Neutral Citation no. (2003) NIQB 2 | *Ref:* **KERC3835**

Judgment: approved by the Court for handing down | *Delivered:* **06/01/2003**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY MARSHALL TAGGART

FOR JUDICIAL REVIEW

KERR J

Introduction

[1] The applicant is a member of the full time reserve force of the Northern Ireland Police Service. By this application he challenges the decision of a senior investigating officer of the office of the Police Ombudsman for Northern Ireland requiring him to attend for interview at a police station. He also challenges a decision of a superintendent of the Police Service of Northern Ireland authorising the interview.

Background

[2] On 28 June 2001 the applicant and three colleagues were on duty as an undercover unit in the area of New Mossley. At about 1 am on that date an incident occurred during which two of his colleagues each discharged a shot. The applicant gave an account of the incident to police on 29 June 2001. Following a complaint by the occupants of a car who were also involved in the incident all four members of the unit became the subject of a formal investigation by the office of the Ombudsman.

[3] The applicant received notification of the allegations that had been made against him by way of two notices issued under Regulation 9 of the Royal Ulster Constabulary (Conduct) Regulations 2000. These notices were issued on 10 July 2001 and 3 October 2001. The first set out the allegation that the two officers had fired without giving the authorised warning and stated that the applicant had been present when that occurred. The second stated that he

had made a false statement to the police about the circumstances of the incident.

[4] On 11 January 2002 Jim Donaghy, the deputy senior investigating officer of the Ombudsman's office, wrote to the applicant to inform him that he wished to interview him in relation to an alleged offence of attempting to pervert the course of justice. Mr Donaghy also informed the applicant that he intended to arrest him but wished to do this by appointment and he suggested a number of dates when this might take place. Mr Donaghy pointed out, however, that a number of police officers were to be interviewed and that he wanted these interviews to take place at the same time. The applicant did not reply to Mr Donaghy's letter. He claims that he did not receive it.

[5] The other three officers to whom letters had been sent did receive them and indicated that they would prefer to be interviewed on 20 February 2002. Subsequently, however, it transpired that one of the officers had to attend court on that date and the interviews were re-arranged for the next day. According to the applicant he received a telephone call from the Ombudsman's office at 10 am approximately on 20 February informing him that he need not attend for an interview that afternoon as arranged because one of the other officers had to attend court. He was told that he should attend Musgrave Street police station the following day, 21 February at 2.30 pm. At this time the applicant was not on duty. He had been on sick leave. He was told, however, that he must attend for interview.

[6] In the evening of 20 February 2002 a letter was delivered to the applicant's house confirming the arrangements for his arrest and interview the following day. He claims that he did not open this until the morning of 21 February. Whether this is true or not, it is clear that as of the morning of 21 February he was well aware that he was due to attend for interview on the afternoon of 21 February. He did not attend for interview. He did not contact the Ombudsman's office. Instead, according to him, he contacted a Mr Peter Cahill, a representative of the Police Federation, and informed him of the contents of the letter from the Ombudsman's office. The applicant claims that Mr Cahill later called him back and informed him that he had spoken to a Superintendent Maxwell and that "under no circumstances was [he] to attend Musgrave Street police station and that Superintendent Maxwell would speak to the Ombudsman's office and explain the circumstances to them".

[7] No-one from the Ombudsman's office received any communication from Superintendent Maxwell. Neither he nor Mr Cahill has made an affidavit to support the claims made by the applicant. No explanation has been offered for the absence of evidence from them. I am unable to accept that the applicant's account of this matter is correct. Nor do I accept that there was any good reason for his failure to attend interview on 21 February.

[8] When the applicant failed to attend at 2.30 pm on 21 February, two investigating officers of the Ombudsman's office went to his home. A woman, presumed to be the applicant's wife, answered the door and claimed that he was not present. A man wearing a blue shirt had been observed at the front door of the house shortly before the investigators approached it, however, and a man of similar appearance was seen travelling in a car from the house after they had left it. The applicant denies that he was at the house at the material time but I have grave misgivings about the truth of that claim.

