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**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN'S BENCH DIVISION**
**(JUDICIAL REVIEW)**

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**IN THE MATTER OF AN APPLICATION BY JR 181(3)**

**AND IN THE MATTER OF DECISIONS MADE BY THE MINISTER FOR THE DEPARTMENT FOR AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS**

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**RULING ON APPLICATION TO SET ASIDE AN ORDER GRANTING ANONYMITY TO THE APPLICANT**

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**RULING**

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**COLTON J**

**Background**

[1] The applicant in this matter issued proceedings on 5 May 2021 in which he sought leave to judicially review a decision of the Minister for the Department for Agriculture, Environment and Rural Affairs (DAERA). That application related to a decision by the Minister for DAERA made on 22 February 2021 to *"unilaterally order his officials to halt works related to the construction of inspection facilities for post-Brexit checks on agri-food goods arriving from Britain and to stop further recruitment of inspection staff."*

[2] That matter was dealt with by Mr Justice Scoffield who issued case management directions on 10 May 2021 in which he granted leave to the applicant on various grounds.

[3] He noted that the applicant sought to be anonymised in the proceedings but indicated that he was not *"presently minded"* to grant the application.

[4] On 5 July 2021 the applicant filed an affidavit and written submissions setting out the grounds upon which he sought anonymity. In those submissions he also dealt with other matters involving amendments to the Order 53 Statement.

[5] Having considered the applicant's submissions Scoffield J then directed the office to write to the parties in the following terms:

> *"The judge assigned to hear this case has now had an opportunity to consider the applicant's further evidence and submissions in relation to the grant of anonymity and in relation to the new ground 5.1(f), as well as the Departmental Solicitors email correspondence of 27 July 2021 in which it was confirmed on behalf of the respondent that no submissions would be made on either of these issues at this time.*
>
> *On balance, the judge is prepared to grant anonymity and will give brief reasons for this in the judgment."*

[6] Thereafter, the applicant was known as JR 181. This changed to JR 181(2) as it was necessary to re-serve the notice of motion in the original application.

[7] On 3 February 2022 the application challenged a further decision of the Minister for DAERA to instruct officials to halt all checks at ports in Northern Ireland that were not in place from 31 December 2020. Those checks relate to the implementation of the Protocol under the Withdrawal Agreement legislation by which the United Kingdom exited the European Union.

[8] In the application he raises the same issues as those relied upon in his previous application.

[9] The matter came before me on 4 February 2022. It was agreed that the two applications should be dealt with together. (Scoffield J was no longer dealing with the first matter due to court commitments.)

[10] In the course of the hearing the applicant asked that the anonymity granted by Scoffield J be extended to include anonymity in these proceedings. Having regard to the fact that Scoffield J had granted the applicant anonymity having received legal submissions and given the overlap between the proceedings I granted the application which was made without any objection from the parties. This had the effect of continuing Scoffield J's order. Had the applicant been identified in these proceedings the effect would be to render Scoffield J's decision obsolete.

[11] As a consequence the applicant is to be referred to throughout these proceedings as JR 181(3).

[12] On 14 February 2022 the Lady Chief Justice's Office (LCJO) received an email from Mr Adam Kula, a journalist from the News Letter newspaper with the following inquiry:

> *"Can you say what the basis was for Mr Justice Colton granting anonymity to the SF member taking the judicial review proceedings over the Irish Sea Border (at a hearing on Feb 4 at the High Court)?"*

[13] On the same date the office replied in the following terms:

> *"The applicant in this case (JR 181) has another live application before the court relating to the same subject matter (the implementation of border checks arising under the protocol). Anonymity in that matter was granted after a full legal argument before a different judge. At the hearing on 4 February 2022 the court discussed with the parties whether the anonymisation of the applicant's name should be carried forward onto this application and this was agreed without objection."*

[14] On the same date Mr Kula replied in the following terms:

> *"Thanks for this. Have members of the press made representations against the anonymity order?*
>
> *If not, I would like to make one. Apparently the anonymous applicant is a Sinn Fein member. My guess is that they have been granted anonymity on the basis that they fear being targeted for their republicanism. But we are dealing with a matter of constitutional significance; the unionist community (or at least much of it) are of the view that the Irish sea border checks are a violation of their constitutional rights, and of the 1998 Agreement. Someone bringing a challenge on a matter of such seismic import surely should face a rather strong presumption against anonymity, on the basis that it would be rather important for major decisions affecting the political integrity of the UK to be taken at the behest of some anonymous cipher. This is surely doubly so when that person is a member of Sinn Fein – a political party which very much has `skin in the game' when it comes to the political battle over the protocol. Added to which is the fact that the other applicant, Mr Rooney, has been named, even though a reasonable person might connect them to Sinn Fein by dint of the joint nature of the application.*

