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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 FREDDIE SCAPPATICCI FOR JUDICIAL REVIEW

CARSWELL LCJ

[1] In this application the applicant Mr Freddie Scappaticci seeks judicial review of a decision of Ms Jane Kennedy MP, Minister of State at the Northern Ireland Office, the minister responsible for security matters in Northern Ireland, whereby she refused to confirm or deny allegations made in the Press that the applicant was an undercover agent for the Government, commonly referred to as "Stakeknife" (sic). Mr Scappaticci has at all times strenuously denied these allegations. His case is founded on the proposition that since the making of the allegations has seriously endangered his life, the Government owes him a duty under Article 2 of the European Convention on Human Rights to reduce that danger by confirming that he is not Stakeknife. The minister's response is that it is Government policy to make no comment on intelligence matters and that she accordingly can neither confirm nor deny the allegations.

[2] On or about Sunday 11 May 2003 articles commenced to appear in newspapers, followed by television coverage, to the effect that the applicant had been an undercover agent working within the IRA for the security services as an informer, with the code name of Stakeknife. It is a matter of notoriety that the IRA pursues and executes persons suspected of being informers, and it was not in dispute that the naming of the applicant as Stakeknife has put his life in severe danger. The applicant has made vigorous attempts to dispel the suspicion by making public denials, through press statements and a television appearance, but press interest in his identity has not diminished.

[3] On 19 May 2003 the applicant's solicitor wrote to the Minister of State in the following terms:

> "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 that 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 information is within your knowledge and in view of the real threat to my client's life I must insist on a reply by return."

The minister's private secretary replied by faxed letter dated 21 May 2003:

> "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."

[4] The applicant commenced the present proceedings for judicial review on 21 May 2003, and leave to apply was given by Kerr J on 17 June 2003, after hearing counsel for the applicant and the Minister, by a written judgment delivered on that date. On 24 June 2003 the applicant's solicitor wrote to the Crown Solicitor's Office in the following terms:

> "This morning a pipe bomb was discovered at my clients home. It has been removed and while police have described it as an elaborate hoax it is an extremely disturbing development. The attack on my client is clearly a serious one and can only be seen as a result of the allegations made against him.
>
> While leave to apply for Judicial Review has been granted there is clearly nothing to stop the Minister reconsidering these matters at this stage. In view of this most serious development I would ask that the Minister re-visit this issue and confirm that Mr Scappaticci is not an agent of the Security Services."

The Crown Solicitor replied by letter dated 26 June as follows:

> "Thank you for yours dated 24 June 2003 in respect of the above, the contents of which are noted.
>
> In light of the grant of leave to apply for judicial review to your client and of the contents of your letter hereinbefore referred to I write to advise that the Minister is prepared to accede to your request that she review her original decision in respect of the matter you have raised with her.
>
> In order to expedite this review the Minister has indicated that she is willing to consider any further representations you or your client may wish to

make in relation to the issue of Mr Scappaticci's Article 2 rights. If you wish to avail of the opportunity to make representations to the Minister you should provide these as soon as possible. Any representations should be provided at the latest within 10 days from the date hereof.

You may be assured that anything you wish to put forward will be carefully considered in the context of the review."

[5] In paragraphs 11 and 13 of his grounding affidavit sworn on 21 May 2003 the applicant expressed concerns that the allegations that he was Stakeknife came from security personnel or Government officials speaking off the record to journalists. He therefore felt that the Minister of State was uniquely placed to refute them authoritatively and that her failure to do so had left his life at continuing risk. He suggested that his position was unique, in that he must be the only person revealed in such a public manner as an agent who asked the minister in charge of security to issue a denial.

