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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY KIERAN JAMES
CUNNINGHAM FOR JUDICIAL REVIEW

Kerr LCJ and Weatherup J

WEATHERUP J

(delivering the first judgment at the invitation of the Lord Chief Justice)

[1] This is an application for judicial review of the decisions of the Police Service for Northern Ireland and the Resident Magistrate sitting in Belfast on 3 and 4 July 2003 when the applicant was remanded into police custody under Articles 47(4A) and (4B) of the Magistrates' Court (Northern Ireland) Order 1981. Further the applicant challenges the compatibility of Article 47(4B) and (4C) and (4F) of the 1981 Order with Article 5.3 of the European Convention on Human Rights. Notice to the Crown was given by the Court under Order 121 Rule 3A of the Rules of the Supreme Court (Northern Ireland) that the Court would consider the compatibility of subordinate legislation with Convention rights.

Remands under the Magistrates Courts (NI) Order 1981.

[2] Article 47 of the 1981 Order provides that -

“(1) Without prejudice to any other provisions of this order, in adjourning any

proceedings for an offence a magistrates' court may remand the accused-

- (a) in custody, that is to say, commit him to custody to be brought at the end of the period of remand before that court of any other magistrates' court for the County Court division for which the court is acting or before any other magistrates' court having jurisdiction to conduct the proceedings; or
- (b) on bail, that is to say, take from him a recognizance condition for his subsequent appearance before such court...."

[3] Article 47 was amended by the Criminal Justice (Northern Ireland) Order 1991 to add paragraphs (4A) to (4F) to provide for remands into police custody.

"(4A) In the exercise of its power under paragraph (1)(a) to remand in custody an accused to whom this paragraph applies, a magistrates' court may, on an application made under this paragraph by a member of the Police Service of NI not below the rank of inspector, commit the accused to detention at a police station.

(4B) In the exercise of its power under paragraph (1)(a) to remand in custody an accused to whom this paragraph applies, a magistrates' court may, on an application made under this paragraph by a member of the Police Service of NI not below the rank of inspector, commit the accused to the custody (otherwise than at a police station) of a constable.

(4C) The period for which an accused is remanded under paragraph (4A) or (4B) shall not exceed 3 days commencing on

(and including) the day following that on which he is remanded.

(4D) Paragraphs (4A) and (4B) apply to an accused who –

- (a) is not under the age of 21 years; and
- (b) is not already detained under a custodial sentence.

(4E) An accused shall not be committed to detention at a police station under paragraph (4A) unless there is a need for him to be so detained for the purposes of inquiries into other offences; and, if a person is committed to such detention –

(a) he shall, as soon as that need ceases, be brought back before the magistrates' court which committed him or any other magistrates' court for the county court division for which that court was acting or before any other magistrates' court having jurisdiction to conduct the proceedings;

(b) he shall be treated as a person in police detention to whom the duties under Article 40 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (responsibilities in relation to persons detained) relate; and

(c) his detention shall be subject to periodic review at the times set out in Article 41 of that Order (review of police detention).

(4F) An accused shall not be committed to the custody (otherwise than at a police station) of a constable under paragraph (4B) unless there is a need for him to be kept in such custody for the purposes of inquiries into other offences; and if a person is committed to such custody, he shall, as soon as that need ceases, be brought back before the magistrates' court

which committed him or any other magistrates' court for the county court division for which that court was acting or before any other magistrates' court having jurisdiction to conduct the proceedings."

[4] It will be noted that the 1991 amendment provides that those who have been charged and are to be remanded into police custody are, under (4A), committed to detention at a police station, and under (4B), committed to the custody of a constable otherwise than at a police station. In the latter case the Resident Magistrate must be satisfied that there is a need for the accused to be kept in the custody of a constable otherwise than at a police station for the purposes of enquiries into other offences.

Detention under the Terrorism Act 2000.

[5] Section 41 of the Terrorism Act 2000 provides that –

“(1) A constable may arrest without warrant a person whom he reasonably suspects to be a terrorist.

(2) Where a person is arrested under the section the provisions of Schedule 8 (detention; treatment, review and extension) shall apply.

