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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

BEFORE A DIVISIONAL COURT

IN THE MATTER OF AN APPLICATION BY PAUL CRAWFORD
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE DIRECTOR OF PUBLIC PROSECUTIONS FOR NORTHERN IRELAND

Mr Larkin QC with Mr O'Keefe (instructed by Phoenix Law Solicitors) for the applicant
Dr McGleenan QC with Mr Henry (instructed by the Crown Solicitors) for the proposed respondent

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Before: Keegan LCJ, Treacy LJ

KEEGAN LCJ (delivering the judgment of the court)

Introduction

[1] This is an application for leave to apply for judicial review arising in the context of a criminal prosecution of the applicant for an offence of belonging to a proscribed organisation, contrary to section 11(1) of the Terrorism Act 2000 ("the Terrorism Act") . We have dealt with this case on the basis that it is a criminal cause or matter.

[2] The prosecution against the applicant and a co-accused, Carl Reilly, arises from covert recording of a conversation said to have taken place on 17 February 2015 at the Carrickdale Hotel, Dundalk, in the Republic of Ireland. The prosecution case is that the participants in the conversation were Mr Crawford and Mr Reilly. The

substance of the prosecution case is that the covertly recorded conversation is evidence that Mr Crawford was a member of the IRA and that Mr Reilly directed terrorism and was a member of the IRA. The entirety of the covertly recorded conversation took place in the Republic of Ireland and contained discussion of persons, places and alleged operational matters.

[3] Mr Reilly was originally an applicant for judicial review but he withdrew his claim prior to hearing. The application for judicial review by Mr Crawford is dated 17 December 2021. When this matter was listed for hearing on 21 February 2022 there was an application made to adjourn the case by the applicant. This application was mounted on a number of bases. First, the court was told that the applicant had not achieved legal aid funding. Second, there was no sworn affidavit on behalf of the applicant. Third, counsel for the applicant raised a new ground of judicial review.

[4] This was a very unsatisfactory situation which obviously raised the concerns of the court as to adherence with good practice. It also meant that with great reluctance the court had to vacate the hearing date. However, the court set an expedited timeframe and ultimately heard the case on 25 February 2022. An amended Order 53 Statement was lodged dated 21 February 2022. In addition, on direction of the court, the applicant's solicitor filed an affidavit to deal with the issue of delay which was not previously addressed. Finally, the applicant provided a sworn affidavit dated 21 February 2022. These are all matters which should have been attended to at an earlier stage in these proceedings and the court trusts that this practice will not be repeated.

The contours of the judicial review

[5] Two claims are now pursued by virtue of the amended Order 53 Statement. They are both claims which are directed against the decision of the Director of Public Prosecutions ("DPP") to prosecute the applicant for the criminal offence referred to above. The challenge is framed as follows:

(i) That the prosecution is a nullity as it stands as it does not comply with section 117(2A) of the Terrorism Act 2000 in that it is alleged that the Advocate General should have given permission for the prosecution due to the evidence gathered in the Republic of Ireland.

(ii) That the authority for prosecution signed by Mr Stephen Herron of 15 June 2016 is unlawful in that he was not the DPP at the relevant time.

Core statutory provisions

[6] Section 117(2A) of the Terrorism Act provides that:

"But if it appears to the Director of Public Prosecutions or the Director of Public Prosecutions for Northern Ireland that an offence to which this section applies has been committed outside the United Kingdom or for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom, his consent for the purposes of this section may be given only with the permission—

(a) in the case of the Director of Public Prosecutions, of the Attorney General; and

(b) in the case of the Director of Public Prosecutions for Northern Ireland, of the Advocate General for Northern Ireland."

[7] The Justice (Northern Ireland) Act 2002 ("the Justice Act") section 33 also refers to consents to prosecutions:

"**Consents to prosecutions**

(1) This section has effect in relation to every provision requiring the giving of consent by the Director (whether or not as an alternative to the consent of any other person) to the institution or conduct of criminal proceedings ("a consent provision").

(2) A consent provision is deemed to be complied with if the consent is produced to the court—

(a) in the case of an indictable offence, at any time before the indictment is presented, or

(b) in the case of an offence to be tried summarily, at any time before the plea of the accused person is taken.

(3) For the purposes of a consent provision it is sufficient—

(a) to describe the offence to which the consent relates in general terms,

(b) to describe in ordinary language any property or place to which reference is made in the consent so as

to identify with reasonable clarity that property or place in relation to the offence, and

(c) to describe the accused person or any other person to whom reference is made in the consent in terms which are reasonably sufficient to enable him to be identified in relation to the offence, without necessarily stating his correct name, or his address or occupation.

