Neutral Citation No. [2004] NIQB 67 | *Ref:* **WEAC5107**

Judgment: approved by the Court for handing down | *Delivered:* **27/10/2004**

(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 "W"
FOR JUDICIAL REVIEW

WEATHERUP J

The Application.

[1] This is an application for judicial review of the decisions of the Secretary of State for Northern Ireland and the Chief Constable of the Police Service for Northern Ireland in relation to the provision of home protection measures for the applicant. In a decision dated 27 April 2004 the Secretary of State refused the applicant admission to a scheme known as the Key Persons Protection Scheme ("the Scheme") and refused additional home protection measures outwith the Scheme.

The Scheme.

[2] The Scheme is a non-statutory discretionary scheme operated by the Secretary of State for Northern Ireland. The aim of the Scheme is stated to be to protect those whose death or injury as a result of terrorist attack could damage or seriously undermine the democratic framework of Government, the effective administration of Government and/or the criminal justice system, or the maintenance of law and order. Admission to the Scheme may, in the first place, apply to persons working in specified jobs or occupations who will normally qualify for inclusion if assessed by the Chief Constable as being under serious or significant threat (the occupation criterion). Secondly, admission to the Scheme may apply to persons not engaged in one of the specified occupations but who would perform a wider public role which makes a positive and helpful contribution to the realisation of the objections of the Scheme. Again it is necessary that the person be assessed by the Chief Constable as being under serious or significant threat (the wider public role criterion). Thirdly, the Secretary of State operates a residual basis for admission to the Scheme where there are compelling political reasons.

Fourthly, the Secretary of State may agree to provide home protection measures outwith the Scheme, which to date has been applied to persons assessed as being under imminent risk.

[3] The Chief Constable provides a current threat level assessment for the Secretary of State. In respect of level one, described as "imminent", the definition refers to specific intelligence that the target is at a very high level of threat and that an attack is imminent. At level two, described as "serious", the definition refers to specific intelligence, recent events or a target's particular circumstances that indicate a likely high priority target and a high level of threat. At level 3, described as "significant", the definition refers to recent general intelligence on terrorist activity, the overall security and political climate or the target's general circumstances indicating a likely priority target and a significant level of threat. At level four, described as "moderate", the definition refers to a target's circumstances indicating potential to be singled out for attack and a moderate level of threat. At level five, described as "low", the definition refers to there being nothing to indicate that the target would be singled out for attack and a low level of threat. At level six, described as "negligible", the definition refers to the target being unlikely to be attacked and a negligible level of threat.

The background.

[4] In 2001 the applicant was charged with murder and on a later plea of guilty to manslaughter was sentenced to two years imprisonment. The applicant was released on 23 December 2003. As a result of the events that gave rise to the applicant's conviction, threats were made to the life of the applicant. In July 2003 an application was made by the applicant's solicitor to the Secretary of State that the applicant be admitted to the Scheme. By a letter dated 19 November 2003 the Minister on behalf of the Secretary of State refused the application on the basis that the applicant "does not satisfy the eligibility criteria for the scheme by virtue of her occupation or wider public role."

[5] The applicant's solicitor sought a review of the Minister's decision and by letter dated 15 December 2003 the refusal was confirmed. In the meantime the applicant's solicitor had written to the Police Service for Northern Ireland and by letter dated 17 December 2003 it was stated that the threat to the applicant was assessed as being "significant", namely level 3. Accordingly by the date of the applicant's release from prison it had been found that the applicant did not satisfy the occupation criterion and did not satisfy the wider public role criterion, although the requirement of each criterion that the level of threat be "significant" was satisfied.

[6] In refusing the application for admission to the Scheme the Minister referred the applicant to local police for security advice. Police from the local

Crime Prevention Office visited the applicant's premises and by the date of release from prison had provided a report that recommended security measures that included door protection, window protection, security lighting and other measures.

[7] The matter became more serious in April 2004. On 6 April 2004 police visited the applicant with information that loyalist paramilitaries were aware of the applicant's address. The applicant's solicitor requested the Chief Constable to undertake a review of the threat analysis and by letter of 9 April 2004 the applicant's solicitor was informed that the threat assessment had been increased to level 2, namely "severe". The applicant's solicitor applied for a review of the Minister's refusal to admit the applicant to the Scheme.

The decision of the Secretary of State.

