

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND  
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY C, A, W, M and McE  
FOR JUDICIAL REVIEW

Before Kerr LCJ, Campbell LJ and Girvan LJ

**KERR LCJ**

[1] The Divisional Court gave judgment in these applications on 30 November 2007. Declarations were made (i) that monitoring in the form of directed surveillance of each of the applicants' legal or medical consultations would be unlawful as infringing their rights under article 8 of the European Convention on Human Rights and Fundamental Freedoms; and (ii) that the refusal of the respondents to give the assurances that no monitoring of communications between the applicants and their legal or medical advisers would take place was unlawful.

[2] Although, therefore, the applicants have succeeded in the main thrust of their applications, by notice dated 13 December 2007 they sought leave to appeal to the House of Lords. On the hearing of the applications for judicial review, it had been accepted by all the parties that the proceedings constituted a criminal cause or matter for the purposes of Order 53. Leave to appeal to the House of Lords is therefore governed by Section 41 of the Judicature (Northern Ireland) Act 1978 which provides: -

**"41 Appeals to House of Lords in other criminal matters**

(1) Subject to the provisions of this section, an appeal shall lie to the House of Lords, at the instance of the defendant or the prosecutor –

(a) from any decision of the High Court in a criminal cause or matter;

(b) from any decision of the Court of Appeal in a criminal cause or matter upon a case stated by a county court or a magistrates' court.

(2) No appeal shall lie under this section except with the leave of the court below or of the House of Lords; and, subject to section 45(3), such leave shall not be granted unless it is certified by the court below that a point of law of general public importance is involved in the decision and it appears to that court or to the House of Lords, as the case may be, that the point is one which ought to be considered by that House."

[3] Before the question of leave can be addressed, therefore, this court must certify that a point of law of general public importance is involved in the decision. In deciding whether to grant a certificate, it appears to us to be necessary to consider if it is appropriate to certify points of law where the applicants have substantially succeeded in their application, although not all their arguments were accepted by the court.

[4] There is a traditional reluctance to permit an appeal by a litigant who has succeeded in the court below. Generally, an appeal will not be entertained where the reasoning underlying the decision rather than its outcome is under challenge (see the judgment of Maurice Kay LJ in *Secretary of State for Work and Pensions v. Morina and another* [2007] EWCA Civ 749.) In *Lake v. Lake* [1955] P 336 a question arose in relation to an appeal from a "judgment or order" under the provisions of Section 27 of the Supreme Court of Judicature (Consolidation) Act 1925. Mrs Lake's answer to an allegation of adultery had been one of denial or, in the alternative, condonation. Her husband's petition was dismissed, the court finding that there had been adultery but that it had been condoned. The wife's application for leave to appeal against the finding of adultery was refused by the Court of Appeal. It held that the judgment or order referred to in Section 27 meant the formal judgment or order which had been drawn up and which disposed of the proceedings, as opposed to a finding or statement contained in the reasons given by the lower court leading to its conclusion.

[5] In the *Morina* case the Secretary of State had been the successful party on an appeal hearing before a Social Security Commissioner. He had argued that the Commissioner did not have jurisdiction to entertain the appeal or, alternatively, that the appeal was without merit. The Commissioner decided that he had jurisdiction to hear the claimant's appeal but dismissed it on the

merits. The Secretary of State sought to appeal the finding that the Commissioner had jurisdiction. An appeal under Section 15 of the relevant Social Security Act lay against a 'decision' rather than a 'judgment or order'. The Court of Appeal accepted that there was a distinction between a 'decision' and a 'judgment or order' in this context and that therefore *Lake* was "not applicable as a matter of construction". Maurice Kay LJ accepted the argument advanced for the Secretary of State that he was seeking to change 'the decision' that the Commissioner had jurisdiction to hear the appeal. He was careful to say that he did not wish to encourage a whole range of "winners' appeals" but that since the subject-matter of the proposed appeals was a ruling on a fundamental legal issue of jurisdiction, the appeal would be permitted to proceed.

[6] In this case the same distinction as was recognised in *Morina* is present. This is clear from an examination of the differing terms of sections 41 and 42 of the Judicature Act. Whereas section 41 provides for an appeal from any 'decision' in a criminal cause or matter, section 42(1) provides that an appeal shall lie to the House of Lords from 'any order or judgment' of the Court of Appeal in any civil cause or matter.

[7] Mr McCloskey QC on behalf of the Secretary of State submitted that a person who is the successful party in litigation by obtaining or resisting an order may only appeal that order where there was some possibility of a benefit in the appeal proceedings. He accepted that there could be exceptions to this general rule, particularly in cases where there was a strong public interest in having the issue resolved or when the decision was in the form of a declaration.

[8] In the present case, the Divisional Court has held, by a majority, that section 28 of the Regulation of Investigatory Powers Act 2000 could be applied to consultations between legal advisers and clients and medical practitioners and their patients. The applicants wish to "change this decision", as Maurice Kay LJ put it in *Morina*. They also wish to challenge the correctness of the subsidiary finding of the majority that paragraphs 3.1 to 3.10 of the Home Office Code of Practice on covert surveillance apply to solicitor/client consultations. In our judgment, these constitute decisions within the meaning of section 41 of the Judicature Act and, provided the questions give rise to a point or points of law of public general importance, certificates should issue in respect of them.

[9] That the questions do give rise to such points of law is accepted by all concerned. Indeed it is self evident that these involve matters of fundamental importance. It is implicit in the findings of the majority that, if proper authorisation is obtained from an independent person such as a surveillance commissioner, directed surveillance of legal or medical consultations would be lawful under the scheme of the legislation. If the applicants' argument is

correct that RIPA does not qualify the rights of a person in custody to consult his legal or medical adviser privately, such surveillance could not be authorised in any circumstances. We have concluded, therefore, that it is appropriate to certify that points of law of public general importance arise.

[10] The applicants have formulated a number of separate but interconnected questions of law. The respondent and notice party, although not seeking leave to appeal, have suggested a reworking of the questions proposed by the applicants and have added a further question which they wish to be considered by the House of Lords. Having considered the submissions of the parties in relation to the form that they should take, we certify the following questions.

*In the case of C, A, W and McE*

1. Does section 28 of the Regulation of Investigatory Powers Act 2000 override or qualify the right of a person to consult in private with a legal adviser (i) at common law; or (ii) under any of the following statutory provisions: (a) article 59 of the Police and Criminal Evidence (Northern Ireland) Order 1989; (b) paragraph 7 of Schedule 8 to the Terrorism Act 2000; and (c) Rule 71 of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 by permitting covert directed surveillance of such consultations?
2. Do paragraphs 3.1 to 3.10 of the Home Office Code of Practice on Covert Surveillance apply to solicitor/client consultations?

*In the case of M*

Does section 28 of the Regulation of Investigatory Powers Act 2000 override or qualify the common law right of a person to consult privately with a medical practitioner by permitting covert directed surveillance of such consultation?

*In the case of all the applications*

Would covert directed surveillance of lawyer/client consultations or doctor/patient consultations, carried out under section 28 of the Regulation of Investigatory Powers Act 2000 and in accordance with the Home Office Code of Practice, infringe the rights of the client/patient under article 8 of the European Convention on Human Rights and Fundamental Freedoms, contrary to section 6 of the Human Rights Act 1998?