(4) A consent required by a consent provision may be amended at any time before the arraignment of the accused person, or before his plea is taken.

(5) And if at any subsequent stage of a trial it appears to the court that the consent is defective, the court may afford the person giving the consent the opportunity of making such amendments as the court may think necessary if the court is satisfied that such amendments can be made without injustice to the accused person.

(6) Any document purporting—

(a) to be the consent of the Director or the Deputy Director to the institution or conduct of criminal proceedings, or criminal proceedings in any particular form, and

(b) to be signed by the Director or Deputy Director,

is admissible as prima facie evidence without further proof."

[8] Section 36 of the Justice Act reads as follows:

"**Exercise of functions by and on behalf of Service**

(1) The Director may delegate any of his powers (to such extent as he determines) to—

(a) any Public Prosecutor, or

(b) any other member of staff of the Public Prosecution Service for Northern Ireland."

The consent for prosecution

[9] The affidavit provided by the applicant's solicitor, Mr Mackin, of 22 February 2022 is the first place where disclosure of information about the consent to prosecution is fully addressed. The following salient facts emerge.

[10] On 23 October 2018 when he had full carriage of the case Mr Mackin drafted and sent a disclosure request to the Public Prosecution Service ("PPS") in which numerous specified materials were sought. Included in that request was disclosure relating to the relevant authorisations required under the Surveillance Act 2009 by An Garda Siochana and:

> "A copy of all authorisations made by the Director of Public Prosecutions Services pursuant to section 117 of the Terrorism Act 2000 in respect of the case."

[11] Mr Mackin avers that he received a reply to this disclosure request on 31 October 2018. In that the PPS stated that "no duty of disclosure arises." Mr Mackin states that he disputed whether no duty of disclosure arose given his knowledge and experience from a trial before the Special Court in Dublin of *DPP v Hannaway and others*. To that end he filed a section 8 application with the court. This resulted in the PPS clarifying their position in further correspondence of 19 November 2018. This reiterated the view that "no duty of disclosure arises."

[12] Mr Mackin confirms that he was familiar with the need for a valid consent having been the solicitor with carriage of the case of *R v Fennell (Damien) Judicial Review* reported at [2016] NIQB 78. He also states that he had assumed that when the PPS claimed there was no duty of disclosure, they were doing so on the basis that they did not have any material which assisted the defence or undermined the prosecution case and therefore had the correct DPP's consent.

[13] Mr Mackin avers that if the PPS had the correct DPP's consent, that the applicant said was required, then arguably there would be no material that would assist the defence or undermine the prosecution case. In support of his position he states:

> "I did not pursue this matter at that junction by way of a section 8 application for a disclosure order and the request for the DPP's consent was not made in respect of section 8 applications which were advanced on the other basis before HHJ Smith on behalf of both Mr Crawford and his co-accused, Mr Reilly."

[14] The aforementioned affidavit also explains that the request for the review of the instant decision was prompted by two main factors as follows. First, when the solicitor attended a consultation in June 2021 with Mr Larkin QC the issues were raised. On foot of this Mr Mackin states that he sent further correspondence to the PPS of 8 June 2021 in which he referenced the previous determination and asked for an urgent review of the decision. He states that the PPS did not reply to this correspondence and were sent a reminder on 8 October 2021. This resulted in the PPS reply of 5 November 2021 in which the PPS confirmed that authorisation from the Advocate General was not obtained in this case. When this was confirmed Mr Mackin states that he was instructed by his client to proceed by way of judicial review.

[15] Pre-action correspondence was issued on 24 November 2021. The PPS reply is dated 2 December 2021. Thereafter, the pleadings were drafted by counsel and settled and papers were then lodged on 6 January 2022.

[16] In his affidavit Mr Mackin takes issue with the suggestion that there has been delay. In the alternative he requests an extension of time on behalf of his client in accordance with Order 53, rule 4 and Order 3, rule 5 of the Rules of the Court of Judicature of Northern Ireland 1980.

The specific terms of the consent to prosecution

[17] The consent to prosecution is now found in the papers as disclosed. It is dated 15 June 2016 and it reads as follows:

> "I, Stephen Herron, solicitor and a public prosecutor, being a person to whom the Director of Public Prosecutions for Northern Ireland, in pursuance of section 36(1)(a) of the Justice (Northern Ireland) 2002, has delegated all powers which the Director may exercise under the Justice (Northern Ireland) Act 2002, in pursuance of the provisions of section 117(2)(b) of the Terrorism Act 2000 do hereby consent to proceedings being taken against the applicant."