(3) Subject to sub-sections (4)-(7) a person detained under this section shall (unless detained under any other power) be released not later than the end of the period of 48 hours beginning with the time of his arrest under this section.”

[6] Schedule 8 of the 2000 Act provides for extension of detention under Section 41. Paragraph 29 provides:

“29 (1) A police officer of at least the rank of superintendent may apply to a judicial authority for the issue of a warrant of further detention under this Part.

(2) A warrant of further detention –

(a) shall authorise the further detention under section 41 of a specified person for a specified period, and

(b) shall state the time at which it is issued

(3) The specified period in relation to a person shall end not later than the end of the period of seven days beginning –

(a) with the time of his arrest under section 41, or

(b) if he was being detained under Schedule 7 when he was arrested under section 41, with the time when his examination under that Schedule began.

[7] Paragraph 32 provides for the grounds for extended detention:

“32 (1) A judicial authority may issue a warrant of further detention only if satisfied that –

(a) there are reasonable grounds for believing that the further detention of the person to whom the application relates is necessary to obtain relevant evidence whether by questioning him or otherwise or to preserve relevant evidence, and

(b) the investigation in connection with which the person is detained is being conducted diligently and expeditiously.

(2) In sub-paragraph (1) “relevant evidence” means, in relation to the person to whom the application relates, evidence which –

(a) relates to his commission of an offence under any of the provisions mentioned in section 40(1)(a), or

(b) indicates that he is a person falling within section 40(1)(b).”

[8] Paragraph 36 provides for additional extended detention:

“36. (1) A police officer of at least the rank of superintendent may apply to a judicial authority for the extension or further extension of the period specified in a warrant of further detention.

(2) Where the period specified is extended, the warrant shall be endorsed with a note stating the new specified period.

(3) The specified period shall end not later than the end of the period of seven days beginning—

(a) with the time of the person’s arrest under section 41, or

(b) if he was being detained under Schedule 7 when he was arrested under section 41, with the time when his examination under that Schedule began.

[9] By order, applications for extension of detention are dealt with by a County Court Judge. It will be noted that any extension of detention under Section 41 must be on the basis that it is necessary to obtain or preserve relevant evidence and that the investigation is being conducted diligently and expeditiously. In addition there are procedural requirements set out in the legislation, not all of which have been recited above.

Detention under the Police and Criminal Evidence (NI) Order 1989.

[10] There are parallel provisions to those in the Terrorism Act contained in the Police and Criminal Evidence (Northern Ireland) Order 1989. Article 42 of the 1989 Order provides that a person shall not be kept in police detention for more than 24 hours without being charged and Article 43 provides that a senior police

officer may authorise police detention for up to 36 hours. In respect of warrants for further detention Article 44 provides:

“44. (1) Where, on a complaint made in writing by a constable and substantiated on oath, a magistrates' court is satisfied that there are reasonable grounds for believing that the further detention of the person to whom the complaint relates is justified, it may issue a warrant of further detention authorising the keeping of that person in police detention.

(4) A person's further detention is only justified for the purposes of this Article or Article 45 if—

(a) his detention without charge is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him;

(b) an offence for which he is under arrest is a serious arrestable offence; and

(c) the investigation is being conducted diligently and expeditiously.”

[11] Article 44 (12) provides that the extension of detention shall not be longer than 36 hours and Article 45 provides for warrants of further detention for a further period of up to 36 hours or for a total detention of 96 hours.

[12] It will be noted that the statutory scheme under PACE is similar to that under the Terrorism Act and the further detention must be necessary to preserve or obtain evidence in respect of a serious arrestable offence and that the investigation is being conducted diligently and expeditiously. In addition there are procedural requirements set out in the legislation, not all of which have been stated above.

The amended provisions for remand into police custody.

