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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 LEAVE TO APPLY FOR JUDICIAL REVIEW

-v-

CHIEF CONSTABLE OF PSNI

MCCLOSKEY J

Framework

[1] This is the court's adjudication of the contested discovery issues which have arisen between the parties.

[2] The Applicant is to be tried for certain alleged offences. The Respondent is the Chief Constable of the Police Service of Northern Ireland (the "Chief Constable"). The Applicant challenges a so-called "Threat to Life Disruption Notice" (hereinafter "the impugned Notice"). The existence and content of this Notice emerged, not for the first time, when the Applicant was making an application for variation of bail conditions – which, notably, succeeded - before the High Court on 18 May 2016. The gist of the impugned Notice is that the police have information suggesting that the Applicant was involved in threatening the personal safety of another. This he denies. His grounds of challenge are procedural unfairness, infringement of the common law principle of legality, breach of his rights under Article 8 ECHR, contrary to section 6 of the Human Rights Act 1998 and breach of Article 6 ECHR.

[3] In passing, leave to apply for judicial review has been granted and the substantive hearing of this challenge is imminent.

Factual Outline

[4] The evidence indicates that the impugned Notice was served by a police officer on the Applicant at his home on 25 May 2016. In response to the pre-action protocol letter the following was stated on behalf of the Chief Constable:

> "*PSNI received information which indicated that* [the Applicant] *intended to take unlawful actions against persons in the Belfast area. A Disruption Notice** was served … informing him that police were aware of the above information and advising him to desist from that activity.* [The Applicant] *refused to sign a copy of the Notice. ….*
>
> *Disruption Notices may be served when the identity of a potential victim is unknown or unclear. Police may issue such notices in cases where the identity of a person believed to be under threat from the criminal activities of another is not known. This is done in order to protect the lives of such persons ….*
>
> *The PSNI does not accept that the Disruption Notice involves any interference with any protected right. The existence of the Notice is restricted to secure police systems and is only visible to officers and staff who have a specific business purpose to access it. Access to systems is audited …*
>
> *Legal advice is required to be obtained and was obtained in this case prior to issuance. If PSNI were unable to issue such notices in appropriate cases our ability to protect life would be significantly reduced.*"

[** The impugned Notice]

[5] The Applicant is aged 43 years. He has an extensive criminal record, consisting of 84 offences. He has committed, *inter alia*, three firearms offences and two of robbery. His criminality spans a period of some 30 years. His punishments have included a commensurate sentence of 11 years for armed robbery (April 2007) and one of five years and seven months for drugs offences (July 2015), accompanied by a confiscation order in the amount of £450,000 which the Applicant has apparently challenged. At the time of the bail hearing noted in [2] above the Applicant was the subject of robbery and firearms charges.

[6] In an affidavit the investigating police officer explains that having been alerted to the Applicant's quest to vary his bail conditions in specified terms, his

researches uncovered the impugned Notice served on the Applicant shortly beforehand. The officer considered the Notice to be relevant to the issues arising in the variation application and brought it to the attention of prosecuting counsel accordingly. In this way the Notice was exposed in a public court. The initiation of the judicial review application followed some two months later.

[7] The decision to issue the impugned Notice was made by a police Chief Superintendent (the "CS") who is also Commander for the Belfast Area. The CS has sworn an affidavit wherein he avers that the impetus for issuing the impugned Notice was the receipt of "… *intelligence material .. relating to possible criminal conduct by the Applicant and other individuals*". He continues:

> "*The gist of the intelligence was that the Applicant and a number of named associates were actively targeting drug dealers within the Great Belfast area for the purposes of extortion. The intelligence report had been entered onto the NICHE*** *system a number of days previously …* [and] *.. had already been disseminated to other divisions within PSNI ….*
>
> *The Applicant and each of the named associates were all known to police and had significant criminal records for the commission of serious criminal offences …*
>
> *The intelligence information had already been graded and was considered by me to be credible and reliable. I was aware from my own experience that within the recent past there had been attacks on known drug dealers within the Belfast area, including murder. This background knowledge appeared to me to be consistent with the intelligence report. In light of what I also knew of the past history and criminal records of the individuals mentioned in the report, I concluded that there was a real risk that the Applicant or one of his associates may cause serious harm to a member of the public. Since the report did not give any indication as to when any criminal conduct may take place, I was not in a position to make a conclusion about whether the risk was an immediate one. However, I considered that this possibility could not be excluded and that police should take measures on foot of this information to reduce or avert the risk of harm.*"
>
> [**"NICHE" is a police computer records management system]

