

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION**

**Coney's (Gavin) Application [2013] NIQB 148**

**IN THE MATTER OF AN APPLICATION BY GAVIN CONEY  
FOR BAIL**

**MAGUIRE J**

[1] The court has before it an application by the applicant for leave to appeal to the Supreme Court against the judgment of the court refusing him bail. It is argued on his behalf that the court should certify certain questions arising from the court's judgment as raising points of law of general importance and should grant leave to appeal in respect of one or more of these.

[2] An issue has arisen, however, as to the court's jurisdiction. It is contended by the respondent to this application, the Public Prosecution Service, that no appeal lies to the Supreme Court in respect of a decision made in exercise of the court's bail jurisdiction in this case and that, accordingly, the court should decline to deal with the substance of the application. This judgment deals with this issue.

[3] The history of the matter is worth referring to in outline. Following the applicant being charged with certain offences and being remanded in custody by the District Judge, he applied in the usual way for bail to the High Court. The judgment of the court on the substantive issue of the grant or refusal of bail in respect of the applicant was provided by the court on 1 November 2012. This application was then filed on his behalf. Pursuant to the directions of the court, a hearing was convened on 28 November 2012. At this hearing the jurisdictional issue was identified as arising and a timetable was set by the court for the receipt of skeleton arguments. A further oral hearing, skeleton arguments having by then been received, took place on 11 February 2013. In the light of the argument conducted on that day, at the request of the applicant, the matter was adjourned to enable further research to be conducted on his behalf into issues which had arisen in connection with the jurisdictional point. Ultimately further written submissions were received on behalf

of the applicant on 10 June 2013 and on behalf of the respondent on 18 June 2013. At the request of the applicant the court agreed to proceed to judgment on the jurisdictional issue on the basis of the totality of the submissions that it had received.

[4] A convenient starting point for a consideration of the issue by the court is the undisputed proposition that in our legal system rights of appeal are invariably conferred by statute. In order to determine whether or not a right of appeal has been provided the court will seek to identify the statutory provision which confers the right of appeal. In the absence of such a conferral, it is well established that no right of appeal exists: on this, see Wade and Forsyth, *Administrative Law*, Tenth Edition at pp 29 and 779. The onus at the outset, therefore, falls on the applicant in this application, to satisfy the court that a right of appeal has been provided by the legislature against a decision of the High Court exercising its inherent jurisdiction to grant or refuse bail.

[5] The applicant accepts that it is for him to establish his right of appeal. In seeking to discharge this onus, he submits that there is a right of appeal established under section 41 of the Judicature (Northern Ireland) Act 1978 (hereafter “the 1978 Act”).

[6] As the argument which has developed relates to the terms of the 1978 Act, it is convenient to set out the relevant provisions of it for present purposes.

[7] Section 41 is headed: “*Appeals to Supreme Court (formerly the House of Lords) in other criminal matters*”. The reference to “*other criminal matters*” seems to relate to matters which are outwith those dealt with in the earlier provisions of Part III of the 1978 Act. In this regard the terms of section 40 of the Act, which in the Act’s original form related to appeals from the Court of Appeal to the House of Lords under the provisions of Criminal Appeal (Northern Ireland) Act 1968, appear to be relevant. Section 40 sets out a regime for appeals from the Court of Appeal to the House of Lords related to what might be viewed as substantive criminal appeals (and certain references), matters which have arisen in the course of a criminal trial which have led to an appeal to the Court of Appeal, for example, appeals by a convicted appellant who has been unsuccessful before the Court of Appeal. Section 41, in contrast, is dealing with appeals in other criminal matters. There is no suggestion that this case falls within section 40 or its successors. Section 40 has now been repealed, its provisions having been replaced by sections 31-42 of the Criminal Appeal Act 1980 (as amended) (hereinafter “*the 1980 Act*”).

[8] Section 41 reads, so far as relevant to this application, as follows:

*“(1) Subject to the provisions of this section, an appeal shall lie to the Supreme Court, at the instance of the defendant or the prosecutor –*

- (a) *from any decision of the High Court in a criminal cause or matter;*
- (b) *from any decision of the Court of Appeal in a criminal cause or matter upon a case stated by a county court or a magistrates' court.*

*(2) No appeal shall lie under this section except with the leave of the court below or the Supreme Court; and, subject to section 45 (3), such leave shall not be granted unless it is certified by the court below that a point of law of general public importance is involved in the decision and it appears to that court or the Supreme Court, as the case may be, that the point is one of general importance.*

*(5) Schedule 1 shall have effect in relation to appeals under this section.*

*(6) In this section, and sections 44 and 45 and Schedule 1*

*(a) any reference to the defendant shall be construed*

- (i) *in relation to proceedings for an offence, and in relation to an application for an order of mandamus, prohibition or certiorari in connection with such proceedings, as a reference to the person who was or would have been the defendant in those proceedings*
- (ii) *in relation to any proceedings or order in respect of contempt of court as a reference to the person against whom proceedings were brought or the order made*
- (iii) *in relation to a criminal application for habeas corpus as a reference to the person by or in respect of whom that application was made,*

*and any reference to the prosecutor shall be construed accordingly...".*

### **The submissions of the parties**

[8] Mr Mulholland QC and Ms Fiona Doherty BL appeared on behalf of the applicant. In their submissions they rely principally on the terms of section 41 (1) which they say are clear and plainly cover the circumstances of this application. The language used, they contend, is broad and straightforward and can be characterised as conferring a right of appeal to the Supreme Court at the instance of the defendant from any decision of the High Court in a criminal cause or matter.

