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*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)**

DIVISIONAL COURT

IN THE MATTER OF AN APPLICATION BY KLARA KOZUBIKOVA

**Mr Ronan Lavery QC with Seamus McIlroy (instructed by Brentnall Legal Ltd)
for the Applicant**

**Dr Tony McGleenan QC with Philip McAteer (instructed by the Crown Solicitor's Office)
for the Proposed Respondent**

Before: Colton J and Humphreys J

COLTON J

Introduction

[1] This is a judgment to which both members of the court have contributed.

[2] The applicant in this case challenges a Fixed Penalty Notice ("FPN") issued to her on 28 December 2020 by a police constable under the Health Protection (Coronavirus Restrictions) (No.2) Regulations (Northern Ireland) 2020 (as amended). On that date she was present at 4 Downshire Park Central, Belfast, with a number of other persons. PSNI officers entered the premises and issued a FPN to all the adults present in the property and ordered a number of them (not including the applicant) to leave.

[3] By these proceedings she seeks the following relief:

- (i) An Order of Certiorari quashing the decision of a constable to issue the FPN notice.
- (ii) A declaration that the said decision was unlawful, *ultra vires* and of no force or effect.
- (iii) A declaration that the FPN issued was unlawful, *ultra vires* and of no force or effect as it did not “give reasonably detailed particulars of the circumstances alleged to constitute an offence.”
- (iv) A declaration that Regulation 7(1) of the Regulations does not give a “relevant person” the right to enter any premises.
- (v) Such further or other relief as may be deemed just.
- (vi) Costs.

Statutory Background

[4] The Health Protection (Coronavirus Restrictions) (No.2) Regulations (Northern Ireland) 2020 (as amended) were made by the Department of Health in exercise of the powers conferred by sections 25C(1), (3)(c), (4)(d) and 25F(2) of the Public Health Act (Northern Ireland) 1967 [see Coronavirus Act 2020 (c.7) Sch. 18].

[5] Regulations 4-6 and Schedule 2 impose restrictions and requirements on members of the public. In particular, Schedule 2 imposes restrictions on persons staying overnight at any place other than the place where they are living or where their linked household is living and provides at paragraph 3(a) that:

“No person may participate in a gathering indoors in a private dwelling which consists of persons from more than one household.”

[6] The Regulations create offences and penalties arising from contraventions of the requirements. In particular, Regulation 8(1) provides as follows:

“8. – (1) A person who, without reasonable excuse, contravenes a requirement in regulation 4 to 6, or Schedule 2 commits an offence.”

Regulation 9 provides for fixed penalty notices. In particular, Regulation 9(1) provides:

“9. – (1) An authorised person may issue a fixed penalty notice to anyone that the authorised person reasonably believes:

(a) *has committed an offence under these Regulations;*

...

(2) *A fixed penalty notice is a notice offering the person to whom it is issued the opportunity of discharging any liability to conviction for the offence by payment of a fixed penalty to the authority specified in the notice.*

...

(4) *Where a person is issued with a notice under this regulation in respect of an offence:*

(a) *no proceedings may be taken for the offence before the end of the period of 28 days following the date of the notice;*

(b) *the person may not be convicted of the offence if the person pays the fixed penalty before the end of that period.*

(5) *A fixed penalty notice must:*

(a) *give reasonably detailed particulars of the circumstances alleged to constitute the offence;*

(b) *state the period during which (because of paragraph (4)(a)) proceedings will not be taken for the offence;*

(c) *specify the amount of the fixed penalty;*

...

(f) *inform the person to whom it is given of the right to ask to be tried for the offence."*

[7] In relation to enforcement of requirements under the Regulations, Regulation 7 provides:

"7. – (1) A relevant person may take such action as is necessary to enforce any requirement imposed by regulation 4 to 6, or Schedule 2."

[8] The interpretation section of the Regulations at Regulation 1 provides that:

"Relevant person means:

(a) *a constable...*"

Factual Background

[9] The background to the issue of the fixed penalty notice in dispute in this application is set out in the supporting affidavit of the applicant.