*Lastly, the whole issue of anonymity for loyalists/republican political supporters was surely dealt with by way of legislation some years ago, when the government opted to repeal laws barring political donors from being named. If it is proper to name a financial benefactor of Sinn Fein, why not someone who is driving forward a politically-contentious court case which aligns with the objectives of their party."*

[15] At this juncture it is important to interject that Mr Rooney is not involved in any application of a *"joint nature"* with JR 181(3). He has no connection with JR 181(3) nor any connection with Sinn Fein.

[16] On the 15 February 2022 the LCJO responded in the following terms:

*"Mr Justice Colton has considered your request and is content to consider your representation on this matter. He is willing to permit you to make an oral submission to the court in addition to your written representation should you wish to do so. Please indicate if you wish to avail of this opportunity and he will make arrangements for this to be done as quickly as possible. If you are content to rely on your written representation he will provide a written response in due course in open court."*

[17] On 17 February 2022 the applicant wrote to the LCJO in the following terms:

*"Thanks for that; we would be grateful for the chance to make a statement in support of overturning the anonymity at the court's convenience.*

*Some questions for the applicants come to mind, which might have a bearing on any ruling about anonymity. Am I able to pose them now, or would it be more proper to do so on the day? The questions are:*

*Whether the anonymous applicant is taking the judicial review at the behest of Sinn Fein, or with its support;*

*Whether Mr Rooney is a member of, or an advisor to, any political party;*

*In terms of funding, I wonder if I may ask whether the lawyers for the applicants are being paid wholly privately, or whether there is any contribution to costs from any political party (obviously, this question is null and void if the lawyers are acting pro bono.)"*

[18] Having received an indication that Mr Kula wished to make oral submissions the following directions were issued to the parties:

> *"As will be seen a journalist from the News Letter wishes to make representations in relation to the reporting restrictions imposed by the court in the form of the anonymising of the applicant.*
>
> *The court takes the view that when making reporting restrictions it is appropriate to facilitate the media in the event that they wish to make representations in relation to any such restrictions imposed.*
>
> *The court therefore directs that a representative of the News Letter be permitted to make an oral submission to the court in support of overturning the reporting restriction imposed by the court.*
>
> *The court and the parties to the application already have the benefit of the submissions in support of the reporting restrictions originally imposed by Scoffield J in relation to JR 181(1) and (2).*
>
> *The court therefore proposes to hear oral submissions on this issue on Thursday 24 February 2022 at 10.00am. …*
>
> *In the light of the specific questions raised by Mr Kula in his email of 17 February 2022 the court makes the following issues clear:*
>
> *(i) It will not hear any submissions in relation to Mr Rooney or his application since there are no reporting restrictions relating to his application.*
>
> *(ii) The court will only consider issues that relate to the basis for imposing the reporting restriction which will be made clear in the course of any ruling in relation to the matter."*

[19] In accordance with these directions the court heard oral submissions from Mr Kula on 24 February 2022. The court subsequently received a speaking note from Mr Kula upon which his oral submissions had been based. Mr Ronan Lavery QC replied on behalf of the applicant in support of the application for anonymity. Mr John Larkin QC on behalf of the respondent, properly made no submissions, leaving the matter to the court.

**The applicant's evidence**

[20] Before considering Mr Kula's arguments I propose to set out the evidence upon which Mr Justice Scoffield granted anonymity in the original application. In his affidavit in support of the application for anonymity the applicant avers as follows:

> ***"Anonymity***
>
> *5. I ask that this Honourable Court grant me anonymity. As I have stated in my previous affidavit dated 5 May 2021 …, I am a member of Sinn Fein, a strong supporter of the Good Friday Agreement (GFA) and the subsequent peace process. I believe that this is a very important case for a number of reasons. As I have set out in my previous affidavit, being a firm supporter of the peace process and GFA, I was of the view that Northern Ireland would be better served remaining within the European Union. However, I acknowledge that a majority of those voting in the 2016 referendum voted to leave and in that regard, I accept that result and I acknowledge that `Brexit' has now occurred."*

[21] In paragraphs 6-8 of his affidavit the applicant expands on the grounds of his application and why he believes the proceedings are important.