[6] An affidavit was sworn on behalf of the respondent by Sir Joseph Pilling KCB, the Permanent Under-Secretary of State of the Northern Ireland Office. In paragraphs 3 and 4 he sets out the Government's policy in respect of the identification of agents, the reasons for its adoption and the way in which it is operated:

"3. The Government has a long established policy in respect of the identification of agents which is relevant to the present proceedings as will appear hereafter. The policy involves the principle that the identity of agents is neither confirmed nor denied (hence it is sometimes referred to as the NCND policy) as –

- to confirm that a person is an agent would place that person in immediate and obvious danger;

- to deny that a person is an agent may place another person in immediate and obvious danger; and

- to comment either way in one case raises a clear inference the Government refuses to comment in another case that it has something to hide in that case, ie the inference will be that

> the individual in that case is an agent, and he may be subject to reprisals (and his life may be at risk) as a result. It is only by maintaining the NCND policy so far as possible across the whole range of cases that this risk can be avoided.
>
> 4. It has been accepted within Government that the policy referred to above does not automatically trump every request for a comment on the identity of agents: it may be departed from in a particular case if there is an overriding reason to do so. However the effectiveness of the policy is undermined if it is not applied consistently: the longer term consequences of any departure from the policy are properly taken into account. Those consequences are described in paragraph 3 above (third bullet point). Given the importance of the rights of agents (including their right to life under Article 2 of the European Convention on Human Rights) which will be jeopardised if the NCND policy is departed from in anything other than the most exceptional circumstances, the Minister (and Government generally) attached great weight to the desirability of maintaining the consistent application of the policy."

Sir Joseph Pilling went on in paragraphs 5 to 9 to deal with the way in which the Minister of State had approached the applicant's request in the present case:

> "5. In respect of the decision taken by the Minister and communicated to the Applicant's solicitor by the Minister's Private Secretary by letter of 21 May 2003, the Minister took into account the threat to his life, created by the publicity regardless of whether true or not, and the ensuring obligation on Government to take reasonable steps to protect him and the totality of information available to her in respect of the Applicant's position. This included relevant background material, the correspondence which had been received from the Applicant's solicitor, the NCND policy referred to hereinbefore and information in the form of an assessment of risk in respect of the Applicant's circumstances. As

Minister for Security, the Minister has been briefed as to the Provisional IRA's own procedures for investigating allegations that individuals were agents for the security forces, which would be pursued regardless of statements by the UK Government.

6. Having given careful consideration to all of the above, the Minister recognised that the Applicant faced a real and immediate risk to his life regardless of the truth or otherwise of the publicity referred to hereinabove. Taking into account the particular circumstances of the Applicant's case and the basis of the NCND policy she concluded that there should be no statement.

7. In respect of the decision taken by the Minister on 17 July 2003 following a review of the case the Minister took into account the threat to the Applicant's life created by the publicity, regardless of whether true or not, and the ensuing obligation on Government to take reasonable steps to protect him and the totality of information available to her in respect of the Applicant's position. This included relevant background material, the further correspondence which had been received from the Applicant's solicitors, the NCND policy referred to hereinbefore, information in the form of updated assessments of risk of the Applicant's circumstances and all of the papers relating to the judicial review proceedings including the judgment of Kerr J given at the leave stage.

8. As before, the Minister recognised that the Applicant faced a real and immediate risk to his life regardless of truth or otherwise of the publicity referred to hereinabove. Taking into account the particular circumstances of the Applicant's case and the basis of the NCND policy she concluded that there should be no statement.

9. I have read the Applicant's Order 53 Statement and the affidavit of the Applicant accompanying same and wish to comment further on these as follows:

(i) Throughout the decision making processes described hereinabove the Minister has been aware of her obligations as a public authority under section 6 of the Human Rights Act 1998 and has fully taken into account the Applicant's Convention rights, especially those contained in Article 2 of the Convention. It is the Minister's view that she has at all times acted compliantly with her obligations under the Human Rights Act 1998.

(ii) It is not the case that in any way the Minister has fettered her discretion by applying the NCND policy to this case in a rigid manner. Throughout the decision making processes the Minister has been alive to the fact that she can depart from the NCND policy as described hereinabove if there is good reason to do so to meet the individual circumstances of the Applicant's case. The individual circumstances of the Applicant's case have been fully considered by the Minister.

(iii) In reaching her conclusions in the course of the decision making processes described above the Minister has paid full regard to all that the Applicant has wished to put forward. In particular, a full opportunity has been afforded to the Applicant in the context of the review of the Minister's original decision to place before the Minister any other relevant material over and above the contents of earlier correspondence to the Minister and the Applicant's affidavit and proceedings in the judicial review.

