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*Judgment: approved by the Court for handing down* | *Delivered:* **17/6/03**

*(subject to editorial corrections)*

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

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**IN THE MATTER OF AN APPLICATION BY FREDDIE SCAPPATICCI**

**FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

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**KERR J**

**[1]** In recent weeks there has been much media coverage in Northern Ireland and elsewhere about the identity of a member of the Provisional IRA who, it is claimed, was an informer on that organisation's activities to the security services. That person is said to have been given the code name 'Stake Knife'. Virtually every newspaper circulating in Northern Ireland and all the broadcasting companies have identified that individual as Freddie Scappaticci.

**[2]** It is not in dispute – nor could it be – that a person identified as an informer to the security services in Northern Ireland would be in danger from paramilitary elements in our society. Mr Scappaticci's life is at risk as a result of these reports.

**[3]** On 13 May 2003 Mr Scappaticci's solicitor issued a press statement on his behalf. This is what it said: -

> "I have been instructed by Mr Fred Scappaticci to make the following public statement.
>
> A number of most serious allegations have been made about my client in the press since Sunday. My client denies each and every one of these allegations. He is not 'Stake Knife'. He has never been an informer, has never contacted the intelligence services, has never been taken into protective custody and has never received any money from the security services.

> My client is the victim of misinformation, apparently emanating from the security forces and disseminated by the press. Mr Scappaticci is an ordinary working man living in West Belfast and as such has no means at his disposal to combat this onslaught of false allegations.
>
> Clearly, his life has been placed in danger as a result and he is now in hiding. He has not been arrested and no attempt has been made by the police to speak to him about any of the matters referred to by the media. He has not been contacted by the Stevens investigation team [a team of police officers investigating allegations of collusion between members of the security forces and paramilitary bodies].
>
> Mr Scappaticci has been compelled to issue this statement as a result of the intense media speculation about him. In the interest of protecting his privacy no further statement will be issued at this time."

**[4]** This statement was issued, Mr Scappaticci claims, to defuse media interest in him. Perhaps predictably, however, so far from having that effect, press interest in the story quickened and intensified. Therefore, on 14 May Mr Scappaticci and his solicitor, Mr Flanigan, faced a television crew in his solicitor's office and Mr Flanigan read out the following statement: -

> "Mr Scappaticci appears here today to give the lie to continuing media speculation as to his whereabouts. He has not been in England and during the course of the past few days has not left Northern Ireland. My client refuses to engage in challenging every statement made by an unnamed and apparently unnameable security source. He repeats the contents of his statement released yesterday and in particular confirms that he is not and never has been in any sort of military, security or police custody. He has never been involved in any criminal activity, and has a clear record.
>
> Mr Scappaticci was forced to leave his home on Sunday morning, not by reason of police or army activity, nor by involvement of any paramilitary organisation but solely because of the media onslaught upon his character.

> The media coverage of this story has been reckless and extremely damaging to my client. A huge volume of very detailed but completely unsubstantiated allegations have been published by all branches of the media with absolutely no regard to Mr Scappaticci's position or the harm which such publication could cause him and his family.
>
> I have been instructed to examine all the material recently published with a view to defamation proceedings.
>
> The past three days have been very traumatic for Mr Scappaticci who now intends to resume his private life."

**[5]** On 19 May 2003 the applicant's solicitor wrote to Jane Kennedy, minister of state in the Northern Ireland Office, as follows: -

> "I act on behalf of Freddie Scappaticci. You will be aware that my client has recently been the subject of extensive press allegations and in particular the specific allegation that he is an agent working on behalf of the security services within the IRA and operating under the code name "stake knife" otherwise "steak knife". My client has expressly denied these allegations through this office and in person.
>
> The vast majority of the press and media reports have quoted extensively from "security sources" and "Whitehall sources" for their information. In addition the press reports have published what would appear to be police and army archive photographs of Mr Scappaticci.
>
> You will of course be aware that my client's life and the lives of his family members have been endangered by these reports. By reason of your position you are uniquely placed to confirm that my client is not the agent "Stake knife/Steak knife". I understand that when asked to comment on the Stake knife controversy that both you and the Secretary of State have refused to comment on it as a security matter. My client has no interest in identifying this

> agent but only wishes to establish this point in order to protect his own life.
>
> It is clear that the government has a duty to protect the lives of its citizens including both at common law and under article 2 of the Convention of Human Rights. I must therefore ask you to confirm that my client is not the agent named "Stake knife" otherwise "Steak knife". I am satisfied that this is information within your knowledge and in view of the real threat to my client's life I must insist on a reply by return."

