertinent: (i) What is the purpose of the application [during which the impugned decision was made]? (ii) Is it a step in the process of bringing a defendant to trial? (iii) Can it affect the conduct of the trial?

[31] The issue was addressed in this jurisdiction by Weatherup J in *Re JR14's Application* [2007] NIQB 102 where the learned judge suggested that the test should be: "Is the application before the court ancillary or incidental to a substantive process which places the applicant at risk of a criminal charge or punishment before a court?" In order to answer this question, he suggested that three steps required to be taken: (i) a distinction must be made between the judicial review application before the court and the underlying substantive process in which the applicant has become involved; (ii) it is necessary to determine whether the underlying substantive process may lead directly to a charge or punishment before the court; and (iii) it is necessary to establish whether the particular application which has been made to the court is ancillary or incidental to that substantive process.

[32] In *Carr v Atkins* [1987] QB 963, during a police fraud investigation the police applied to a judge of the Central Criminal Court for an order under the

Police and Criminal Evidence Act 1984 (PACE) requiring the applicant, who was a suspect in the investigation, to produce certain financial documents (which fell within the definition of "special procedure documents" under the Act). The applicant sought a judicial review of the judge's decision to grant the order. The Divisional Court dismissed the application and the applicant sought to appeal to the Court of Appeal which considered whether the proceedings were a criminal cause or matter as a preliminary point. Sir John Donaldson MR said that the nature of an order made or refused in judicial review proceedings must depend not upon that order but upon the order that is sought to be reviewed. What was being reviewed in that case was an order under PACE. Referring to the long title of the Act and the provisions relating to an application by the police for an order and the consequences of the suspect not complying with the order, he said: -

> "It is to my mind clear beyond argument that the order which was made in this case was made in a criminal context, but it is right to note, as Mr. Shaw has stressed, that there are no proceedings in existence. In the limited time that has been available I have not been able to find out whether this Act could or would be used where criminal proceedings have begun, but it does not really matter for Mr. Shaw's purposes. It is sufficient to note that no criminal proceedings have been begun here and, indeed, in most cases there is no doubt that orders would be sought under this Act where a decision had not yet been reached whether or not to prosecute. It is essentially a statutory provision in aid of a criminal investigation designed, if the evidence will stand it, to lead to a criminal prosecution. But unless it is to be said that an order under the Act is either never or very rarely one which is by its nature a criminal cause or matter merely because of the stage at which the order is made, then the fact that there are no criminal proceedings does not, in my judgment, matter. That fact stems purely from the nature of the Act and the statutory provisions and does not affect the criminal characters of the proceedings."

[33] In *R v Blandford Justices* [1990] 1 WLR 1940 the applicant had been charged with public order offences and had been remanded in custody by the Magistrates' Court. He immediately commenced judicial review proceedings on the grounds that he was charged with an offence which was not punishable with a custodial sentence. A few days later he pleaded guilty to

the offence and was released but continued with the judicial review proceedings. The Divisional Court granted the application for judicial review and the Justices appealed to the Court of Appeal. On dealing with the matter as a preliminary point, the Court of Appeal held that the proceedings were a criminal cause or matter. Taylor LJ said: -

> "The application for judicial review was an application to the Divisional Court to review a decision of an inferior court in criminal proceedings then still in progress and was clearly an application in a criminal cause or matter. But Mr. Sankey says that, by the time the application was heard, the Divisional Court's judgment was not in a criminal cause or matter since the justices had made their final order. He sought to rationalise this approach by saying that, once the criminal proceedings were concluded in the magistrates' court, the decision of the Divisional Court could not affect their course and was not, therefore, in the cause or matter 'at whatever stage of the proceedings.' But, once the applicant had been granted bail the day after the challenged decision, any review by the Divisional Court of the challenged decision would not have affected the course of the criminal proceedings even if that decision had been made at some later 'stage of the proceedings' and before they were concluded. If the Divisional Court's decision was not in a criminal cause or matter, in what type of proceeding was it made? It cannot have been a decision *in vacuo* and, for my part, I see no basis in principle or authority for attributing such a chameleon character to a cause or matter as to make it change from criminal to civil simply because the proceedings are concluded or because the review of the decision in such cause or matter may be too late to affect the outcome of the proceedings. In my opinion, the judgment of the Divisional Court in the present case was made in a criminal cause or matter."

[34] The impugned decision in each of the four cases before this court involved a decision by a constable to arrest. Applying Lord Bingham's three questions in *Cuoghi* the following answers are supplied: (i) *What is the purpose of the application [during which the impugned decision was made]?* - This is a decision by a constable to arrest the applicant for the purposes of

investigating whether he or she had committed a criminal offence. (ii) *Is it a step in the process of bringing a defendant to trial?* – This was a preliminary step in gathering evidence for a possible future trial. (iii) *Can it affect the conduct of the trial?* – The lawfulness of an arrest may be the subject of issues raised at trial in those cases where a trial is to take place.

[35] Adopting the approach of the Court of Appeal in *Carr* which had regard to the legislation under which the impugned decision was exercised, in the present case, the arrests were conducted under the Police and Criminal Evidence (Northern Ireland) Order 1989 which had the same purpose as that of the PACE Act 1984 and should on that account be regarded as criminal causes or matters. The 1989 Order, like the 1984 Act, provides the statutory framework for, inter alia, the investigation of crime, the arrest and detention of persons suspected of crime and rules of evidence in criminal trials.

[36] We consider that there is much force in the view expressed in the *Blandford Justices* case that a process is either a 'criminal cause or matter' or it is not. It is not capable of having chameleon qualities whereby it changes status from one to the other depending on the specific facts at any particular stage of the proceedings. The underlying arrest and investigatory process is a criminal cause or matter and we consider that all four cases should be so regarded irrespective of what has occurred since the date of arrest.

[37] If we are wrong in our conclusion that all of these cases constitute criminal causes or matters, the question arises whether the hearing on 13 January 2009 was ultra vires the Divisional Court's jurisdiction. In *Re Coleman's Application* [1988] NI 205, the NI Court of Appeal heard an appeal from the Divisional Court. It concluded that the case was not a criminal cause or matter and the court therefore considered how this might affect the validity of the first instance decision. Lord Lowry CJ, after referring to the Judicature (Northern Ireland) Act 1978 and the Rules of the Supreme Court (Northern Ireland) 1980, expressed the following view: -

> "It is an accepted maxim that nothing is to be intended out of the jurisdiction of the High Court except that which is expressly excluded from it. At common law the Court of Queen's Bench, and subsequently the Queen's Bench Division of the High Court, exercised the prerogative jurisdiction through a plurality of judges and there is nothing in section 16(5) which unequivocally dictates that that jurisdiction can now only be lawfully exercised by one judge, where it was formerly exercised by two or three judges, or even by the entire Bench as, for example, in *R (Martin) v Mahony* [1910] 2 IR 695."

[38] We are satisfied therefore that the Divisional Court (*i.e.* the High Court comprising two or more judges) has jurisdiction to hear cases which are not criminal causes or matters.