(iv) As noted above, Government policy in respect of the identification of agents operates on the central principle that the identity of agents is neither confirmed nor denied. It is not the case therefore that there has been any authorised departure

from the policy as suggested in paragraphs 11 and 13 of the Applicant's affidavit dated 24 May 2003."

[7] The case made on behalf of the applicant, as refined by his counsel Mr CM Lavery QC at the hearing of the application, was based on two main grounds:

(a) the Minister of State failed to apply the Government policy in a lawful manner, in that she applied it rigidly without considering adequately the circumstances of the applicant's case and failed to give sufficient weight to the threat to the applicant's life which would ensue if she refused his request;

(b) in refusing the applicant's request the Minister was in breach of the duty cast upon her by Article 2 of the Convention.

The applicant had also invoked Article 8 of the Convention in his grounding statement, but Mr Lavery did not press this issue, accepting that the applicant's case under this provision had been subsumed into the contentions based on Article 2. For his part Mr Morgan QC for the respondent did not rely on the question of discretion, based on the availability of a remedy the Data Protection 1998, which had been argued at the leave hearing. In addition to the arguments presented by the parties to the application, I was furnished with a written submission prepared by the Northern Ireland Human Rights Commission, which I gave them leave to present, and whose contents I have taken into account in considering the case. Counsel for the Commission sought leave to intervene and present oral submissions at the hearing of the application, but after hearing the arguments presented on behalf of the parties I declined to permit intervention, since I considered that those arguments had sufficiently covered the issues before me.

[8] A decision maker exercising public functions who is entrusted with a discretion may not, by the adoption of a fixed rule of policy, disable himself from exercising his discretion in individual cases: de Smith, Woolf & Jowell, *Judicial Review of Administrative Action,* 5th ed, para 11-001. In the customary phrase, he may not fetter his discretion, but must, in another commonly employed phrase, "keep his mind ajar." That does not prevent him from adopting and following a policy that all cases of a certain type will be dealt with in a particular way, so long as he does not follow it so rigidly that he fails to entertain the possibility of admitting an exception in an appropriate case: cf *R v Secretary of State for the Home Department, ex parte Venables* [1998] AC 407 at 497, per Lord Browne-Wilkinson.

[9] While acknowledging that the Minister and her Government were entitled to follow the NCND policy in relation to intelligence matters, Mr

Lavery contended on behalf of the applicant that it was operated in such a way that no consideration was given to the possibility of admitting an exception in the instant case. The averments in paragraphs 4 to 9 of Sir Joseph Pilling's affidavit specifically reject that contention, and if they are accepted as correct the appellant's case on this issue cannot be sustained. Mr Lavery expressed scepticism, however, about the correctness of those averments. He pointed to the fact that no indication appeared from the letter of 21 May 2003 from the Minister's private secretary of any consideration of the possibility of admitting an exception to the operation of the NCND policy. He went on to argue that although it is established that a review carried out on correct lines can result in a legally sustainable decision where it was previously procedurally flawed, such a change of approach savoured in the circumstances of the case of an opportunistic effort to repair shortcomings in the original procedure and caused one to question the genuineness of the purported willingness to look at the applicant's case rather than rejection of his request by the application of a rigid policy rule.

[10] I have considered with critical care the contents of Sir Joseph Pilling's affidavit and the correspondence between the appellant's solicitors and the Minister. I do not consider that the laconic nature of the letter of 21 May 2003 from the Minister's private secretary is necessarily indicative of the blanket operation of the NCND policy. In my opinion it is consistent with an approach to the case which admits of the possibility (admittedly very exceptional) of departing from the NCND policy, for in such an area one would not necessarily expect a debate spelling out all the factors in correspondence. Even if one does not accept this, the fact that the Minister subsequently expressed willingness to review the matter is a demonstration of a correlative willingness to make an exception to the policy if the facts should warrant it. It was urged upon me that this was a mere sham, designed to mend the Government's hand, but I am not prepared to reject as false and untrue the clear and unequivocal averments made on behalf of the Minister in Sir Joseph Pilling's affidavit. As I held on the application for discovery, the applicant is well short of reaching the threshold which he must cross of establishing the incorrectness of the affidavit. I therefore do not accept the appellant's contentions on this part of the case.

