Neutral Citation No. [2014] NIQB 136

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Jones' (Kyle) Application [2014] NIQB 136

IN THE MATTER OF AN APPLICATION BY KYLE JONES FOR JUDICAL REVIEW

TREACY J

Introduction

[1] This is a challenge to two decisions of the Police Service of Northern Ireland ("PSNI"), the first being the decision of 2 March 2012 to open and read a letter from the applicant to his solicitor and the second being the decision of around 26 March 2012 where the PSNI refused to provide an undertaking that further communications between the applicant and his solicitor would not be opened and read.

Background Facts

[2] The applicant is an ex-police officer who was dismissed from the police service following allegations relating to drugs. He was arrested in 2011 for armed robbery and was imprisoned on 18 November 2011 until he was released on bail on 25 February 2012.

[3] On 28 February 2012 a list was provided to police officers by a fellow inmate of the applicant. The list had been written by the applicant and appeared to contain the personal details of around 42 police officers. The applicant deposes that this list was partial and was part of therapeutic writing he used to help him adjust to being imprisoned. He deposes that upon his release on bail he destroyed the writing he had done without checking if all pages were there. He deposes that it is his belief that his fellow inmate removed a section of the papers and gave them over to police.

[4] On 29 February 2012 Detective Inspector Gillian Kearney was informed of this list and other allegations made by the fellow inmate. Having examined all available information directed the arrest of the applicant and the search of his property. A handwriting analyst was put on standby in order to compare the list against comparison items which were to be seized from the applicant's property. This was in order to determine if the applicant had in fact written the list.

[5] On 29 February 2012 the applicant was arrested for possessing/collecting information likely to be of use to terrorists contrary to section 103(a) of the Terrorism Act 2000 ("the 2000 Act"). A search was carried out of his house on this date and a number of items were seized. One of the items seized was a sealed envelope addressed to Mr Ciaran Shiels of Madden and Finucane Solicitors. The envelope was a standard Maghaberry prison envelope that was sealed with the applicant's prison number written on the seal to ensure it would not be opened. It was not stamped.

[6] When the envelope was returned to the station Detective Constable Campbell directed that it be seized and bagged, pending clarification of whether it was subject to legal privilege or not. The envelope was held separately pending determination of this issue.

[7] The applicant was taken to Antrim Serious Crime suite and questioned. Before the first interview, the applicant's solicitor, Patrick Madden, asked Detective Constable Pollock to give a guarantee that no privileged documents had been seized by police. The Detective Constable noted that an envelope had been seized; he further noted that the police were not interested in the content of the envelope but merely the envelope itself.

[8] Mr Madden, upon becoming aware of the addressee on the envelope, advised the Custody Sergeant and Inspector in attendance that the police were in possession of privileged documentation and requested it be returned immediately. Mr Madden asked that this be recorded in the custody record. Mr Madden was advised that no item had been seized in respect of which it was thought that legal privilege attached to. It was reiterated that the envelope was not seized with a view to inspecting its contents.

[9] It was indicated to Mr Madden that the envelope would not be opened or examined prior to the engagement of an independent barrister the following morning. Mr Madden indicated that this was not acceptable and that the envelope should not be opened under any circumstances.

[10] At 9.15pm Detective Sergeant Pollard (The 'Tier 5 Interview Advisor' assigned to the case who was responsible for developing and coordinating interview strategy, securing and preserving evidence and dealing with any legal issues) advised Detective Inspector Kearney that Mr Madden had declared to staff at the

Serious Crime Suite that the letter was subject to privilege and had indicated that it was to be returned to the applicant. Detective Sergeant Pollard further advised that he had taken advice from Detective Superintendent Wright and arrangements had been made with an independent barrister to attend Antrim Serious Crime Suite on 1st March 2012.

[11] The following day (1st March) Mr Tony Smith BL arrived at the station at approximately 4.15pm. He explained to Mr Madden that he was a member of the Bar and was independent from the police. He stated that his job was to open the letter and inspect the document to see if it was privileged and if it was he would return it. Mr Madden pointed out his belief that the letter was clearly privileged and further noted that the police had clearly changed tack from wanting to keep the envelope only to wanting to open the envelope and inspect the content. The Detective Sergeant agreed that this was the case but declined to say why he wished to do so. Mr Madden advised again that the letter should be handed back immediately.

