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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

BEFORE A DIVISIONAL COURT

IN THE MATTER OF APPLICATIONS BY ALAN SHUKER, WILLIAM CURRIE, PHILIP McKERGAN and RYAN McGALL FOR JUDICIAL REVIEW

Before Kerr LCJ and Campbell LJ

KERR LCJ

Introduction

[1] These cases involve common issues and were heard together. Each of the applicants is charged with an offence that is 'scheduled' *i.e.* is of a type specified in Schedule 9 to the Terrorism Act 2000. By virtue of section 75 (1) of the 2000 Act such offences are tried by a judge sitting without a jury. Certain offences are stated to be subject to Note 1 of the Schedule. Those offences shall not be scheduled offences when the Attorney General certifies that they are not to be treated as such. The offences with which the applicants are charged are subject to Note 1 and may therefore be certified or, as it is colloquially known, 'de-scheduled'.

[2] By these applications for judicial review the applicants seek to challenge the decision of the Attorney General not to exercise his power to certify the offences with which they have been charged.

[3] Three principal issues were canvassed in the course of the hearing of the application. The first was whether the decision of the Attorney General is

justiciable. On behalf of the respondent it was argued that the unique constitutional role played by the Attorney General in the organisation of the state's affairs makes his decision immune from judicial review. The respondent claims therefore that the applications should not be entertained because they are not justiciable. If, contrary to that argument, a challenge to the decision is justiciable, the second issue is whether there has been a failure to observe procedural fairness. The principal argument on this issue arises on the applicants' claim that they have not been afforded the opportunity to make an effective contribution to the decision-making process. The final issue relates to article 6 of the European Convention on Human Rights. It was claimed that the applicants' article 6 rights are engaged by the making of the decision whether their trial should be by judge alone and that the procedure adopted by the Attorney General in deciding whether to de-schedule the applicants' cases failed to comply with the requirements of that article.

Justiciability

[4] Mr Larkin QC for Mr Shuker described the Attorney General as occupying a position "at the apex of the criminal justice system". He has, said Mr Larkin, a "central role in the prosecution of offences". It was because of this aspect of his office that the Attorney General was chosen as the arbiter of whether an offence should be tried by a judge sitting with a jury or by a judge sitting alone. It would be anomalous, said Mr Larkin, if the discharge of that function was not susceptible to judicial review, not least because it lay at the heart of an accused person's fundamental right to trial by jury.

[5] For the other applicants Mr McCloskey QC, while recognising the 'theoretical legitimacy' of the argument that the Attorney General should be immune from judicial review, suggested that complete exemption from the superintendence of the courts should be accorded to very few situations where a decision in the realm of public law was taken. The decision of the Attorney in this area did not qualify for such exceptional immunity.

[6] For the Attorney General Mr Morgan QC argued that the question of justiciability should be analysed on the basis of the doctrine of separation of powers. Certain features of the work of the Attorney General did not lend themselves to review by the court because of the nature of the decision involved. The decision-making process entailed the application of policy and was frequently based on sensitive material that could not be disclosed without risk to certain vital public interests. Mr Morgan did not suggest that in all circumstances, the Attorney's decision in this area would be immune from judicial review. He accepted, for instance, that a decision tainted by bad faith, even if taken in the realm of high policy, would be reviewable. Absent such a challenge, however, he suggested that the Attorney's decision should be regarded as exempt from judicial review.

[7] In the course of the hearing a good deal of debate was engaged on whether this issue was properly to be regarded as one of justiciability; it was suggested that it might better be seen as an issue involving the reviewability of the Attorney's decision. It is possible (at least at a theoretical level) to distinguish the question of justiciability (which might be defined for present purposes as 'whether the decision of the Attorney General is subject to the jurisdiction of the court') from the notion of reviewability (*i.e.* whether the specific type of challenge made can, in the particular circumstances of the case, be permitted) although the application of the correct principles from either concept may provide the same answer, and in any event, the concepts tend to blend into one another. Mr Morgan accepted that whether the Attorney's decision was subject to judicial review would depend on a case-by-case analysis, which might suggest that this partakes of a reviewability rather than a justiciability approach to the question. But it is clear that justiciability issues must also be judged on an individual basis – see, for instance, *R (on the application of Abbasi and another) v Secretary of State for Foreign and Commonwealth Affairs and another* paragraph 85. For reasons that we shall give, we consider that this species of decision is justiciable but there are significant constraints on the extent of review that may be undertaken.

