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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY PM, A MINOR, BY TM, HIS MOTHER AND NEXT FRIEND, FOR JUDICIAL REVIEW

Before Kerr LCJ and Weatherup J

KERR LCJ

Introduction

[1] This is an application for judicial review of an order made by His Honour Judge Smyth QC under article 11 of and Schedule 1 to the Police and Criminal Evidence (Northern Ireland) Order 1989 that all personal files, records, correspondence, attendance notes, internal memoranda and reports and other documentation relating to the applicant and held by the secondary school that he attends should be produced to a police officer of the Police Service of Northern Ireland. The order was made on 30 June 2006 on the *ex parte* application of PSNI.

[2] The application is made by a young man of fifteen years and in view of his age, nothing must be published that would tend to reveal his identity. We shall refer to him in this judgment as 'the applicant' or by the acronym, 'PM'.

Factual background

[3] On 7 May 2006 a young Catholic man called Michael McIlveen was attacked in Ballymena, County Antrim. He died of his injuries the following day. The applicant is one of a number of youths who are charged with Michael McIlveen's murder.

[4] In an affidavit filed on behalf of PSNI, Detective Constable Hazel Gilmore stated that, before Mr McIlveen was killed, there had been concern about a number of sectarian incidents in Ballymena. The police believed that young

people of school age were involved in some of these incidents. It was also widely known that an internet site known as 'BEBO' was being used by school children to leave sectarian messages relating to the area. The police were aware that, as a result of these matters, schools in the Ballymena area had made it known that pupils would be subject to disciplinary measures if it was established that they had been involved in sectarian activities.

[5] According to Detective Constable Gilmore, PSNI firmly believes that Mr McIlveen's murder was sectarian but during interviews with some of those who have now been charged with the murder it was claimed that the killing was not sectarian. The detective officer has not suggested that PM was one of those who made that claim. Because of the assertions that have been made, however, she and other police officers on the inquiry team believe that evidence of propensity to sectarian violence on the part of the applicant and the other defendants "is likely to be of substantial value to the investigation" that will culminate in the criminal trial.

[6] The police approached the principals of several schools in the Ballymena area asking for access to the school records of a number of persons including the applicant. With the exception of the applicant's school, all provided the material requested. The principal of his school indicated that a court order would be required before he could release the material sought and application was therefore made to the County Court judge for the order that is the subject of these proceedings. In the written application it was stated: -

> "Police are following a line of inquiry which requires the researching of school records which may reveal evidence of involvement in previous sectarian incidents or sectarian behaviour. Such evidence of previous bad character is now admissible as evidence in criminal trials with the leave of the court."

The relevant statutory provisions

[7] Article 11 (1) of the Police and Criminal Evidence (Northern Ireland) Order 1989 provides: -

> "(1) A constable may obtain access to excluded material or special procedure material for the purposes of a criminal investigation by making an application under Schedule 1 and in accordance with that Schedule."

[8] It is agreed that the material involved here is special procedure material and the relevant definition provision in relation to this case is article 16 (2) which provides: -

> "(2) Subject to the following provisions of this Article, this paragraph applies to material, other than items subject to legal privilege and excluded material, in the possession of a person who—
>
> (a) acquired or created it in the course of any trade, business, profession or other occupation or for the purpose of any paid or unpaid office; and
>
> (b) holds it subject—
>
> (i) to an express or implied undertaking to hold it in confidence; or
> (ii) to a restriction or obligation such as is mentioned in Article 13(2)(b)."

[9] Schedule 1 outlines the conditions that must be satisfied if access to special procedure material is to be allowed. Paragraph 2 is the material provision: -

> "**2.** The first set of access conditions is fulfilled if—
>
> (a) there are reasonable grounds for believing—
>
> (i) that a serious arrestable offence has been committed;
>
> (ii) that there is material which consists of special procedure material or includes special procedure material and does not also include excluded material on premises specified in the application;
>
> (iii) that the material is likely to be of substantial value (whether by itself or together with other material) to the investigation in connection with which the application is made; and

> (iv) that the material is likely to be relevant evidence;
>
> (b) other methods of obtaining the material—
>
> (i) have been tried without success; or
>
> (ii) have not been tried because it appeared that they were bound to fail; and
>
> (c) it is in the public interest, having regard—
>
> (i) to the benefit likely to accrue to the investigation if the material is obtained; and
>
> (ii) to the circumstances under which the person in possession of the material holds it,
>
> that the material should be produced or that access to it should be given."

The issues

[10] The central issue in this case is whether the access conditions have been fulfilled. There is no controversy about those that are contained in paragraphs (i) and (ii) of subparagraph (a). It is accepted that there are reasonable – indeed indisputable – grounds for believing that a serious arrestable offence has been committed and that the material sought consists of special procedure material. What is hotly disputed is that there are reasonable grounds for believing that the material is likely to be of substantial value to the investigation or that it is likely to constitute relevant evidence.

[11] For the applicant Mr Martin McCann submitted that the most that could be said about the application was that it identified a possibility that records exist that *might* contain information that was relevant to the investigation. It was, he suggested, impossible to postulate that such material, if it did exist, could be translated into relevant evidence.

