Neutral Citation No.: [2008] NIQB 113 | *Ref:* **McCL7289**

Judgment: approved by the Court for handing down | *Delivered:* **22/10/08**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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08/099783/1

IN THE MATTER OF AN APLICATION BY KEITH DAVIDSON FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

and

08/099785/1

IN THE MATTER OF AN APPLICATION BY MICHAEL HILL FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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McCLOSKEY J

[1] These are two applications for leave to apply for judicial review. The factual matrix in each case is materially indistinguishable and it appeared to me from the outset that they should be considered together. Counsel for both the Applicants and the proposed Respondent (who is the Chief Constable of PSNI) concurred and the cases have proceeded accordingly.

[2] The leave applications were listed, on notice to the proposed Respondent, initially on 13th October 2008. Both parties were represented by counsel. An adjournment ensued, when it became apparent that there were certain material letters in existence not included in the evidence, to ensure that the legal representatives of both parties exchanged and gave consideration to these letters and, further, brought them to the attention of the court. The hearings were duly completed on 16th October 2008.

[3] Each of the Applicants is described as a serving police officer. They live close together, in the same park. In both Order 53 Statements, the impugned determination is couched in the same terms viz –

> "*… a decision of the Police Service of Northern Ireland communicated to the Applicant by letter dated 8th August 2008 whereby it refused to issue a Chief Constable's Certificate in support of the Applicant's application to the Northern Ireland Housing Executive's Scheme for the purchase of evacuated dwellings*".

This is commonly known as the "SPED" scheme. It has, to the court's knowledge been in existence for many years.

[4] The relief sought in the two Order 53 Statements is identical. So too are the grounds of challenge. There are five grounds:

(a) Alleged irrationality in the ***Wednesbury*** sense.

(b) A failure to give adequate reasons.

(c) A failure to consider, or properly consider, the evidence available in connection with the two applications for SPED Certificates.

(d) The taking into account of immaterial considers/fetter of discretion/failing to give effect to the statutory purpose.

(e) Acting in breach of Article 2 of the Convention, contrary to Section 6 of the Human Rights Act 1998.

[5] It is the aspiration of each of the Applicants to leave their present addresses and to receive the assistance available under the SPED scheme to enable them to do so and, thereby, to acquire an alternative residence. In their grounding affidavits, the Applicants articulate the concerns which they harbour for their safety and that of their families while they continue to reside at their present addresses. Each of the Applicants deposes to a series of incidents and events spanning the period April to August 2008. By way of example, Mr. Hill deposes [in paragraph 6 of his affidavit] that on 16th May 2008, the Police Service informed him of a specific threat to his house and that of Mr. Davidson. This was unparticularised. He further deposes that, the following week, he received letters making reference to funeral payments and containing a sympathy card. A further incident ensued on 1st June 2008, when the Police Service relayed to both Applicants the receipt by the Samaritans of a telephone call intimating an attack on the homes of both Applicants. It is the understanding of the Applicants that the threatened attack evaporated on account of the intoxication of the miscreants. A police search of an area some three-quarters of a mile away uncovered a gallon of petrol, rags, a lighter and a note on which the

house numbers of the Applicants' respective addresses was written. Other incidents of concern to the Applicants occurred during the following weeks. The two affidavits are couched in broadly similar terms.

[6] Each of the Applicants makes the following averment:

> "*I believe that there is a clear and specific threat against myself and my family and that there is clear evidence of threats to commit acts of violence or other intimidation against us*".

This would appear to be the nub of their respective cases. The two Applicants further depose to their opinion that there existed "*… sufficient evidence and information to satisfy the criterion for the grant of a Chief Constable's Certificate …*". The ***evidence*** to which each of them alludes is, it would appear, the information contained in a series of reports compiled by them and submitted to superior officers, in support of their "SPED Scheme" applications, as exhibited to their affidavits.