[10] For the purposes of this ruling it is sufficient to note that when Covid-19 restrictions were put in place the applicant decided to move in with her step-mother and some of her family in their home at 4 Downshire Park Central, Belfast. On 28 December 2020 she was present in those premises when two PSNI officers entered the house. It is her case that they did so without anyone's consent and were uninvited. She records that a number of other persons were in the house including her step-mother, two of her sons, three other persons and two other children.

[11] She avers that the PSNI took the details of all those present and issued a FPN to all the adults in the property.

[12] The FPN challenged in this application is set out in a pro-forma document. In one column it sets out the details of the applicant, her name, date of birth and her address. Under the section **Offence Details** a box adjacent to the following statement is ticked:

"You were in contravention of a requirement without a reasonable excuse – Regulation 8(1)."

[13] The document goes on to set out the date of the offence, the location of the offence and the issuing officer. It also records that the relevant penalty is £200. The FPN form is signed by the applicant. The pro-forma also informs the recipient in a section headed **Part A** how to pay the fixed penalty of £200.

[14] The document further provides in Part B that:

"If you choose to request a court hearing you must do so either by returning Part B of the fixed penalty notice or by writing within 28 days to the address shown giving your details and an address at which a summons may be served on you."

Part B includes the following declaration:

"I wish to be dealt with by a court for the alleged offence described within the Recipient Copy of this notice."

[15] The applicant has completed a **Part B** Notice which is signed on 30 December 2020.

[16] Finally, the fixed penalty notice contains information for the attention of the person in receipt of the notice. The information includes the following paragraphs:

*“Within 28 days of the date of issue you must either pay the penalty by completing **PART A** or request the matter to be heard by a court by completing **PART B**. You may not do both.*

If you do not either pay or request a court hearing within the permitted 28 day period (known as the suspended enforcement period) the sum payable will be automatically increased by 50% and registered against you in your local court for enforcement as a court fine, which if it remains unpaid may result in the issue of a court warrant.

You can seek legal advice on these matters if you wish but you must still either make full payment or request a court hearing within the permitted 28 day period.

A penalty notice does not result in a criminal conviction or form part of a criminal record. However, a record will be kept on police computer systems that will show you as being responsible for committing this offence and may be used for other policing purposes. If you go on to commit another offence this record will be reviewed to help decide how to deal with the matter.

It may also be disclosed if deemed relevant as part of an enhanced Criminal Record check or shared for other purposes where deemed relevant and appropriate. ...”

The Applicant’s Challenge

[17] The applicant’s challenge is essentially twofold. Firstly, it is alleged that the Regulations do not provide the officers of the PSNI with powers to enter premises. Secondly, it is submitted that the FPN issued to the applicant is in breach of Regulation 9(5)(a) in that it does not give reasonably detailed particulars of the circumstances alleged to constitute the offence.

[18] The proposed respondent accepts the latter point. It disputes the contention that police officers do not have the power to enter the premises under the Regulations.

[19] Furthermore, it is argued on behalf of the proposed respondent that the proceedings constitute satellite litigation and the arguments raised can be dealt with by the court hearing requested by the applicant should a summons be issued.

Preliminary Issue

[20] A preliminary issue has arisen as to whether or not this application constitutes “a criminal cause or matter.” Whilst this has no impact on the decision to be made by this court it has a direct consequence for the parties in terms of appeal rights. Mr Lavery on behalf of the applicant contends that this is not a criminal cause or matter. Dr McGleenan, on behalf of the proposed respondent, contends that it is.

[21] The court agreed to deliver a ruling on this issue before determining the substance of the leave application. It is the court’s experience that this issue is being raised on a regular basis with the parties often in disagreement as to the correct approach.

Criminal Cause or Matter

[22] The issue of what is meant by a criminal cause or matter has recently been considered by the Supreme Court in the case of an application by **Deborah McGuinness for Judicial Review** [2020] UKSC 6.

[23] As indicated, the point is important because of the implications for the appeal rights of the parties. The issue concerns the interpretation of section 41(1) of the Judicature (Northern Ireland) Act 1978 (“the 1978 Act”). By virtue of section 41(1), subject to certain conditions, there may be an appeal to the Supreme Court “from any decision of the High Court in a criminal cause or matter.”

