Neutral Citation: [2016] NIQB 78 | *Ref:* **MAG10058**

Judgment: approved by the Court for handing down | *Delivered:* **27/09/2016**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

IN THE DIVISIONAL COURT

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Fennell's (Damien) Application (Judicial Review) [2016] NIQB 78

IN THE MATTER OF AN APPLICATION BY DAMIEN FENNELL FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Before: Gillen LJ and Maguire J

MAGUIRE J (giving the judgment of the Court)

[1] The applicant is Damien Fennell. He seeks leave to apply for judicial review of an alleged failure by the Director of Public Prosecutions ("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.

[2] It appears that the applicant was charged on an indictment containing three offences. These were one count of encouraging terrorism; one count of inviting support for terrorism; and one count of addressing a meeting for the purpose of encouraging terrorism.

[3] All of the offences arise from a speech made by the applicant on 5 April 2015 at Lurgan, County Armagh, at a public meeting at which he was the main speaker.

[4] It is clear that each of the offences could only be prosecuted with the consent of the DPP. Such consent in fact was forthcoming. Within the papers there is a written consent from the DPP in respect of each offence. That in respect of the charge of inviting support for a proscribed organisation is dated 8 October 2015; this is also the date of the consent in respect of the offence of encouraging terrorism; the consent in respect of the offence of encouraging support for a proscribed organisation is dated 12 January 2016.

The Applicant's Case

[5] The applicant's case is 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 is 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 and read, where relevant to this application, as follows:

> "… if it appears to the … Director of Public Prosecutions for Northern Ireland that an offence under this Part has been committed … 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 … of the Advocate General for Northern Ireland".

It is argued that before the DPP could himself consent to the institution of proceedings he required permission from the Advocate General for Northern Ireland. This was because the alleged offences were, the applicant submits, ones "committed for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom" and it must have appeared to the DPP that this was so.

[6] The issue with which the court is concerned was the subject of a challenge within the criminal proceedings which arose from the institution of the charges. On 8 June 2016 the Crown Court was asked to rule on the question of whether the indictment was a nullity. His Honour Judge Kerr QC heard the applicant's application. It is right to say that he felt that the matter could be best dealt with by means of a judicial review. However, he nonetheless considered the merits of the application and refused it holding that it was entirely without merit. In these circumstances the prosecutions are continuing at this time. The matter has been adjourned pending the outcome of this judicial review application. The present application was initiated on 23 June 2016.

The Court's Approach to the Application

[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.

[8] 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.

[9] The present case is a relatively unusual one because the position here is that, unlike many other challenges of this sort, the applicant has already sought to challenge the indictment within the forum of the Crown Court. If his challenge had been successful, this would have had the effect of defeating the prosecution. But, as is clear, it was not successful with the consequence that the prosecution continues. Ultimately, the prosecution will now or in the near future be the medium by which the guilt or innocence of the applicant will be determined. In the event of a conviction or convictions, the issue now before this court can be made the subject of an appeal from the Crown Court to the Court of Appeal in the usual way and the point now being pursued can be determined at appellate level.

[10] It seems to this court that this is a case in which it is appropriate that that route described above should be followed. 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.

[11] In the circumstances which have arisen the court considers that it would be wrong to grant leave to apply for judicial review. It would also be wrong for the court to be drawn into any commentary on the merits of the application now before it. This is because it may be that in due course these merits will later form the subject of a criminal appeal – and the court therefore should not seek to say anything about the merits of the present application which could affect the outcome of any possible appeal.

[12] In the course of the leave hearing the applicant sought to deal with the satellite litigation point by arguing that this was a case involving exceptional circumstances where it would be appropriate for judicial review proceedings to take place outside the criminal proceedings. It was suggested that the judicial review application involved the general approach which the DPP should take in cases of consents in terrorist proceedings. Ms Quinlivan QC, on behalf of the applicant, drew attention, in particular, to paragraph [24] of the judgment of Weatherup J (as he then was) in the case of In the Matter of An Application by Bernard O'Connor and

Andrew Broderick for Judicial Review [2005] NIQB 40, where an exception to the satellite litigation approach was made in respect of consideration of an issue of apparent bias which affected the whole system of disciplinary adjudication within the police.

[13] The court has considered whether this is a case which falls into an exceptional category. However, in the court's opinion, the present application for judicial review is highly fact specific and there is no evidence that this case deals with a longstanding practice. In these circumstances the conclusion which the court reaches is that the circumstances in this case are not exceptional.

Conclusion

[14] The court declines to grant leave to apply for judicial review for the reasons indicated.