[7] According to letters dated 8th August 2008 addressed by Superintendent Kyle of the "Emergency Housing Unit, Security Branch" of the Police Service to each of the Applicants, the *modus operandi* of the SPED Scheme is that three eligibility criteria must be satisfied:

> "*1. The house must be owner-occupied and must be the owner's only or principal home.*
>
> *2. A certificate signed by the PSNI Chief Constable or authorised signatory must be submitted stating clearly that it is unsafe for the applicant, or a member of his/her household residing with him/her, to continue to live in the house* ***because that person has been directly or specifically threatened or intimidated and as a result is at risk of serious injury or death.*** [My emphasis]
>
> *3. The applicant must qualify for Full Duty Applicant (Emergency) Status under the Housing Selection Scheme*".

[8] In the same letters, Superintendent Kyle informed the Applicants:

> "*In light of all the information available to the Police Service for Northern Ireland at this time the criterion for a grant of a Chief Constable's Certificate has not been satisfied*".

[9] The evidence now before the court contains certain significant letters. Firstly, there is a letter dated 12th August 2008 from the PFNI Chairman to ACC Toner (Operational Support Department) which makes representations on behalf of the Applicants. This letter asserts an escalating threat to the two Applicants and continues:

> "*In conclusion, I believe that there can be no doubt that there is a concerted campaign (probably orchestrated by loyalist paramilitaries) to attack the two officers concerned and force them from their homes. All of the intelligence and indeed evidence gathered corroborates that fact …*
>
> *I feel that had you been in receipt of all the facts surrounding these applications for SPED then you would have arrived at a different conclusion. It is therefore on the basis of the official information that I have provided that I ask you to reconsider your original decision …*".

[10] This letter precipitated a letter of reply from ACC Toner, dated 22nd August 2008. In this letter, the author asserts that he has requested, and considered –

> ". . . *specific time lines and analysis of all the incidents pertaining to each of the officers for the past twelve months … to include date, time, location and nature of any incident and details of any threat that may exist … also any advice, PM1 or support offered to the officer, with associated views on file from the local area or District Commanders*".

The letter further records the author's knowledge of the "petrol container" incident of which he claims to have made "*specific note*" and which, he claims, could not be connected with either of the Applicants. Elaborating, he explains that the telephone communication received by the Samaritans was to the effect that –

> ". . . *the materials were intended for burning cars belonging to two unnamed police officers* [and] . . . *There was nothing to indicate risk of serious injury or death against either of the officers*".

[11] The third newly available item of correspondence is a letter dated 25th September 2008 from ACC Toner to the Applicants' solicitors. This contains the following passage:

> "*Although it may be argued that* [the Applicants] *had been 'directly or specifically threatened or intimidated', there is no evidence to show that it is 'unsafe' for either constable 'to continue to live in his house' or that either constable 'is at risk of serious injury or death as a result of the threats or intimidation'*".

[12] This is an application for leave to apply for judicial review. It is trite that the threshold for the grant of leave is of limited elevation – for example, in the words of Kerr J in ***Re Morrow and Campbell's Application*** [2001] NI 261, it poses a "*modest hurdle*". In a well known passage, Lord Diplock stated that leave should be granted

where "*… on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case*": ***Regina –v- IRC, ex parte National Federation of Self Employed and Small Businesses*** [1982] AC 617, at p. 644A. Conversely, it has been stated that leave should be refused where the case appears to be "*manifestly untenable*": see ***Matalulu –v- Director of Public Prosecutions*** [2003] 4 LRC 712 (a fairly recent authority of the Privy Council).

[13] The application of the leave threshold will inevitably depend on the context of the particular case: "*In law, context is everything*", as Lord Steyn famously stated in ***Regina –v- Secretary of State for the Home Department, ex parte Daly*** [2001] 2 WLR 1622, paragraph [28].

[14] The first ground of challenge advances a complaint of irrationality in the ***Wednesbury*** sense. The question for the court is whether this has reached the threshold of arguability. The court is placed to make a reasonably confident and informed judgment about the approach of the decision maker and the rationale of the impugned determination, having regard to the correspondence now available. I consider the first ground of challenge unarguable.