[18] We were informed that the criminal proceedings remain undetermined as yet but are to be reviewed this month with a view to listing.

The Fennell case

[19] We mention this decision which is also referenced by Mr Mackin in a little detail due to its similar facts. In that case the applicant sought leave to apply for judicial review of an alleged failure by the DPP to prosecute him without first having obtained the permission of the Advocate General in connection with the

granting by the DPP of his consent to prosecution. The applicant was charged on an indictment containing three terrorist offences arising out of a speech he gave.

[20] The applicant's case was that in addition to the consent of the DPP there was and is a legal requirement that there must also be a permission given by the Advocate General before proceedings could lawfully be made subject to the DPP's consent. The requirement was said to derive from section 19(2) of the Terrorism Act 2006 or section 117(2A) of the Terrorism Act 2000 depending on the charge involved. Both sections are in the same terms. The issue with which the court was concerned was the subject of a challenge within the criminal proceedings which arose from the institution of the charges. In that case the Crown Court had been asked to rule on the question of whether the indictment was a nullity. The Crown court judge considered the merits of the application and refused it holding that it was entirely without merit.

[21] Maguire J providing the ruling of the court said at paragraph [7]:

> "In the court's opinion the crucial issue which arises in relation to the application before it is that of whether the court should grant leave for what may be viewed as satellite litigation."

[22] At paragraph [8] of the judgment he also made the following comments:

> "It is well known that the usual posture of the Divisional Court in Northern Ireland is not to grant leave where in its opinion a challenge can be dealt with within the criminal process. This has been a longstanding position grounded in the House of Lords decision in *R v DPP ex parte Kebilene* [2000] 2 AC 326 and followed in a range of cases since."

[23] The court refused leave and provided an overall conclusion at paragraph [11] as follows:

> "Accordingly, consistently with the principle that issues to be raised relating to a criminal prosecution should generally be determined within the criminal arena, this litigation appears to us to be a case of satellite litigation. In effect, the position in this case is that not only is there an attempt to take the matter outside the criminal arena, to which it belongs, but there is also an attempt to use judicial review as a back door means of seeking to procure the overturning of a Crown Court Judge's ruling in respect of on-going proceedings of which he is seized. In the court's view, this latter aspect infringes not only the

> general rule against satellite litigation but it also evades the prohibition of judicial review in respect of Crown Court decisions – which is also a well-established rule of law."

Consideration

[24] The context of this case is important. It arises in the midst of a prosecution for terrorist offences alleged to have happened some seven years ago. This court cannot help but be struck by the vintage of these criminal proceedings and has, from the outset, been anxious to avoid any further delay. The fact that criminal proceedings have been extant for some time means that the applicant has had experienced lawyers at his disposal. He has also been represented in the Crown Court at a number of preliminary hearings and reviews that have already taken place.

[25] Therefore, it is highly surprising, in our view, that the issue of the validity of the prosecution arises so late in the day. It is also surprising that judicial review is pursued when the criminal court has a wide facility to consider the regularity of proceedings and should do so where possible in accordance with the principles in *ex parte Kebeline*. This point was also reiterated by Maguire J in *Fennell* which is a case involving similar subject matter which Mr Mackin was aware of.

[26] We have decided to exercise our discretion and deal with the merits of the case first notwithstanding the fact that the proposed respondent raises a number of valid preliminary arguments, not least delay, alternative remedy and satellite litigation. We do so as the criminal proceedings are so far advanced to avoid further delay. Turning to the two substantive grounds of challenge we have concluded as follows:

Ground 1: Invalid prosecution pursuant to section 117 (2A) of the Terrorism Act

[27] This original ground postulates that a prosecution in this case which involved covert surveillance in the Republic of Ireland required the permission of the Advocate General. Pursuant to the Terrorism Act specific permission is required for what may be described as an "extra-territorial" offence. In relation to Northern Ireland, if applicable, that consent must come from the Advocate General.

[28] There is an obvious distinction between where the offending occurred, and where the evidence which is said to ground the offence was obtained from. The prosecution case is that the two men recorded in the Carrickdale Hotel were the applicant and his co-accused, Mr Carl Reilly. Although they were clearly in the Republic of Ireland when recorded, they are alleged to have discussed IRA activity more generally. That is why the PPS letter dated 5 November 2021 said:

> "The prosecution case against your client is that he was a member of the IRA in this jurisdiction."