[22] He goes on to aver:

> *"9. However, I am very concerned about the risk to my person, my property and my health if I am not granted anonymity.*
>
> *10. In my original affidavit, I ask that I be granted anonymity given the ongoing violence, tensions and unrest that have surrounded the issue of the Northern Ireland Protocol. I was, and remain, extremely concerned by the nature of the language used by some prominent politicians regarding `guerrilla warfare', destroying the Northern Ireland Protocol, and by the threats that were made to staff at the border port checks. I was, and remain extremely concerned by the violence and the clashes with police. I was and remain concerned with the acts of aggression and hostility shown towards all things Northern Ireland Protocol related.*
>
> *11. I was previously the recipient of death threats in the 1990s and 2000s. … I previously received a death threat from the orange volunteers. I was notified of this by the police.*

*12. In or about 2001, the police called at my property as a result of a report that a `device' was left at my home, but thankfully nothing untoward was found.*

*13. Around this time, fireworks were fired towards my kitchen window.*

*14. Over the years, I have received threatening phone calls to my home landline which have terrified me.*

*15. The Northern Ireland Office (NIO) previously provided me with a security grant to bulletproof my homes and to put in CCTV due to the threats made to me by loyalists.*

*16. Whilst I am a member of Sinn Fein, I am not an elected representative and never have been. My interest in politics is one of the reasons that I appreciate and understand the significance and importance of this case, but I do not see this case in any way as a political one – it is a legal one and one of the utmost importance.*

*17. I am a 70 year old man who lives alone. I am in bad health with Type 2 Diabetes and the onset of COPD. I also suffer from irregular heartbeat and am on medication for this. If I have the worry, stress and concern about being targeted or having my property attacked for taking this case, I fear that my heart condition may be affected. I simply would not be fit to deal with that sort of thing anymore. Should this Honourable Court require medical notes and records as evidence of the above conditions I am happy to provide same.*

*18. Furthermore, given that I am clearly known to elements within the loyalist community who previously made threats on my life and targeted my home, I am very concerned that these elements would recognise my name and would once again seek to target me given that this case relates to the Protocol.*

*19. The court will also be aware that over the last number of months there has been a series of protests, a number of which have turned violent, including clashes with police, arson and the destruction of property, all in protest at the Protocol. These protests began in or around 29 March 2021 and continued up until around April 2021 when Prince Phillip died. Protests took place on a near nightly basis and occurred in Derry, Ballymena, Carrickfergus, Newtownabbey and Belfast. Nearly 90 police officers were injured. In this respect I refer to a BBC news report dated 14 April 2021 and entitled `NI Riots: what*

> *is behind the riots in Northern Ireland' which is exhibited hereto. … And whilst I am relieved to say that the violent protests are not ongoing at the moment, the threat of violence has not completely gone away.*
>
> *20. On 19 May 2021 representatives of the Loyalists Committee Council (LCC) told the Northern Ireland Affairs Committee at Westminster that the use of violence in opposition to the Protocol was a 'last resort' and was not 'off the table.' …*
>
> *21. In my view, this case is undoubtedly one that is in the public interest and it is a case that is important for the reasons set out above, not least because it involves the operation of the Northern Ireland Constitutional Decision Making Framework and within the context of the NI Protocol. I am a very concerned citizen and I want to proceed with this case, but I have real reservations about continuing if I am not granted anonymity because I would be very concerned with my health and safety, particularly given my age and the fact that I live alone.*
>
> *22. In all the circumstances of this case including the current political climate and the tensions surrounding these issues, I respectfully ask to be granted anonymity for the above reasons."*

[23] I have omitted some of the contents of the affidavit as they would have the effect of identifying the applicant.

[24] In his able submissions Mr Kula suggested the applicant's reference to potential violence is, in his words, *"overcooked."* Specifically the reference to the term "*guerrilla warfare*" which relates to a remark made by a single politician in which he clarified that he was speaking on a "metaphorical" basis. He points out that in all his coverage of the Protocol and the protests he cannot point to any politician explicitly threatening violence.

[25] He points out that the applicant cannot point to any current or direct threat that has been made to him specifically.

[26] In the absence of such a threat the applicant states that he is *"clearly known to loyalist paramilitaries."* Mr Kula points out that if this were the test for granting anonymity then anyone in the public domain could seek to bring proceedings under a cipher as the applicant has sought to do here.