[12] Mr Madden again noted that having an independent Counsel open the letter was unacceptable. He again sought reasons for why this course was proposed. No reasons were provided. Eventually in the course of this conversation the Detective Sergeant advised that they wanted to open the letter to ascertain if there was information in the document that may be of use to terrorists.

[13] At some stage on 1 March DI Kearney was advised that Mr Madden challenged the independence of Mr Smith. It was decided that Mr Smith would remove the letter to safe storage until the matter was settled and to enable interviews to continue.

[14] Again at some stage on 1 March the interviewing officers had revealed that they had no further evidence to put forward. The applicant had a consultation with his solicitor and a further interview was conducted at 6.20pm. In the course of this interview the applicant's solicitor read two pre-prepared statements which had been signed by the applicant. In these statements the applicant admitted to writing the lists, however he also stated that the list was incomplete and that the completed version would contain the names and detail of a further 45 police officers and 51 people from his university and high school days. In a further interview at 8.54pm the applicant was asked to name the further 45 police officers however he was only able to name a further 15 persons whom he stated were police officers from his squad while he was training. The applicant denied that there was any malicious intent in the compilation of these lists. As it was admitted that he had written the list, forensic handwriting analysis was no longer necessary.

[15] Later on 1 March PI Kearney took advice from Ms Pamela Atchison PPS and received support for her decision to charge the applicant under Section 103(1) of the

2000 Act. At 9.25pm DI Kearney directed Detective Sergeant Pollard to charge the Applicant. He was charged to appear at court the following day.

[16] At some stage following the disclosure relating to the extended list, PI Kearney became suspicious that the document addressed to Mr Shiels could be the continued list. PI Kearney noted this potential risk to the as yet unnamed police officers and the inability of the respondent to warn those officers. Accordingly, PI Kearney raised this as a potential Art 2 issue with regards the opening of the envelope.

[17] At 10.00am on 2 March a fax was sent by Mr Smith BL to PSNI Legal Services in which he detailed the issues and requested advice on the appropriate steps to take with regards having the contents of the envelope examined. At 11.00am Detective Constable Campbell contacted PSNI legal services for an update. He was informed that the Crown Solicitors Office would take the matter forward. PI Kearney had a consultation with Detective Superintendent Wright.

[18] On the afternoon of 2 March PI Kearney contacted Legal Services again to reinforce her concerns. She updated DS Wright. DS Wright contacted the PSNI Human Rights Legal adviser to discuss the Article 2 issues.

[19] At 5.03pm an email was received from the PSNI Legal adviser containing a letter for Mr Madden's attention informing them that the respondent intended to examine the envelope on Monday at 12.00 noon unless the matter was raised in court. PI Kearney and DS Wright were not made aware that this instruction was being given. PI Kearney and DS Wright had another consultation in which they agreed that the issues could not wait until Monday afternoon. DS Wright and Detective Chief Superintendent Hanley consulted on the matter.

[20] On Friday 2 March at 5.15pm Mr Madden received a letter from the Crown Solicitor's Office indicating that if there was no response by noon on 5 March the police would authorise Mr Smith to inspect the document. At 5.40pm on 2 March D/C/S Hanley gave the direction to *open* the envelope.

[21] At 5.45pm Detective Superintendent Wright liaised with the PSNI Human Rights Legal to inform him the instruction should *not* be sent to Madden and Finucane. At 6.04pm an email was sent from PSNI Human Right Legal Adviser to the Crown Solicitors office relaying the 5.45pm instruction. At 6.15pm the PSNI Human Right Adviser confirmed that the Crown Solicitors Office had already faxed the letter to Madden and Finucane and at the same time Mr Smith was directed by police to hand over the envelope. Mr Smith did not inspect it.

[22] At 6.43pm the document was received by Detective Sergeant Crawford from Tony Smith BL and at 7.10pm Detective Sergeant Crawford arranged for the document to be taken to Detective Superintendent Murray.

[23] At 7.23pm Detective Chief Superintendent Hanley phoned Detective Superintendent Murray at home and outlined the facts. Mr Murray was contacted because he was independent of the investigation.

[24] At 8.55pm on the same day Mr Madden responded to the letter from the Crown Solicitor's Office indicating that Counsel had been instructed in the matter and asked that the material would not be inspected until a Court had ruled on the issue. At 9.10pm DC Ian Towell arrived at the station with the letter. DS Murray was already there. DS Murray inspected the letter and confirmed that it did not contain any information that created a security risk.

