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(subject to editorial corrections)

IN THE HIGH COURT OF NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY ANN BROLLY AND FRANCIS BROLLY FOR JUDICIAL REVIEW

WEATHERUP J

The applications

[1] The applicants have applied for judicial review of the decisions of the Secretary of State for Northern Ireland and the Chief Constable of the Police Service of Northern Ireland relating to their exclusion from the Key Persons Protection Scheme ("the Scheme") and the refusal to disclose to the applicants a risk assessment carried out by police.

[2] The applicants are husband and wife. The first applicant is vice-principal of a primary school and Sinn Féin counsellor on Limavady Council and Mayor of Limavady for the year 2003/2004. The second applicant is a retired school teacher and is also a Sinn Féin counsellor on Limavady Council. In April 2002 the applicants were visited by police to advise of death threats issued to all Sinn Féin counsellors by a Loyalist terrorist organisation known as the Red Hand Defenders. The group has claimed responsibility for a number of murders.

[3] The applicants emphasise a number of factors that include their high standing and high profile in the community; their strong advocacy of a peaceful and tolerant society and of the peace process; the police view that they are vulnerable; the isolated area where they live; the lengthy potential police call out time in emergencies; the serious and significant threat to society and the peace process posed by the Red Hand Defenders; the proscribing of the Red Hand Defenders and the Orange Volunteers in March 1999; the involvement of the group in throwing a pipe bomb at the Holy Cross protest; its claim of responsibility for the murder of a journalist; its antagonism towards the UVF and warnings against PUP politicians; the characterisation of the group by a

PUP member as gangsters trying to stop the peace process; the claim of responsibility for the murder of a postal worker; the role of the group as part of the UDA/UVF/LVF and the consternation caused when it was told to stand down by the UDA; that it declared all Catholic teachers, postal workers and prison officers as legitimate targets, a threat that was later withdrawn; involvement in a further murder in July 2002; the operational link with other more mainstream Loyalist organisations; that a threat from the group could come equally from other quarters that required investigation and assessment; the raising of the applicants' profile by irresponsible allegations that they were terrorists and by the first applicant's election as Mayor of Limavady and by the second applicant's standing as a Sinn Féin candidate in the Assembly elections.

[4] 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 perform a wider public role which makes a positive and helpful contribution to the realisation of the objectives of the Scheme; admission to the Scheme being subject to the person being assessed by the Chief Constable as under serious or significant threat (the wider public role criterion). Thirdly, for those not satisfying the occupation criterion or the wider public role criterion the Secretary of State operates a residual basis for admission where there are compelling political reasons. Fourthly, the Secretary of State may agree to provide home protection measures outside the Scheme in cases where a person is under imminent risk.

[5] The Chief Constable applies six levels of threat. The highest level is level 1 described as "imminent" where there is specific intelligence showing that the target is at a very high level of threat and that an attack is imminent. Level 2 is "serious" where there is specific intelligence of recent events or a target's particular circumstances indicating a likely high priority target and a high level of threat. Level 3 is "significant" where recent general intelligence on terrorist activity, the overall security and political climate or the target's general circumstances indicate a likely priority target and a significant level of threat. Level 4 is "moderate" where a target's circumstances indicate that there is potential for being singled out for attack and a moderate level of threat. Level 5 is "low" where there is nothing to indicate that the target would be singled out for attack and there is a low level of threat. Level 6 is "negligible" where a target is unlikely to be attacked and there is a negligible level of threat.

[6] By letter dated 15 October 2002 the applicants' solicitors applied for the applicants to be considered under the Scheme and by reply dated 21 October 2002 the Northern Ireland Office set out a description of the Scheme, indicated that they had requested the police for a threat risk analysis and invited the applicants to furnish

background information about themselves and their circumstances. The applicants furnished additional particulars through their solicitors on 10 December 2002. By letter dated 17 March 2003 the Minister of State on behalf of the Secretary of State issued a decision refusing the applicants' admission to the Scheme. The decision stated –

> "Following a detailed threat risk assessment the Chief Constable has informed the Minister that Mr and Mrs Brolly are not considered by him to be under a serious or significant threat.
>
> In view of the overall criteria for admission to the key person protection scheme, and in light of the Chief Constable's advice, the Minister has concluded that the protection of your client's home is not warranted at this time."

The letter advised the applicants to speak to their PSNI District Commander or to seek advice and assistance from the Crime Prevention Officer.