[29] The PPS has referred to some non-exhaustive excerpts from the transcript which it is not necessary to repeat. The applicant is charged with membership as follows:

> "That you between [the relevant dates] in the County Court Division of Belfast or elsewhere within the jurisdiction of the Crown Court belonged to a proscribed organisation namely the Irish Republican Army, contrary to section 11(1) of the Terrorism Act 2000."

The prosecution case is that although the two accused were in the Republic of Ireland at the time their conversation was recorded, they discussed IRA business in Northern Ireland.

[30] This is unlike the position in *R v Smyth* [1982] NI 272 where Hutton J found that some offences clearly must have occurred outside the jurisdiction of Northern Ireland and therefore required consent of the Attorney General. His ruling did not apply to the membership charge in that case but to the counselling and procuring of murder. Hutton J also determined that the charges pursued without consent were void.

[31] Therefore, and for these reasons we consider that the first ground of challenge is inherently weak and does not reach the test of arguability for judicial review. The test we apply is that found in *Omagh District Council's Application* [2004] NICA 10 which is that for an application to succeed there must be an arguable case with a reasonable prospect of success. This argument falls very well short of that.

Ground 2: That the authority given by Mr Stephen Herron is invalid

[32] This ground of challenge requires examination of the core statutory provisions. Having determined that the consent of the Advocate General was not required for this prosecution the issue still arises as to whether the actual consent is valid because it is not signed by the DPP. The next step is to consider is the terms of the Justice Act.

[33] Section 33 of the Justice Act deals with consents to prosecutions. There are references to the office of Director at sections 36(1) and 26(6) and therefore the question arises whether the Director or arguably the Deputy Director needed to sign the consent in this type of case. That depends upon whether section 36 of the Justice Act allows for delegation. In this case the consent is not given by the DPP but rather by a solicitor in the DPP's office at the relevant time. Therefore, the powers of delegation come into focus.

[34] Applying the first established canon of statutory interpretation we look to the words of section 36 and apply an ordinary and natural meaning. Specifically,

section 36(1)(a) allows a delegation of "any of his powers" by the DPP to "any public prosecutor." To our mind the language is clear and provides for the delegation which occurred here.

[35] If there is some ambiguity (which we do not discern) the court can look to the meaning of the statutory provision to assist. If the court looks at Part II of 2002 Act that makes provision for the law officers and Prosecution Service. Sections 29-36 make specific provision for the PPS. Section 29(6) provides:

> "(6) The Director is head of the Service; and the Deputy Director and the Public Prosecutors are subject to his direction and control."

[36] Part II of the Act provides the PPS with core statutory functions and it is in that context that the statute permits the DPP to delegate any of his powers. We prefer the proposed respondent's argument in support of this position. We have considered the applicant's four points against and reject them as follows.

[37] We reject the applicant's submission that the general power conferred by section 36 yields to the particular consent of section 33(6). The specific provision he relies upon, namely 33(6), refers to the production of a signed consent from the DPP or Deputy DPP as being sufficient proof that such a consent exists. However, this does not interfere or otherwise overcome the language of section 36(1) which permits the delegation of any of the DPP's powers. We find strength in the point raised by Dr McGleenan that when Parliament has sought to limit the exercise of the section 36 discretion to delegate it is done so expressly. An example is given by way of section 10 of the Bribery Act 2010 which makes specific provision for consent to prosecution for offences under that Act being only allowable by or with the consent of the Director.

[38] The next argument made by the applicant is that there would be a "lopsided incongruity" if the DPP could delegate his functions under section 117(2A)(a) of the 2000 Act when the Solicitor General for England and Wales can only delegate to the Attorney General for Northern Ireland and no one else. This submission conflicts with the clear and unambiguous language of section 36 and we do not think it is sustainable in relation to consent for prosecution in this jurisdiction.

[39] The third argument raised by the applicant draws upon Schedule 7 to the 2002 Act in aid of an interpretation of section 36 and the limit which the applicant says is imposed on the ability to delegate authority to consent. However, as the proposed respondent points out the title of Schedule 7 also provides no assistance in the interpretation of section 36. Schedule 7 is entitled "Functions of the Advocate General." Section 36 concerns the delegation of the DPP's functions, not the Advocate General's functions. Further, the paragraph in Schedule 7 relied upon by the applicant, namely paragraph 37 refers only to the giving of consent by the DPP in connection with section 33. It makes no reference to the Deputy DPP even though

section 33 includes reference to the Deputy DPP. Therefore, we draw no assistance from this line of argument.