[11] The main argument in the application centred round the validity of the Minister's decision in the light of the obligations placed upon her by virtue of Article 2 of the Convention and section 6 of the Human Rights Act 1998. Article 2 provides:

> "1 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.

> 2 Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> a in defence of any person from unlawful violence;
> b in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
> c in action lawfully taken for the purpose of quelling a riot or insurrection."

The negative obligation not to take life has been described as one of the most important and fundamental rights under the Convention and is construed in such a way as to place a substantial obligation upon states. Article 2 may, however, give rise to positive as well as negative obligations, to take affirmative steps to protect life, and in this sphere the scope of the obligation placed upon a state is less demanding. Its extent was considered by the European Court of Human Rights in *Osman v United Kingdom* (1998) 29 EHRR 245, in which the applicant's complaint was that the police had failed to take sufficient steps to protect a family when they had repeatedly been threatened and intimidated by the mentally disturbed teacher of one of their children, who eventually shot the father dead and seriously wounded the child. The Court stated at paragraphs 115 and 116 of its judgment:

> "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. 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 whole life is at risk from the criminal acts of

another individual. The scope of this obligation is a matter of dispute between the parties.

116. For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, 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. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.

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, 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 or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. … For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, 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. This is a question which can only be answered in the light of all the circumstances of any particular case. …"

[12] In the present case it was readily apparent that there was a real and present danger to the life of the applicant when it was alleged in the Press that he was the agent known as Stakeknife. The action which he asked the Minister to take, viz making a public statement that he was not the agent, was a simple and quick action for her to take. The ground on which she declined was that if she did so it would have very serious consequences in the field of intelligence gathering for combating terrorist crime. In my opinion it was legitimate for the Minister to take into account such factors in making her decision, and they are valid considerations to place in the balance when determining if her decision constituted a breach of the applicant's Article 2 rights. It is clear from paragraph 116 of the decision of the ECtHR in *Osman v United Kingdom* that such decisions have to be proportionate. One of the factors in determining proportionality is that which the Court discussed, the extent of the burden which measures to protect life would impose on the state in the particular case. In my view the effect which such measures would have on the state's interests and the lives (and Article 2 rights) of other persons similarly constitute factors to which one must have regard in determining proportionality.

[13] Three factors in particular were relied upon by the respondent as constituting reasons why the Minister's refusal to confirm or deny that the applicant was an agent was not in breach of Article 2:

(a) a statement by the Minister denying that the applicant was an agent would have little effect upon those who threatened his life;

(b) to depart from the NCND policy would create a serious risk to the lives of other agents and imperil the continued receipt of intelligence from agents;

(c) the decision was one involving national security and the court should be slow to question ministerial decisions in this field.

[14] It was suggested on behalf of the respondent that paramilitary terrorists would not be influenced to any significant degree by a statement from the Minister that the applicant is not the agent Stakeknife. It was argued that they have their own methods of ascertaining the identity of informers and that they are wholly unlikely to place any credence on a statement made by a Government minister or to refrain from harming him simply because such a statement is made, referred to in paragraph 5 of Sir Joseph Pilling's affidavit. The validity of this proposition is a matter of some speculation, and it is not possible on the evidence available to make any firm judgment upon it, though there may very well be a good deal of substance in it. It seems to me that it falls short of being a conclusive argument, but that it may be legitimate to place it in the balance along with other more clearly established factors.

[15] The reasons for adopting and adhering to the NCND policy appear from paragraph 3 of Sir Joseph Pilling's affidavit. To state that a person is an agent would be likely to place him in immediate danger from terrorist organisations. To deny that he is an agent may in some cases endanger another person, who may be under suspicion from terrorists. Most significant, once the Government confirms in the case of one person that he is not an agent, a refusal to comment in the case of another person would then give rise to an immediate suspicion that the latter was in fact an agent, so possibly placing his life in grave danger (a comparable proposition may be found in paragraph 35(3)(a) of the decision of the Information Tribunal in *Baker v Secretary of State for the Home Department* (2001), a copy of which was furnished to me). If the Government were to deny in all cases that persons named were agents, the denials would become meaningless and would carry no weight. Moreover, if agents became uneasy about the risk to themselves being increased through the effect of Government statements, their willingness to give information and the supply of intelligence vital to the war against terrorism could be gravely reduced. There is in my judgment substantial force in these propositions and they form powerful reasons for maintaining the strict NCND policy.