[7] By letter dated 26 March 2003 the applicants' solicitors sought particulars of the levels of threat operated by the Chief Constable, the levels that entitle a person to entry to the scheme, a copy of the Chief Constable's threat assessment and confirmation that only those judged by the Chief Constable to be under "a serious or significant threat" have been admitted to the scheme. By reply dated 6 May 2003 the Minister on behalf of the Secretary of State replied that the levels of threat operated by the Chief Constable were a matter for the Police Service, that only those under significant or serious threat are eligible for inclusion in the scheme, that a copy of the Chief Constable's threat assessment is a matter for the Police Service and that some of those admitted to the scheme in the past were admitted under the occupation criteria when they were not under significant or serious threat.

[8] In exchange of correspondence with the Chief Constable the applicants' solicitors by letter dated 14 May 2003 requested disclosure of the threat assessment carried out on the applicants and of any recommendations made by the Chief Constable in relation to the scheme together with further requests for information about the categories applied in threat assessments. By reply dated 19 June 2003 the Assistant Chief Constable referred to the completion of a threat risk analysis and did not agree to disclosure.

[9] The respondent's affidavit was filed by Ronald Armour, Principal Officer in the Northern Ireland Office with responsibility for the operation of the Scheme. The Chief Constable's threat risk assessment was furnished to the Secretary of State on 3 December 2002 indicating a moderate level of risk in respect of both applicants. Thereafter the particulars furnished by the applicants were forwarded to the Police Service and a further threat risk assessment was forwarded on 24 January 2003 which confirmed the moderate level of threat. Officials of the Northern Ireland Office wrote to the local District Commander of the Police Service and by reply dated 7 February 2003 it

was confirmed that local police had no information to suggest a specific threat against the applicants or their property.

[10] By the submission to the Minister in March 2003 it was recommended that the applicant be refused home protection on the ground that the applicants failed to meet the risk criteria required by the Scheme. The Minister accepted the recommendation. Had the applicants satisfied the risk criterion by being classed by the Chief Constable as being at significant, serious or imminent risk, then the applicants would have been admitted to the Scheme on the basis that as Councillors they would have satisfied the occupation criterion.

The Grounds for Judicial Review

[11] The grounds of challenge made against the decisions are as follows:

(i) The decision of the Secretary of State dated 17 March 2003 refusing the applicant's admission to the Scheme -

(a) Breach of the right to life under Article 2 of the European Convention on Human Rights or failing to provide the applicants with the right to protections and reasonable operational measures to ensure their protection.

(b) Procedural unfairness.

(ii) The decision of the Secretary of State dated 6 May 2003 refusing to disclose the threat risk assessment and

(iii) The decision of the Chief Constable dated 19 June 2003 refusing to disclose the threat risk assessment -

(a) Breach of the right to a fair hearing under Article 6 of the European Convention and the determination of the applicant's rights under Article 2.

(b) Procedural unfairness.

(c) Obstruction of the applicant's opportunity to challenge the original determination by way of judicial review.

(d) Acting incompatibly with the applicant's Article 6 rights and delegating consideration of those rights to an alternative public authority.

(e) Fettering of discretion by the rigid application of a pre-determined policy to delegate issues of disclosure to the Police Service.

(f) Applying an unlawful policy.

(g) Applying a disproportionate blanket policy.

Article 2 of the European Convention.

[12] The developments in relation to the positive obligations of the State under Article 2 were discussed in relation to the operation of the Scheme in *Re W's Application* [2004] and *Re Frazer's Application* [2004]. The summary set out in the latter case is repeated below.

(1) Article 2 of the European Convention 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 and "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". *Osman v United Kingdom* (1998) 29 EHRR 245.

(2) *Lord Saville v Widgery Soldiers* (2001) EWCA CIV 2048 concerned the risk to soldiers giving evidence to the Saville Inquiry at the Guildhall in Londonderry. In the Court of Appeal Lord Phillips approach was to consider first the nature of the subjective fears that the soldier witnesses were likely to experience if called to give evidence in the Guildhall, to consider the extent to which those fears were objectively justified and then to consider the extent to which those fears, and the grounds giving rise to them, would be alleviated if the soldiers gave their evidence somewhere in Great Britain rather than in Londonderry. That alleviation then had 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 determined the appropriate decision. This was a course that it was believed would accommodate both the requirements of Article 2 and the common law requirement that the procedure should be fair.

(3) The issue has been considered in relation 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 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 with 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).

(4) In *R (on the application of Bloggs) v Secretary of State for the Home Department* (2003) EWCA CIV 686, a further case concerned with protection for a prisoner, the

Court of Appeal reviewed the decisions. It was stated that 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 duty 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 being or proposed to counter it and the adequacy of those means (para 61).

Further it was stated 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).

