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(subject to editorial corrections)*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY MARK CAVANAGH FOR JUDICIAL REVIEW (NO 2)

KEEGAN J

[1] I have provided a judgment in this case which is reported at [2019] NIQB 28. At paragraph [69] of that judgment I state as follows:

> "It will be apparent from the foregoing that I accept much of the respondent's case. I accept that disruption notices serve an important purpose which is legitimate. I am not minded to quash the notice or to issue any Order of Mandamus. However, before I finalise the case I am going to allow the respondent a short time to reflect on its position particularly as a review of the relevant policy should be imminent. I will hear from counsel in relation to this and any other issues that arise. The applicant is not prejudiced as he has had the benefit of a review in December 2018. I therefore reserve my position on the retention issue and I will hear further submissions in due course."

[2] I do not repeat the points made in my original judgment which deal with the facts and the law in this area particularly the cases of *Gallagher* [2019] UKSC 3 and *Catt v UK Application no 43514/15 24 January 2019*. On 13 September 2019 I heard submissions in relation to the remaining issue which is essentially whether the regime for retention of the disruption notice breaches Article 8 of the ECHR. Counsel provided helpful written and oral arguments and I also considered additional material from the respondent in response to my original judgment.

[3] I turn first to that material which is comprised in a letter from the Crown Solicitor's Office of 30 May 2019. The salient paragraphs of this letter read as follows:

> "In paragraph 69 of her judgment, the learned Judge indicated that she would allow further time for the PSNI to complete its process of reviewing its records management policy. This is an extremely onerous body of work, which extends beyond mere drafting, but also involves many important policy judgments and the allocation of resources.
>
> I have been instructed by the PSNI that the policy review process is very well advanced. PSNI officials have prepared in draft both a revised policy document and also a revised review retention and disposal schedule. Together these documents will set the future framework for the retention, management and disposal of policing records by the PSNI. Legal advice has been requested upon the content of the existing draft. The draft will then be the subject of internal consultation within the various departments of the PSNI and approved by its senior management. The RRD schedule must also be approved by the Department for Communities and the Public Records Office of Northern Ireland (PRONI) and then laid before the Assembly.
>
> In the absence of the Assembly, it is not possible to give a definitive date by which the new policy will take effect. In addition, PSNI cannot say when, or if, the Department for Communities will approve the document. However, it is anticipated that the remaining steps within the control of PSNI should be completed within 3 months. While this is an estimate made in good faith, it is subject to change for a number of reasons including potential operational and staffing pressures."

[4] I appreciate that this is a complex area with newly emerging law, hence I paused in my consideration of the retention and review issue. However, the letter I received in response does not deal with the substance of the review as regards retention and it obviously raises issues about timeframes for any change. Therefore both counsel accepted that I would have to deal with the issue on the evidence as it stands. This has not been a straightforward exercise for a number of reasons which I record. First I note that the actual policy documents in this case were not produced initially and that the second affidavit from Sergeant Roberts was produced at a late stage when matters had already begun before another judge. Also, I have had to consider extremely detailed submissions from experienced counsel about what the policy actually means – specifically whether the material in this case a disruption

notice is reviewed under normal review processes or not. These factors inevitably beg the question whether the policy is in fact accessible and clearly comprehensible.

[5] By way of contrast, I have had the benefit of considering policies from other police forces in this area which to my mind are relevant and which point to an easily accessible and readable regime for review and retention of disruption notices. This evidence is exhibited to the affidavit of the applicant's solicitor Mr Pierce of 12 April 2017.

[6] In deciding the remaining discrete question I am also cognisant of the underlying facts of this case. The applicant has a significant criminal history. I am told that he remains on bail for serious offences and he has a past criminal history. Mr McLaughlin understandably relies on these facts however that is only one part of the picture and is not determinative as regards the retention and review issue I have to decide.