[25] At 9.18pm the content of the letter was known and there was confirmation that it did not include any detail raising a concern for any person's personal security.

[26] On the morning of 5 March PI Kearney informed the PSNI Legal advisor of what course of action had been taken and at approximately 11.00am Ms Meegan of the Crown Solicitor's Office phoned Mr Madden and advised that the police had in fact opened the envelope on 2 March at the direction of an Assistant Chief Constable. That same day the letter was hand delivered to Mr Ciaran Shiels by Detective Constable Towell. Mr Shiels was advised that Superintendant Raymond Murray had opened the letter.

[27] On 6 March 2012 Mr Madden wrote to Detective Constable Pollard requesting the return of the envelope. Four subsequent letters were sent by Mr Madden to Detective Constable Pollard asking for confirmation of the identities of all persons who had touched or viewed this material and to confirm what material had been inspected and whether all the material had been returned.

[28] One response to Mr Madden's letters was received on 7 March detailing that all material in the envelope had been returned. On 9 March 2012 Mr Madden wrote to the Crown Solicitors Office asking that it be confirmed that privileged communications had been opened in breach of the applicant's common law and Art 8 rights and further seeking compensation.

[29] A response was received on 20 March 2012 (dated 15 March 2012) which contained the reason for opening the letter, that reason being that the police wanted to find the second list that the applicant had stated he had written.

[30] On 23 March 2012 Mr Madden wrote to the Crown Solicitors office indicating that the reasons provided in the letter of 15 March were not accepted as justification for opening the letter and repeating the requests of his letter of 9 March.

Order 53 Statement

[31] The applicant sought the following relief:

(a) A declaration that the decision made on or about 2nd March 2012 whereby the Police Service of Northern Ireland opened and read a private letter from the Applicant to his solicitor was unlawful.

(b) A declaration that the decision of 26th March 2012 whereby the PSNI refused to provide an undertaking that no further items of correspondence protected by legal professional privilege would be opened was unlawful.

(c) An order of certiorari to quash the decision of 26th March 2012;

(d) An order of Mandamus requiring the PSNI to reconsider the decision of 26th March 2012.

…"

[32] The grounds upon which relief was sought included:

"(a) The decisions were in breach of the Applicant's common law right to privileged communication with his solicitor;

(b) The decisions were in breach of the Applicant's rights under Article 6 ECHR and therefore were in breach of section 6 Human Rights Act 1998;

(c) The decisions were in breach of the Applicant's rights under Article 8 ECHR and therefore were in breach of section 6 Human Rights Act 1998;

(d) The decisions were irrational and unfair in the circumstances;

(e) The Applicant had a legitimate expectation that his letter would not be opened by the Police."

Relevant Law

[33] Art 8 ECHR states:

> "Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Arguments

Applicant's Arguments

[34] The applicant argued that the decisions made by the PSNI on the dates in question were not in accordance with law, were not necessary and were not proportionate. Relying on Derby Magistrates Court [1996] AC 48 the applicant argued that legal professional privilege is an absolute right (subject to client right of waiver and statute) and a substantive right which cannot be overridden by 'some supposedly greater public interest' and there was no scheme overseeing the action, whether independent or judicial to ensure that any such act was convention compliant.

[35] Further the applicant argued that the action could only be convention compliant if certain safeguards were in place to ensure the prisoners right to privacy, family life and correspondence were infringed only to the extent that was necessary and proportionate.

Respondents Arguments

[36] The respondent argued that its actions were in accordance with the law, in pursuit of a legitimate aim and necessary and proportionate in a democratic society to pursue that aim. Further the actions were taken to protect the security of police officers which is sufficiently important to justify the interference with the applicant's Art 8 rights. Further the interference was rationally connected with the action taken.

[37] Further the respondent argued that legal professional privilege cannot be simultaneously absolute and capable of being overridden by statute and that legal

professional privilege itself is subject to fundamental human rights and it must be construed in a manner that is compatible with competing convention rights.

[38] The respondent argued that it would be logically incoherent if legal professional privilege could be overridden by statute but not by one of the most fundamental human rights as enshrined at Art 2(1) ECHR. While the European Court has recognised that legal professional privilege is a fundamental human right it has recognised that it can be interfered with in exceptional circumstances. In deciding whether the interference was necessary in a democratic society regard may be had to the states margin of appreciation.