[24] The judgment of the court delivered by Lord Sales in **McGuinness** reviews the relevant legislative background leading to the 1978 Act (and the equivalent legislation in England) and the case law on the topic. Previously the leading decision of the House of Lords in relation to this phrase was delivered in **Amand v Home Secretary** [1943] AC 147 (“**Amand**”). That case concerned a soldier in the Netherlands Army in Great Britain during World War II who was arrested as being absent without leave and taken before a Magistrate with a view to being handed over to the Netherlands’ Military authorities pursuant to the Allied Forces Act 1940 for punishment according to military law. He applied to the High Court for a Writ of Habeas Corpus which was refused. The Court of Appeal held that the judgment of the High Court was in “a criminal cause or matter” with the result that by virtue of the relevant provision at that time it had no jurisdiction to hear the appeal. The House of Lords upheld that ruling.

[25] Lord Sales analyses the judgments of the House of Lords and refers to the accurate summary of the decision in the headnote to the effect that:

“If the matter is one, the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal.”

As a consequence there could be no appeal to the Court of Appeal.

[26] Lord Sales quotes from the judgment of Lord Wright where he said at page 162:

“The principle which I deduce from the authorities I have cited and the other relevant authorities which I have considered, is that if the cause or matter is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment such as imprisonment or a fine, it is a ‘criminal cause or matter.’ The person charged is thus put in jeopardy.”

He also quotes from Lord Porter’s speech which was to similar effect. At page 164 Lord Porter said:

“The proceeding from which the appeal is attempted to be taken must be a step in a criminal proceeding, but it need not of itself of necessity end in a criminal trial or punishment. It is enough if it puts the person brought up before the magistrate in jeopardy of a criminal charge. . .’

[27] Prior to the decision in **McGuinness, Amand** remained the leading decision at the highest level regarding the meaning of the phrase “criminal cause or matter” in the context of rights of appeal. The principle to be derived from the decision in **Amand** is that for a proceeding to qualify as a “criminal cause or matter” a person had to be placed in jeopardy of criminal trial and punishment as the direct outcome of that proceeding.

[28] Lord Sales goes on to consider subsequent legislative developments in the contexts of arrangements for appeals, and in particular, the Administration of Justice Act 1960 and the Senior Courts Act 1981 (the equivalent of the 1978 Act) and referred to “a somewhat tangled jurisprudence regarding the meaning of the relevant phrase in the context of the creation of rights of appeal.”

[29] At paragraph 63 Lord Sales says:

“63. It is unsatisfactory that there should be uncertainty regarding the meaning of the important procedural provisions in section 41(1) of the 1978 Act ... The phrase a “criminal cause or matter” as employed in those provisions defines a legal

category of cases before the High Court for which there is only a highly circumscribed possibility of appeal to the Supreme Court, involving specified procedural hurdles; and outside which there is the usual right of appeal to the Court of Appeal, involving different procedural hurdles. Parties in a matter before the High Court need to be able to understand into which category their case falls, so that if they want to appeal they can know what their right of appeal is and how it may be exercised. Parliament intended that these procedural provisions should have a reasonably fixed and readily comprehensible effect."

He goes on to point out at paragraph 68:

"an overly expansive interpretation of the phrase 'a criminal cause or matter' in section 41(1) ... would have the effect of reducing to an unacceptable degree parties' access to justice at appellate level, leaving pockets of unchallengeable, potentially erroneous first instance decisions."

[30] The court should be alive to the risk of improperly undermining the general right of appeal which the 1978 statute confers. In those circumstances a court should be careful before determining that an application before it is truly a criminal cause or matter. As Lord Sales said in paragraph 69 of the **McGuinness** judgment:

"it is to be inferred that the intention is that the phrase defines a reasonably tightly drawn category of case focused directly on the process for bringing and determining criminal charges."