[9] The applicant eventually attended for interview accompanied by his solicitor, Mr Caher, on 27 February. He was arrested and interviewed for two periods between 12.47 pm and 1.15 pm and from 1.40 pm until 2.15 pm. Mr Caher was present throughout the interviews. After interview the applicant was taken to the duty sergeant. One of the interviewing officers indicated to the sergeant that he required to re-interview the applicant and asked that he be directed to return at 2 pm on 21 March 2002. Mr Caher objected to this arrangement, indicating that he would be attending an interview of another of the police officers under investigation in relation to the same incident.

[10] Superintendent Reid's advice was sought at this stage. He discussed the matter with Mr Caher and with Mr Donaghy. The latter told the superintendent that he had organised teams of interviewers for the same date to interview each of the officers under investigation at separate police stations. Mr Donaghy wanted to ensure that there was no collusion between the police officers about the matters under investigation. Having considered the matter for a little time, Superintendent Reid concluded that the interview of the applicant should proceed as proposed by Mr Donaghy. It is this decision and that of Mr Donaghy which are under challenge in these proceedings.

The applicant's case

[11] The applicant claims that at the time of the decisions under challenge were taken he was a person charged with a criminal offence within the terms of article 6 of the European Convention on Human Rights and was therefore entitled to defend himself through legal assistance of his own choosing in accordance with article 6 (3) (c). It is further submitted that the decisions were unreasonable and disproportionate.

Was the applicant a "person charged with a criminal offence"?

[12] The applicant relied on the judgments of ECtHR in *Eckle v FRG* [1983] 5 EHRR 1 at paragraph 73; *Deweer v Belgium* [1980] 2 EHRR 439 at paragraph 46 and *Allenet de Ribemont v France* [1995] 20 EHRR 557 at paragraph 37 in support of his claim that he had been charged with a criminal offence. In reliance on *Howarth v UK* [2001] 31 EHRR 861 it was submitted on his behalf

that the issue of the notices referred to in paragraph 3 above and the arrest and detention of the applicant during interview were sufficient to incur the protection of article 6.

[13] In so far as is material to the present case article 6 (3) of ECHR provides: -

> "Everyone charged with a criminal offence has the following minimum rights:
>
> a. …
> b. …
> c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; "

[14] In *Attorney-General's reference (no 2 of 2001)* [2001] 1WLR 1869 the Court of Appeal in England dealt with the issue of when a person was to be deemed to have been charged with a criminal offence for the purposes of article 6 (1). At paragraph 13 of the judgment it was stated: -

> "In the ordinary way an interrogation or an interview of a suspect by itself does not amount to a charging of that suspect for the purpose of the reasonable time requirement in Article 6(1). We do not consider it would be helpful to seek to try and identify all the circumstances where it would be possible to say that a charging has taken place for the purpose of Article 6(1), although there has been no formal charge."

[15] This conclusion has been the subject of criticism in an article by Alistair Webster QC in *Criminal Law Review*, October 2001 where he said: -

> "The Court of Appeal rightly identified that the meaning of 'criminal charge' in Article 6(1) is an autonomous concept and that one should look behind the national terms used to get to the substance of the situation. It then adopted a test propounded in a number of decisions by the European Court of Human Rights, identifying the time of a criminal charge as,

> ' ... the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence.'

The Court of Appeal, applying that test, held that,

> 'In the ordinary way an interrogation or an interview of a suspect by itself does not amount to a charging of that suspect for the purpose of the reasonable time requirement in Article 6(1). '

The cases cited in support of this view do not, in fact, lend it great support. *Deweer v. Belgium* was a case in which the European Court of Human Rights had to consider whether or not particular proceedings were, in effect, criminal in character. The court noted, at paragraph 42 of its judgment, that,

> 'The *Wemhoff* and *Neumeister* judgments ... and then the *Ringeisen* judgment ... took as the starting point the moment of arrest, the moment when the person was officially notified that he would be prosecuted and the moment when preliminary investigations were opened respectively.'