[40] The final argument raised by the applicant is that the consent required under section 117(2A)(a) of the Terrorism Act should involve the DPP himself given the nature of the exercise that is required. We can well understand that this is a serious offence which should be viewed by experienced personnel. However, it does not follow that the DPP has to undertake this exercise in every case of this nature himself. That is because of the wording of section 36 which allows the delegation of functions. In this case the person so delegated was an experienced solicitor, Mr Herron, who has now become the DPP. As such we see nothing impermissible in the authority granted for the prosecution contained in the consent of June 2016. Therefore, ground 2 must fail.

[41] It follows that we do not find any merit in the two arguments raised in this case. In judicial review terms this case is also well out of time and so an extension would have been required pursuant to Order 53 rule 4. We have considered Mr Mackin's point that the disclosure was initially not provided. That said we simply cannot understand the rationale for not pursuing a section 8 application to extract the disclosure letter which was ultimately revealed. It follows that the court would have been required to extend time for this case to proceed. No "good reason" has been established to justify this course.

Alternative remedy

[42] We endorse the view of Maguire J in *Fennell* on the issue of satellite litigation and the need to exhaust alternative remedies. *Fennell* was a slightly different case in that there was an application before the Crown Court judge. In this case, a point is raised that the Crown Court judge may not have jurisdiction to deal with this issue. In that vein counsel for the applicant has relied upon a passage which comes at the conclusion of *Valentine's annotated laws of Northern Ireland* commentary on the issue of consent to prosecution. This commentary is to the effect that:

> "Note: if it were clear that a requisite consent had not been validly given, surely it would be proper for the Div Ct to intervene to prevent the time and cost of a criminal trial to proceed to a void conviction or acquittal."

[43] This sentence must be read in context particularly given the sentences which immediately precede it which read as follows:

> "A challenge by judicial review that the consent of the DPP should on a proper view of the facts have been given is likely to fail as being satellite litigation. The usual posture of the Divisional Court is not to grant leave where in its opinion a challenge can be dealt with within the

> criminal process. In the event of a conviction or convictions, this issue can be the subject of an appeal from the Crown Court to the Court of Appeal. This satellite judicial review litigation is an attempt to take the matter outside the criminal arena where it belongs and use judicial review as a back door means of overturning a Crown Court judge's ruling in on going proceedings of which he is seized and evades the immunity from judicial review of the Crown Court."

[44] Once read as a whole it is readily apparent this paragraph primarily alerts the reader to the fact that applications should be brought pre-trial to avoid the time and costs associated with a potentially void acquittal or conviction. That makes some sense however in this case the trial has not yet occurred. Avenues were open to the applicant to bring a no bill or abuse of process application in the first instance before the Crown Court.

[45] *Valentine* also refers to the practice in criminal courts referencing a number of cases as follows: "Normally, there is no need for review of a granting of consent because any issue of abuse or unfairness can be raised at the court of trial" see *R Pretty v DPP* [2002] I AC 800. In addition, *Valentine* refers to the fact "if after charging the law is changed to require consent of the Attorney General to proceedings instead of the Director, a consent given by the Director before the charge does not validate committal for trial after the charge a new consent by the AG must be given," see *Marron* [1981] NI 132.

[46] Furthermore, reference is made to the case of *Chief Constable v Roulston* [2004] NICA 48. In that case there was an application before a Resident Magistrate ("RM") to vacate guilty pleas prior to sentence because of the absence of consent by the DPP to prosecution which was discovered late in the day. The defence argued that this was an abuse of process. The RM determined the case on the merits and found that the consent had not been valid and therefore the pleas were void. *Valentine* comments that:

> "The RM's ruling that the DPP did not consent to the four summary charges is a finding of fact and it means that the convictions entered in June are void (*R v Smyth* [1982] NI at 276F) as the RM rightly decided."

[47] The above points to the fact that the Crown Court has the facility to deal with this type of issue and has done so in the past in this jurisdiction. Judicial review is a measure of last resort and should only be exercised where alternative remedies are exhausted. That means that whilst there is a residual jurisdiction it should only need to be utilised in cases after alternative remedies are tried or unavailable. In addition, to avoidance of delay in criminal cases and the duplication of judicial effort this has

the significant advantage of saving the public funds expended on judicial reviews of this nature.

Conclusion

[48] Accordingly, we have not found that any of the arguments establish an arguable case for leave to apply for judicial review and we dismiss the application.