[8] The CS next adverts to (and exhibits) the relevant PSNI guidance, deposing that –

> "*One of the recognised operational responses for police is to issue a Disruption Notice. Notices of this nature are recognised as a means by which police may discharge any positive obligation arising under Article 2 ECHR to take steps to avert a real and immediate threat to life. Where the identity of the possible victim is known, it will generally be appropriate for the police response to include a Warning Notice (TM1) to that individual …*
>
> *Disruption Notices are generally only appropriate where the information available to police identifies a potential perpetrator but not a victim …*
>
> ***The purpose of the Notice is both to alert the individual to the fact that police are aware of the threat and thereby to deter any possible future actions by the person which may cause harm to another person.***"
>
> [Emphasis added.]

The CS further deposes to his assessment that reasonable grounds justifying the arrest of the Applicant or any of his associates did not exist. Nor was there sufficient information to warrant serving a Warning Notice on any identified potential victim. Following consultation with the Duty Officer and the PSNI human rights advisor (a qualified lawyer), both of whom concurred, the CS determined to issue the impugned Notice. The action of serving the impugned Notice on the Applicant was replicated in respect of each of the other identified suspected miscreants.

[9] Finally, the CS describes the strict controls which regulate and limit access to the PSNI NICHE database system wherein notices of this kind are stored. These controls and restrictions are enshrined within procedural protocols which are duly augmented by the Data Protection Act 1998 and the "PSNI Guidelines on Management of Police Information". Only officers of a certain rank <u>and</u> in possession of the requisite levels of security clearance can access information of this kind.

<u>The Contentious Discovery Issues</u>

[10] The Applicant has brought an application for specific discovery pursuant to RCC Order 24, Rule 7, seeking disclosure of the unredacted versions of the redacted documents exhibited to the affidavit of the CS (*supra*); the "*grounding intelligence reports*" identified in the affidavit; the "*background profile and threat assessments*" similarly identified; the impugned Notice; and the relevant PSNI policy guidance documents. This was grounded by a solicitor's affidavit the main averment

wherein is that "*… full discovery of these documents is necessary for the proper resolution of the issues in this case*".

[11] The Applicant's discovery application stimulated a Ministerial Certificate dated 04 December 2017. The thrust of this was to assert privilege, specifically public interest immunity ("PII"), in respect of specified documents which had been identified in response to the discovery application. The certificate, in summary:

(a) Acknowledges that the subject documents are relevant to the issues in these proceedings.

(b) Asserts that real harm to the public interest would, in the Minister's view, ensue if such documents were to be disclosed.

(c) Elaborates on this assertion in a specific schedule available to the Court only.

(d) Exhibits all of the documents in question.

(e) Suggests that certain documents can be produced only in redacted form; and, finally,

(f) (my paraphrasing) contends that the public interests engaged outweigh any right which the Applicant might otherwise have to receive the subject documents unredacted.

[12] I elaborate on the public interests asserted as follows. These are, in summary, the need to protect police information gathering systems, the providers of such information and the efficacy of police operations and activities designed to protect the public at large. Due elaboration of these imperatives is (I assume) provided in the so-called "Secret Schedule", available to the Chief Constable's representatives and the Court only, which I have not found necessary to consider (*infra*). I surmise that this is, in the usual way, a mixture of the general and the specific, probably replicating both the Chief Constable's affidavits and the PAP response and containing the Chief Constable's assessment of the documents under scrutiny, while differentiating between documents in the public domain and otherwise and addressing also the option of "gisting".

[13] The governing principles are uncontentious. Where a public authority relies upon a document as significant to its decision, this should normally be provided: Tweed v Parades Commission for Northern Ireland [2007] 1 AC 650 at [4]. Lord Bingham formulated the following test at [3]:

> "*The test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly.*"

In R (Mohammad) v Secretary of State for Commonwealth Affairs [2009] 1 WLR 2653, the Court of Appeal formulated the following four questions at [34]:

(i) Is there a public interest in bringing the documents into the public domain?