[16] Courts of law in our constitutional system have traditionally been reluctant, and in some areas unwilling, to adjudicate on questions involving issues of national security. The issue whether a particular matter is in the interests of national security is one of policy and judgment, and the courts have tended to say that that is for the executive and not for the courts to determine: cf *Chandler v Director of Public Prosecutions* [1964] AC 763; *Secretary of State for the Home Department v Rehman* [2002] 1 All ER 122 at paragraph 50, per Lord Hoffmann.

[17] There are, however, issues which are not the exclusive province of the executive. Lord Hoffmann gave an example in *Rehman's* case at paragraph 54:

> "A good example is the question, which arose in *Chahal's* case itself, as to whether deporting someone would infringe his rights under art 3 of the convention because there was a substantial risk that he would suffer torture or inhuman or degrading treatment. The European jurisprudence makes it clear that whether deportation is in the interest of national security is irrelevant to rights under art 3. If there is a danger of torture, the government must find some other way of dealing with a threat to national security. Whether a sufficient risk exists is a question of evaluation and prediction based on evidence. In answering such a

> question, the executive enjoys no constitutional prerogative."

It seems to me clear that the issue whether an action taken on grounds of protection of the national interest constitutes a breach of a person's Article 2 rights is governed by the same principles and that the courts may not abdicate their responsibility for protecting such rights by leaving the decision to the executive.

[18] Mr Morgan did not seek to argue to the contrary, but he did submit that the courts must, as Lord Steyn observed in *Home Secretary v Rehman* at paragraph 31, give great weight to the views of the executive in matters of national security. That is indisputable and, as Lord Steyn said, "self-evidently right". The point was trenchantly made by Brooke LJ in *A v Secretary of State for the Home Department* [2003] 1 All ER 816 at paragraph 87:

> "If the security of the nation may be at risk from terrorist violence, and if the lives of informers may be at risk, or the flow of valuable information they represent may dry up if sources of intelligence have to be revealed, there comes a stage when judicial scrutiny can go no further."

[19] In the present case the issues are such that it is not necessary to rely to a large degree upon the informed judgment of the executive, in contradistinction to *A v Home Secretary,* where the court had to take on trust intelligence material whose substance could not be tested. In the case before me there was no issue as to the adoption by the government of the NCND policy. If this had been in issue there could conceivably have been some question about such matters as the wisdom of the policy, the extent to which and occasions on which it has been invoked and its usefulness in dealing with agents. In such matters the court might have had to be prepared to take the conclusions of the executive upon trust. The issue here, however, is whether adhering to the policy, with the admitted risk that that may involve to the life of the applicant, is to be regarded as a breach of his Article 2 rights when one balances it against the consequences which are likely to ensue if exceptions are made. The opinion of the responsible Minister, who has access to material which cannot be placed before the court, is obviously of importance, but the court is also well placed to weigh the issues without having to place the question of national security in the balance. I have been able to form a sufficiently firm opinion on these issues to reach a conclusion determinative of the case without considering the national security question. If one added that to the equation, by giving particular weight to the Minister's views on this matter of national security, that would reinforce my conclusion even more strongly.

[20] My conclusion on this part of the case is that the Minister's decision did not constitute a breach of the positive obligation placed upon her as a public authority and upon the Government to take appropriate steps to safeguard the applicant's life. In reaching this conclusion I have taken into account the several factors which I have mentioned, the risk to the applicant's life, the extent to which a statement from the Minister would protect him, the risk that departure from the NCND policy in this case would endanger the lives of agents on other occasions and the effect on the Government's ability to continue to obtain intelligence in order to combat terrorism. Having weighed these matters, I am of the firm opinion that the Minister's decision not to depart from the NCND policy did not constitute a breach of Article 2.

[21] For the reasons which I have given the application for judicial review will be dismissed.