

Neutral Citation no. [2008] NIQB 59

Ref: **TRE7197**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **05/06/08**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY BRIAN KELLY
FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF A DECISION OF THE SECRETARY OF
STATE FOR NORTHERN IRELAND MADE ON 19 DECEMBER 2007**

**AND IN THE MATTER OF A DECISION OF THE CHIEF CONSTABLE
OF THE POLICE OF NORTHERN IRELAND DATED 7 NOVEMBER 2006**

TREACY J

[1] The applicant has brought judicial review proceedings, inter alia, to quash the decision of the Secretary of State made on 19 December 2007 upholding the Chief Constable's decision to revoke the applicant's firearms certificate.

[2] By summons dated 23 May 2008 the applicant has sought an order requiring the respondent to give specific discovery pursuant to Order 24 rule 7 and/or Order 24 rule 12 of the Rules of the Supreme Court (Northern Ireland) 1980 of the documents set out in the schedule attached to the summons. The schedule is in the following terms:

"1. The police report of 21 March 2007 provided to the Secretary of State referred to in paragraph 16(3) of the affidavit of Detective Chief Inspector Rossborough of 21 April 2008 and paragraph 2(xiv) of the affidavit of Mr Eric Kingsmill of 17 April 2008.

2. The HQC3 reports referred to in paragraph 2(x) of the affidavit of Mr Eric Kingsmill of 17 April 2008 and further referred to in the report from the Firearms and Explosives Branch of the

police (FEB) exhibited at pages 13-15 in the bundle of exhibits marked 'EK1'.

3. All notes, minutes and memoranda made by or considered by the Secretary of State when considering or made in relation to meetings or occasions when the Minister considered, the decision impugned in the present proceedings."

[3] In the Order 53 statement the grounds on which the relief claimed is sought is stated as follows:

"(a) That the decision to revoke and/or uphold the revocation was reached in breach of the rules of natural justice in and about the failure to give the applicant advanced notice of the specific reasons for the revocation; the failure to personally hear the applicant or allow any or adequate representations and in the failure to give any or adequate reasons for the decision.

(b) That the said decision was one which no reasonable responsible authority could have reached in the circumstances in that there were no grounds or reasons to support the decision to revoke and/or uphold the decision to revoke and that the said decision was therefore based upon insufficient and unreliable inquiry and evidence.

(c) That there was a failure to disclose to Mr Kelly and permit him to make representation in relation to the police intelligence or the gist of the police intelligence.

(d) That there was a failure to disclose to the applicant and to allow him the opportunity to comment on the police report or the gist of the report and all other relevant materials which were before the Secretary of State in making his decision.

(e) That there was a failure to give effect to the applicant's procedural legitimate expectation that if material came into police possession which would effect his continuing entitlement to hold a firearms certificate he would be afforded proper

opportunity to be made aware of and comment on same or at least the gist of same before his firearms certificate was revoked.

(f) That in making the said decision to revoke and/or uphold the revocation of the applicant's firearms certificate, there was a failure to comply with the obligations under Section 6 of the Human Rights Act 1998, in that the decision maker acted incompatibly with the applicant's rights under Article 6 and under Article 1 of Protocol 1 of the Convention by interfering with his right to a fair trial and the right to property in a manner which is not proportionate by failing to allow any or adequate representations to be made and/or in failing to disclose any of the relevant information taken into consideration when coming to the decision to uphold the revocation and/or in failing to give to legitimate expectation and/or in failing to give reasons for the decision."

[4] The police report of 21 March 2007 (item 1 on the schedule) referred to in paragraph 16(iii) of the affidavit of DCI Rossborough of 21 April 2008 and paragraph 2(xiv) of the affidavit of Mr Eric Kingsmill of 17 April 2008 were provided to the Secretary of State prior to his decision being made rejecting the applicant's appeal from the Chief Constable's revocation of his licence. According to both affidavits the report contained sensitive information provided by the Crime Operations Department regarding the applicant. The affidavit's continue:

"The substance of the information related to the applicant's association with a prescribed dissident Republican organisation. The contents of the letter cannot be disclosed in these proceedings as this would cause real harm to the public interest."

[5] Similarly the HQC3 reports, (item 2 in the schedule to the summons) referred to in paragraph 2(x) of the affidavit of Mr Kingsmill and in the report from FEB (exhibit `EK1'), again relate to the allegation that the applicant associated with an "unnamed prescribed dissident Republican organisation". At paragraph 16(iv) Mr Rossborough stated:

"It is evident to me that this was a case where only very limited disclosure to anyone apart from the Minister could occur for the reasons which had been set out above. Hence the Minister alone

received a briefing which occurred on 18 December 2007 and involved him being provided with an oral explanation of the intelligence situation vis a vis the applicant. The Minister was also advised of the police concern in respect of greater disclosure to the appellant than that which had occurred heretofore and he agreed that no greater disclosure could be made. At the briefing the Minister was able to, and did, ask questions.”