(ii) Will disclosure bring about a real risk of serious harm to an important public interest and, if so, which interest?

(iii) Can the real risk of serious harm to national security and international relations be protected by other methods or more limited disclosure?

(iv) If the alternatives are insufficient, where does the balance of the public interest lie?

While the second, third and fourth of these questions reflect a long-established approach in cases where discovery is resisted in whole or in part on PII grounds, the first question is somewhat more opaque. If the court provides an affirmative answer to the second question, it is not easy to ascertain how resort to the first of the questions could affect such answer. In the present context I observe only that this issue may be ripe for more detailed examination in a suitable future case. The submissions of the two parties have not raised it in the instant case.

[14] The test formulated by Lord Bingham in Tweed involves applying the following question in the present case: is disclosure of any of the documents the subject of the PII claim necessary in order to adjudicate fairly and justly on the Applicant's challenge? I add that, in this context, this requires the court to consider three types of disclosure: full unredacted disclosure of all of the subject documents; redacted disclosure of some or all of the documents; and further disclosure, ie disclosure over and above what has been provided already, taking into account that certain of the documents have already been provided to the Applicant via the mechanism of redacted exhibits to the Chief Constable's affidavit evidence.

[15] Adopting the Minister's approach, which is not in dispute, the first question to be addressed is whether the contentious material, per [8] of the Certificate –

> "*… relates to matters at issue in the proceedings and has lawfully been requested for discovery …*"

This self-direction is a faithful reflection of the long-established test of relevance, namely – per Order 24, Rule 3(1) – whether the quest is to secure disclosure of documents "*.. relating to any matter in question in the cause or matter*". While the Minister's assessment is that the threshold test is satisfied, this does not, of course, bind the court.

[16] Alertness to the nature and species of this litigation is, self-evidently, essential. These are public law proceedings involving no *lis inter-partes,* requiring adjudication by the court on whether the Chief Constable has committed any relevant public law misdemeanour. The boundaries of the court's enquiry and adjudication are determined by the Applicant's grounds of challenge, which are subject to judicial approval of certain proposed amendments. These are summarised in [2] above. I shall examine each in turn.

<u>Procedural Unfairness</u>

[17] The essence of this ground, as pleaded, is simplicity itself. The central complaint is that the Applicant -

> ".. *was unable to challenge the basis upon which* [the impugned Notice] *was made or make any representations as to its validity before it was presented before the Court …*
>
> *He should have been heard on the issue …*
>
> *The creation, issue and use of the Notice is in breach of the common law duty to act fairly.*"

The context in which these complaints are advanced is, as noted in [2] above, that the prosecution, without advance notice, sought to rely on the impugned Notice upon the hearing of the Applicant's application to the High Court to vary his conditions of bail. I refer to the Applicant's first affidavit:

> "*The Notice says, in essence, that the police were in receipt of information which suggested that I was involved in threatening the personal safety of another person … that I had intended to take unlawful action against unnamed persons in Belfast and that I was advised to desist from this ….*
>
> *It is of great concern to me that the existence and contents of this Notice were used against me before a Court which was considering issues which affected my liberty. In this instance it concerned lifting restrictions upon my liberty in order to allow me to take up employment.*"

The Applicant further complains that when police called at his home some two weeks before the hearing of the bail variation application the contents of the impugned Notice were simply read to him and he was not provided with a copy.

[18] The purpose of the Applicant's discovery quest, in a nutshell, is to secure the police records underpinning and underlying the impugned Notice. It is common

case that such records exist and there is no challenge to the Applicant's assessment that these are threefold: Occurrence Enquiry Log ("OEL") Reports, an intelligence report and a background profile and threat assessment.

[19] The kernel of the Applicant's procedural unfairness challenge, as pleaded and as developed in his affidavits, is that the impugned Notice was generated and then used in court without prior warning to him and, hence, without the opportunity to make representations about these actions. These are the essential ingredients of this ground. I am satisfied that they are all undisputed or, alternatively, incapable of being plausibly disputed on behalf of the Chief Constable. It follows, applying the Tweed test, that disclosure of the materials pursued is not necessary for the fair and just adjudication of this aspect of the Applicant's challenge.