[8] By letter dated 27 April 2004 the Minister on behalf of the Secretary of State refused the application in the following terms –

> "Turning to your client's latest application for admission to the scheme, the Minister has concluded that your client does not satisfy the eligibility criteria for the scheme by virtue of (your client's) occupation or wider public role. In reaching this decision the Minister has carefully considered the Chief Constable's assessment of the level of threat that your client is under.
>
> In considering your client's case the Minister has also taken into consideration the State's Article 2 responsibility and has considered whether it would be appropriate to use his discretion in afford your client physical home protection outwith the normal KPP Scheme arrangements. In doing so he has noted that positive action taken by the Police Service for Northern Ireland and the Northern Ireland Housing Executive. The Minister has concluded that protection outwith the normal arrangements should not be provided in this case. Should the level of threat against your client increase, the Minister will have no hesitation in reconsidering this decision.
>
> In closing the Minister had indicated that the it may be helpful for your client to discuss her personal security with the local PSNI District Commander."

[9] The above reference to positive action taken by the Northern Ireland Housing Executive referred to the security measures relating to doors, windows and lighting and other measures. The above reference to positive action taken by the Police Service for Northern Ireland referred to the installation of a security system and other measures.

The applicant's grounds for judicial review.

[10] The applicant's grounds for judicial review are as follows –

> (i) The respondents erred in concluding that the applicant is not "making a positive and helpful contribution to the realisation of the objectives of the scheme."
>
> (ii) The respondents erred in their interpretation of the duty imposed upon them by Article 2 (of the European Conviction on Human Rights) in that they ought to have considered the applicant a key person for the purpose of providing protection under Article 2.
>
> (iii) The respondents erred in failing to create or implement a policy for individuals who are not to be considered as key persons but whose life is accepted to be under a real and immediate threat.
>
> (iv) The respondents erred in failing to admit the applicant to the scheme.
>
> (v) The respondents have taken a decision which exposes the applicant 'to a real possibility of a risk to (the applicant's) life in the future' (*ex parte A & Others v Lord Saville & Others,* Rose LJ & Sullivan J, 16 November 2001)
>
> (vi) The respondents decision is incompatible with the applicant's rights pursuant to Article 2 of the European Convention and in breach of Section 6 of the Human Rights Act 1998.
>
> (vii) The respondents decision is incompatible with the applicant's rights pursuant to Article 14 of the European Convention read in conjunction with Article 2 and in breach of Section 6 of the Human Rights Act 1998 in that if the applicant was a key

> person then a higher protection would have been afforded than as a mere citizen.
>
> (ix) The respondents have applied the wrong test in accessing whether or not they have a duty in these circumstances to act under Article 2 of the European Convention.
>
> (x) The respondents erred in law in holding that the applicant is not under real and immediate threat when compared to level 2 of the scale.
>
> (xi) The decision to refuse the applicant inclusion in the KPPS was unfair, unreasonable and unlawful."

Article 2 of the European Convention.

[11] At the heart of this application lies a consideration of the nature of the obligation imposed on the State by Article 2 of the European Convention. Article 2 provides for the right to life in terms that "everyone's right to life shall be protected by law". This has been interpreted as including a positive obligation to protect life. In *Osman v United Kingdom* (1998) 29 EHRR 245 the applicant complained that the police had failed to take reasonable steps to protect persons from threats from a specified person. The ECtHR expressed the obligation of the State at paragraph [18] as follows –

> "For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case."

Osman introduced the phrase "real and immediate risk to life." While much attention focussed on that phrase it should be noted that the passage refers not only to a level of risk but also to requirement that the risk is one of which the authorities "have or ought to have knowledge" and that they "do all that could be reasonably expected" and that the nature of the obligation depends on "all the circumstances of the particular case."

[12] In *Lord Saville v Widgery Soldiers* (2001) EWCA CIV 2048 the Court of Appeal considered the decision of the Saville Tribunal to require soldiers to give evidence in Londonderry rather than in a location in England. The

Saville Tribunal had concluded that there was no "real and immediate risk" to the life of the soldiers and the Court at first instance considered the relevant threshold of risk as being "a real possibility of risk". In the Court of Appeal Lord Phillips contrasted the facts of the case with those in *Osman* -

> "It was `the real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party' which was, or ought to have been, known to the authorities. Such a degree of risk is well above the threshold that will engage Article 2 when the risk is attendant upon some action that an authority is contemplating putting into effect itself. It was not an appropriate test to invoke in the present context."