[8] In *de Smith, Woolf & Jowell*, Judicial Review of Administrative Action (5th edn.) at paragraph 6-045 it is stated: -

> "There will be some questions of 'high policy' such as the making of treaties, the defence of the realm, the dissolution of Parliament and the appointment of Ministers where the courts as a matter of discretion do not intervene, because the matters are simply not justiciable."

[9] Relying, in part at least, on this passage Laws LJ in *R (on the application of Marchiori) v The Environment Agency* [2002] EWCA Civ 03, paragraph 38, held that the law of England would not contemplate "a merits review of any honest decision of government upon matters of national defence policy". But he recognised that a challenge to government decisions in the realm of policy was nevertheless viable in certain circumstances. At paragraph 40 he said: -

> "Democracy itself requires that all public power be lawfully conferred and exercised, and of this the courts are the surety. No matter how grave the policy issues involved, the courts will be alert to see that no use of power exceeds its proper constitutional bounds."

[10] The applicants drew heavily on this statement to support their claim that the Attorney General was amenable to judicial review in the exercise of his

power to de-schedule offences. It was suggested that "no longer are there any forbidden areas of executive action into which the courts simply cannot look"[1].

[11] In *Re McBride's application (No 2)* [2003] NI 319 the Court of Appeal dealt with an argument that the decision of an Army Board on whether two soldiers who had been convicted of murder should be retained in the army was not justiciable. Although the court divided on the ultimate outcome of the appeal, it agreed on this issue. It referred to the judgment of Lord Reid in *Chandler v DPP* [1964] AC 763 at 791 where he said: -

> 'It is in my opinion clear that the disposition and armament of the armed forces are and for centuries have been within the exclusive discretion of the Crown and that no one can seek a legal remedy on the ground that such discretion has been wrongly exercised.'

The court explained the reasons that these matters were immune from judicial review at paragraph 23 of the judgment of Carswell LCJ: -

> "The reasons why the courts will not adjudicate on such matters centre round such factors as national security, the sensitive policy nature of the decisions questioned, the inability of the courts to make judgments on matters in those areas, the necessity that they should be decided by the democratic rather than the judicial organs of the state, and the distribution of resources. Foreign policy matters clearly come within this category, as was exemplified recently in *R (on the application of the Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin), [2003] 3 LRC 335. Similarly, considerations of defence policy or decisions as to the ordering of armaments will not be justiciable. It also appears clear that decisions about the disposition of troops in the field or sending them to particular locations would not be judicially reviewed."

[12] The court in *McBride* rejected the claim that the challenge to the Army Board's decision was not justiciable because "the issue …[was] whether the Army Board acted within the bounds of the power conferred upon it by adopting reasons for retaining the guardsmen which qualified as exceptional

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[1] *Campaign for Nuclear Disarmament v Prime Minister & others* [2002] EWHC 2777 (Admin)

reasons." It did not therefore partake of the exceptional nature of decision that was exempt from judicial review; on the contrary, it was the type of issue that was regularly considered by the courts and there was no reason that it should be outside its reviewing capacity. In so concluding the court relied on the observations made by Simon Brown LJ in *R v Ministry of Defence, ex p Smith* [1996] QB 517 at 539 (a case involving the discharge of members of the Armed Forces on the ground of their homosexuality) where he said: -

> "'I have no hesitation in holding this challenge justiciable. To my mind only the rarest cases will today be ruled strictly beyond the court's purview—only cases involving national security properly so called and where in addition the courts really do lack the expertise or material to form a judgment on the point at issue. This case does not fall into that category. True, it touches on the defence of the realm but it does not involve determining "whether … the armed forces [should be] disposed of in a particular manner" (which Lord Roskill in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 thought plainly unreviewable—as indeed had been held in *China Navigation Co Ltd v A-G* [1932] 2 KB 197, [1932] All ER Rep 626). No operational considerations are involved in this policy. Now, indeed, that the "security implications" have disappeared, there appears little about it which the courts are not perfectly well qualified to judge for themselves.'