(5) Carswell LCJ visited this issue in *Re Meehan's Application* (2004) NIJB 53 and agreed with the approach of the Court of Appeal in *Lord Saville of Newdigate v Widgery Soldiers,* which it was stated was not inconsistent with that of the ECtHR in *Osman v United Kingdom.* The approach of the court should be to ascertain the extent or degree of risk to life, take into account whether or not that risk had 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 were cogent reasons in the public interest why it should not take a course of action open to it which would reduce the risk. The court should then balance all these considerations in order to determine whether there has been a breach of Article 2 (para18).

(6) 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.

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.

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 Secretary of States approach to Article 2.

[13] The risk to the applicant was assessed by police as "moderate." The police definition of that level of risk refers to a target's circumstances indicating that there is potential for the target to be singled out for attack and there is a moderate level of threat. That risk is real as it is objectively verified and it is immediate as it is present and continuing. The assessment indicates the "potential" for the applicants to be singled out but nevertheless there is a level of risk that is present and continuing. The State is required to take reasonable steps in response to that risk.

[14] The respondent's affidavit states that the question of whether the applicants' rights under Article 2 required admission to the Scheme or protective measures to be taken outside the Scheme was considered in the course of decision making. It is stated that home protection measures can be put in place outside the Scheme in cases of imminent risk. The conclusion is stated as follows -

> "The Minister also decided that the level of risk did not require measures to be taken outside the scheme on any basis. There have been cases where the level of threat to an individual has been so high that protection measures outside the scheme have been provided. While this option was considered in the present case the level of threat did not warrant such a step being taken."

[15] In *Re W's Application* [2004] and *Re Frazer's Application* [2004] I found that the operation 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 not qualify for inclusion in the Scheme and that 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 find the same approach to this issue in the present case in the description set out in the respondent's affidavit. I am satisfied that this approach is flawed.

[16] 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 "moderate" 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.

[17] Accordingly I am satisfied that the decision of the Secretary of State in relation to the Scheme must be quashed.

Article 6 of the European Convention.

[18] The applicant contends that Article 2 of the European Convention is engaged so that a determination of the applicant's claim to protective measures under Article 2 requires a fair hearing that satisfies the requirements of Article 6. Article 6 provides that -

> "(1) In the determination of his civil rights and obligations or 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."

[19] For the purposes of Article 6 it is necessary to establish a contestation over a civil right and the respondent contends that that does not arise in the present case. The applicant contends that the scope of "civil rights" for the purposes of Article 6 has been altered by the decision of the House of Lords in *Re S and Re W (Children – Care Plan)* [2002] 2 All ER 192, so that once an Article of the European Convention has been engaged, as Article 2 has been engaged in the present case, then Article 6 will apply. In *Re S and Re W* Lord Nicholls stated –

> "[71] Although a right guaranteed by art 8 is not *in itself* a civil right within the meaning of art 6(1), the [Human Rights Act 1998] has now transformed the position in this country. By virtue of the 1998 Act art 8 rights are now part of the civil rights of parents and children for the purposes of art 6(1). This is because now under s 6 of the 1998 Act it is unlawful for a public authority to act inconsistently with art 8.
>
> "[72] I have already noted that, apart from the difficulty concerning young children, the court remedies provided by ss 7 and 8 should ordinarily provide effective relief for an infringement of art 8 rights. I need therefore say

> nothing further on this aspect of the application of art 6(1). I can confine my attention to the application of art 6(1) to *other* civil rights and obligations of parents and children."

[20] The scope of "civil rights and obligations" for the purposes of Article 6 was considered by the House of Lords in *Runa Begum v Tower Hamlets* LBC [2003] 1All ER 731. As stated by Lord Hoffman, it would appear that the concept of civil rights was originally intended to mean those rights and obligations which, in continental European systems of law, were adjudicated upon by the civil courts. These were, essentially, rights and obligations in private law. The term was not intended to cover administrative decisions which were conventionally subject to review (if at all) by administrative courts (paragraph 28). However, "the Strasbourg Court has extended Article 6 to cover a wide range of administrative decision making on the ground that the decision determines or decisively affects rights or obligations in private law." (paragraph 30). Lord Walker found that Article 6 was likely to extend to those public law rights of a personal and economic nature that did not involve any large measure of discretion (paragraph 112).

[21] As to the boundary between those administrative decisions to which Article 6 applies and to those which Article 6 does not apply Lord Bingham stated in *Runa Begum* that the Strasbourg case law developed and evolved as new cases had fallen for decision, testing the bounds set by those already decided. (Paragraph 5). The scope of Article 6 developed on an incremental basis. *Re S and Re W* does not establish that every engagement of Article 8 necessarily involves a "civil right" for the purposes of Article 6. It remains the position that Article 6 extends to administrative decision making that "determines or decisively affects rights or obligations in private law" including those public rights of a personal and economic nature that did not involve a large measure of discretion. It is a question of fact and degree as to whether the dominant features of the dispute are of such a nature.

