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Judgment: approved by the Court for handing down | *Delivered:* **06/07/07**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEENS BENCH DIVISION

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IN THE MATTER OF AN APPLICATION BY JR10 FOR JUDICIAL REVIEW

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Before Campbell LJ and Weatherup J

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CAMPBELL LJ

[1] The applicant, who has been called JR10 for his own safety, has initiated proceedings for judicial review of a decision of Inspector McMenamin of the Police Service of Northern Ireland to conduct a video identification parade on 14 July 2006 at Antrim police station notwithstanding that the applicant had withdrawn his consent to the procedure. Leave to bring the application was granted by Weatherup J.

[2] On 14 July 2006 the applicant was arrested under the Terrorism Act 2000 on suspicion of membership of a proscribed organisation and of the commission, preparation or instigation of acts of terrorism namely the use of an incendiary device. When he was being interviewed at Antrim Police Station he was asked if he would consent to an identification parade. Having taken advice from his solicitor he agreed to do so.

[3] The Secretary of State issued a revised Code of Practice under section 99 of the Terrorism Act 2000 for the Identification of Persons by Police Officers which came into force on 12 May 2006.

[4] Inspector Collette McMenamin has received training in the procedures established by the Code of Practice. As the Identification Officer she handed the applicant a copy of a document entitled "Notice to Suspect: Identification Procedures." She also gave him a brief description of a video identification procedure and asked him to consent in writing to this procedure.

[5] A Video Identification Parade Electronic Recording (with the acronym VIPER) differs from the usual form of identification parade in that it uses a national database of images of volunteers. A video is made of the face and upper body of the suspect. The video is sent electronically to the national bureau in Wakefield for confirmation that the images are of suitable quality. While this is happening the suspect and his solicitor are shown a number of images of volunteers and the suspect selects at least eight that he wishes to have in the line up and where he wants them to appear in the line. These eight, so far as is practicable, resemble the suspect in age, height, general appearance and position in life. The selection is then sent to Wakefield where the clips are edited and returned to Northern Ireland within about one hour. The images are then burnt on a digital versatile disk (a DVD). The suspect and his solicitor are invited to inspect the images on the DVD to ensure that they are in the agreed form.

[6] When the electronic line up is shown to the potential witness the suspect's solicitor is allowed to be present but the suspect is not.

[7] Part 11 of the code of practice applies to any identification carried out by a police officer of a person detained under section 41 or schedule 7 of the Terrorism Act 2000. In paragraph 2.1 the code requires a record to be made of the first description of the suspect given by a potential witness in a form that allows details of the description to be given to the suspect or his solicitor. The form that is used is entitled Notice to Suspect (PACE26A(i)) and it states that the potential witness is to be identified by number only and not by name.

[8] The potential witness viewing the images in this case had expressed concern for his own personal safety and he was not prepared to be identified by anyone. Inspector McMenamin was told by the investigating officers that he was to be referred to as witness A and that he would be disguised. According to Inspector McMenamin this is not unusual in Northern Ireland and so she understands in Great Britain. The Inspector has made it clear that when she asked the applicant for his consent she knew that the witness would be heavily disguised but she did not make this, or the fact that he would not be referred to by name, known to the applicant or to his solicitor. She did not consider it necessary for her to do so.

[9] When Mr Leonard who is the applicant's solicitor attended the viewing of the images by the witness and was told that the witness would be referred to as witness A and would be wearing a blue forensic suit and a woollen balaclava he asked for his objection to be noted. He told the Inspector that the applicant had been misled and was now withdrawing his consent to the process. In an affidavit sworn in these proceedings the applicant has stated that if he had been aware of the total anonymity afforded to the witness he would not have agreed to participate in the VIPER process.

[10] Despite the objection raised by Mr Leonard the procedure continued and, according to Mr Leonard, the witness failed to make a positive identification.

[11] The applicant asks the court to make the following declarations;

i. That the decision of Inspector McMenamin to conduct the VIPER identification when the applicant had withdrawn his consent was unlawful, ultra vires and of no force or effect.

ii. That the decision to conduct the identification parade in such a manner as to afford the identifying witness complete anonymity was unlawful, ultra vires and of no force or effect.

iii. That the decision to obtain the applicant's consent to the VIPER identification procedure without informing him about the special measures to ensure witness anonymity was unlawful ultra vires and of no force or effect.

[12] For the applicant the issue is only of theoretical interest as he was released without charge. His counsel Mr McGleenan relying on a statement by Inspector McMenamin that it has never been considered by police officers of PSNI that they should advise a suspect in advance of identification that the witness will be disguised, asked the court to proceed with the application. Mr McGleenan referred to a passage in Woolf and Zamir *The Declaratory Judgment* (3rd edition) where the authors state;

> "The courts will not grant declarations which are of no value but, if a declaration will be helpful to the parties or the public, the courts will be sympathetic to the claim for a declaration even if the facts on which it is based or the issue to which it relates can be described as theoretical."

