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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Canning's (Marvin) Application (Judicial Review) [2016] NIQB 73

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY MARVIN CANNING

and

IN THE MATTER OF THE FAILURE OF THE CRIMINAL JUSTICE INSPECTORATE TO HAVE IN PLACE AN EFFECTIVE POLICY OF OVERSIGHT OF THE DISCLOSURE REGIME IN TERRORIST/SCHEDULED CASES

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MAGUIRE J

Introduction

[1] The applicant in respect of this application for leave to apply for judicial review is Marvin Canning ("the applicant"). He is represented in these proceedings by Mr O'Donoghue QC and Mr Devine BL. The intended respondents are the Criminal Justice Inspectorate ("CJI") and the Chief Constable ("CC") of the Police Service of Northern Ireland ("the PSNI"). The former was represented at the leave hearing by Mr Philip McAteer BL. The latter was represented by Mr Robinson BL. In the course of the submissions on behalf of the applicant it was made clear at the hearing that any case against the CC was not being pursued.

[2] It appears that these proceedings were filed on 7 October 2015.

[3] The applicant's affidavit records the following material facts:

(a) The applicant stood trial in 2010 at Belfast Crown Court on a number of serious charges. These related to offences allegedly committed by him in April 2007.

(b) The trial commenced on 14 June 2010. It did not end until November 2010 when the judge stayed the trial on the grounds that to continue with it would be an abuse of process.

(c) The nature of the abuse of process lay in the failure on the part of the Prosecution Service and the police to discharge their disclosure obligations in accordance with the Criminal Procedure and Investigation Act 1996 ("the 1996 Act").

(d) The trial judge provided a full written judgment giving the reasons for his decision. He set out, in particular, the evidence which informed the abuse of process allegation (see paragraphs [87]-[99]); the Crown's duty of disclosure (see paragraphs [100]-[104]); and the governing principles relating to such an application (see paragraph 105 et seq).

(e) In the course of paragraph 127 the trial judge stated that:

> "The failures which have occurred are of some gravity and it is to be expected that the Chief Constable will ensure that their origins and causes are scrupulously investigated with a view to correcting any weakness, cultural or endemic or otherwise, in the police system so as to ensure that there will be no comparable recurrence."

(f) The applicant avers that since the trial judge's judgment he has awaited the outcome of the investigation the trial judge had expected would occur. He goes on to say that he instructed his solicitor's "to find out what progress had been made".

[4] The relief sought by the applicant in these proceedings principally consists of:

(i) A declaration that the CJI's inspection of [the] disclosure regime that is presently in place is unlawful.

(ii) A declaration that the PSNI's failure to scrupulously investigate the origin and causes of the serious failures in the applicant's criminal trial is unlawful.

(iii) An order of mandamus compelling the PSNI to disclose the product of any investigation into the police system, including steps taken to improve police skills, competence, training and systems.

As the case against the CC has been abandoned the latter two of the above three forms of relief fall away.

[5] The grounds for judicial review appear to be threefold. Firstly, there is a claim that the CJI has not conducted a lawful inspection and that the inspection carried out is "so lacking in detail and intensity … that its claim to meet its terms of reference is irrational". Secondly, it is claimed that the inspection carried out by CJI fails to meet the applicant's legitimate expectation arising from the trial judge's remarks. Thirdly, the investigation it is alleged failed to meet the legitimate expectation of the applicant that a scrupulous investigation would be carried out by the PSNI.

The Correspondence

[6] It is clear that from in or about March 2012 the applicant's solicitors have been engaged in a lengthy process of correspondence with multiple authorities about Mr Canning's case.

[7] At different times correspondence has been exchanged with:

- The PSNI
- The Policing Board ("PB")
- The Department of Justice ("DOJ")
- The Police Ombudsman for Northern Ireland ("PONI")
- The Director of Public Prosecutions ("PPS")
- The CJI

It is not proposed to analysis this correspondence in depth, save in respect of CJI, as the present proceedings are directed now against it exclusively. However, the court briefly notes the following:

- The police claim to have taken two steps resulting from the criticisms directed against it by the trial judge. Firstly, in November 2010 it referred the judge's remarks to PONI for investigation. Secondly, it made arrangements for the provision of additional training of its officers in respect of disclosure, especially in relation to the officer involved in the applicant's case. An approved baseline for best practice in disclosure was also introduced by the police. In its correspondence to the applicant's solicitors, the PPS confirmed that it had active involvement in the area of police training and also in respect of training of its own staff in relation to the disclosure regime. As regards the PB, it has indicated that it has taken an interest in the subject of disclosure in criminal cases but it indicated that it is not within its remit to carry out investigations of the sort being sought. PONI responded to various letters over a substantial period. It confirmed that it did investigate the matter. What is said to be a summary of its report was provided to the applicant's solicitor. The court has not seen the full report. The summary, in broad terms, notes the referral of the judge's comments

to it by the PSNI. As a result PONI investigators spoke to the senior PSNI officer who had reviewed the case. The review apparently concluded that in the case the relevant disclosure officer had no grasp of his obligations under the 1996 Act and had failed to recognise the issues which arose. Two officers, in particular, accepted that they failed to comply with disclosure requirements. As a remedial step, an action plan had been developed to prevent such failings in the future. The summary indicates that the PSNI had since overhauled their disclosure system. The changes were welcomed by PONI in the summary. PONI's conclusion was that the matter had been addressed by PSNI which had identified failings and put new training systems in place to prevent a recurrence. The position taken by the DOJ in correspondence was that the trial judge's remarks were concerned with how the police had dealt with the disclosure issue rather than about issues in respect of the underlying legislation. In these circumstances the Minister indicated that the matter was an operational issue for the CC to deal with. The Attorney General for Northern Ireland also provided a response in a letter to the applicant's solicitor. This indicated that he did not have a superintendence role in relation to the PPS but did have a consultative relationship with it. It was not clear to the Attorney General's office why it was considered that it had any role in relation to the matter.

Correspondence with CJI

[8] This began as long ago as 5 January 2012. The applicant's solicitor provided a copy of the trial judge's remarks to CJI. The solicitor asked whether CJI was in a position to oversee the implementation of the comments made by the judge. In response on 12 January 2012 CJI indicated that it was prohibited by legislation from inspecting individual cases and was unable to engage further in relation to the case.

[9] A further round of correspondence ensued in July 2012. On 3 July the applicant's solicitor, without referring to the earlier CJI response, asked whether CJI would investigate the matter together with PSNI's ongoing failure to review. CJI responded on 18 July 2012 again pointing out that CJI was precluded by statute from carrying out inspections into individual cases. In these circumstances it was unable to assist. It did, however, note that its future inspection programme included an inspection to examine how the PSNI and PPS deal with the issue of disclosure in non-terrorist cases. The work was planned for 2013-14. CJI's reply produced a further letter from the applicant's solicitors dated 24 July 2012. This noted the proposed inspection in relation to disclosure in non-terrorist cases but asked if there were any proposals to carry out a similar inspection in terrorist cases. On 30 July 2012 CJI replied to this query. It explained the process of determining its programme and indicated that it was anticipated that "in the future we would examine disclosure in terrorist cases".

[10] Matters rested there until January 2013 when the CJI wrote to indicate to the applicant's solicitors that the Chief Inspector had been consulting on the future inspection programme. The final inspection programme for 2013-14 was to be

published in April 2013. The applicant's solicitors responded to this letter on 28 February 2013. The applicant's solicitors wished to know "whether or not the issues raised by us in previous correspondence will form part of the proposed inspection programme".

[11] The letter also noted that "the issue of non-compliance with the comments of Mr Justice McCloskey QC (pursuant to the case of R v Marvin Canning) is the subject of a potential application for leave to apply for judicial review". The letter added:

> "The inclusion of the matter in the programme will remove the need to persist with … any perspective judicial review application."

[12] The response of the CJI was that the Chief Inspector had decided, following consultation with stakeholders, "to include a thematic inspection into disclosure in serious cases (excluding national security) in the CJI inspection programme for 2013-14".

[13] In a subsequent letter from the applicant's solicitors of 20 March 2013 the applicant's solicitors stated that "any proposed thematic inspection into disclosure practice and procedure in serious cases would appear to exclude cases such as R v Marvin Canning and similarly themed criminal proceedings". This elicited a response from the CJI affirming its proposed thematic inspection but the Chief Inspector indicated that "when the work has been completed", he would "consider any emerging issues and consult … as to the benefit of further work in this area in future years which could include disclosure in terrorist cases".

[14] The debate in similar vein then continued in a letter from the applicant's solicitors dated 5 April 2003. The applicant's solicitors indicated that "we take your correspondence … to exclude issues of concern raised by Mr Justice McCloskey QC in the case of R v Canning".