**[6]** The private secretary to the minister replied to this letter on 21 May 2003. She said: -

> "Thank you for your letter to Jane Kennedy dated 19 May regarding your client Freddie Scappaticci. I have been asked to respond on her behalf.
>
> I can only reiterate that the government does not comment on intelligence matters, including the identity of agents."

**[7]** Mr Scappaticci now seeks leave to apply for judicial review to challenge the minister's refusal to provide the confirmation that he had sought in the letter from his solicitor of 19 May. He claims that if the minister persists in her refusal to state that he is not 'Stake Knife', his life will be placed in even greater danger; that she has a positive duty under article 2 of ECHR to provide the requested confirmation because this will reduce the threat to his life and that she should not be deterred from doing so because of the existence of a policy to refrain from comment on "intelligence matters".

**[8]** The applicant need only raise an arguable case that the minister was wrong to provide the confirmation that he sought. This test is sometimes alternatively expressed as the need to show that there is a case worthy of further investigation.

**[9]** Article 2 (1) of the European Convention on Human Rights provides: -

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

**[10]** In *Osman v United Kingdom* [1998] ECHR 23452/94 ECtHR said: -

> "115. The Court notes that the first sentence of Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the *LCB v United Kingdom* judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, para. 36). It is common ground that the State's obligation in this respect 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. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual."

The Court recognised, however, that this duty did not require the state to act in every case where a risk to life might be said to exist. At paragraph 116 of its judgment the Court said: -

> "… such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.
>
> …
>
> In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see para. 115 above), it must be established to its 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."

**[11]** The test propounded in these passages has been described in *Lester & Pannick, Human Rights Law and Practice* as "essentially a two-limb test with the

first limb resting on the extent of the State's knowledge and the second limb resting on the reasonableness of the steps taken" – paragraph 4.2.7.

**[12]** On behalf of the proposed respondent Mr Morgan QC did not dispute that the applicant's life was in danger as a result of the extensive media coverage suggesting that he had been an informer to the security services. He pointed out, however, that no evidence had been presented on the applicant's behalf of a specific threat. He also submitted that there was no evidence that those from whom the applicant might be under threat were likely to be influenced by any statement that the minister would make.

**[13]** I am satisfied that it is at least arguable that the applicant's life is in real and immediate danger as a result of the disclosures that have been made about him in the press. The history of the murder of informers or suspected informers by paramilitary organisations is too well known and documented to allow any other conclusion. The critical issue in the case, therefore, is whether, in light of that risk, the minister is under a duty to make the statement sought.

**[14]** This question must be addressed for present purposes on the assumption that Mr Scappaticci is not – or, at least, may not be – Stake Knife. If he is not the informer and if his life is in real and immediate danger as a result of the widespread reporting that he is that informer, what ought the minister do?

**[15]** One might, as Mr Morgan suggested, begin by asking whether anything that she might do would make the slightest difference to those who pose the threat to Mr Scappaticci. But the issue of the minister's obligations is perhaps not best approached by speculating as to the disposition of those who might do the applicant harm. Such an exercise is intrinsically fraught with difficulty. At the stage of an application for leave to apply for judicial review, where the arguability of the propositions advanced by the applicant is the test to be applied, it seems to me to be more sensible to address this question on an objective basis. Viewed thus, I am firmly of the opinion that it is at least arguable that an unequivocal statement by the minister that Mr Scappaticci is not Stake Knife would reduce the risk to his life.