[13] Carswell LCJ in *McBride* was not prepared to go quite so far as to hold that all but the rarest cases were justiciable but it appears to us that the general trend of modern authority lies clearly in that direction. Unless the matter is one that falls within the limited categories outlined in the foregoing paragraphs and is such as to lie outside the traditional competence of the courts, the exercise of power in the public domain will be subject to review. The extent of that review is, of course, another matter, and one to which we shall shortly turn, but we are satisfied that the decision of the Attorney General on whether a case should be de-scheduled is not within the exceptional category that is exempt from judicial review.

[14] One must then consider the extent of review of the decision that may be entertained. The Attorney General has indicated that it is his policy not to de-schedule an offence unless he is satisfied that it is not connected with the emergency. Mr Larkin suggested that there was nothing in the text of the statute that required such a restrictive test to be devised but we are satisfied

that, since the discretion vested in the Attorney General is unfettered, it is open to him to adopt this approach to the exercise of his powers.

[15] On behalf of the Attorney General his legal adviser, Kevin McGinty, has explained how questions of de-scheduling are dealt with. In all cases where a person is charged with a relevant offence, the Director of Public Prosecutions submits a form to the Attorney, describing the charge and summarising the case against the individual concerned. The form also contains such material as is relevant to the question whether the charge is connected with the emergency, the observations of the Director on this subject and a recommendation as to whether the charge should be de-scheduled. In many cases sensitive material will be placed before the Attorney. This often takes the form of intelligence information that cannot be disclosed because of its nature; on occasion, even to reveal that intelligence information has been provided would be against the public interest.

[16] In Fordham's *Judicial Review Handbook* (3rd edition) at paragraph 32.2 the non-availability or the adaptation of recognised judicial review grounds because of the nature of the decision under challenge is discussed in the following passage: -

> "Modified grounds. A measure or decision, although amenable to judicial review, may because of its nature or subject matter be reviewable: (1) only on some of the recognised grounds; or (2) on recognised grounds of which one or more are to be applied in a specially adapted way. Not that there are any neat pigeonholes or rigid adjustments. For, in truth, all grounds for judicial review are invariably contextual and capable of modification so as to accommodate the interests of justice in the particular context and circumstances under review."

[17] It is therefore clear that in certain situations, a decision which is subject to judicial review generally may be exempt from certain grounds of challenge or that the scope of the challenge under some of the conventional judicial review grounds will have to be modified or adjusted in order to reflect the specific nature of the decision attacked. Thus, for instance, in *R v Director of Public Prosecutions ex parte Kebilene & others* [2002] 2 AC 326, at 371G Lord Steyn said that "absent dishonesty or mala fides or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review." It is true that a large part of the reason for that conclusion was what was described as the "analogical force" of section 29(3) of the Supreme Court Act 1981 which excludes judicial review of matters under the jurisdiction of the Crown Court relating to trial on indictment. But

the judgment that the DPP's decision whether to prosecute should not in that instance be subject to judicial review followed a theme established by earlier cases.

[18] In *R v Director of Public Prosecutions ex parte C* (1995) 7 Admin LR 385 it was held that a decision not to prosecute was reviewable but that the power to review should be exercised sparingly and only where it could be shown that an unlawful policy had dictated the decision not to prosecute or there had been a failure to adhere to an established policy or where the decision was perverse. Likewise in *R v Panel on Take-overs and Mergers ex parte Fayed* [1992] BCC 524 at 536C-D Steyn LJ said: -

> "It seems to me that, in the absence of evidence of fraud, corruption or mala fides, judicial review will not be allowed to probe a decision to charge individuals in criminal proceedings. The law must take a practical view of the limits of judicial review. It would be unworkable to extend judicial review into this field."

