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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

Carlin's (Daniel Martin) Application [2013] NICA 40

DANIEL MARTIN CARLIN FOR JUDICIAL REVIEW

Before: Morgan LCJ and Treacy J

MORGAN LCJ (ex tempore)

Application

[1] This is an application for judicial review of a decision by District Judge McElholm made at Londonderry Magistrates' Court on 4 July 2013 when he refused to make an order for anonymity in respect of the applicant who was charged with offences relating to the making of indecent images of children. Judicial review proceedings were then issued which came before this court on 5 July 2013. The application was pursued on the basis that the refusal of anonymity was contrary to the positive duty on the courts to protect the applicant's right to life under Article 2 ECHR. We made an interim order for anonymity because no advice had been sought from the police in respect of the applicant's safety. We sat on 8 July 2013 in order to deal with this as a rolled up hearing dealing with both leave and the disposal of the application.

Background

[2] The background is that the applicant had been employed as an Assistant Manager at the Templemore Leisure Centre in Derry. He was well known within the city but was convicted of voyeurism on 30 June 2008, an offence which was committed in August 2007. On 14 November 2011 he was arraigned before Londonderry Crown Court on charges of indecent assault against a female child. The offences were allegedly committed between 1 January 2006 and 31 December 2007. The next morning he contacted his solicitors to complain that he had been approached by the father of the injured person at his home that night. The father told him that he should admit what he had done and if he did so the father said he would not contact him again. Clearly at that stage the applicant did not make any

admissions. The following evening he was shot five times outside his home by a person who had approached him at his home. He had arrived and left on a motorcycle. The father of the child was excluded as the attacker as he was on his way back to England at the time. The applicant sustained injuries to his legs and his hip. The shooting was subsequently claimed by Republican Action Against Drugs. No further threat or warning has been made to the applicant who was subsequently convicted on his plea of guilty in relation to gross indecency concerning this child. He has apparently continued to reside at his home without any apparent difficulty since then.

[3] On 17 May 2013 a summons was issued requiring him to appear before a preliminary enquiry in relation to charges of making indecent images of children. Those offences allegedly spanned a period between August 2008 and April 2010. He was due to appear before the court on 4 July 2013. This was his first appearance before the court in respect of this offence. On that date his solicitor asked to speak to the District Judge in Chambers and informed him that there was an application for anonymity in light of the previous attack which had been launched upon him. At that stage the District Judge invited the prosecution to come into Chambers so that an adversarial hearing on the issue could take place and then at a later stage invited the press to join the group in Chambers so that any representations about the restriction of any reporting could be heard. He concluded that the attack on the applicant in November 2011 was a one-off incident and not part of a pattern. In those circumstances he did not consider that the applicant had made out a case of a real risk falling within the test set out in Osman v UK [2000] 29 EHRR 245. He accordingly refused the application for an Anonymity Order.

Discussion

[4] We have examined the procedure adopted by the District Judge. We are aware that applications for anonymity orders have generally been made in open court in this jurisdiction but we recognise that there may be specific circumstances where there may be some difficulty in doing so. That might arise if issues relating to PII were involved or if there were likely to be persons actually in court who may be persons in respect of whom there was some issue relating to the application for the anonymity order. But it is for the District Judge in each case to satisfy him or herself that there is good reason for not dealing with the anonymity issue in open court and if there is such good reason the District Judge should say so when the anonymity order is being dealt with. Other than in exceptional circumstances such as PII issues arising, where an anonymity order is being considered both prosecution and defence should be present and any co-defendants who are involved should be there unless there is some very good reason for excluding them and it is fair to do so. It is essential, other than in exceptional circumstances, that a member of the press also be available to ensure that the press have an adequate opportunity to make representations and to take any further steps that they consider are appropriate in relation to the application. That is a minimum requirement of open justice and it is important that all of those involved in the justice system are aware of it. One of the

issues that may need to be considered is the extent to which the press should be free to report the application even where the application is granted. Any restriction on public access to information about what happens in the justice system must be kept to the absolute minimum.

[5] When this application was made there was no material from police before the District Judge at the time that he made his decision. We consider that where it is proposed to make an application for anonymity for a defendant there should be at the earliest possible time notification to the court, the police and the prosecution setting out the circumstances of the application. This should include any statements upon which the applicant may wish to rely. The police should be asked to comment on whether there is any reason to consider that there is a risk or threat to the individual concerned and if possible to give some indication as to what, if any, steps have been or might be taken in relation to it. This mirrors the procedure for determination of applications for anonymity in the Crown Court set out at paragraph 30 of the judgment of Hart J in R v Marshall and others [2005] NICC 29.

[6] This was a case in which the summons was issued on 17 May 2013 and the appearance was not scheduled until 4 July 2013. We are satisfied that there was ample time to pursue that aspect of the application so as to ensure that the material was before the District Judge at the time that he was making his decision. We make no criticism of the solicitor in this case but those making any such applications in the future should bear in mind the preliminary action that should be taken.

[7] We now turn to the facts of this case. First of all the general background is that there is no material before the court to indicate that there is any form of generalised threat in relation to those who are charged with offences of this kind in the Derry area. Despite the fact that it is common case that there are unhappily a large number of people in this area who have been charged with offences both involving children and other sexual misconduct there is nothing to indicate that they have been targeted by criminal or paramilitary groups. Secondly, this man was not targeted in relation to the voyeurism in 2008. He was targeted in relation to this specific child in November 2011 but has received neither threats nor warnings since that time. Taking all of those circumstances into account it seems to us that the background indicates that the attack in November 2011 was related to this specific incident. That seems to us to be further supported by the fact that police have indicated in an email received this morning that they are not in possession of any information that would suggest that the applicant is under any current threat from any known grouping. The police will have taken into account both their intelligence material as well as material that is publicly available.

[8] In his able submissions on behalf of the applicant Mr Reel accepted that the key issue in the case was whether the applicant could demonstrate that he was subject to a real threat which required the court to take positive action. He also accepted that in light of the police response the evidential base for the real risk had to be the previous attack which he submitted was sufficient. We accept that we must

take that material into account when considering the issue of whether there is a real risk but we must also take into account the circumstances of that attack and all the surrounding circumstances.

[9] There is no generalised threat in this locality to those who are alleged to have committed offences of this kind. The applicant was not attacked in relation to the offence of voyeurism. There is no evidence of subsequent threats to the applicant since November 2011. There was a direct approach to the applicant in respect of the November 2011 arraignment. There was an identifiable victim in the November 2011 offence. The police material we take into account as supportive rather than indicative of the position that the applicant is not at risk. We conclude that the applicant has not crossed the hurdle of demonstrating that there is a real risk of attack in relation to this matter. The title of the application will be changed from LM to Daniel Martin Carlin, which is the name of the applicant.

Conclusion

[10] We grant leave to apply for judicial review and dismiss the application for the reasons given.