[9] They argue that the applicant, on a proper analysis, is for the purpose of the statute, the “defendant” and that the decision of the High Court in respect of a bail application is a decision “in a criminal cause or matter”.

[10] In contrast, Mr McGrory QC and Conor Maguire BL for the respondent, while accepting that a bail application in the High Court is properly to be viewed as within the description “criminal cause or matter”, nonetheless maintain that such an application does not fall within the terms of section 41 (1). The key to this submission, they argue, is the use of the word “defendant” in the phrase “at the instance of the defendant” in section 41 (1). They point out that the terms of section 41 (1) are, as the subsection states “subject to the provisions of the section” and that one of those provisions deals expressly with how the words “the defendant” are to be construed. This is a reference to section 41 (6). They submit that an applicant before the High Court for bail is an applicant and not a defendant and that it would be an error for the court to regard an application for bail as coming within any of the cases referred to in section 41 (6). They go a step further and contend that the purpose of section 41 is to bring in certain forms of proceedings for appeal purposes. The legislature chose not to bring in applications for bail though it did bring in certain judicial review, contempt of court, and habeas corpus proceedings. They say that if it had been intended that applicants for bail should have appeal rights to the Supreme Court it would have been simple so to provide but that, in fact and in law, no such provision was made. It follows, they say, that the court has no jurisdiction and that there simply is no right of appeal to the Supreme Court in the present context.

## **Conclusion**

[11] The court has concluded that the applicant has established a right of appeal from the High Court to the Supreme Court in respect of a bail application of this type. The right is, of course, subject to the requirements of section 41 of, and Schedule 1 to, the 1978 Act.

[12] The court has reached this conclusion having regard to the provisions of section 41 read as a whole. In the court’s view it is necessary, in particular, to read section 41 (1) together with the later provisions of the section. This means that regard must be had to the words at the beginning of section 41 (1) “Subject to the provisions of this section” and to the subsection (6) dealing with how the words “the defendant” are to be interpreted. However, it appears to the court, that subsection 6 (a) (i) should not be read narrowly and is capable of encompassing a right of appeal in the present context.

[13] While the court appreciates that it may be said (as the respondent has said) that a bail application is not in itself in the nature of proceedings for an offence, the language of subsection 6 (a) (i) is that any reference to the defendant shall be construed “in relation to proceedings for an offence...as a reference to the person who was in

*those proceedings or would have been the defendant*". It seems to the court that a bail application is an application "*in relation to proceedings for an offence*" even though it does not itself constitute proceedings for an offence.

[14] The words "*in relation to*" proceedings for an offence envisage a connection between the proceedings for an offence and the particular matter at issue. There is plainly such a connection in the context of a bail application as without the underlying proceedings for an offence the issue of bail would not arise at all. In other words, the connection between a High Court bail application of this type and the underlying criminal process is sufficient to enable it to be said that the latter is "*in relation to proceedings for an offence*".

[15] This interpretation is fortified by a consideration of section 41 (1) (b) which deals with appeals rights as between the Court of Appeal and the Supreme Court in the context of a decision of the Court of Appeal in a criminal cause or matter upon a case stated by a county court or magistrates' court. It seems to the court that for this provision to be engaged the appeal in question must be at the instance of the defendant or the prosecutor. For the correct approach to these descriptions resort must be had to section 41 (6) and, in particular, to section 41 (6) (a) (i). Applying the same mode of analysis as that above, it can be said that while the case stated procedure may not itself constitute proceedings for an offence, it is nonetheless in relation to proceedings for an offence and so can attract a right of appeal.

[16] The court, therefore, concludes that on an ordinary interpretation of the provisions of section 41 the section includes a right of appeal in the present context. It is unnecessary to deal with the arguments made by the applicant that the interpretation of section 41 should be informed by section 3 of the Human Rights Act 1998.

[17] The above interpretation is also consistent with references provided by the applicant to the court from Valentine's, *Criminal Procedure in Northern Ireland* (page 143), and from the Northern Ireland Law Commission's Consultative Paper on Bail in Northern Ireland (at page 25), both of which are supportive of an appeal in respect of a High Court bail matter to the Supreme Court being at least possible. Neither of these publications, however, descend into the detail of the textual structure of section 41.

[18] While the court is conscious that the interpretation it has arrived at above may not sit comfortably with the statutory regime for prosecution appeals from decisions of District Judges, in which explicitly it is provided that there is no appeal from a decision of the High Court on such an appeal (see section 6 (10) of the Justice (Northern Ireland) Act 2004), there may not always complete symmetry as to the way in which rights of appeal have been provided.