[15] On 22 August 2014 there was a further letter from the applicant's solicitors to the Chief Inspector. This largely rehearsed the issues again. Most of the letter as before was about Mr Justice McCloskey's comments. However, the matter at one stage was put more broadly when it was stated that:

> "The purpose of this correspondence therefore is to request you initiate forthwith a review into how the PSNI deal with the issue of disclosure in terrorist cases."

[16] Notwithstanding this, the letter ended by referring to the need for the investigation directed by Mr Justice McCloskey in the Canning case to be carried out to the Chief Inspector's satisfaction.

[17] By an undated reply the Chief Inspector (probably in September 2014) simply noted that "CJI is about to commence fieldwork for an inspection to assess the quality and timelines of police prosecution files and how disclosure is being managed by both the police and the Prosecution Service. I intend to publish a report of the findings of the Inspection in mid-2015".

[18] The correspondence continued after this date. On 11 September 2014 the applicant's solicitor wanted to know whether the proposed work included political/terrorist cases. This elicited the following response of CJI on 16 September 2014. The Chief Inspector said:

> "I can confirm that a random selection of completed Crown Court and Magistrates' Court cases will form part of the inspection methodology and will be examined to assess performance … I have not stipulated the types of cases to be examined and am confident that they will broadly reflect the full range of criminal cases coming before the courts."

[19] The applicant's solicitor then wished to know whether the sample would include terrorist/political cases. His enquiry was by letter of 16 December 2014. This produced a response from the Chief Inspector on 8 January 2015. This stated that:

> "The fieldwork for the inspection to assess the quality and timelines of police prosecution files and how disclosure was being managed by the police has been completed and the report is currently being written. The fieldwork methodology included an analysis of the full range of offences coming before the courts from which a random sample was selected which included a case involving terrorist offences."

The Chief Inspector went on to say that the report would be published in mid-2015. While further correspondence ensued the Chief Inspector maintained his position.

CJI Statutory Framework

[20] Section 45 of the Justice (Northern Ireland) Act 2002, as amended, provides for the appointment of a Chief Inspector of Criminal Justice for Northern Ireland. Section 46 sets out, *inter alia*, the organisations in respect of which the Chief Inspector must carry out inspections. This includes the PSNI and the PPS. Section 47 makes further provision as to his functions. Of interest for the purpose of these proceedings are:

Section 47(1) which states that "the Chief Inspector must from time to time, after consultation with the Department of Justice, the Advocate General for Northern Ireland and the Attorney General for Northern Ireland, prepare a programme specifying the inspections which he proposes to carry out under Section 46".

Under Section 47(6) the Chief Inspector may not:

"(a) carry out inspections or reviews of individual cases ….".

Section 48 provides for the powers of inspectors. Section 49 provides *inter alia* for the obligation on the Chief Inspector to report to the Department of Justice on each inspection and review carried out by the Chief Inspector.

The November 2015 Inspection

[21] While not initially found in the papers in this application, the court at the leave hearing was provided with a copy of the CJI Inspection which was completed in November 2015. Its official title is "an inspection of the quality and timelines of police files (incorporating disclosure) submitted to the Public Prosecution Service for Northern Ireland".

[22] While the subject matter of this inspection relates to the quality and timeliness of police files provided to the PPS generally, the inspection makes reference to the issue of disclosure, principally at paragraphs 3.41-3.53. These paragraphs refer to the statutory obligations on the prosecutor to disclose unused material. They go on to note the importance of those obligations being performed in criminal proceedings. In particular, there is reference to the need for disclosure schedules to be clear and accurate to ensure that all parties to the proceedings are fully aware of the unused materials available. There is then a discussion in respect of matters which had come to light in respect of the Chief Inspector's review of a quantity (at all court levels) of files in particular cases (including in one terrorist case). It is right to say that the inspectors were critical of disclosure performance, especially in the Crown Court where of 17 Crown Court cases considered only 4 were viewed as ones in which disclosure had been satisfactorily dealt with.

[23] The Inspection Report made a series of recommendations in respect of how disclosure performance could be improved. At paragraph 3.49 the case of Canning is referred to as a case which "highlighted what can go wrong when disclosure is not applied correctly". The terms of reference of the inspection are set out in full at Appendix 2 to the report. In themselves, the court finds nothing objectionable in them.

Assessment

[24] The court sees no arguable basis for the grant of leave to apply for judicial review in this case against the CJI (or its Chief Inspector). Its reasons for adopting this view are as follows:

(i) The court is satisfied that it was not the intention of the trial judge in any way to place the CJI under any obligation to investigate or review the events at the trial before him. His remarks in regard to investigation were directed at the CC and only him. The applicant could have no legitimate expectation from what the trial judge had said that CJI would carry out an investigation into his case, either directly or as part of a more general investigation.