[27] Mr Kula acknowledges that this challenge is *"politically charged"*, but says this could not form the basis for anonymity. Indeed he suggests that the nature of the challenge involved here is an argument against granting anonymity.

[28] As to the applicant's concern about his health difficulties and the effect the stress and worry of the proceedings would have on him Mr Kula queries as to whether or not it is necessary for him to proceed at all given that he is not the only applicant challenging the Minister's order. He cannot have assumed that anonymity would be guaranteed at the outset of these proceedings.

[29] A key thrust of Mr Kula's submissions appear to be based on his suspicion or assumption that these proceedings are being brought by the applicant on behalf of or with support from his party. The thrust of the objection appears to be based on the fact that the applicant may well have been granted anonymity simply because he is a member of Sinn Fein. Underlying his objection is the suggestion that the applicant is somehow a proxy for Sinn Fein and that it would be wrong for this to be done under the cloak of anonymity. In aid of this he points out that via primary legislation the names of donors to political parties of over £1,500 must be published. He says that the principle of transparency should apply even more to the identity of someone who is undertaking an extremely "politically-valuable" legal case of constitutional magnitude.

[30] In reply Mr Lavery relies on the written submissions made in respect of the original anonymity application. He points out that the situation remains equally charged in a general sense and that the applicant's personal circumstances remain as set out in his affidavit.

[31] He takes issue with any suggestion that the applicant takes this case on behalf of or as proxy for a political party. As part of the applicant's duty of candour he disclosed from the outset that he was a member of Sinn Fein which has, according to Mr Lavery, a membership of 15,000. He does not bring this application on behalf of the party or at the behest of the party. He has not and never has been an elected representative.

[32] He brings this challenge as a public law challenge. In the past he has been a victim of loyalist violence and threats, something recognised by the authorities and in respect of which he has received support. His fear of violence is real and credible. He says that the decision of Mr Justice Scoffield was justified and correct. He submits it should be maintained.

**The court's consideration**

[33] The starting point for the court is that the parties in legal proceedings and in these proceedings should be named and known to the public. This is in accordance with the common law principle of open justice. It has also been reinforced in Article

10 of ECHR which protects freedom of speech and section 12 of the Human Rights Act 1998.

[34] Any derogation from those principles in the form of a reporting restriction needs to be strictly justified and necessary. By his application the applicant seeks to protect his right to life protected by Article 2 of the ECHR, which is an absolute right, and his right to private and family life pursuant to Article 8 ECHR which is a qualified right and which are protected in domestic law by the Human Rights Act 1998.

[35] The overarching test for establishing an Article 2 right in this context is whether or not the public authority (in this case the court) knows of a real and immediate risk to the life of the person concerned.

[36] In *Re W's Application* [2005] NIJB 253, Weatherup J stated, in paragraph [17]:

> *"A real risk is one that is objectively verified and an immediate risk is one that is present and continuing."*

[37] When such a risk is established the court is under an obligation of a positive protective duty in respect of Article 2.

[38] This jurisdiction is very familiar with applications for anonymity, particularly in the context of controversial inquiries, inquests and criminal trials. The leading authority is the judgment of Girvan LJ in the Northern Ireland Court of Appeal in *Re C & Ors* [2012] NICA 47. In his judgment at paragraphs [38]-[41] he contrasts a real risk to a person's life with a risk that is merely fanciful or remote. He expressed the view that a risk that is neither fanciful nor trivial constitutes a real risk in this context.

[39] Whether the test is met in a particular case and whether any derogation from the principle of open justice is necessary will inevitably be fact sensitive.

[40] Before returning to the facts of this application the court notes that applicants have been granted anonymity in *"Brexit"* related applications. In this jurisdiction, in *JR 83,* the High Court granted anonymity to an applicant who sought to challenge the UK Government's decision to introduce the UK withdrawal legislation. The matter went to the Court of Appeal without any interference with the anonymity order. In England and Wales the Divisional Court comprising Lord Justice Lloyd Jones and Mr Justice Lewis granted anonymity to claimants who were also challenging Brexit legislation. – *Yalland & Ors v Secretary of State for Exiting the European Union* [2017] EWCA 629 (Admin).

[41] In that case four applicants sought anonymity based on the real risk to personal safety experienced by the claimant in the Supreme Court Article 50 litigation. That claimant was of course Gina Miller. The claimants were aware of the

threats received by her and had grave concerns that they would be subjected to the same.