Infringement of the Principle of Legality

[20] This ground of challenge is framed in the following terms:

> "*The absence of a legislative or other legal framework to regulate the mechanisms for creating, issuing and using the Notice is unlawful.*"

This is repeated in the next following subparagraph which, paraphrasing, contends that legislation is indispensable. In my judgment it is abundantly clear that disclosure of the materials pursued is not necessary to enable the court to adjudicate fairly and justly on this ground.

[21] While I do not overlook the Applicant's application to amend this ground so as to incorporate a further challenge involving the assertion that the criteria for issuing the impugned Notice were not satisfied, I am refusing this application on two grounds. First, it has no discernible nexus with the principle of legality. Second, it does not formulate any recognisable public law misdemeanour.

Article 8 ECHR

[22] The formulation of this ground is that the generation, use, retention and storage of the impugned Notice infringes Article 8 ECHR as it entails an interference with the Applicant's right to private life, protected by Article 8(1), which, contrary to Article 8(2), is not "*in accordance with the law*", in contravention of section 6 of the Human Rights Act 1998. The particulars of this ground are that the aforementioned actions have no basis in domestic law or, alternatively, are based on a law that is not sufficiently accessible; or, in the further alternative, are based on something which does not satisfy the "*quality of law*" test; and, in any event, there are insufficient restrictions and protections for the individual, including appeal and review mechanisms.

[23] My assessment is that this ground of challenge can be fairly and justly advanced and judicially determined without disclosure of any of the materials pursued.

Article 6 ECHR

[24] This ground of challenge repeats the procedural unfairness ground and adds:

> *"At the heart of Article 6 ECHR lies the fundamental right of the Applicant to confront his accusers and/or at the very least be provided with, some type of mechanism by which to challenge the very damaging assessment that has been, firstly, arrived at; secondly, publicised and, thirdly, relied upon to restrict his liberty. This is especially so given the absence of any relevant safeguards or procedures and the use to which the prosecuting authorities seek to put the Notice to …"*

The first observation is that certain elements of this ground, considered as a whole, are encompassed by the Article 8 ECHR ground. The second is that there is clear duplication of the procedural unfairness ground. The discrete, free standing complaint which this ground advances is the denial of a mechanism whereby the Applicant could challenge the assessment embodied in the impugned Notice.

[25] In my judgement, the essential factual ingredients of this ground are either uncontested or incapable of being plausibly contested on behalf of the Chief Constable. It follows that there will be no impairment of the Applicant's entitlement to a fair and just adjudication of this discrete challenge.

Disposal

[26] On the grounds and for the reasons elaborated above I dismiss the Applicant's discovery application.

[27] It is appropriate to add the following. The court has considered the Ministerial Certificate and, in doing so, has concentrated its focus on what might be termed the "stage one" issue, namely whether the threshold test for discovery is satisfied. I interpose here the observation that the Applicant's legal representatives are also in receipt of the certificate. The court has been provided by the Chief Constable's legal representatives with a bundle containing the so-called "Sensitive Schedule" and a series of documents. An anodyne guide to this bundle is contained in the letter dated 26 April 2018 from the Crown Solicitor's Office. My assessment is that, in the interests of fairness and transparency, a copy of this letter should be provided to the Applicant's solicitors (if this step has not already been taken). If uncontentious, this step should be taken within seven days of promulgating this judgment. If contentious, the Chief Constable's written

representations opposing this course will be provided by 15 May 2018, with the Applicant's solicitors to rejoin by 26 May 2018.

[28] As should be clear from the terms of this ruling, the court has not found it necessary to have resort to or read any part of the "Sensitive Schedule" or any of the accompanying documents. While this self-denying ordnance does not extend to the aforementioned Crown Solicitor's letter, this contains nothing which reveals the contents of either of the aforementioned.

[29] I accede to the Applicant's application to amend the grounds of challenge in the Order 53 Statement, with the exception noted in [21] above.

[30] It will be possible to revisit this ruling at the substantive hearing on 21 June 2018 if proper grounds for doing so materialise. I consider this facility appropriate in every ruling of this species as the court does not have the gift of a crystal ball.

[31] Any appropriate further or ancillary ruling or directions will be provided if required.