[13] The 1991 amendment of the 1981 Order was the form of response adopted by the Government to the recommendation of Viscount Colville in his Review of the Northern Ireland (Emergency Provisions) Act 1978 and 1987, published in July 1990, (Command Paper 1115) at paragraph 7.3.1. Viscount Colville stated that where a person is charged by the police and remanded in custody he comes into the care of the prison authorities, and that circumstance presented difficulties for further interrogation by the police in respect of different suspected offences. He referred to provisions in England and Wales under the Police and Criminal Evidence Act 1984 providing for a remand into police custody for up to three days and recommended that consideration should be given to a similar provision for all offences in Northern Ireland. Section 48 of PACE 1984 had amended section 128 of the Magistrates' Courts Act 1980 to provide for detention at a police station on conditions similar to those now appearing in Article 47(4E) of the 1981 Order.

The applicant's arrest and detention under section 41

[14] The applicant was arrested under section 41 of the 2000 Act at 0845 on Tuesday 1 July 2003 and taken for questioning by police to Antrim Serious Crime Suite. Detective Sergeant Cromie, the officer in charge of the investigation, described on affidavit the circumstances. At the time of his arrest the applicant was employed as a transit clerk at the Royal Victoria Hospital in Belfast. His job involved the collection and delivery of medical records and involved case note tracking which required him to access the patient administration computer system at the hospital. Enquiries had revealed that the applicant was using his position to access the computer system to obtain the personal details of others and a planned search was carried out at his home on 1 July 2003. During the search notes were recovered containing information about police officers, prison officers, members of HM Forces, politicians, independent members of District Policing Partnerships and alleged members of Loyalist and Republican communities. In addition a seven page handwritten document described as debrief notes was seized, and this contained details of the planning, preparation and commission of a failed car bomb attack at premises in Belfast in November 2002.

[15] The applicant was interviewed on four occasions on Tuesday 1 July and Wednesday 2 July 2003 in relation to what the police described as the targeting information and his activities at

the RVH. He was not questioned about the debriefing notes in relation to the failed car bomb but as a result of that information four other arrests were carried out on Wednesday 2 July and the suspects were questioned in relation to the failed car bomb. At 21.15 on Wednesday 2 July 2003 the applicant was charged with four counts of collecting information likely to be of use to terrorists, which charges related to the targeting information and the applicant's activities at the RVH. He was not charged in relation to any matter arising out of the discovery of the debriefing notes on the failed car bomb.

The applicant's remand under Article 47(4A).

[16] On Thursday 3 July 2003 the applicant appeared before Mr Hamill RM at Belfast Magistrates' Court where he was remanded in custody. The police applied for an order under Article 47(4A) to commit the applicant to detention at a police station for 3 days for the purposes of enquiries into the failed car bomb of November 2002. The applicant's solicitor objected to the police application on the basis that it amounted to an avoidance of the statutory controls on extended detention of those arrested under Section 41 of the 2000 Act as set out in Schedule 8 to the Act. It was contended by the applicant's solicitor that there was no "need" for the applicant's detention under Article 47(4A) because the police had had possession of the debriefing notes on the failed car bomb for two days and could have questioned the applicant about the matter. Further it was contended that the police should have made application to the County Court judge and established the statutory grounds for extension of detention under paragraph 32 of Schedule 8 of the 2000 Act. The defence contention was that the police were using the 1981 Order to "side step" the 2000 Act.

[17] The RM accepted the evidence of the investigating officer that there was a need to detain the applicant under Article 47(4A) for the purposes of enquiries into the failed car bomb. On the issue raised by the defence that the police were using the procedure to side step the 2000 Act the notes of the hearing exhibited by the applicant's solicitor record the RM as stating "I have no view on this" and in the note of judgment exhibited to the investigating officer's affidavit the RM is recorded as stating "I have no fixed view on whether this is or is not the case". The RM acceded to the police application and remanded the applicant to detention at a police station under Article 47(4A).

The applicant's remand under Article 47(4B).