(ii) In any event, it has been clear from an early stage – and indeed was communicated to applicant's solicitor and later reiterated – that the CJI are precluded by statute from carrying out an inspection or review of individual cases.

(iii) In the protracted correspondence between the applicant's solicitor and CJI the latter made no promise to carry out an inspection into or which encompassed, the applicant's case.

(iv) It was for the CJI to determine what its programme of work for the future was to be and the court detects no form of illegality or unfairness in the way in which it went about this task.

(v) Nor in the court's view could the CJI be said arguably to have acted unreasonably in deciding as it decided. The terms of reference were straightforward and unobjectionable.

(vi) The approach taken by CJI in connection with the inspection entitled "An inspection of the quality and timeliness of police files (incorporating disclosure) submitted to the Public Prosecution Service for Northern Ireland" published in November 2015 was a matter for CJI and the court sees no arguable basis for any form of legal challenge to it.

(vii) The report when published appears to be well within the latitude conferred by the terms of reference.

Other Issues

[25] At the hearing of the leave application a number of bars to the applicant's judicial review directed at the CJI were raised by Mr McAteer on behalf of the intended respondent. In view of the court's clear conclusions above, it is not strictly necessary to deal with these. However, for the avoidance of doubt, the court will indicate that it considers that the intended respondent's time point is well made. Indeed, Mr O'Donoghue accepted that the application was not made promptly or within the outer limit of 3 months found in Order 53 Rule 4. In these circumstances, it was up to the applicant to provide an adequate explanation for the delay by affidavit evidence. No such evidence was put before the court despite the substantial period which had elapsed since the judicial review application had been filed. What seems clear to the court is that insofar as the target of judicial review was the failure by CJI to carry out an inspection into the applicant's case the position of CJI had been known about since early January 2012 when the Chief Inspector indicated that CJI could not inspect or review individual cases. Insofar as the issue related to any later inspection encompassing the applicant's case as a terrorist case, the position of CJI had crystallised at least by March 2013. At this time the applicant's solicitor was clearly contemplating judicial review proceedings as the letter from the applicant's solicitor of 28 February 2013 indicated. But, notwithstanding the CJI response of 5 March 2013, no proceedings were issued until November 2015. Finally, insofar as the case being made was about whether CJI would conduct a general inspection into disclosure in terrorist cases, CJI's position that it was not going to do this in the way suggested by the applicant's solicitor, appears to have been clear, at latest by the end of September 2014.

[26] In the court's view, there would now be prejudice to CJI if the court granted leave to apply for judicial review of the 2015 report. As is clear from the above, the report has now been published and only in part relates to the issue of disclosure in criminal cases.

[27] Overall therefore the court sees no basis for any extension of time in this case in the public interest. Indeed, it notes that the Order 53 Statement contains no request to the court to extend time though orally Mr O'Donoghue made such a suggestion. If, therefore, contrary to the court's view that there is no arguable case established on the merits of the application, the court had taken the view that an arguable case had been made out, the court would have rejected the application on grounds of delay.

[28] Mr McAteer also raised at the leave hearing the issue of whether or not the applicant had *locus standi* to support these proceedings. Counsel noted that the applicant's concern was in relation to what happened in his case *ie* his treatment both before and during his trial. While he did not dispute that the applicant could have a sufficient interest to support a judicial review based on the events of his own case, it was submitted that he did not have standing in respect of a wider judicial review based on any need for a general investigation into the merits of an inspection into the disclosure issue in terrorist cases generally. Mr McAteer argued that it

would be improper for the court to allow a judicial review application in the applicant's name of such a general nature to be mounted in circumstances where the applicant's only proper interest was with what had occurred in his own case. Instead it was suggested that concerns of a general nature which were motivating the application were the concerns of defence solicitors and that the applicant was in effect a legally assisted front person for their interests.

[29] On the other hand, Mr O'Donoghue maintained that his client's concerns were to do with his general treatment and with failures in the system of criminal justice in terrorist cases which had affected him. These were genuine concerns, counsel argued, and the applicant was not a stalking horse for the views of others.

[30] The court has considered this issue but in view of its conclusions, already indicated, on the other issues in the case it declines to make any ruling on this aspect of the matter. In so doing the court takes into account that in general a liberal approach normally is taken in relation to the issue of standing.

Conclusion

[31] The court declines to grant leave to apply for judicial review in this case, both on the merits of the application and by reason of the applicant's delay in initiating these proceedings.