[39] The respondent referred to the case of Campbell [1992] 15 EHRR 137 in which it was held that the reading of a prisoners mail to his lawyer could be permitted in 'exceptional circumstances when the authorities have reasonable cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature'. What may be regarded as 'reasonable cause' will depend on all the circumstances…'. It is submitted that exceptional circumstances existed in this case and that the respondent had reasonable cause to believe the legal professional privilege was being abused. Insofar as the respondent concluded that there was a 'reasonable cause' to justify its actions: the rationality of this decision not only falls within the State's margin of appreciation, but can also be seen as a matter for the respondent's discretion as to what weight to attach to the particular circumstances.

[40] The respondent argued that there were safeguards offered to the applicant by way of an independent lawyer. The fact that these safeguards were rejected does not undermine the legality of the action. No scheme is necessary where the rights were in fact protected.

[41] The respondent gave examples of other areas in which legal professional privilege can be overridden in the absence of specific provision in legislation. If criminal proceedings had resulted the admissibility of the letter could have been challenged at the trial on the basis of legal professional privilege.

[42] The respondent did not accept that legal professional privilege was established until it could be ruled out that the contents of the letter were not in furtherance of a crime and subject to the iniquity exception and for the following reasons argued that Three Rivers [2004] 3 WLR 1274 is of limited relevance:

- To limit Three Rivers on the basis that it dealt with a very narrow issue (the breadth of legal advice privilege) and crucially that it did not raise issues in relation to balancing legal professional privilege and convention rights. At the bottom of it the respondent argued that the Three Rivers case was too confined to be directly applicable in the instant case.

- The respondent noted that in Three Rivers the assertion that legal professional privilege is absolute was qualified by the necessity for a 'relevant legal context'. No such context was established by the applicant and thus the court could not be confident that the letter was properly protected by legal professional privilege. The respondent did not accept that the letter was not subject to the iniquity exception.

- The respondent further submitted that until legal professional privilege was unequivocally established its protections could not be considered to be absolute.

- The respondent submitted that the core of Three Rivers was related to balancing the public interest of all relevant information being before a court against the public interest of being able to consult ones lawyer, this is fundamentally different to balancing convention rights.

[43] The respondent further argued that to give the undertaking requested would have been unreasonable without knowing what issues may arise in the future of the case. Further it was argued that such an undertaking may have conflicted with its statutory functions or the convention rights of others. If the letter had contained details of Police Officers, it would not have been subject to legal professional privilege as it would have been created for the furtherance of a crime.

Discussion

[44] I propose only to consider the arguments in relation to the common law position and the position under Art 8 as the Art 6 point was not advanced in the skeletons

Breach of Common Law Right to Legal Professional Privilege

[45] In R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532 it was held that the right to communicate confidentially with a legal adviser under the seal of legal professional privilege could *only* be curtailed by clear and express words and then only to the extent reasonably necessary to meet the ends which justified the curtailment.

[46] In the present case there was *no* statute or statutory scheme or existing policy which was considered or used by the PSNI in deciding to open the letter on 2 March 2012. Furthermore the applicant's right was removed on the basis of a bare suspicion without *any* accompanying safeguards. Accordingly, the common law right to professional privilege which the applicant enjoyed was curtailed without any lawful authority.

[47] The further decision not to offer an assurance that no further privileged communication would be opened was similarly unlawful as the PSNI are under an obligation not to so interfere in the absence of lawful authority.

Breach of Art 8

[48] As noted in Daly the UK common law and the Art 8 law on this subject ultimately lead to the same conclusion (see judgment of Lord Steyn at paras 24–28). As above the police decisions fail at the first hurdle as the decisions to open the letter/refuse to give the undertaking were not in accordance with law. That is, there was no domestic law provision authorising such behaviour. The arguments advanced based on L v UK [2000] 2 FLR 322 are of no assistance to the respondent. In L the mother had obtained court leave to disclose court papers to an expert for the purposes of preparing a report. The court order granting leave stipulated that any such report was to be disclosed to all parties. Therefore the lawful basis for or the clear words authorising the ultimate disclosure order was contained in the original court order. Being 'in accordance with law' does not necessitate statutory authority; the lawful authority may also be judicial.