The judgment later identified the test as being where, 'the situation of the suspect has been substantially affected.' In the other cases cited by the Court of Appeal, *Foti v. Italy* and *Corigliano v. Italy,* we see similar analyses of the concept of charge.

As we have seen from the case of *Howarth v. United Kingdom*, the European Court of Human Rights considered that time began to run (in what was a typical English context) from the time of first interview. This case is not considered in the Court of Appeal's judgment. It is submitted that the *Howarth* approach is the correct one. It was the approach conceded by the Crown in the Scottish case of *Robb v. H.M. Advocate*. It also equates, in reality, with the tests set out above in the

> European decisions: what is the foundation of the caution given to suspects upon arrest if not the communication to them that they are suspected of having committed an offence? The words of the caution given before interview strongly carry with them the implication that the interviewee is suspected of an offence (why else the reference to 'your defence'?). The purpose of the reasonable time guarantee was identified in the case of *Stogmuller v. Austria* as, ' ... to protect people against excessive criminal delays; in criminal matters, especially, it is designed to avoid that a person charged should remain too long in a state of uncertainty about his fate.' Can it realistically be argued that the vice of uncertainty does not begin to bite from the time of arrest and questioning (absent any indication that no charge will follow)?"

[16] It must first be noted that the Court of Appeal was concerned with whether there had been unreasonable delay between the charging of the accused and his trial and Mr Webster's commentary was made in that context. The situation in the present case is quite different. What is at stake here is whether the applicant is entitled to have counsel of his choosing at the time when he has been charged with a criminal offence as opposed to the position under article 6 (1) which, so far as is material, provides: -

> "In the determination of … any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The article 6 (1) aspect involved in the *Attorney-General's reference (no 2 of 2001)* was the requirement that there be a trial determining the guilt or innocence of the accused within a reasonable time of his having been charged. The article 6 (3) (c) right in the present case is concerned with ensuring that the applicant is entitled to be represented by a lawyer of his choosing when he has been charged with a criminal offence. The 'charge' in each of such two contexts will not always be synonymous nor will a person necessarily be deemed to have been charged for the purposes of article 6 (1) at the same time as for the purposes of article 6 (3) (c).

[17] In *Attorney-General's reference (no 2 of 2001)* the Court of Appeal recognised that in the article 6 (1) context there would be occasions where the

conventional connotation of 'charge' as it has been traditionally regarded may not always be appropriate. At paragraph 11 of its judgment it said: -

> "There will, however, be situations where a broader approach is required to be adopted in order to give full effect to the rights preserved by Article 6(1) of the Convention. Mr Perry put the matter as follows. For the purposes of that Article there could be a period prior to a person formally being charged under English law if the situation was one where the accused has been substantially affected by the actions of a State so as a matter of substance to be in no different position from a person who has been charged. The importance of the approach that Mr Perry concedes the Court has to adopt is that it takes account of the fact that there may be some stage prior to an accused being formally charged in accordance with our domestic law where, as a result of the actions of a state linked to an investigation, when he has been materially prejudiced in his position."

This reflects the approach of ECtHR in *Eckle v Germany* where at paragraph 73 of its judgment the court said: -

> "In criminal matters, the "reasonable time" referred to in Article 6(1) begins to run as soon as a person is "charged"; this may occur on a date prior to the case coming before the trial court (see, for example, the *Deweer* judgment of 27 February 1980, Series A no. 35, p. 22, para. 42), such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened (see the *Wemhoff* judgment of 27 June 1968, Series A no. 7, pp. 26-27, para. 19, the *Neumeister* judgment of the same date, Series A no. 8, p. 41, para. 18, and the *Ringeisen* judgment of 16 July 1971, Series A no. 13, p. 45, para. 110). "Charge", for the purposes of Article 6(1), may be defined as:
>
> > "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence,"

> a definition that also corresponds to the test whether "the situation of the [suspect] has been substantially affected" (see the above-mentioned *Deweer* judgment, p. 24, para. 46)."