[19] In this jurisdiction the availability of judicial review to challenge the failure of the Director of Public Prosecutions to give reasons for his decision not to prosecute was considered by the Court of Appeal in *Re Adams* [2001] NI 1. In that case the court followed a line of authority in England reviewed by Rose LJ in *R v DPP ex parte Treadaway* (1997) Times, 31 October. This was to the effect that the circumstances in which the DPP will be subject to judicial review in relation to a decision not to prosecute are extremely limited. In *Treadaway* the Divisional Court held that there was no duty on the DPP to give reasons for not prosecuting because, in reaching that decision, the DPP did not perform an adjudicatory function. The Court of Appeal in *Adams* followed that approach.

[20] Both *Treadaway* and *Adams* concerned decisions of the DPP taken before the Human Right Act 1998 came into force. Although in *Adams* the possible effect of the Act was considered, the primary conclusion of the Court of Appeal on this issue was that the Act did not have retrospective effect and therefore could not be relied on by the appellant to challenge the refusal to give reasons. In *R v DPP ex parte Manning* [2001] QB 330, the Court of Appeal in England also dealt with a challenge to the DPP's refusal to give reasons. In that case the applicants, the sisters of a man who died while in police custody, sought judicial review of the decision of the DPP not to prosecute any officer for manslaughter. The court also dealt with a complaint that the DPP had refused to give reasons for the decision not to prosecute. At paragraph 33 Lord Bingham CJ said: -

> "It is not contended that the Director is subject to an obligation to give reasons in every case in which he decides not to prosecute. Even in the small and very narrowly defined class of cases which meet Mr Blake's conditions set out above,[2] we do not understand domestic law or the jurisprudence of the European Court of Human Rights to impose an absolute and unqualified obligation to give reasons for a decision not to prosecute. But the right to life is the most fundamental of all human rights. It is put at the forefront of the Convention. The power to derogate from it is very limited. The death of a person in the custody of the state must always arouse concern, as recognised by section 8(1)(c), (3)(b) and (6) of the Coroners Act 1988, and if the death resulted from violence inflicted by agents of the state that concern must be profound. The holding of an inquest in public by an independent judicial official, the coroner, in which interested parties are able to participate must in our view be regarded as a full and effective inquiry: see *McCann v United Kingdom* (1996) 21 EHRR 97, 163-164, paras 159-164. Where such an inquest following a proper direction to the jury culminates in a lawful verdict of unlawful killing implicating a person who, although not named in the verdict, is clearly identified, who is living and whose whereabouts are known, the ordinary expectation would naturally be that a prosecution would follow. In the absence of compelling grounds for not giving reasons, we would expect the Director to give reasons in such a case …"

[21] In *Adams* Carswell LCJ suggested that *Manning* did not lay down a different rule from that put forward in *Treadaway*, pointing out that that case had been cited to the Court of Appeal and that no criticism was expressed by Lord Bingham of Rose LJ's judgment. It is not clear, however, that Lord Bingham can be said to have subscribed to the opinion that the DPP was not subject to judicial review for his refusal to give reasons because the function in deciding whether or not to prosecute was not adjudicatory. It is not

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[2] The cases in which it was suggested that the duty to give reasons arose were "(1) there has been a death in custody suggesting that unlawful force has been used; (2) a properly directed jury at the conclusion of a properly conducted inquest has returned a lawful verdict of unlawful killing; (3) there is credible evidence to identify the person responsible for the use of unlawful force against whom a prima facie case exists." – see para 25 of the judgment.

necessary to reach a firm conclusion on this question, however, and we leave for an appropriate occasion the decision whether the non-adjudicatory aspect of the Attorney's decision renders it less suitable for judicial review.

[22] The restriction on the availability of judicial review to challenge decisions taken in relation to the prosecution of offences was also recognised in *Elguzouli-Daf v Commissioner of Police & others; McBrearty v Ministry of Defence* [1995] QB 335, 346 where Steyn LJ said: -

> "Given the nature of the prosecution process it is, however, right to say that the scope for such judicial review proceedings is very limited indeed: *Wiseman v. Borneman* [1971] A.C. 297."