[12] For the respondent Mr Coll argued that it was clear that the material sought existed. There could be no doubt that the school held records relating to PM. Access to that material was likely to be of substantial value to the investigation of the offence because it would unquestionably inform the

police whether further inquiries should be conducted into matters that the records would disclose. Even if they contained nothing that was relevant, this would still be of value to the investigation for it would close off a line of possible inquiry. If it contained material that showed a propensity on the part of the applicant to sectarianism it would be relevant evidence for the prosecution. If it did not the absence of such material would be relevant evidence for the defence.

[13] There was a subsidiary issue as to whether the material that might be obtained from the school records could in any circumstances be admissible in evidence but, for reasons that will presently appear, we do not need to examine that question.

Conclusions

[14] In *R v Maidstone Crown Court ex parte Waitt* [1988] Crim LR 384 and *R v Crown Court at Lewes, Ex parte Hill* 93 Cr App Rep 60 the Divisional Court in England and Wales stressed that it was essential for the judge to satisfy himself by scrupulous inquiry that the equivalent statutory conditions (section 9 of and the First Schedule to the Police and Criminal Evidence Act 1984) for the making of an order such as was made in this case were met.

[15] Similar provisions to the special procedure access conditions were considered by this court in *Re Moloney's application* [2000] NIJB 195. In that case the applicant was the northern editor of the Sunday Tribune newspaper. By an order made by the Recorder of Belfast he was required to produce any notes made by him in an interview which he had with one William Stobie in or about 1990, in which Stobie gave an account to him of his connection with the events leading up to and following the murder of Patrick Finucane. The order was made under paragraph 3 of Schedule 7 to the Prevention of Terrorism (Temporary Provisions) Act 1989. So far as is material paragraph 3 provided: -

> "3.-(1) A constable may, for the purposes of a terrorist investigation, apply to a Circuit Judge for an order under sub-paragraph (2) below in relation to particular material or material of a particular description, being material consisting of or including excluded material or special procedure material.
>
> (2) If on such an application the judge is satisfied that the material consists of or includes such material as is mentioned in sub-paragraph (1) above, that it does not include items subject to legal privilege and that the conditions in sub-

paragraph (5) below are fulfilled he may order a person who appears to him to have in his possession, custody or power any of the material to which the application relates, to –

(a) produce it to a constable for him to take away, or

(b) give a constable access to it,

within such period as the order may specify and if the material is not in that person's possession, custody or power (and will not come into his possession, custody or power within that period) to state to the best of his knowledge and belief where it is.

...

(5) The conditions referred to in sub-paragraph (2) above are-

> (a) that a terrorist investigation is being carried out and that there are reasonable grounds for believing that the material is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purposes of which the application is made; and
>
> (b) that there are reasonable grounds for believing that it is in the public interest, having regard-
>
> > (i) to the benefit likely to accrue to the investigation if the material is obtained; and
> >
> > (ii) to the circumstances under which the person has the material in his possession, custody or power,
>
> that the material should be produced or that access to it should be given."

[16] Dealing with the requirements in sub-paragraph (5) (a) the court said: -

> "Naturally a conscientious investigator will want to follow up every possible avenue by which he might be able to obtain information or indications which could take forward his task of finding and producing evidence against those who committed a serious crime. But in order to satisfy the condition laid down by paragraph 3(5)(a) of Schedule 7 to the 1989 Act the police have in our view to show something more than a possibility that the material will be of some use. They must establish that there are reasonable grounds for believing that the material is likely to be of *substantial* value to the investigation."

The court quashed the order made by the Recorder.

[17] Applying this reasoning to the present case, it appears to us that it cannot be said that the police have shown that there are reasonable grounds for believing that the records which have been sought will contain material that is likely to be of substantial value to the investigation. That the records *may* contain such information is clear but, as the court in *Moloney* pointed out, this is not sufficient. It must be shown that reasonable grounds exist for believing that the material *is likely to be* of substantial value (whether by itself or together with other material) to the investigation.

[18] It is important to note that the provision is not fulfilled by there being an absence of material. One can quite understand that there will be occasions where it is useful for the police to find out whether records contain material that might be helpful to their inquiry and, as Mr Coll put it, to close off a line of inquiry when they do not. But valuable though such an exercise might be, the plain fact is that it is not authorised by the legislation in its present form. It would be a different matter if the provision was to the effect that there were reasonable grounds for believing that the material *might* be of substantial value to the investigation. But the statute requires that there be a reasonable belief that the material *is likely to be* of substantial value. Clearly something more than a mere possibility is required.

[19] The same reasoning applies to the requirement that there be reasonable grounds for believing that the material is likely to be relevant evidence. We do not consider that this necessarily connotes admissible evidence in the trial but it appears to us that, as a minimum, it requires to be shown that material actually exists that will constitute relevant evidence. In the present case the police service is unable to say that there is material in existence, much less that it will qualify as relevant evidence. Mr Coll's ingenious attempt to

circumvent this fatal deficiency by suggesting that if there is material tending to show that the applicant had engaged in sectarian activity in the past this will be relevant evidence for the prosecution and that if there is not, this will be relevant for the defence cannot avail. The relevance of the evidence is linked inextricably, in our opinion, to the existence of the material. On any conventional construction it is impossible to say that the discovery that there is no material can constitute the relevant evidence. The use of the definite article to qualify 'material' in sub-paragraph (iv) involves a reference back to sub-paragraph (ii) which requires that it be shown that there is material that consists of or includes special procedure material.

[20] We have therefore concluded that the statutory conditions which are prerequisite on the making of the order were not fulfilled in this case and the order of the learned County Court judge must be quashed.