Lord Phillips went on to consider Article 2 in terms of a balancing exercise –

> "We consider that the appropriate course is to consider first the nature of the subjective fears that the soldier witnesses are likely to experience if called to give evidence in the Guildhall, to consider the extent to which those fears are objectively justified and then to consider the extent to which those fears, and the grounds giving rise to them, will be alleviated if the soldiers give their evidence somewhere in Great Britain rather than in Londonderry. That alleviation then has to balanced against the adverse consequences to the inquiry of the move of venue, applying common sense and humanity. The result of the balancing exercise will determine the appropriate decision. This course will, we believe, accommodate both the requirements of Article 2 and the common law requirement that the procedure should be fair."

[13] The issue has been considered in relation to the admission of prisoners into a protected witness unit where the Prison Service act on advice from the police. In *R (on the application of DF) v Chief Constable of Norfolk Police and Secretary of State for the Home Department* (2002) EWCH 1738 (Admin) Crane J, having considered *Osman* and *Widgery Soldiers* stated that recommendations by the police and resulting decisions of the Prison Service are not the kind of actions contemplated in *Widgery Soldiers*. Such recommendations and decisions were considered to be more closely analogous to decisions taken by the police in the course of their duty to protect members of the community (para 36). It was noted that the situation of prison is not identical to that in the community. Prisoners are in a vulnerable position. The requirement that the

authorities knew or ought to have known of the risk will usually be satisfied much more readily in relation to a prisoner. The authorities are in a position to take measures to avoid any risk to an extent much greater than are the police in relation to a member of the community. The authorities are likely to be less inhibited where the provision of a protective regime is unlikely to affect the rights of others (para 37). Consideration was given to what a 'real and immediate' risk involved in the prison context. A real risk is one that is not simply a fear felt by the prisoner, but is disclosed by all the information available. Immediacy requires that the risk must be present and continuing (para 38).

[14] *R (on the application of Bloggs) v Secretary of State for the Home Department* (2003) EWCA CIV 686 also concerned the placing of a prisoner at risk. The Court of Appeal reviewed the authorities and at paragraph 61 it was stated -

> " If a risk to life is not "real", it is not a risk to life. If a risk to life is not "immediate" in the sense that it is not present at the time or during the period when it is claimed that a protective duty is owed by a public body it is not a risk that can engage Article 2. It is a future risk that may, at some later date do so. To be a candidate for engaging Article 2 all that is needed is "a risk to life". To engage it depends, in the circumstances of each case, on the degree of risk, which necessarily includes consideration of the nature of the threat, the protective means in being or proposed to counter it and the adequacy of those means".

[15] Further it was stated in *Bloggs* that it could be unhelpful to attempt to identify some sort of broad band of thresholds of risk for different categories of case (para 62). The starting point is that the right to life under Article 2 is unqualified (para 64). However despite the fundamental and unqualified nature of the right to life it is still appropriate to show *some* deference to and/or to recognise the special competence of the (Prison Service) in making a decision going to the safety of the inmates life. The intensity of the court's review is greater – perhaps greatest in an Article 2 case – that for those human rights where the Convention requires a balance to be struck (para 65).

[16] Carswell LCJ visited this issue in *Re Meehan's Application* (2004) NIJB 53 in the context of an application for a personal protection weapon. At paragraph [18] it was stated -

> "In our opinion it is useful to focus, as did the judge in the present case, on whether a breach of Article 2 has been established rather than concentrating on the

> question whether Article 2 has been engaged. Of course if Article 2 has not been engaged at all, there cannot be a breach, but a decision that it has been engaged does not necessarily provide a conclusive answer to the question whether the State has been in breach of the requirements of the Article. We respectfully agree with the approach of the Court of Appeal in *Lord Saville of Newdigate v Widgery Soldiers,* which in our view is not inconsistent with that of the ECtHR in *Osman v United Kingdom.* The court should ascertain the extent or degree of risk to life, take into account whether or not that risk has been created by some action carried out (or proposed) by the State, determine whether it would be difficult for the State to act to reduce the risk and whether there are cogent reasons in the public interest why it should not take a course of action open to it which would reduce the risk. It should then balance all these considerations in order to determine whether there has been a breach of Article 2."

[17] The approach to Article 2 obligations is not based on an applicant reaching a threshold of risk set at different levels in different contexts, but rather about balancing the risk against reasonable measures to reduce the risk. The relevant risk must be real and immediate where a real risk is one that is objectively verified and an immediate risk is one that is present and continuing. The reasonable steps required by the authorities depend upon the degree and character of the risk and the anticipated effect of the proposed measures. Carswell LCJ in *Re Meehan's Application* put four factors in the balance, first, the extent or degree of risk, second, whether the State creates the risk, third, the difficulties involved in reducing the risk, and fourth, any public interest in not taking action.