What is clear from this passage is that the court did not consider that there was a single immutable moment at which a person would in every circumstance be deemed to have been charged for the purposes of article 6. This may be before he comes to trial but need not necessarily be so; it may be at the time of arrest or at the time when he was officially notified that he would be prosecuted; alternatively it may be at the time that the preliminary investigations were opened.

[18] This reasoning applies *mutatis mutandis* to the position under article 6 (3) (c). Thus, a person may be entitled, during his interview after arrest on suspicion of having committed an offence, to defend himself 'through legal assistance of his own choosing' even though at that stage no formal charge has been preferred against him. Whether that is required will depend on the particular circumstances of the individual case.

[19] It should perhaps be noted that the *Howarth* decision does not purport to lay down a universally applicable rule that a person is charged from the moment that an inquiry into the charge begins. In that case the court did not record whether there had been any argument as to when the applicant had been charged, merely stating at paragraph 20 that "the court finds that the proceedings in the present case began on 17 March 1993, when the applicant was first interviewed by officers of the Serious Fraud Squad" without further elaboration.

[20] For reasons that I will give presently it is unnecessary for me to find whether the applicant was at the material time a person who had been charged for the purposes of article 6. In any event, it is to be remembered that the protection afforded by article 6 (3) (c) is part of the complement of safeguards designed to achieve a fair trial. Whether there has been a violation of an article 6 right is not to be determined in satellite litigation challenging the propriety of extra-judicial inquiries but at the criminal trial itself. The Court of Appeal in this jurisdiction has so stated in the recent decision in *Brockbank v Shannon* (2002) unreported, applying the emphatic statement to that effect by Lord Hoffman in *R v Hertfordshire County Council, ex parte Green Environmental Industries Ltd* [2000] 2 AC 412 at 423F where he said: -

> "The European jurisprudence is firmly anchored to the fairness of the trial and is not concerned with extra-judicial inquiries. Such impact as article 6 (1) may have is upon the use of such evidence at a criminal trial."

The challenge to the decisions of Mr Donaghy and Superintendent Reid cannot therefore be entertained at this stage.

The right to legal assistance

[21] It was accepted by the applicant that the right to a lawyer of one's choosing is not an absolute right. It was submitted that this right should be respected unless there were substantial reasons for concluding that the interests of justice required otherwise - *Re Doherty's (t/a JMD Autospares) Application for Judicial Review* [2002] NI 11.

[22] The strategy of holding simultaneous interviews was both appropriate and necessary, in my opinion. The nature of the inquiry was such that the risk of collusion between those under investigation was obvious. The need to take steps to reduce – if not eliminate – that risk was equally obvious. There was no question that the applicant would be denied legal representation. Another lawyer from Mr Caher's office could have represented him or, if he preferred, a lawyer from a different firm could easily have been engaged. By insisting on having Mr Caher, the applicant frustrated the perfectly valid desire of the investigating authorities to have all four officers interviewed in circumstances whereby they could not alert each other to lines of inquiry that were to be pursued.

[23] I am satisfied that the tactic of interviewing all four officers at the same time was a legitimate and reasonable one. If I had held that the applicant's article 6 (3) (c) rights were engaged, I would have held that the decision to proceed in the manner proposed was proportionate. The applicant's claim must fail on that account also, therefore.

Conclusions

[24] It was not open to the applicant to challenge the decisions of Mr Donaghy and Superintendent Reid in the form of satellite litigation represented by this judicial review application.

[25] In any event, even if the applicant's right to counsel of his choosing had been interfered with, this was fully justified by the exigencies of the investigation and the need to ensure as far as possible that there was no collusion between those who were the subject of inquiry.

[26] The application for judicial review must be dismissed.