[18] The police then realised that if they were to question the applicant at Antrim Serious Crime Suite it was necessary to obtain an order, not under Article 47(4A) but under Article 47(4B). Accordingly the applicant was not questioned about the debriefing note on the failed car bomb but was brought back to Belfast Magistrates' Court on Friday 4 July 2003. The police then made their application under Article 47(4B) and the applicant's solicitor renewed his objection. In the meantime the four other persons who had been arrested on Wednesday 2 July 2003 in relation to the debriefing notes on the failed car bomb had been the subject of an application to the County Court Judge on the evening of Thursday 3 July 2003 for extended detention under Schedule 8 of the 2000 Act and 36 hour extensions had been granted. The RM adopted the same approach as he had adopted to the previous application and made an order under Article 47(4B) for three days detention of the applicant in the custody of a constable, otherwise than at a police station, from the time of the first order on Thursday 3 July 2003.

The operation of Article 47.

[19] Article 47 of the 1981 Order applies after an accused has been charged. Where an accused is liable to be questioned in respect of a number of offences, and there is sufficient evidence to prosecute in respect of some of those offences, the police have to determine whether to charge the applicant with some offences or to delay charging until it can be determined whether charges can be brought in respect of all offences. This applies to those arrested under PACE as well as the Terrorism Act and there is a common approach to the issue in the respective Codes of Practice. The Code of Practice under section 99 of the 2000 Act came into force on 19 February 2001 and by paragraph 1.1 it is stated to apply to remands made under Article 47(4B) of the 1981 Order. That Code of Practice adopts the PACE Code of Practice in respect of the charging of detained persons and at Annex H states -

“(1) When the investigating officer considers that there is sufficient evidence to justify the prosecution of a detained person, and that the person has been given the opportunity to say all that he or she wishes to say about the offence(s) for which he or she was arrested and detention authorised, then the detained person shall

without delay be brought before the custody officer for the purpose of charging.

(1A) The nature of the charge to be preferred and the actual charging of the detained person shall be at the direction of the investigating officer. The custody officer's responsibility is to ensure that he or she has before him or her sufficient evidence for the person to be charged and that the investigating officer complies with the charging procedure.

(1B) Where the detention of a person has been authorised in respect of more than one offence, it is permissible to delay bringing him or her before the custody officer until the above conditions are satisfied in respect of all the offences. In the case of a juvenile or a person who is mentally disordered any resulting action should be taken in the presence of the appropriate adult."

[20] The evidence of the investigating officer before the RM was that the interviewing of the applicant in respect of the targeting information and his activities at RVH had not allowed time for the interview of the applicant in relation to the debriefing notes of the failed car bomb. The affidavit filed in the present proceedings by the Detective Chief Superintendent in charge of criminal investigations in the Belfast urban district deals with the reasons for charging the applicant at 21.15 on Wednesday 2 July 2003. The affidavit states that the degree of media coverage was a major factor in charging the applicant at the earliest opportunity in the hope of stopping speculation and providing reassurance to those persons whose details had been accessed and who were very concerned about their personal security, as were their families.

Article 5 of the European Convention.

[21] Article 5 provides -

"(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following

cases and in accordance with a procedure prescribed by law -

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent him committing an offence or fleeing after having done so.

(3) Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time, or to release pending trial. Release may be conditioned by guarantees to appear for trial."

[22] Article 5. 3 of the European Convention deals with two matters. The opening part deals with a detained person's right to prompt and automatic reference to a judicial authority for determination of the lawfulness of the detention. The second part deals with rights to trial within a reasonable time and to release on bail.

[23] The scope of the opening part of Article 5. 3 was described by the European Court in *Aquilina v Malta* [1999] EHRR 185 at paragraph 47 as follows -

"This provision enjoins the judicial officer before whom the arrested person appears to review the circumstances militating for or against detention, to decide by reference to legal criteria whether there are reasons to justify detention, and to order release if there are no such reasons (see the Yong Baljet and Vanden Brink v The Netherlands judgment of 22 May 1984). In other words Article 5. 3 requires the judicial officer to consider the merits of the detention."

[24] *Re McAuley's Application* [2004] dealt with the issue of bail in scheduled offences but in consideration of Article 5. 3 Kerr LCJ stated at paragraph [24]-

“The magistrates’ court is therefore empowered to – and should, where required to – examine whether there is a reasonable suspicion grounding the arrest of the detained person; whether there is a proper basis for charging him with the offence on which his remand is sought; and whether there has been procedural due process. Since a defendant must be brought before the magistrates’ court and the magistrates’ court must, where necessary, examine fully the basis for the arrest and detention of the accused person and since an application for bail pending trial may be made at any time and will be dealt with promptly, we do not consider that there has been any breach of article 5 (3) of ECHR.”