**[16]** Although he referred to the dubiety of the claim that a statement by the minister would *in fact* reduce the risk appreciably, I do not understand Mr Morgan to argue that such a statement would not have an impact on the perception of the public about the truth of the suggestion that the applicant was an informer. Where claims have been made in the media that Mr Scappaticci is Stake Knife, the silence of the authorities on those claims must surely add credence to them. A statement that the claims are untrue would at least cast doubt on their accuracy. In turn it is at least arguable that this would have an impact on the risk of an attack on Mr Scappaticci.

**[17]** The principal argument made on behalf of the intended respondent was that the applicant had an effective alternative remedy in the form of an application under the Data Protection Act 1998. By section 7 (1) of this Act the applicant may apply to any "data controller" to be informed whether personal data relating to him are being processed. He is also entitled to be given a description of the personal data of which he is the subject; the purposes for which the data are held; and the recipients of the data to whom they are or may be disclosed.

**[18]** By virtue of section 28 of the Act personal data are exempt from the disclosure provisions in section 7 if the exemption is required for the purpose of safeguarding national security. Section 28 (2) authorises a minister of the Crown to issue a certificate which shall be conclusive evidence that exemption from the disclosure provisions is required for that purpose. Section 28 (4) provides that any person directly affected by such a certificate may appeal to the Information Tribunal against the certificate and under section 28 (5) the tribunal may quash the certificate if it finds that the minister did not have reasonable grounds for issuing the certificate.

**[19]** Mr Michael Lavery QC for the applicant submitted that the procedure involved in making an application under section 7 of the Act was inapt to provide the urgent relief that he required. An application would have to be considered by the authorities; it might well be the subject of a certificate and the processing of an appeal to the tribunal would inevitably lead to delay.

**[20]** Mr Morgan's riposte to these submissions was to suggest that there was no evidence that any undue delay would occur. The agencies required to service any application under the 1998 Act were those who would be required to advise the minister on the applicant's request for the confirmation that he was not an informer and there was no reason to suppose that they could not act as promptly in response to an application under the Act as in reaction to the latter request.

**[21]** In *R v IRC, ex parte Opman International UK* [1986] 1 WLR 568 at 571, Woolf J said the fact that there was an alternative procedure available in revenue matters did not mean that an application for judicial review of a decision in relation to such matters should never be made. Applicants should bear in mind, however, that

> "… an application for judicial review is the procedure, so to speak, of last resort. It is a residual procedure which is available in those cases where the alternative procedure does not satisfactorily achieve a just resolution of the applicant's claim".

The general rule that an applicant for judicial review should demonstrate that there is no effective alternative remedy is subject to some important

qualifications, however. These were discussed by the Court of Appeal in this jurisdiction in the case of *Re Director of Public Prosecutions for Northern Ireland's application* [2000] NI 174. At page 178 the Court said: -

> "The trend of modern authority is to be more ready to look at the balance of cost and convenience between an application by judicial review and resort to an alternative remedy: see, eg, *R v Huntingdon District Council, ex p Cowan* [1984] 1 All ER 58 at 63, per Glidewell J. That approach was expressed in paras 14 and 15 of a valuable article by Beloff and Mountfield in [1999] JR 143, in which the learned authors attempted the same type of principled analysis (the general dearth of which is lamented in Supperstone and Goudie *Judicial Review* (2nd edn), p 15.27) as was made in the context of immigration cases by Laws J in *R v Secretary of State for the Home Department, ex p Capti-Mehmet* [1997] COD 61. They considered the case-law and referred to the effect of the new [English] Civil Procedure Rules:
>
> > '14. On the one hand, the "overriding objective" is to enable the court to deal justly with the cases before it. This would suggest that technical questions of whether some other avenue ought to have been pursued will not be viewed favourably if there is little detriment to the respondent in the case proceeding along the existing route, there is a public interest in the matter being determined by way of judicial view, and pursuit of the alternative route would cause further cost and delay.
> >
> > 15. On the other hand, what is the most efficient and convenient remedy will be determined having regard to the interests of other litigants and the overall administration of justice, not just the interests of the applicant and respondent before the court. Thus, convenience to instant litigants should not be permitted to disrupt the apt distribution of cases.'