[49] The respondent argued that it would be nonsensical for the privilege to be capable of being limited pursuant to statute and simultaneously not capable of being limited pursuant to the Art 2 guarantees and state Art 2 obligations. In short, the respondent argued that the interference with the applicant's Art 8 rights was justified because it was performed for the legitimate aim of protecting the Art 2 rights of the officers whose names were on the second list. Further the respondent argued that the applicant's rights were in fact safeguarded sufficiently because an independent barrister was provided to open the letter and ensure that it did not contain the second list. The respondent asked the court to consider that 'in the judicial review forum the focus should be on the substance of the act, rather than the form' and in this regard that the offer of the independent counsel was sufficient to safeguard the applicant's Art 8 rights. The respondent further noted that the fact that the applicant unreasonably rejected the proposed safeguards of independent counsel's assistance cannot be construed so as to vitiate the legality of the respondent's actions.

[50] It is accepted that in appropriate circumstances protection of Art 2 guarantees can make interference with Art 8 guarantees lawful by coming within the saving provisions of Art 8(2). However, Art 8(2) spells out when and how this interference will be made lawful, that is when the interference fulfils the following criteria (a) it is in accordance with the law, (b) it pursues a legitimate aim and (c) it is necessary in a democratic society.

[51] In order to satisfy criteria (a) a further three sub-criteria must be fulfilled, that is:

> 'First, the impugned measure will have some basis in domestic law. Secondly, the domestic law must be compatible with the rule of law and accessible to the person concerned. Thirdly, the person affected must be able to foresee the consequences of the domestic law for him' (Kennedy v United Kingdom (2011) 52 EHRR 4 para 151.

[52] In relation to criteria (c) this has been further extrapolated in the ECHR to necessarily imply that 'the interference corresponds to a pressing social need and, in particular that it is proportionate to the legitimate aim pursued.'

[53] The decision to open the letter flowed from, on the evidence before the court, a bare and untested suspicion. The right was removed without any accompanying safeguards. Furthermore there was no statute, statutory scheme or policy underpinning the decision of the PSNI. The decision was clearly flawed as not being in accordance with law. The criteria which make lawful an interference with Art 8 rights are designed to prevent exactly this kind of arbitrariness. If Art 8 fundamental rights could be interfered with on the basis of mere suspicion and in the absence of appropriate safeguards, the Art 8 guarantees would be largely emasculated.

[54] Further, in relation to the 'safeguard' of the independent counsel, the independent counsel was ultimately relieved of his role and the letter was opened by members of the police force, in the absence of the applicant or his legal advisors. That is, at the relevant time, the applicant did not have the benefit of *any* safeguards. Neither he, nor his representatives even knew the envelope was being opened or that it had in fact been opened and read for a further three days.

[55] In relation to the later decision refusing to give the undertaking, it too was in breach of Art 8. In refusing to give such an undertaking, the police service was, in effect, refusing to be bound by their Art 8 obligations without any statutory or judicial authority. Clearly, this was not in accordance with the law.

Legal Professional Privilege and The Iniquity Exception

[56] I have already dealt with the circumstances in which legal professional privilege may be overridden above and do not propose to repeat them. However, I will, briefly, address the respondent's contention that legal professional privilege is not established 'until it could be ruled out that the contents of the letter were not in furtherance of a crime, and subject to the iniquity exception'.

[57] At para 11 of McE v Prison Service of Northern Ireland [2009] 1 AC 908 it is stated:

> 'I have adopted the expression 'the iniquity exception' to describe the principle that consultations or communications between a lawyer and his client that are in furtherance of crime or fraud are not protected by LPP. It is questionable whether this is properly to be described as an exception to LPP. The fact remains that disclosure of such communications will normally be based on a provisional conclusion that the communications were in furtherance of crime or fraud. If, after the documents have been disclosed, this proves to be the case, the protection of LPP will have been lost…'

[58] A 'provisional conclusion' must therefore be arrived at before any ruling out of that provisional conclusion can be undertaken. The removal of the applicant's right to LPP was based on mere suspicion and without any accompanying safeguards. In the circumstances of this case no conclusion provisional or otherwise could lawfully be reached in such circumstances. There was in short a complete absence of process. If a mere suspicion was sufficient to override an individual's Art 8 rights, Art 8 would be largely devoid of content.

<u>Conclusion</u>

[59] For the above reasons the application is allowed.