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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY CHRISTOPHER OWEN WARD FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

HART J

[1] This application for judicial review seeks an order of certiorari quashing the decision of His Honour Judge Gibson QC to grant an extension of detention of the applicant, Christopher Owen Ward, until 2313 hours on 7th December 2005. It is not necessary to say much about the background to the application, save that Mr Ward has been detained following his arrest at 0737 hours on Tuesday 29th November 2005 when he was arrested by virtue of Section 41 of the Terrorism Act 2000 on suspicion of robbery at the Northern Bank, Belfast on 20th December 2004.

[2] There have been previous applications for extensions of the periods of time within which he may be detained and the third such application came before His Honour Judge Gibson last night. The hearing before Judge Gibson commenced at 1953 hours and plainly it was a very extended and detailed hearing, because at 2223 hours last night Judge Gibson excluded from the hearing the applicant and his solicitor, Mr Murphy. This came about because at 2210 hours Detective Superintendent Aiken had been called and had proceeded to give evidence for some 13 minutes in the course of which, as I understand from what has been given in evidence today, it was explained that the police had already questioned Mr Ward in relation to some 14 topics and proposed if the extension was granted to deal with a further five topics.

[3] In the course of the hearing and the course of Detective Superintendent Aiken's evidence it appears that the following exchange occurred. The judge interjected to say:

> "I would like more detail and the Superintendent might supply from a further five topics which the police hope to explore."

Crown counsel then observed:

> "If your Honour seeks to hear that then we would want the respondent and his solicitor excluded as it is very pertinent to strategy."

Mr Murphy's evidence was that strategy in those terms meant the interview strategy which the police were following or presumably proposing to follow if the extension was granted. The detail of the five topics was not, it seems, disclosed at this stage. The judge then said:

> "I am very reluctant to exclude but it is open to me to draw [an] inference from the nature of the charge and the type of interview already conducted as to whether or not the five areas are likely to be of significance. Therefore don't need any detail unless you want to."

[4] I must confess that I am not entirely clear whether that exchange occurred before the Superintendent started to give his evidence or not, but I do not think it is material because the judge also said:

> "I can understand the reason not to disclose the nature (?) and therefore I intend to exclude the defendant and his solicitor on this issue and this issue alone."

Mr Murphy accepts that whilst he cannot specifically recall if he objected he accepts that it is more likely than not that he did object to himself and his client being excluded. I should also say that on a subsequent occasion during the hearing Mr Murphy volunteered, as I find he did, that he and his client would leave the room. So far as that second occasion is concerned the judge plainly did not make any determination and as the withdrawal was voluntary I consider that there is no question of that withdrawal giving rise to any claim for judicial review, and, therefore, any consideration of this issue must focus on the determination by the judge to exclude the applicant and his solicitor in relation to what I would call the first period of absence.

[5] The formulation of the applicant's case in the statement filed under Order 53 sets out a number of grounds, but the nub of the application is, it seems to me, that contained at paragraph 13(e) which is in the following terms:

> "In excluding the applicant and his solicitor while the police informed the judicial authority of the five matters that they wish to put to the applicant at further interviews the judicial authority failed to refer at all to his powers under paragraph 33(3) and how he intended to apply them; failed to consider the reasons why he was excluding the applicant and his solicitor and failed upon their return to inform them of the information that had been presented to them so that they could make oral or written representations to the judicial authority about the whole of the application. In so doing the judge erred in law. As a consequence of his decision, namely to extend time for the interview of the applicant, is unlawful."

[6] Mr O'Donoghue QC during the application for leave earlier this morning, and in the course of this hearing, submitted that the protection given to the applicant by virtue of the provisions that are contained in paragraph 34 of Schedule 8 of the Terrorism Act 2000, which I shall simply refer to as paragraph 34, could not be bypassed by the judge having recourse to the provision contained in paragraph 33(3). Paragraph 33(3) states:

> "A judicial authority may exclude any of the following persons from any part of the hearing -
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> (a) the person to whom the application relates,
> (b) anyone representing him."

[7] For the respondent, who is Judge Gibson, Mr McCloskey QC submits that paragraph 33 is an entirely free-standing and self-contained provision which is not dependant upon paragraph 34. He submits that paragraph 33(3) contains and confers a broad and unqualified discretion upon the judge, subject of course to his acting reasonably, acting for a proper purpose and construing the provision in accordance with the relevant law. This requires the court today to consider the relationship, if any, between paragraph 33(3) and paragraph 34. Paragraph 34 (1) provides that:

> "The officer who has made an application for a warrant may apply to the judicial authority for an order that specified information upon which he intends to rely be withheld from –
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> (a) the person to whom the application relates and,
> (b) anyone representing him."