The authors summarise their conclusions in para 18 of the same article, in a passage with which we fully agree:

> '(a) The existence of an alternative statutory machinery will mean that courts will look for "special circumstances" before granting an alternative remedy.
>
> (b) There are, however, a number of factors which may amount to "special circumstances", and the court should be astute not to abdicate its supervisory role.
>
> (c) What is the most efficient and convenient method of resolving a dispute should be determined having regard not only to the interests of the applicant and respondent before the court, but also the wider public interest.
>
> (d) Whether the allegedly alternative remedy can, in reality, be equally efficacious to solve the problem before the court, having regard both to the interests of the parties before the court, the public interest and the overall working of the legal system.
>
> (e) In determining the most efficacious procedure, the scope of enquiry should be considered. It may be that fact-finding is better carried out by an alternative tribunal. However, if an individual case challenges a general policy, the relevant evidence may be more readily admissible if the challenge is brought as a judicial review: an allegation that a prosecution is unlawful because brought in pursuit of an over-rigid policy can scarcely be made out on the facts of one case.
>
> (f) Expense of the alternative remedy or delay may constitute special circumstances."

**[22]** I consider that it is at least arguable that the balance of cost and convenience favours the litigation of this matter by way of judicial review. It is likewise arguable that it is in the public interest that this matter is dealt

with by way of judicial review application. The manner in which the government reacts to a demand by one of its citizens to have a statement made that might enhance his safety or at least reduce the threat to his life is a matter of acute public interest that ought to be considered in public law proceedings. One would not anticipate that a significant fact finding exercise would be required in order to deal with the applicant's application for judicial review. All of these factors favour the grant of leave to apply.

**[23]** In any event, at the leave stage, in common with the other issues that arise, the applicant need only show that it is arguable that the alternative remedy mooted by the intended respondent is not suitable to meet his requirements. In the present case I consider that the applicant has sufficiently demonstrated the potential deficiencies in an application under the Data Protection Act as a means of meeting his particular needs.

**[24]** An application under section 7 of the Act envisages a requirement of the data controller to reveal whether material is held in relation to the person applying and an obligation to describe that material. As Mr Lavery pointed out, neither is requested here. The applicant merely wishes to have a statement from the minister. She may, of course, find it necessary to consult the material that would have to be accessed in order to provide the answer to an application under the Act but different considerations are likely to arise in relation to a decision to confirm that information on the applicant is held and to describe that information than would arise in deciding whether to provide the confirmation that the applicant currently seeks from the minister.

**[25]** It also seems likely that an application under the Act would take longer to process than providing an answer to the applicant's request. While there is currently no direct evidence on how long it would take to process an application and an appeal to the tribunal, it appears to me that this may be reasonably inferred when one has regard to the various steps that must be followed under the legislation. The reply from the minister's office certainly appears to presage the issue of a certificate should an application under the Act be made. An appeal against the issue of the certificate is unlikely to be dealt with within the time that would be required for the minister to obtain the information to give the authoritative response that the applicant seeks.

**[26]** I am not satisfied that an application under the Data Protection Act constitutes an effective alternative remedy for the applicant.

**[27]** The second limb of the *Osman* test relates to the reasonableness of the measures that have been taken, or, as in this case, the reasonableness of the request that the applicant makes that such measures should be taken. The applicant must raise an arguable case that it is reasonable to require the minister to make the statement requested. While one may anticipate that there may be lively dispute as to whether the interests of national security demand that there should be strict adherence to a policy of refusing to

comment on intelligence matters, even if that is at the expense of the particular interests of someone such as Mr Scappaticci, those issues have not crystallised at this stage. It cannot be said therefore that the applicant has failed to raise an arguable case that it is reasonable to require the minister to make the statement that he seeks.

**[28]** I will therefore grant leave to apply for judicial review.