[6] The applicant has sought discovery from the respondent of the aforesaid documents and these requests have been refused.

[7] It is clear from the passages referred to above that the respondent appears to rely upon public interest immunity as the basis for refusing to disclose the material sought. However no Certificate has been furnished to the court or the parties. Counsel for the applicant Mr Barry MacDonald QC referred the court to the decision of the House of Lords in Tweed v Parades Commission for Northern Ireland [2006] UKHL 53 and, in particular, paragraph 5 of the judgment of Lord Bingham and to similar effect paragraph 41 of the judgment of Lord Carswell.

[8] At paragraph 5 Lord Bingham stated:

“In the present case, Mr Tweed has obtained leave to apply for judicial review on grounds which include a challenge to the proportionality of the Commission’s interference with his claimed Convention rights. The Commission’s deponent has summarised five documents which Mr Tweed wishes to see. Disclosure is resisted on the grounds that this would breach the assurance of confidentiality given to the Commission’s informants. Like my noble and learned friends, and for the reasons they give, I would order that the five documents in question be disclosed by the Commission, in the first instance to the judge alone. He will assess whether the documents appear to record information imparted in confidence by identified informants. If not, he is likely to order disclosure to Mr Tweed, since there would be no reason not to do so. If they do appear to disclose such information, he must consider whether the documents add anything of value to the summaries in the evidence. If not, that will be the end of the matter. If he judges that they do

add something of the value to the summaries, he will move on to consider the submissions of the parties on redaction and, if raised, public interest immunity.”

[9] Lord Carswell stated:

“I would order disclosure in the manner set out below of items 2-6 in the list which I set out in para [24] of this opinion. Disclosure of the situation reports from the authorised officers will require some care. The complete text of the officer’s views may be of some importance, for the reasons which I have given, but much of it appears to have based on information and opinions obtained on the basis of assurances of confidentiality. I think that the judge considering disclosure should first receive and inspect the full text of all the documents in items 2-6 so that he may decide whether that would give sufficient extra assistance to the appellant’s case on proportionality over and above the summary already furnished, to justify its disclosure in the interests of fair disposal of the case. If he does so decide, then the question of redaction may have to be considered, in which the parties may be invited to make submissions to the court. If he decides the contrary in the case of any of the deponents, that document will not be disclosed to the appellant. Only after this has been settled should the question of public interest immunity receive any necessary consideration.”

[10] Whilst acknowledging the context in the Tweed case was one of confidentiality Mr MacDonald nevertheless urged the court based on those passages that the proper procedure was for the court in the first instance to look at the documents.

[11] Mr McMillan on behalf of the respondent resisted the application contending that in the context of this case the respondent must be the sole arbiter in this field. In response Mr MacDonald asserted that such a submission – that the respondent be the sole arbiter – had not been made seriously in 40 years. He referred the court to a well-known passage in Conway v Rimmer [1968] 1 ALL ER 874 where Lord Reid, at page 888 stated:

“I would therefore propose that the House ought now to decide that courts have and are entitled to exercise a power and duty to hold a balance between the public interest, as expressed by a Minister, to withhold certain documents or other evidence, and the public interest in ensuring the proper administration of justice. That does mean that a court would reject a Minister’s view: full weight must be given to it in every case, and if the Minister’s reasons are of a character which judicial experience is not competent to weigh then the Minister’s view must prevail; but experience has shown that reasons given for withholding whole classes documents are often not of that character. ...”

[12] The court has in effect been invited to treat the Crown’s de facto claim for PII (albeit unsupported by a Minister’s certificate) as conclusive. However taking into account the facts and circumstances of the present case and, in particular, the nature of the claim advanced by the applicant together with the passages referred to above I consider it necessary in the interests of justice that the court should itself, in the first instance, see and consider the documentation sought.

[13] Any issue of disclosure will only arise if the court considered as a possibility that further disclosure might be required. No determination would be arrived at on this issue without the respondent being given the fullest opportunity to make submissions as to why any further disclosure should not be ordered. Moreover if any further disclosure was to be ultimately ordered actual disclosure would not take place until the time for appeal had expired or the Crown had indicated that they did not intend to appeal.

[14] Accordingly I order that the material referred to in items 1 and 2 of the schedule to the summons be produced to the court for inspection.