[15] The second ground of challenge complains of a failure on the part of the proposed Respondent to provide any or adequate reasons. In ***Re O'Neill's Application*** [2008] NIQB … [unreported, 28th July 2008], Weatherup J stated:

> "*[27] In the context of a SPED application, where the criteria for the grant of a certificate are made known to an Applicant, that the criteria for a certificate had not been satisfied would be sufficient to comply with any obligation to give reasons.*"

I would simply observe that this is an evolving compartment of public law and, further, that one could not rule out the possibility of a court holding that in the context and circumstances of a particular case, belonging to this field, the decision maker has a legal obligation to provide reasons. However, in the present case, the further letters now available constitute, in my view, an adequate discharge of any duty that may be said to have existed in this respect. Paragraph [28] of ***O'Neill*** is especially apposite, in this context:

> "*[28] In any event all the relevant materials relating to the PSNI decision have become available on the application for judicial review and the reasoning that led to the decision to refuse the certificate is apparent to the Applicant*".

I find this ground of challenge unarguable accordingly.

[16] I shall deal with the third and fourth grounds of challenge together. These complain, in very general terms, that the impugned determination is vitiated by the taking into account of extraneous factors and the exclusion of material

considerations. I consider these two grounds to amount to little more than bare and unparticularised assertion. In this respect, see ***Re SOS Application*** [2003] NIJB 252, at paragraph [19], per Carswell LCJ:

> "*There must be some evidence or a sufficient inference that* [the decision maker] *failed to do so before a case has been made out for leave to apply for judicial review*".

I find neither primary evidence nor any basis for the necessary inference here and, in consequence, I hold each of these grounds unarguable.

[17] The final substantive ground of challenge invokes Article 2 of the Convention and Section 6 of HRA 1998. This gives rise to a consideration of the well known decision of ***Osman –v- United Kingdom*** [1998] 29 EHRR 245, which was the subject of recent consideration by the House of Lords in the Northern Irish Appeal, ***In Re Officer L*** [2007] UKHL 36. Their Lordships approved the formulation by Weatherup J in ***Re W's Application*** [2004] NIQB 67 to the following effect:

> "*A real risk is one that is objectively verified and an immediate risk is one that is present and continuing*".

Lord Carswell cautioned that this criterion is "*one that is not readily satisfied*", giving rise to a threshold that is "*high*": see paragraph [20]. He observed that it is necessary to focus on "*the reality of the existence of the risk*", while acknowledging that the subjective views and fears of the individual could properly be considered.

[18] The recent decision of the House of Lords in ***Van Colle –v- Chief Constable of Hertfordshire Police*** [2007] EWCA. Civ 325 falls to be considered. Their Lordships held that the ***Osman*** test is a uniform one: it does not vary from context to context. In thus holding, they reversed both the trial judge and the Court of Appeal. Lord Bingham recalled that Article 2 of the Convention provides, in material part:

> "*Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally …*".

Lord Bingham continued:

> "*[28] … According to what has become a conventional analysis, this provision enjoins each Member State not only to refrain from the intentional and unlawful taking of life* ['Thou shalt not kill'] *but also to take appropriate steps to safeguard the lives of those within its jurisdiction:* ***Osman –v- United Kingdom*** [1998] 29 EHRR 245, paragraph 115. *The State's duty in this respect … includes but extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law*

> *enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. Article 2 may also,* 'in certain well defined circumstances', *imply a positive obligation on national authorities to take preventative measures to protect an individual whose life is at risk from the criminal acts of another.*"

Lord Bingham then recalled how the European Court, in ***Osman***, paragraph [116] defined the circumstances in which the obligation arises:

> "*… it must be established to* [the Court's] *satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have expected to avoid that risk*".

Lord Bingham's immediately ensuing observation is worthy of particular note:

> "*Every ingredient of this carefully drafted ruling is, I think, of importance*".

