Neutral Citation No. [2009] NICty 8 | *Ref:*

Judgment: approved by the Court for handing down | *Delivered:* **04/12/09**

(subject to editorial corrections)

IN THE MATTER OF AN APPLICATION

BY D/INSPECTOR JUSTYN GALLOWAY, PSNI
PARAGRAPH 5 SCHEDULE 5 OF THE TERRORISM ACT 2000

Burgess J

[1] On 7 May 2009 an application was made under the provisions of the above Act whereby the PSNI sought all records and material, including mobile phones, computers, related media and journalistic notes in the possession of Ms Suzanne Breen, the Northern Editor of the Sunday Tribune Newspapers relating to claims of responsibility for the murders of Patrick Azimkar and Mark Quinsey on 7 March 2009.

[2] For the reason given in my original Ruling, I refused the application. Ms Breen has now applied for an order that her costs in resisting the application should be paid by the PSNI. It is accepted that the resolution of this application is entirely within my discretion.

[3] At the outset I should record perhaps the obvious fact that it is the duty of the PSNI to investigate all crime, and to take all steps that are appropriate to apprehend and bring to trial those who are alleged to have committed those crimes. It is a duty that the general public look to the PSNI to pursue assiduously in all cases, but particularly so when dealing with investigations into such brutal crimes as those with which we are dealing in this application. In this case I determined on the evidence I was given that the line of enquiry that was at the heart of the decision to make this application was one which could merit an order under the Act, subject to any countervailing argument on the part of Ms Breen. This therefore was not a spurious application.

[4] The legislation makes no provision for costs. In many cases where such an Order involves considerable expense on the part of institutions and professional firms in complying with its terms, there is no provision for the payment of costs. I suspect that one reason may well be to ensure there is no restraint on the PSNI and other organisations permitted to apply for such Orders in pursuing that duty of investigation to which I have referred. I therefore am required to consider this application in the light of those duties and that legislative background.

[5] In my original Ruling I set out in considerable detail the factual background whereby such claims of responsibility were made to Ms Breen, and to the extent that that background is relevant to the issue of costs this Decision should be seen as supplementary to that original Ruling. I will however set out such facts as, inter alia, I regard as relevant to this Decision

[6] In the weeks after the murders, and prior to the formal application to the court, a series of articles where published in the Sunday Tribunal - initially in relation to the claims for responsibility. Within a short time after the murders approaches were made by the PSNI to Ms Breen seeking the information which became eventually the subject of the formal application to the court. She refused to hand over that material and that has been her position at all times since then. Those approaches by the PSNI in themselves then became the subject of comment in a series of articles in the newspaper. Again I need only refer to some parts of these articles for the purposes of this Decision.

[7] The application of 7 May 2009 was made on notice to Ms Breen, but the Information upon which the application was made was not disclosed. The reason for this was that it was regarded by me to be in the interests of the integrity of the investigation that the lines of enquiry being followed by the police should not be disclosed. At a hearing on 8 May 2009 I heard legal argument from counsel on behalf of Ms Breen. A considerable number of issues were raised, but at that stage there was agreement that the approach of the court was to be in two stages. The first as to whether or not the statutory criteria under paragraph 5 of schedule 5 of the Act were satisfied. If not, then the matter terminated at that point.

On the other hand, if the statutory provisions were satisfied then the next stage was to consider whether or not an Order should be made. In the context of this case the issues would become whether the responsibilities of the PSNI in the investigation of crime, and in particular the investigation of such hideous murders outweighed the competing interests of the rights of confidentiality invested in the material received by Ms Breen as a journalist (which were addressed under Article 10 of the European Convention on Human Rights), and the rights of Ms Breen under Article 2 of the ECHR. This latter right arose out of the perceived risk to her life, and indeed to the life of her family, from the terrorist group that had been responsible for these murders.

[8] In my original Ruling I determined that there was a right of confidentiality invested in the material sought. This however is a qualified right, which required to be balanced against the public interest in the investigation of serious crime and the bringing to justice of those who perpetrated it. Both were powerful interests. As I have said and repeat the responsibility and duties of the police to investigate such crimes are fundamental to the safety and on occasion the right to life of members of this community. At the same

time there is a substantial public interest in a free press and in investigative journalism which often places into the public domain information which can allow for informed debate.

[9] If these had been the only competing interests, then in my opinion the police would have had every right to pursue this matter through both procedural stages in order for the court to determine where the balance lay between those obligations and rights. That, in turn, would have had a significant impact on the application now made by Ms Breen that the PSNI should discharge her legal costs in respect of the entire proceedings. However I nevertheless have taken that position into account in my decision to the extent that costs have been incurred in respect of this aspect of the argument which the court was asked to consider.

[10] But of course it was not the only interest which the court was required to take into account. Her Article 2 right to life was not only a matter raised by her in the formal court proceedings, but had been raised in some of the articles published by the newspaper before any proceedings were taken by the police. On 3 May 2009 two articles were published in the Sunday Tribune, one by Ms Breen and the other seemingly on the part of a member of the editorial staff of the newspaper. In her article Ms Breen stated inter alia as follows:

> "Compliance would also destroy my livelihood and life. No organisation or individual with sensitive information would trust me again. If I did what the PSNI want, my life would be in imminent danger. The Real IRA is utterly ruthless. It shoots men delivering pizza to the security forces. It doesn't grant special status to journalists who, in its eyes, "collaborate".

[11] In the Editorial article it states inter alia

> "The reporter isn't a detective, nor is he or she a witness or "informer". If the role of messenger is interfered with so that the journalist becomes a state witness, then his or her credibility is destroyed. There is also the sinister reality that if Suzanne Breen co-operates with the police, her life would be endangered."