[7] The real issue here is what the current PSNI policy means in relation to retention and review regarding disruption notices and whether or not that complies with Article 8 of the Convention. There was no argument that Article 8 is engaged. There was no argument that this policy pursues a legitimate aim namely the prevention of crime. The case comes down to whether or not the actions of the police in this realm are in accordance with law and proportionate under the Article 8(2) rubric. I also bear in mind that this case is confined to the retention of the notice and not the underlying police records disclosed to the applicant and the court in redacted form for the purposes of these proceedings.

[8] I recognise the applicant's concern that on the analysis of the PSNI documentation put forth by Ms Doherty QC the retention period for this disruption notice is 100 years or until the applicant would turn 100 with no possibility of review. The alternative argument made by Mr McLaughlin is that whilst the retention period is 100 years given that this documentation falls within the category of serious crime documentation, that there is the facility for review under normal review processes.

[9] At the initial hearing and again at this hearing Mr McLaughlin conceded that there should be some periodic review of this type of material. That of course is an entirely appropriate concession in line with the Strasbourg jurisprudence in this area which states that:

> "Safeguards must enable the deletion of any such data, once its continued retention becomes disproportionate." See *Catt v UK at paragraph 119.*

[10] In *M.M. v UK, no 24029/07, 13 November* 2012 the ECtHR stated that:

> "There may be a need for a comprehensive record of all cautions, conviction, warnings, reprimands, acquittals and even other information of the nature currently disclosed pursuant to section 113B(4) of the 1997 Act. However, the indiscriminate and open-ended collection of criminal records is unlikely to comply with the requirements of Article 8 in the absence of clear and detailed statutory regulations clarifying the safeguards applicable and setting out the rules governing *inter alia* the circumstances in which data can be collected, the duration of the storage, the use to which they can be put and the circumstances in which they may be destroyed."

[11] It follows from the legal argument in this case that a blanket retention period of 100 years with no possibility of review and in the absence of adequate safeguards cannot be compatible with Article 8 of the Convention. Mr McLaughlin pointed out that the policy itself would not make much sense if this were the position. Clearly that is why he contends for a reading of the normal review process into the policy documentation.

[12] I have considered both of the arguments made by Mr McLaughlin and Ms Doherty and I have re-read the PSNI documentation contained in the various policy documents. From that it is clear that the Service Procedure SP 3/12 indicates that the retention of material is determined by the RRD Schedule. For the category of material at issue in this case it appears clear to me that the RRD schedule provides for a retention period of 100 years (or until the person turns 100) without any stipulated review. The "normal review process" outlined in SP3/12 is different in that it provides for first review of retention after 5 years and normal review after 15 years. To my mind Ms Doherty is right to say that on a natural reading of the documentation the categories are mutually exclusive and there is no normal review mechanism clearly stated in this policy documentation for this class of documentation. If the normal review process effectively has to be read in, the policy itself is not clear. Accordingly I cannot see that it is in accordance with law or proportionate to the legitimate aim.

[13] I do not accept that there is an alternative remedy under the Data Protection Act 2018. There is of course a remedy for rectification afforded to an individual. However as Mr McLaughlin conceded that does not absolve the controller of the data from having a robust and proper policy. In other words the onus does not shift from the holder of the information simply because there is a rectification remedy. As I have said previously the Data Protection Act does not deal with the issue of review and so this is not an adequate recourse.

[14] I reject the argument that because the policy is not on the internet it is not accessible however I cannot see at the moment on the basis of the arguments that I

have had that it is comprehensible and I cannot see that it provides an adequate safeguard for this interference with Article 8 rights.

[15] It follows that the applicant is entitled to relief on this simple point. Had I been made aware that the policy review was dealing with this issue relief may not have been appropriate however I am in the dark as to what direction the review is taking and so it seems to me that declaratory relief on this discrete point is of utility and I will make a declaration to that effect the terms of which can be settled by counsel. I will hear the parties as to the question of costs.