[25] Thus consideration of the merits of detention extends to an examination of whether there is reasonable suspicion, a proper basis for charging and procedural due process. This applies not only to the justification for the person being detained and being charged and to the processes applied, but also to the manner in which those processes might impact on powers of the judicial authority. In the present case the processes impacted on the issue of whether the remand in custody should involve detention by the prison authorities or detention by the police. The lawfulness of detention requires that powers in relation to detention be exercised for proper purposes. *De Smith, Woolf and Jowell*, *Judicial Review of Administrative Action* (5th ed.) at para 6-059 describes it as an “elementary proposition” that -

“If a power granted for one purpose is exercised for a different purpose, that power has not been validly exercised.”

[26] The applicant’s solicitor contended that the police had exercised their powers for improper purposes so as to avoid certain statutory protections. By charging the applicant the police had brought into play Article 47 rather than Schedule 8. The RM did

not address that issue. The consideration of Article 47 (4A) or (4B) involves the exercise of the power under Article 47(1)(a) to remand in custody, and in the exercise of that power, the need to commit the accused to detention by police. The RM did find, for the purposes of Article (4A) and (4B), that there was a “need” for police detention in the circumstances prevailing upon the remand in custody. However he did not address the objections on behalf of the applicant as to how those circumstances had arisen. The circumstances came about by reason of the charging of the applicant before questioning him about the failed car bomb, with the result that he was required to be brought before the RM. Had that come about because the police had taken a course of action in order to avoid the statutory provisions of Schedule 8 then they would not have exercised the power for a proper purpose and the power would not have been validly exercised. As the RM did not address the issue raised by the applicant’s solicitor he did not assess all the merits of the applicant’s further detention in police custody, even though the applicant would have been remanded into the custody of the prison authorities in any event. The RM’s decision to remand the applicant in police custody under Article 47(4B) will be quashed.

Compatibility of Article 47.

[27] The applicant’s challenge is more far reaching than merely an attack on the validity of the magistrate’s order, however. The applicant contends that the amended provisions of Article 47 of the 1981 Order are not compatible with Article 5.3 of the European Convention in that they run counter to the developments in the terrorist legislation that have been brought about by the examination of that legislation by the European Court of Human Rights. In *Brogan v United Kingdom* (1989) 11 EHRR 177 the ECtHR held that there had been a violation of Article 5. 3 in respect of persons detained under the Prevention of Terrorism (Temporary Provisions) Act 1984 where those persons had been detained in excess of four days by executive authority and without being brought before a judicial authority. The response of the United Kingdom Government was to issue a Derogation Notice from the requirements of Article 5. 3 and the validity of that notice was upheld by the ECtHR in *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539. With the introduction of the Human Rights Act 1998 the derogation was maintained in Section 14 and Schedule 3 of the 1998 Act. The terms of the derogation set out in Schedule 3 referred to the statutory scheme then in place whereby extension of detention was made on the authority of the Secretary of State rather than a judicial authority and expressed the Government’s

wish that a judicial process could be found for extended detention. Judicial authority for the extended detention of those arrested for terrorist offences now appears in Schedule 8 to the 2000 Act. The Human Rights Act (Amendment) Order 2001 repealed the United Kingdom Government's derogation from Article 5. 3 with effect from 1 April 2001.

[28] Against the above background the applicant contends that Article 5. 3 requires that the judicial authority provided for in Schedule 8 (to authorise extension of detention of those arrested under section 41) is the only lawful basis on which such persons may be detained. However the additional ingredients in the present case are the charging of the applicant and the application for remand into police custody for questioning for further offences. Article 5. 3 does not require that the statutory regime applied to detained persons before charging should be the same statutory regime that is applied after charging. What Article 5. 3 requires is that the merits of the detention be examined promptly and automatically by a judicial authority, and that is what Article 47 of the 1981 Order provides.