[23] The cases where it has been held that judicial review will not lie to challenge the decision of prosecuting authorities have been essentially pragmatic in their reasoning. In the present case many of the reasons advanced by the respondent that judicial review should not be available to challenge the decision of the Attorney General are likewise pragmatic. It is suggested that much of the material that informs that decision is sensitive and that on occasions the mere disclosure that such material exists would imperil the public interest. It should be noted that similar arguments were raised in the *Manning* case. Substantial practical difficulties were also canvassed. The Lord Chief Justice outlined both in paragraph 32 of his judgment as follows: -

> "The practical arguments against imposition of such an obligation [to give reasons for a decision not to prosecute], Mr Turner submits, are very strong. The Director might have received information in confidence which he would not be free to disclose; some of the information on which he relied might be subject to public interest immunity; disclosure might prejudice a continuing inquiry or investigation; such reasons might be prejudicial and damaging to a third party and lay the Director open to proceedings for defamation. In a complex case involving a mass of material, the composition of reasons which adequately summarised the reasons for the decision would be a very difficult and time-consuming task, which would involve considerable expense."

[24] These reasons did not avail the respondent in *Manning* but it is to be noted that the number of cases involved was likely to be very small. Lord Bingham dealt with this in the following further passage from paragraph 33: -

> "We readily accept that such reasons would have to be drawn with care and skill so as to respect third party and public interests and avoid undue prejudice to those who would have no opportunity to defend themselves. We also accept that time and skill would be needed to prepare a summary which was reasonably brief but did not distort the true basis of the decision. But the number of cases which meet Mr Blake's conditions is very small (we were told that since 1981, including deaths in police custody, there have been seven such cases), and the time and expense involved could scarcely be greater than that involved in resisting an application for judicial review."

[25] Again the approach here is pragmatic. It was also dictated, of course, by the special circumstances that arise in cases involving the investigation of deaths and the requirements of article 2 of the European Convention on Human Rights and obviously such considerations do not apply here. What the various cases that deal with the reviewability of prosecutors' decisions have in common is an approach to the question that is firmly based on the practical implications of permitting judicial review of the decision, whether it is a decision not to prosecute or a decision to withhold reasons. Ultimately, therefore, the question whether the Attorney General should be subject to judicial review in respect of decisions about de-scheduling must be answered in a way that takes account of the particular features of this process of decision-making. We have concluded that it is not a process which is suitable for the full panoply of judicial review superintendence. In particular, we do not consider that the decision is amenable to review on the basis that it failed to comply with the requirements of procedural fairness.

[26] The exercise involved in deciding whether offences should be de-scheduled is in some respects akin to the decision whether to prosecute. It involves the evaluation of material that will frequently be of a sensitive nature and the assessment of recommendations made by or on behalf of the Director of Public Prosecutions based on his appraisal of matters that may not be admissible in evidence or whose disclosure would be against the public interest. This is *par excellence* a procedure on which the courts should be reluctant to intrude. It is, moreover, a task that has been entrusted by Parliament to the Attorney General and while this will not in all circumstances render judicial review impermissible, it signifies a further reason for reticence.

[27] It must be made clear that while we have concluded that judicial review is not available to challenge the decision of the Attorney in the present cases, we do not consider that this will be excluded in every circumstance. As Mr

Morgan has said, such a decision would be reviewable on the ground of bad faith. Depending on the circumstances of other cases that may arise, further grounds of judicial review challenge may be deemed appropriate but we do not consider that it would be helpful, or even possible, to predict what those grounds might be.

Procedural fairness

[28] If, contrary to our conclusion, judicial review was available to test the procedural propriety of the Attorney's decision, it cannot be regarded as inevitable that the challenge would have succeeded. It is axiomatic that what will be required to satisfy the demands of procedural fairness will vary according to the circumstances of the individual case. In the present cases the applicants were able through their solicitors to make representations on why they believed that the offences with which they were charged had no connection with the emergency and those representations were considered before the decision not to de-schedule was taken.

[29] Moreover, there is nothing in the material which was put before us to suggest that, had the Attorney made available the information that he was given, any effective riposte to it would have been possible. It is of course true that the applicants are handicapped in making such a case because they have not received that information. It would be wrong, however, to assume that because they have not had a chance to consider the material, the applicants have been deprived of the chance to make an effective case against it.