[42] At paragraph 26 in *Yalland*, the court stated:

> *"However, members of the public should be able to bring a legal challenge such as the present without an objectively justified fear as to the possible repercussions for their or their families' safety. In the present case, these claimants rely on what they say is a clear risk to their safety and the chilling effect on litigation if their identities were known. They do not suggest that any other consideration, taken individually or cumulatively, would justify an exception to the principle of open justice."*

[43] In the *Yalland* case the court was critical of the fact that there was an absence of any specific risk to the claimants.

[44] Nonetheless the court was satisfied:

> *"36 … that given the nature of threats in closely related proceedings and the orders made in those proceedings and also given the communication already received by one of their representatives and the personal characteristics of these claimants, that a real risk of their being exposed to violence, threats of violence and other criminal acts is demonstrated."*

[45] The court went on to state at paragraphs 38-40 as follows:

> *"38. We have nevertheless sought to assess whether there is here a sufficient public interest capable of outweighing the risk to the Claimants. We consider that matters such as the Claimants' nationality, status and personal situation may make a material contribution to the public debate on the issues in this case. However, the following facts concerning these Claimants are already in the public domain.*

(The court then sets out the individual background to the claimants.)

> *The order which we propose to make will not restrict disclosure of that information.*
>
> *39. We consider that in this particular case to publish the names of the Claimants would add little, if anything, to a proper understanding of these proceedings and the issues involved. Furthermore, the issues are such that the proceedings and the result are likely to be widely reported and read*

*irrespective of any inability to name the Claimants. This is not a case in which the grant of anonymity to the Claimants will impede public debate of the issues involved.*

*40. In these circumstances, having given careful and anxious consideration to the issue, we are satisfied that we should make an anonymity order. We consider that there is no public interest arising from the publication of the names of the Claimants which could possibly outweigh the risk that we have found in the present case. We are satisfied that the restrictions on reporting which will result are the least restrictive means of avoiding the risk to the Claimants whilst allowing the fullest possible public debate of the important issues in this case. …"*

[46] Returning to the facts of this case it seems to the court that there is no doubt that if this application for a reporting restriction is refused this will have the effect of frustrating the order made by Mr Justice Scoffield.

[47] In any event, like him, I am satisfied that on the applicant's evidence if he is named there is a real risk of him being exposed to violence, threats of violence and other criminal acts. This is because of the highly charged background to the protests against the Protocol, which have unfortunately resulted in acts of violence and threats of violence. I am satisfied that the risk is a real one. In the words of Girvan LJ it is not *"fanciful or remote."* It is immediate in the sense that it is present and continuing as the controversy relating to the Protocol rages on.

[48] That risk also has to be seen in the context of the applicant's individual circumstances. I am satisfied that he is someone who has been targeted by loyalist paramilitaries in the past and his fears that such targeting might continue were his name to become public is real.

[49] Given the concerns raised by Mr Kula it is important to stress that the applicant is not being granted anonymity because he is a member of Sinn Fein. In the court's view that would not be sufficient to justify making such an order.

[50] Because of the court's conclusion I am satisfied that the principle of open justice must yield to an extent to the applicant's Article 2 rights.

[51] The reporting restriction which I have imposed is the least restrictive means of avoiding the risk which has been identified to the applicant. It is a limited restriction.

[52] In so far as it is relevant the applicant is known to be a member of Sinn Fein. In so far as this is relevant it can be reported and referred to in argument if deemed appropriate by the legal representatives in the case.

[53] The applicant's identity is not relevant to the actual merits of the decision the court has to make. He has no private interest in the matter. This is a public interest case. Whilst the subject matter is one of political controversy this cannot have and will not have any influence on the court's decision. The decision will be based purely on legal principles.

[54] Thus, the publication of the applicant's name will not add anything to a proper understanding of these proceedings or the issues involved. I assume that the issues raised in the application are such that the proceedings and the court's judgment are likely to be widely reported and read irrespective of any inability to name the applicant. As per *Yalland* – *"this is not a case in which the grant of anonymity to the applicant will impede public debate of the issues involved."*

[55] Having given careful and anxious consideration to the issue I am satisfied that Mr Justice Scoffield was correct to make the anonymity order in relation to JR 181(1) and (2) and I am also satisfied that a similar order should be made in these proceedings.