[19] Lord Bingham further noted Lord Carswell's statement in ***Officer L*** that the test of real and immediate risk is one not easily satisfied, describing the threshold as "*high*" and observing:

> "*[30] … I would for my part accept that a court should not lightly find that a public authority has violated one of an individual's fundamental rights or freedoms*".

Significantly, his Lordship expressed approval of the submission that the ***Osman*** test "*… is clear and calls for no judicial exegesis*".

The following passage in Lord Bingham's opinion must also be carefully noted:

> "*[32] In its formulation of the 'real and immediate risk' test the Strasbourg Court, in paragraph 116 of its* ***Osman*** *judgment, laid emphasis on what the authorities knew or ought to have known 'at the time'.* ***This is a crucial part of the test, since where (as here) a tragic killing has occurred it is all too easy to interpret the events which preceded it in the light of that knowledge and not as they appeared at the time.***"

[Emphasis added].

His Lordship continued:

> "*But the application of the test depends not only on what the authorities knew, but also on what they ought to have known. Thus stupidity, lack of imagination and inertia do not afford an excuse to a national authority which reasonably ought, in the light of what it knew or was told, to make further enquiries or investigations: it is then to be treated as knowing what further enquiries or investigations would have elicited.*"

[20] Applying the ***Osman*** "template" to the present applications, the ***measure*** which the Applicants require of the State is the facility available under the SPED scheme to enable them to leave their existing addresses and move to new ones. The Applicants' case is that this constitutes (in the language of ***Osman***) *a reasonable preventative measure* or, to borrow Lord Bingham's formulation, one of "*the powers available to them for the purpose of protecting life*". At this stage, it is for the Applicants to establish that the Chief Constable is *arguably* under a duty, by virtue of Article 2, to facilitate this measure, by granting his certificate, on the ground that he is aware of an arguable real and immediate risk to their lives.

[21] I return to the emphasis on *context*. The court is constituted a public authority by Section 6 of the Human Rights Act 1998 ("*HRA 1998*"). It is correct that HRA 1998 has not (in Lord Steyn's words) brought about "*a shift to merits review*". However, there will normally be but limited scope for the operation of either the deference principle or a discretionary area of judgment in cases involving asserted contraventions of Article 2. In such cases, the intensity of review is at its most elevated. In my opinion, this has a bearing on how the threshold for arguability is to be approached in cases of this kind.

[22] In the present cases, the Applicants say that there is a clear and specific threat against them and their families. They characterise this a threat to commit acts of violence or other intimidation against them. They have presented both to the Chief Constable and this court the evidence which they claim supports the existence of this threat. By virtue of Article 2 of the Convention and Section 6 of HRA 1998, and having regard to the principled framework to be applied, the court is obliged to proceed with some caution in these circumstances. I must also take into account that the court does not have before it all material evidence: this is clear from the terms of ACC Toner's letter to PFNI. Furthermore, while accepting that a court should normally be slow to subject correspondence of this variety to microscopic dissection, I find, at this stage, that the two key letters from ACC Toner are not fully consistent inter se. While the first (dated 22 August 2008) specifically recognized evidence of intimidation of the two Applicants, the second (dated 25 September 2008) diluted this to (merely) an argument to this effect. I consider that there is also scope for further debate about the decision maker's treatment of the "Samaritans" issue and its outworkings.

[23] In the circumstances I consider that, albeit by a narrow margin, the Applicants' final ground of challenge overcomes the threshold for the grant of leave to apply for judicial review, bearing in mind the contextual approach which this entails in the present case.

[24] I treat paragraph 3(f) of the Order 53 Statement as an unparticularised, "omnibus" pleading, adding nothing of substance.

Conclusion

[25] I grant leave to the Applicants to apply for judicial review on ground 3(e) of the Order 53 Statement only, in accordance with paragraph [23] above. The remaining grounds are unarguable. The Order 53 Statement will require amendment accordingly and this should be served within seven days of delivery of this judgment.

[26] It is noted that there is no claim for interim relief. A hearing date of 4th December 2008 has now been fixed.

[27] The costs of the inter-partes leave hearing will be reserved.