It is noteworthy that paragraph 34(1) first of all requires the court to make an order, and secondly, that the basis for the application is that specified information upon which the police intend to rely be withheld from the applicant and his representative. The information upon which the police "intend to rely" plainly infers that if information was placed before the court under paragraph 34 it is intended that it will be relied upon by the authority, that is the judge, in making an order under paragraph 32 because the police are seeking to rely on it also. I do not consider it is necessary to set out for the purposes of this morning's application the remaining provisions of paragraph 34. It is plain that the provision in paragraph 34(4) is mandatory, in other words, the judge has to exclude the applicant and his representative whilst he considers the material to see whether or not it complies with paragraph 34(2), and he may only make an order withholding it from the applicant if there are reasonable grounds for believing that the information if it were disclosed would fall within sub-paragraphs 34(2)(a) to (g). In contrast to that paragraph 33(3) is in my view plainly discretionary. It uses the traditional word "may" as opposed to "shall" which appears in paragraph 34(4) and although a decision as to whether or not a provision is directory or mandatory is no longer one which the modern authorities should suggest should be made by relying solely or perhaps even predominately on the use of such terminology, I am satisfied that 33(3) is a discretionary power. One can well understand why paragraph 34(4) is mandatory because plainly the whole purpose of the application would be frustrated if the applicant and his advisor were able to hear what it was that it was sought to be withhold from him and from his solicitor. I accept that paragraph 33(3) is a wide and entirely free-standing discretion vested in the judge which is not dependent upon, or related to, the provisions of paragraph 34, they are quite distinct and quite separate. In the present case, it is, as I understand it, common ground that the judge does not appear to have referred in any way to the provisions of paragraph 34, and he certainly does not appear to have made an order, and, therefore, if his order permitting the continuance of Mr Ward's detention for the purpose of questioning is to be upheld or struck down that must be by virtue of its validity or otherwise under the provisions of paragraph 33(3).

[8] If one returns to what was said in the course of the hearing I am satisfied that the police in the shape of the applicant officer wished to deal with matters which they considered could not properly be ventilated in the presence of the applicant or his solicitor. The judge was plainly very alive to the position of the applicant and his advisor because he said in terms that he was very reluctant to exclude them from the hearing. He plainly, therefore, recognised the exceptional nature of what was being asked of him. He then said that he intended to exclude them on this issue and this issue alone, that is the 5 topics that remained to be explored, and he said that he could understand the reason why the police sought not to disclose the nature of the material and that was why he intended to exclude the applicant and his solicitor. I am entirely satisfied that the judge plainly considered whether he should grant the application by referring to the exceptional nature of what it was that was being sought when he said that he was very reluctant to exclude them. He plainly had in mind that he had a discretion and the next question, therefore, is whether having

arrived at that decision, it was rendered invalid by his failure to permit representations beforehand. Mr Murphy objected, no doubt strongly, and, therefore, the judge was well aware of the fact that the applicant and his solicitor objected. I do not consider that in circumstances where paragraph 33 is being invoked it is possible for an applicant to pursue in any significant detail the reasons why the application is being made because by their very nature such applications are intended to prevent an applicant from being aware of certain information. The safeguard which the applicant has is that this matter is being placed before the judge, and the judge's function is to rigorously and comprehensively examine the basis upon which the application is being made if, as proved to be the case here, the applicant and his advisor are excluded. There is no material whatever before me to suggest that function was not conscientiously performed by Judge Gibson on this occasion. Indeed the fact that the hearing lasted for several hours suggests that all of the relevant matters were given the most careful and thorough scrutiny, and indeed there is absolutely no suggestion to the contrary by the applicant in relation to any of the other matters that were considered by the judge in the course of last night's hearing.

[9] The next matter upon which it seems to me that Mr O'Donoghue relies is that the judge should then have come back and explained what it was that he had heard in the absence of the applicant and his advisor. I consider that that is a wholly mis-conceived suggestion. If the judge arrives at the conclusion that whatever has been explored before him in the ex-parte aspect of the hearing is a matter that should be withheld from the applicant, he plainly cannot explain what it was or even why it should be withheld without undermining the whole basis of his decision to deal with the matter in the absence of the applicant and his advisor. Again, I repeat, the applicant's safeguard is the function of the judge and the judge's role. It is finally suggested that in taking this course the applicant was deprived of the safeguards contained within paragraph 34. But as paragraph 34 and paragraph 33 are quite separate, paragraph 34 in my view has no bearing on the matter. It may be that in some circumstances there could be an overlap between matters which are sought to be raised by the police in the absence of the applicant where the application is considered by the judge under paragraph 33(3), and in those circumstances if there is an overlap with paragraph 34 the judge has the power to require the application to be made in accordance with paragraph 34. One of the grounds put forward in support of the argument that paragraph 33(3) is subject to paragraph 34 was that 34(2)(a) to (g) relate to matters that would be normally raised in the absence of the applicant and his adviser, but, as Mr O'Donoghue was driven to concede when he said that there may be a residual power in the judge to exclude matters that were outside paragraph 34, it is not difficult to visualise that there may be matters which the police wish to raise under paragraph 33(3) which do not fall within paragraph 34, for example, if public interest immunity is to be sought for something which does not fall within paragraph 34(2)(a) to (g).

[10] I am satisfied that the applicant has failed to establish the grounds upon which he brings this application. The application is dismissed. The interim order

which I made last night preventing further questioning until the matter was determined is lifted as from this moment.