[18] A schedule of levels of risk may not be helpful in determining the appropriate response to a real and immediate risk. Inclusion in the Scheme may or may not be the appropriate response to a real and immediate risk. The degree and character of a risk that is classed as significant or serious may be such that it does not warrant the home protection measures accorded by the Scheme, but rather some different measures depending on the degree and character of the risk. On the other hand the degree and character of a lesser risk may require appropriate action that includes some home protection measures. The operation of the Scheme and protection outwith the Scheme is but one part of the measures operated by public authorities in relation to threats to the lives of citizens. Whether one or more of the available arrangements should be applied to a particular case must depend on the nature and extent of the threat in question and the circumstances of the case.

[19] The starting point for the State must be to address the requirements of Article 2 by reference to the balancing exercise. Admission to the Scheme or protection outwith the Scheme may be a means of meeting Article 2 obligations in a particular case. However other means may be more appropriate to meet Article 2 obligations, again depending on the circumstances of the particular case.

The approach of the Secretary of State to Article 2.

[20] The risk to the applicant was assessed by police as "serious." The police definition of that level of risk refers to specific intelligence, recent events or a target's particular circumstances indicating a likely high priority target and a high level of threat. That risk is real as it is objectively verified and it is immediate as it is present and continuing. The State is required to take reasonable steps in response to that risk.

[21] The Minister made the decision of 27 April 2004 further to an officials submission which recommended that the applicant should not be admitted to the Scheme and should not be granted additional protective measures outwith the Scheme. In relation to the occupation criterion and the wider public role criterion the submission noted that while the applicant satisfied the threat requirement the applicant did not quality by virtue of occupation or wider public role. In relation to the third ground namely compelling political reasons the submission noted that there did not appear to be any such reasons. The Scheme operated by the Secretary of State did not entitle the applicant to protection within the Scheme.

[22] However that was not the end of the matter because the Secretary of State also provided protection outwith the Scheme. The officials submission noted that since this ground had been added in January 2002 only two individuals had been protected on the basis that they were considered by the Chief Constable to be under an imminent (level one) threat. The submission added "this level of threat has hitherto been considered by us under Article 2 of the ECHR to be real and immediate." The officials submission proceeded on the basis that only a level one threat classed as "imminent" equated to a "real and immediate" risk for the purposes of Article 2 of the European Convention.

[23] As appears from the discussion of Article 2 above a "real and immediate" risk is not limited to one that is "imminent". It appears that the introduction of the fourth ground for home protection, namely measures outwith the Scheme, purports to address the State's Article 2 obligations in respect of those who do qualify for inclusion in the Scheme. This approach excludes from home protection measures outwith the Scheme those who are

subject to a "real and immediate" risk that is less than "imminent". I am satisfied that this approach is flawed.

[24] Counsel for the Secretary of State supports the approach of the officials submission on the basis that it proceeded to outline the measures taken by police and included the police view that the applicant should move from the present residence and also noted the Housing Executive action in installing protective measures at the premises. It expressed the view that the State through the PSNI and the Housing Executive had taken reasonable steps to manage the risk to the applicant.

[25] Accordingly it is contended on behalf of the Secretary of State that a balancing exercise has been carried out in accordance with the approach of Carswell LCJ in *Re Meehan's Application* and the conclusion has been reached that reasonable measures have been taken in response to the identified risk. Further it is contended on behalf of the Secretary of State that the Scheme is not intended to be coincidental with the extent of the State's Article 2 obligations, and that additional protective measures are otherwise provided by public authorities. In addition reliance is placed on the discretionary area of judgment that ought to be accorded to the authorities in reaching a determination as to the extent of the measures required to meet Article 2 obligations from case to case.

[26] It is apparent from the officials submission that a balancing exercise was carried out in relation to the level of risk and an appropriate response considered, that home protection within and outwith the Scheme is not intended to be the full extent of the measures provided by public authorities to meet Article 2 obligations and that there is indeed an area of discretionary judgment to be accorded to those who carry out these assessments. However I find that the exercise that was carried out was based on a false premise, namely that provision outwith the Scheme for those at "imminent" risk was sufficient to comply with Article 2. The State's obligation to those at "real and immediate risk" is not limited to "imminent" risk. Had the officials submission recognised that a "real and immediate" threat for the purposes of Article 2 extended beyond an "imminent" threat and applied to the "serious" threat to the applicant the outcome may have been different. The outcome would not necessarily have been different because the balancing exercise may have resulted in the conclusion that the measures in place were sufficient. However the approach adopted by the officials submission leaves out of account a relevant consideration namely that the applicant faces a real and immediate risk to life.