[31] That said, he follows at paragraph 70 by saying that:

"70. At the same time, Parliament obviously intended that cases with a direct bearing on that process should be captured by the phrase without drawing subtle and ultimately unsustainable distinctions depending on the precise nature of the procedure by which a matter concerning the process for bringing and determining criminal charges might be brought before the High Court. This was the point emphasised in the early case law, as reviewed above, as justifying "the widest possible interpretation" of the phrase (see Ex p Woodhall). That is to say, the phrase was to be given the widest possible interpretation in order to catch those cases with a clear and direct connection to the process for bringing and determining criminal charges, by contrast with the narrow interpretation urged by counsel in those cases which sought rather to focus on the nature of proceedings in the High Court (where a claim for habeas corpus or for the prerogative writs might be classified as a civil claim). Although a claim in the High Court for habeas

corpus or for one of the prerogative writs could not itself readily be described as a criminal “cause”, as defined, the significance of the words “or matter” is to widen the meaning of the phrase so as to create a category defined, in effect, by reference to the criminal nature of the underlying proceedings in respect of which the decision under review in the High Court was taken.”

[32] Notwithstanding the significance of the words “or matter”, it is important to identify cases which although related to a criminal cause or matter are essentially civil in nature. Examples, include cases which involved collateral issues such as **R(Guardian News and Media Ltd) v City of Westminster Magistrates Court** [2011] EWCA Civ 1188 (which involved disclosure of material in criminal proceedings to a third party); **R(Purdy) v Director of Public Prosecutions** [2009] UKHL 45 (which concerned a judicial review of the refusal of the DPP to publish details of his policy as to the circumstances in which a prosecution would be brought for the offence of aiding or abetting suicide, contrary to section 2(1) of the Suicide Act 1961); a decision in criminal proceedings to make an order estreating a recognisance (**R v Southhampton Justices, Ex p Green** [1976] QB 11; cases such as **McGuinness** itself which deals with the calculation of a prisoner’s release date after sentence had been imposed and generally claims under the Human Rights Act for declarations of incompatibility in respect of statutory provisions which are generally treated as civil claims.

[33] Returning to **Amand** Lord Sales confirms that the speeches therein explain how to identify what counts as a decision in “a criminal cause or matter.” As per Lord Sales at paragraph 77:

“This involves asking the question in relation to the proceedings which underlie those in the High Court: are they proceedings ‘the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so’ (p 156 per Viscount Simon LC) and ‘which, if carried to [their] conclusion, might result in the conviction of the person charged and in a sentence of some punishment’ (p 162 per Lord Wright)?”

Is this application a criminal cause or matter?

[34] Having set out the relevant principles we bear in mind that the interpretation of the phrase is necessarily informed by the context in which it falls to be applied.

[35] In this case we conclude that this application is a criminal cause or matter. We say so for a number of reasons.

[36] The underlying proceedings are of a criminal nature. A police constable in the PSNI has made the judgment that the applicant has committed a criminal

offence. A fixed penalty has been imposed as a result of that alleged offence, namely a fine of £200. The FPN offers the applicant an opportunity of discharging any liability to conviction. The applicant has exercised her right to seek a court hearing in relation to the matter. It will be for the DPP to decide whether to issue a summons. If none is issued within the relevant time that will be the end of the matter. If, as seems more likely, a summons is issued the matter will proceed to a hearing in a court where, if the applicant is found guilty, she will be liable to a penalty.

[37] In our view these proceedings have a direct bearing on the process for bringing and determining criminal charges. The original assessment of the police officer to issue the fixed penalty notice is part of that process in our view. This involved a determination by a duly authorised police officer that the applicant had committed a criminal offence. Specific criminal proceedings are contemplated in respect of a specific defendant, who has exercised her right to seek a court hearing. The process clearly places the applicant in jeopardy of conviction of an offence and the imposition of a penalty. Returning to the **Amand** formulation the direct outcome of the proceedings may be a trial of the applicant and her possible punishment for an alleged offence by a court claiming jurisdiction to do so, which if carried to its conclusion might result in the conviction of the applicant and a sentence of some punishment. She is clearly in jeopardy of such an outcome as adumbrated in **Amand**.

[38] Accordingly, we have decided that the proceedings in this case relate to a criminal cause or matter. The court will therefore convene as a Divisional Court to determine the substantive leave application.