[13] The principle was enunciated by Lord Slynn in *R -v- Secretary of State for the Home Department ex p.Salem* [1999] 1AC 45 that "appeals which are academic between parties should not be heard unless there is good reason in the public interest for doing so …".

[14] As the VIPER procedure is widely used and identifying witnesses will on occasions seek anonymity and insist on being disguised the question as to whether the suspect should be informed of this when asked to consent to the procedure is likely to arise on other occasions. The court decided therefore to hear the application.

[15] The applicant does not question in these proceedings the need for anonymity and on occasions disguise to be made available to potential witnesses in order to protect them from intimidation and to provide support to those who may be reluctant to take part in an identification procedure. The question is whether the suspect, on being asked to consent to the procedure, should be told of the conditions under which it will take place.

[16] In her affidavit Inspector McMenamin has stated that if the applicant had declined the offer of VIPER identification his refusal would have been recorded and this could have been given in evidence at a trial. If he had refused consent it is likely that she would have authorised officers to proceed covertly or she would have made other arrangements to see if the witness could make a "cold" identification of the suspect.

[17] The Inspector stresses in her affidavit that the fact that the witness was disguised in the presence of the applicant's solicitor was not intended as a reflection on the professional integrity of the solicitor but rather to address the concern of the witness who had made it known that he would not take part even in the presence of the solicitor without the protection of being disguised.

[18] Mr McGleenan submitted that as the identification process is based on consent the person who is asked to consent to a procedure must be fully informed. If agreement is not forthcoming the default procedures come into play and the reason given for withholding consent may be given in evidence at the trial.

[19] Paragraph 2.15 of the code is in these terms:

> "A suspect who refuses the identification procedure first offered shall be asked to state their reason for refusing and may get advice from their solicitor and/or if present, their appropriate adult. The suspect, solicitor and/ or appropriate adult shall be allowed to make representations about why another procedure should be used. A record should be made of the reasons for refusal and any representations made. After considering any reasons given, and representations made, the identification officer shall, if appropriate, arrange for the suspect to be offered an alternative which the officer considers suitable and practicable. If the officer decides it is not suitable and practicable to offer an alternative identification procedure, the reasons for that decision shall be recorded."

[20] It was contended on behalf of the applicant that if he had been told that the witness would be anonymised and heavily disguised this would have given him a cogent reason for refusing to consent to a video identification. Once he became aware of it through his solicitor his consent was withdrawn. The video procedure should then have been discontinued and the reason for withdrawal of his consent recorded. An alternative or a covert procedure should have been followed.

[21] Mr Coll on behalf of the respondent said that the anonymity of the witness at the identification procedure stage does not go to the reliability of the witness's identification or otherwise of the suspect.

Conclusion

[22] Section 101 (8) of the Terrorism Act 2000 provides that a code made under section 99 of the Act;

> "(a) shall be admissible in evidence in criminal or civil proceedings, and
>
> (b) shall be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant."

[23] As with other codes the Identification code is directed to police officers and Lord Bingham observed in *R v Forbes* [2001] 1AC 473 at 480 that "the codes could not govern the admissibility at the trial of any evidence obtained in breach of the codes." If there is a breach and it is established that some prejudice has been caused to an accused the court must decide under article 76 of the Police and Criminal Evidence (NI) Order 1989 if the adverse effect is such that justice requires the evidence to be excluded.

[24] It is at trial stage that the court is in a position to decide if there has been prejudice to the accused. When she asked the applicant for his consent it was for Inspector McMenamin to decide if he should be told that the name of the witness would be withheld and that he would be disguised. If there has been prejudice to an accused the trial judge would have to decide if the evidence should be excluded.

[25] When consent was withdrawn by the applicant's solicitor the Inspector noted this and she informed the solicitor that she deemed that this was the most appropriate means of proceeding despite the applicant's objection. By doing so she was following the guidance given in the code where a suspect refuses the identification procedure. That approach was not unlawful. The consequences of such an approach are a matter for the trial judge in a particular case.

[26] There is no evidence before us that Inspector McMenamin acted in bad faith. The VIPER procedure is only viable with the suspect's co-operation and if it appeared at a subsequent trial that the police officer had tricked the suspect into giving his agreement by withholding information that may have caused him to decline to give it, justice may require that the evidence be excluded.

[27] For the reasons we have given we decline to make the declarations asked for by the applicant and refuse the application.