[27] Accordingly the decision made on behalf of the Secretary of State will be quashed. This conclusion in effect addresses all of the applicant's grounds for judicial review save for the issue of discrimination, which is considered below.

Article 14 of the European Convention.

[28] The applicant contends that the operation of the Scheme involves discrimination in breach of Article 14 of the European Convention read in conjunction with Article 2. The applicant contends that in consideration of Article 2 obligations the State affords preferential treatment to specified groups of citizens to the exclusion of others to whom Article 2 obligations are owed by the State.

Article 14 of the European Convention provides that –

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The character of Article 14 is described by *Lester and Pannick on Human Rights Law and Practice* at paragraph 4.14.1 - "The Convention, unlike other international human rights instruments, contains no freestanding guarantee of equal treatment without discrimination. Instead Article 14 is restricted to a parasitic prohibition of discrimination in relation only to the substantive rights and freedoms set out elsewhere in the Convention."

[29] In *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617 Brooke LJ set out four questions as a framework for dealing with Article 14 claims –

> "1. Do the facts fall within the ambit of one or more of the substantive Convention provisions.
>
> 2. If so was there different treatment as respects the right between the complainant on the one hand and other persons put forward for comparison on the other.
>
> 3. Were the chosen comparators in an analogous situation to the complainant's situation.
>
> 4. If so did the difference in treatment have an objective and reasonable justification – in other words did it pursue a legitimate aim and did the differential treatment bear a reasonable

relationship of proportionality to the aim sought to be achieved."

[30] On the first question, the present case falls within the ambit of Article 2. On the second question the applicant's comparator would be a person who qualifies for admission to the Scheme, namely those in the specified occupations, those with a wide public role and those attracting compelling political reasons. The contention is that in addressing Article 2 obligations those who qualify as "key persons" under the occupation criterion or the wider public role criterion or for compelling political reasons are afforded higher protection than any other citizen. However the Secretary of State has sought to provide home protection measures under the Scheme and also outwith the Scheme for the purposes of Article 2. The system purports to provide Article 2 protection for all citizens at real and immediate risk. To those who are not "key persons" Article 2 protection purports to be provided outwith the Scheme. It is not the case that the system purports to deny Article 2 protection to those who are not in the specified categories. However I have found the system to be flawed by reason of the adoption of an unduly narrow interpretation of real and immediate risk. For this reason the system has failed to consider all cases that ought to be considered. But for the mistaken interpretation of real and immediate risk, protection would be considered outwith the Scheme to those at real and immediate risk in the wider sense of that term outlined above and there would not be differential treatment for the purposes of Article 2.

[31] However there is a different issue as to whether the Secretary of State may provide added protection to certain persons. The object of the Scheme is stated to be to protect those whose death or injury as a result of terrorist attack could damage or seriously undermine the democratic framework of Government, the effective administration of Government and/or the criminal justice system, or the maintenance of law and order. The respondent contends that those admitted to the Scheme by occupation or wider public role or compelling political reason are by reason of their inclusion in the specified groups at greater risk and require correspondingly greater protection. To that extent their treatment is but the outworking of the balancing exercise that is required to be undertaken for the purposes of Article 2. On the basis that no citizen subject to a real and immediate risk is excluded from consideration for the purposes of Article 2, whether within or outwith the Scheme, I accept the respondents contention.

[32] Further, once Article 2 obligations have been satisfied, the respondent contends that the State may provide added protection to certain persons on the basis that, if the risk to life materialises in a particular case, there may be additional detrimental consequences. Those consequences are said to be the impact of certain fatalities on the functioning of democratic society and the need to maintain confidence of those fulfilling certain public roles and

confidence of the public that those roles will be filled without intimidation. Such differential treatment would require objective justification. The respondent offers such objective justification. The legitimate aim is to be found in the objects of the Scheme. The measures applied, to the extent that they may be other than those required by the increased risk to those concerned, are proportionate to the legitimate aim. Provided the States Article 2 obligations have already been met in respect of all citizens I accept this contention.

[33] Accordingly I reject the applicant's arguments based on discrimination. For the reasons set out above in relation to protection outwith the Scheme the decision of the Secretary of State will be quashed.