[22] In *Re Brown's Application* [2003] NIJB 168 the Court of Appeal considered the refusal by the Secretary of State of a firearms certificate and found (paragraph [11]) that the decision did not fall within the definition of civil rights and that Article 6 was not directly engaged. Similarly in the present case I am satisfied that Article 6 is not engaged. The Court of Appeal went on to consider the applicant's argument that Article 6 was nevertheless applicable because the applicant's rights under Article 8 and Article 1 of Protocol 1 were engaged. However the Court of Appeal rejected the argument that Article 8 and Article 1 of Protocol 1 were engaged. I do not accept that the Court of Appeal proceeded on the basis that Article 6 would have been applicable had the other Articles been found to have been engaged.

[23] If, contrary to the above conclusion, Article 6 applies, it would be necessary to determine whether the availability of Judicial Review of the decision would have been sufficient to render the process compliant with the requirements of Article 6 for an independent and impartial hearing. The Court of Appeal discussed this issue in *Re Brown's Application* [2003] NIJB168 at paragraphs [14] to [16] and on the approach outlined by Carswell LCJ the present type of case is in the class where Judicial Review satisfies the requirements of Article 6.

[24] However the applicants object to reliance on Judicial Review to render the process compliant with Article 6 because, argue the applicants, such proceedings are not able to provide a sufficient hearing. This is said to arise because of the non disclosure of the risk assessment preventing the applicants from examining that issue. Before reaching a conclusion on this matter it is necessary to consider the position in relation to the disclosure of the threat risk assessment.

Disclosure of the Risk Assessment

[25] The applicant claims disclosure of the threat risk assessment carried out by police. As far as the Secretary of State is concerned the statement of the level of threat furnished by the police is the information on which the decision was made. That statement comprised the "outcome" of the assessment, namely the result of the analysis that the level was moderate. That "outcome" was disclosed to the applicants.

[26] As far as the police are concerned the applicants were informed of the nature of the threat that had been issued by loyalist paramilitaries and they received advice from police. In relation to the police assessment completed for the Secretary of State Assistant Chief Constable McCausland states:

> "The provision of a threat risk analysis involves an expert assessment within Special Branch of all the information including information from intelligence sources available to police. The exact methodology involved in this process is a confidential matter which would not be appropriate for Security Branch to discuss in an affidavit in legal proceedings. It is the police view that any such revelation would be detrimental to the processes of gathering and assessing information and intelligence and might lead to the risk that there could be manipulation of the process of threat risk assessment on the part of those who are aware of how such assessments are arrived at."

Accordingly the police rely on the above public interest reasons for the non-disclosure of threat risk analysis to the applicants.

[27] It is common case that this application must be processed in accordance with the requirements of procedural fairness. If there are adverse factors that are unknown to an applicant, and there is no public interest inhibiting their disclosure, then fairness may require that an applicant has the opportunity to address the adverse factors. This may be achieved where an applicant is informed of the "gist" of the case which he has to answer. In the present case the applicants treat the finding of moderate risk as a factor that is adverse to their claim for inclusion in the Scheme. I have found that the assessment ought nevertheless to have entitled the applicants to consideration outside the Scheme. Had the matter been considered on that basis the applicants may still have requested disclosure of the assessment on the basis that there ought to have been a higher assessment that would have warranted a correspondingly higher response.

[28] The applicants have been informed of the nature of the threat, the outcome of the assessment and the definitions applied to the categories of risk. I consider that the applicants have been provide with the "gist" of the information on which the assessment was carried out and the "gist" of the analysis in the form of the outcome and the definitions of categories of risk. The assessment itself may have contained additional intelligence as well as an analysis of all the information available to enable an outcome to be stated in accordance with the categories of risk. I am satisfied that there are public interest grounds for refusing disclosure of the threat risk analysis.

[29] In the circumstances the question is whether the requirements of fairness have been satisfied by the extent of disclosure that has been made? The applicants have had the opportunity to make representations on risk and it has been confirmed that all the considerations that they would wish to be taken into account have been considered. Of course there may be other information available to police that is not known to the applicants that will have been taken into account in the assessment. The outcome is a matter of judgment and I am satisfied that there is no procedural unfairness in the non disclosure of the assessment. There may be cases where there are grounds for concluding that fairness requires greater disclosure that that provided by police and in that event the Court may make an appropriate order in relation to discovery or the overall disposal of the application for judicial review. That being the case, had it been necessary to so find, I would have been satisfied that these proceedings for judicial review were capable of providing a sufficient hearing for the purposes of Article 6.

[30] For the reasons set out above the decisions of the Secretary of State will be quashed.