[30] As we have said, what procedural fairness requires depends on the particular circumstances of each case. In these instances, the Attorney General defends his decision not to de-schedule on the basis that he should not be required to reveal the information that he received from the DPP. Even if we had held that the Attorney was required to observe procedural fairness in dealing with the cases, it does not follow that he would have to disclose this information. In the event, for the reasons given earlier, we do not have to decide that issue and we will refrain from expressing any final view on it.

Article 6

[31] So far as is material article 6 (1) of ECHR provides: -

> 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

[32] Mr Larkin sought to argue, albeit with seemly diffidence, that depriving the applicants of trial by jury amounted to a breach of their right to 'a fair and public hearing' of the criminal charges that they faced. That argument can be disposed of quickly. There is no evidence that the trial that the applicants will receive will be other than fair. Trial by jury may be the traditional mode of trial of indictable offences in most common law jurisdictions but it is not the exclusive touchstone for a fair trial.

[33] The more substantial point under article 6 is that the determination whether the trial should be before a jury engages the applicants' civil rights under article 6 and that that determination should be made in a manner that conforms with the requirements of the article.

[34] It is now well known that the phrase 'civil rights and obligations' has an autonomous meaning – see, for instance, the speech of Lord Hoffmann in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389, 1414-1416, paras 78-88. An extensive review of the historical development of the Strasbourg jurisprudence in this area was conducted by Lord Hoffmann in his speeches in *Alconbury* and *Runa Begum v Tower Hamlets London BC* [2003] UKHL 5. As he pointed out, ECtHR had traditionally accepted that the expression 'civil rights' meant rights in private law and had excluded administrative decisions made in the realm of public law from the ambit of article 6. Significant inroads have been made on that traditional exemption and further erosion of that exclusion is likely to take place. The current position was perhaps best encapsulated recently in the speech of Lord Walker of Gestingthorpe in *Runa Begum* where he said at paragraph 112: -

> "Further development in the case-law may therefore be expected. The existing Strasbourg jurisprudence most directly in point is the line of cases starting with *Feldbrugge v The Netherlands* (1986) 8 EHRR 425 and leading to *Salesi v Italy* (1993) 26 EHRR 187 and *Mennitto v Italy* (2000) 34 EHRR 1122. These indicate that article 6(1) is likely to be engaged when the applicant has public law rights which are of a personal and economic nature and do not involve any large measure of official discretion (see *Masson v The Netherlands* (1995) 22 EHRR 491, 511, para 51."

[35] We are satisfied that such rights as the applicants may enjoy in relation to the decision whether their trial should take place before a jury do not come within the ambit of article 6. This decision falls squarely within the public law sphere and a substantial measure of official discretion is involved in the

decision made by the Attorney General. As Lord Hoffmann explains (in paragraph 28 *et seq* in *Runa Begum*) the extension of article 6 to administrative decision-making has been on the ground that the decision determines rights or obligations in private law or because the public law rights involved closely resemble rights in private law: *Salesi v Italy* (1993) 26 EHRR 187. Such rights as are involved here are firmly rooted in public law and are not similar in character to private law rights.

Conclusions

[36] None of the grounds advanced by the applicants has been made out. The application for judicial review must therefore be dismissed.

Criminal cause or matter?

[37] Before the hearing of the substantive application began, Mr McCloskey questioned whether this was a criminal cause or matter within Order 53 rule 2 of the Rules of the Supreme Court (Northern Ireland) 1980. This provides that in a criminal cause or matter three judges sitting together shall exercise the jurisdiction of the court in an application for judicial review. (Order 53 rule 3 provides, that where the Lord Chief Justice directs, two judges may exercise the jurisdiction). In *Cuoghi v Governor of Brixton Prison and another* [1997] 1WLR 1346, Lord Bingham CJ said that if the main substantive proceedings in question are criminal, proceedings ancillary or incidental thereto are similarly to be treated as criminal. Applying that principle to the present case it was clear that this application should be treated as criminal and we proceeded on that basis.