[12] In these circumstances, before the police applied to the court they would either have been aware, or in my opinion should have been aware, that Ms Breen was raising the issue of the threat to her life as one of the principal reasons as to why she was refusing to co-operate in handing over the material sought. To deploy that argument successfully Ms Breen was required to place before the court evidence which would satisfy a very high threshold –

that there would be a substantial risk of a breach of her Article 2 rights and those of her family.

[13] In the event the evidence that I considered reflected to a very substantial extent what would already have been known to the police as to the existence of such a risk. In my original Ruling when considering the question of whether or not Ms Breen had satisfied that threshold I set out what would have been known to the police at that time. These were:

(a) Objective assessments of the Real IRA, outwith any of the parties in this case and outwith the claims of the organisation itself:
(b) The statements of the Real IRA as to their objectives and their attitude towards those who they regard as legitimate targets:
(c) The reports of the Independent Monitoring Commission including one published on the 7th May 2009, the contents of which would have been informed by intelligence from the PSNI, and which reported that the CIRA and RIRA were especially active: the view that the threat was only to police was no longer valid: and that the RIRA remained highly dangerous and active; and
(d) The public statements made by the then Chief Constable himself as to the state of affairs with regard to security, assessments made by someone in a position to assess the risk generally or to assess the risk to any particular individual or groups of individuals, including Ms Breen.

[14] The only matter in the evidence before me as part of the court proceedings which may well not have been in the possession of the police at the time of the application was evidence of any specific threat made against Ms Breen. This was particularised in her statement of evidence dated the 22nd May 2009 at paragraphs 21 and 22, which refers to information received by her as to what the response of this terrorist group would be if she was to hand over any material – seemingly whether under court order or not. This last piece of the evidential jigsaw of the argument on Ms Breen's part as to her Article 2 Convention rights would therefore have been known to the PSNI a short time after that date. However it was but one piece of the evidence and in my opinion a small piece when weighed against the other evidence, facts and assessments in the knowledge of the PSNI.

[15] The police called no evidence at the hearing to counter either the general threat or the specific concerns of Ms Breen as to her position. Instead it sought to argue that the evidential threshold to which I have referred had not been reached, but in any case if it was attained there were other steps that could have been taken which would have afforded protection to Ms Breen against those threats. Even if the court could have taken such matters into account in a balancing exercise, the police produced no evidence as to what steps could be taken and, given the ongoing nature of the campaign of this terrorist group, as to how those could be effectually put into place to allow Ms Breen and her

family to be protected against any such risk. Again no evidence was called, and none was served prior to the hearing in respect of either aspect of this ground of objection. I can only assume that from an early stage a decision was made to leave the matter entirely to the court to decide in the absence of such evidence.

[16] Having considered all of the above background I have made the following determinations which inform my decision:

1. There is a proper and substantial obligation on the part of the police to investigate serious crime in the public interest:

2. Where the police have information that someone may have in their possession evidence which is likely to be of substantial value in the investigation of such crime, then clearly they have the same responsibility to consider seriously if that line should be followed:

3. In the course of following those lines of enquiry it will become clear whether or not a witness is prepared to co-operate. However in those circumstances as with any public authority the police must consider carefully the reasons why a particular witness in specific circumstances may not be prepared to co-operate, particularly when Convention Rights are engaged:

4. While the police have the right to apply to the court in order to obtain information which is being withheld, and whilst they may be satisfied that the statutory criteria under paragraph 5, schedule 5 of the Act can be met, they nevertheless are required to consider all issues in the case including the bases of opposition being put forward by the person with that potential evidence. In this respect it is no different to the approach by any party in any legal proceedings. One is obliged to look to the potential conclusion and the possibility of success at the conclusion of all arguments which may be deployed.

5. The issue of confidentiality is, for the reasons I have given, a determination which balances competing Convention Rights. I have commented that if this had been the only grounds of opposition then my approach to costs would have been different, at least in terms of the extent allowed against the PSNI.

[17] In this case, before the application was made on 7 May 2009, the PSNI would have been aware that, quite apart from the argument of journalistic confidentiality and privilege, Ms Breen was arguing that her life would be at risk if she were to hand over this information. They no doubt would have assessed that risk. In doing so they were in a unique position to consider the general security background: the general threat from this dissident group not

least in terms of their murderous and attempted murderous activity on this night: and their attitude towards anyone who may co-operate with the police, particularly in handing over evidence which they, the police, specifically understood likely to be of substantial value. If indeed such a risk assessment was carried out, it was never made known to the court – on any basis. If one was not carried out then that would be a serious lacuna given the nature of the threat and the fact that this was an argument that the court would be asked to determine.

[18] I am satisfied that the police would have known from an early stage whether or not they would have been arguing either that no such risk existed – and the factual basis for that given the statements made by the police and others - and the specific position of Ms Breen in the context of this case. I am satisfied that from an early stage it would have been clear to them what those risks were and that I have no evidence in front of me to suggest that at any stage they intended to challenge that factual backdrop by production of evidence of their own.

[19] I have concluded with no difficulty that at least some part of Ms Breen's costs should be met by the PSNI. As to the extent I have sought to strike a balance in respect of this mixture of issues and have concluded that short of a detailed measuring of the costs that I should instead reflect the costs to be paid as a percentage. I have therefore concluded that the PSNI should discharge 75% of Ms Breen's costs, which hopefully can be agreed, but which I will settle in the event of disagreement. The costs of this application will be met by the PSNI.