[29] The applicant further contends that the 2000 Act contains a comprehensive code for dealing with terrorist offences and section 41(2) provides that the provisions of Schedule 8 "shall apply" to such detention to the exclusion of Article 47 of the 1981 Order. Schedule 8 applies to the detention of the arrested person prior to charging. If the applicant had not been charged with the four offences and if it had then been proposed to question him outside the permitted time about other offences relating to the failed car bomb, the provisions of Article 8 would have applied. When a detained person is charged with an offence, Article 47 applies to introduce judicial scrutiny and regulate the adjournment of proceedings. If the accused person is arrested in respect of other offences then Article 47(4A) or (4B) will apply if he is to be questioned in respect of the further offences. This does not exclude judicial scrutiny as the accused may only be detained in such custody further to judicial authority. Further, as the need for such custody ceases the accused must be brought back before a Magistrates' Court. We do not accept the applicant's contention that Schedule 8 provides a comprehensive code for dealing with terrorist offences, nor could it have been intended as such.

[30] Finally the applicant contends that Article 47(4A) and (4B) require that the "other offences" about which there is a need to make further inquiries must be offences unconnected with those with which the accused has been charged. In *R v Bailey & Smith*

[1993] 97 Cr. App. R. 365 at 372 the Court of Appeal in England and Wales rejected the argument that “other offences” should be construed restrictively to extend only to offences wholly unrelated to those already charged. Simon Brown LJ stated that it was “not merely unnecessary but would be quite artificial to construe the provision in the way contended for”.

[31] The Resident Magistrate’s decision, under Article 47(4B) of the Magistrates Courts (NI) Order 1981, to commit the applicant to the custody (otherwise than at a police station) of a constable, will be quashed. Article 47(4B) of the 1981 Order is not incompatible with Article 5.3 of the European Convention on Human Rights.

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KERR LCJ

[32] A magistrates' court, invited to commit an arrested person to detention under article 47 (4A) or 47 (4B) of the 1981 Order, must be mindful of the safeguards that are provided for in paragraphs (4E) and (4F) of the article. In both instances the committal should not take place unless there is a need for the person to be kept in custody for the purposes of inquiries into other offences.

[33] In the present case the applicant complains that the safeguards contained in paragraph (4F) are not as extensive as those found in paragraph 32 of Schedule 8 to the Terrorism Act 2000. In particular, it is suggested that the requirement that the warrant of further detention should only be issued where "the investigation in connection with which the person is detained is being conducted diligently and expeditiously" is not included in paragraph (4F).

[34] It is important to recognise the difference in context of the two sets of provisions. Whereas under article 47 of the 1981 Order the application is for a committal to custody for the purpose of investigating other offences, the extended detention provisions in the 2000 Act are designed to enlarge, in appropriate cases, the period that a detained person may be kept in detention for the purpose of carrying on an investigation of the reasons for his arrest, namely, that he is suspected of being a terrorist. The requirement that there be diligence and expedition in the conduct of the investigation that has already taken place is intended to address the

obvious danger of increasing unjustifiably the period of detention by dilatory inquiry. It is therefore designed to ensure that there should be no unnecessary prolongation of detention on account of a lack of urgency in the inquiries that have been carried out before the application for extended detention is made.

[35] The provisions of article 47, by contrast, are designed to cater for the situation where police wish to conduct an investigation into a different offence or offences from those that have been the subject of earlier inquiry. The element of due diligence in the conduct of the investigation into the further offences is not neglected, however. In both paragraph (4E) and (4F) the person detained in custody for the purposes of inquiries into other offences must be brought before a magistrates' court as soon as the need to detain him ceases. In my view this connotes an obligation to conduct the inquiries with dispatch.

[36] Moreover, the term 'need' in paragraph (4F) should be given a broad interpretation consistent with its significance in relation to the liberty of the subject. What will be necessary to satisfy this requirement will vary from case to case but it might well include, in cases where the issue arises, an explanation for failing to conduct such inquiries earlier.