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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

L's Application [2009] NIQB 67

IN A MATTER OF AN APPLICATION BY G L FOR JUDICIAL REVIEW

MORGAN LCJ

[1] The applicant challenges a decision of the Minister of State made on 12 September 2008 when the Minister refused to admit the applicant to the Limited Home Protection Scheme (the Scheme). The applicant seeks an order of certiorari quashing the decision, an order of mandamus compelling the Minister to admit the applicant to the Scheme and a declaration that the refusal of the Secretary of State to admit the applicant to the Scheme was unlawful and contrary to article 2 of the ECHR.

Background

[2] The applicant lived until recently in North Belfast. He has been the subject of threats to his life from loyalist paramilitaries for a number of years. In his affidavit he lists the threats as follows:

> (i) On 8 June 1993 a police officer spoke to the applicant and his wife and informed them that police were in receipt of information that loyalist paramilitaries were aware of them and where they lived. In view of this they were told that their lives could be at risk and advised to take all steps in respect of their personal security.
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> (ii) In April 2000 a list of names with personal details including the occupation and vehicle registration number of the applicant was found. It was believed to have been in the possession of a loyalist paramilitary organisation. The applicant was advised of this find by police.

(iii) In February 2001 an anonymous message was received on the confidential telephone purporting to come from loyalist paramilitaries stating that ex-republican prisoners including the applicant would be targeted.

(iv) In October 2001 police were contacted by the Samaritans who stated that they had received an anonymous telephone call stating that two persons including the applicant were under threat from the Red Hand Defenders. No code word was used.

(v) On 23 June 2005 the applicant received a police message indicating that the Protestant Action Force had stated that they would "take out" a number of persons in the next 24 hours including the applicant.

(vi) On 25 July 2005 the applicant received a police message which stated that a letter had been received by Antrim Road police stating that the applicant and another would be executed for continuous attacks on loyalist homes.

(vii) On 12 May 2006 the applicant received a police message stating that intelligence indicated that three members of the applicant's family, including himself, would be executed within the next 24 hours for crimes against the Unionist community.

(viii) On 16 October 2006 the applicant and his wife received a further police message stating that an attack would be carried out on each of them within the next 24 hours for crimes against the loyalist community. The information was received anonymously.

(ix) On 23 March 2007 the applicant received a police message that information had been received that he may be under threat from the Irish Republican Liberation Army and that he should review his personal security.

[3] On 8 May 2007 the applicant's solicitors requested the appropriate forms to enable him and his wife to be admitted to the Scheme. An assessment of risk was sought from the Chief Constable. On 17 September 2007 the applicant's solicitors received a letter from the Northern Ireland Office advising them that the risk pertaining to their clients was moderate. In assessing the case the Minister noted the nature and extent of the risk, reflected on whether or not the State had contributed to that risk, considered public interest issues and the difficulties that the State would face in reducing the risk and reviewed the case in the context of the range of measures the State had already put in place to protect its citizens. The Minister concluded

that the state had taken appropriate action in relation to the applicant's case and that he should not be admitted to the Scheme.

[4] On 26 November 2007 the applicant received a further police message informing him that police had received anonymous information through Crimestoppers which they believed referred to him. The message advised that the Irish Republican Liberation Army had indicated that he should stop support for North Belfast Police or else military action would be taken. The applicant was advised to seek advice and take steps to protect himself and his property.

[5] In light of this the applicant's solicitors renewed their application for him to the admitted to the Scheme. The Minister agreed to look again at his decision not to admit the applicant to the Scheme and requested an up-to-date assessment of the threat. On 8 April 2008 he wrote to the applicant's solicitors indicating that the Security Service have assessed the Irish related terrorist threat to the applicant at "moderate", an attack is possible but not likely. This level of threat fell below the level required for automatic admission to the Scheme. Having completed the balancing exercise the Minister concluded that the State had in the circumstances taken appropriate action in relation to the applicant's case and decided that he should not be admitted to the Scheme.

[6] On 19 June 2008 the applicant received a further police message stating that information had been received indicating that persons purporting to be loyalist paramilitaries had identified the applicant and his wife as being members of the IRA and that they were passing information about ex-police officers to the IRA. The applicant's wife's place of work was identified.

[7] On 25 July 2008 the applicant's solicitors wrote to the Minister of State inviting him to reconsider his decision not to admit the applicant to the Scheme. The Minister agreed to look again at his decision and requested an up-to-date assessment. On 9 August 2008 the applicant received a further police message stating that anonymous information had been received by police that the applicant had to leave the area within 48 hours or he would be killed and his house burnt. On 22 August 2008 a further police message advised the applicant that anonymous information had been received stating that the applicant must leave his home or he would be shot. The message referred to the applicant owning a car of a particular type and colour and stated that a device had been placed under it the previous night. No such device was found. On 12 September 2008 the Northern Ireland Office responded to the applicant's solicitors stating that the further assessment by the Security Service of the level of threat indicated that it remained "moderate". In those circumstances the Minister did not alter his decision that the applicant should not be admitted to the Scheme. That is the decision under challenge.

[8] Three further threats were received prior to the hearing of this application. On 30 September 2008 police telephoned the applicant to inform him that they had received a telephone call stating that a bomb had been placed under his car. He was asked to check his car but nothing was found. The applicant had been driving his car earlier that morning and police then checked the route but nothing was found. He was advised to contact police if he saw anything suspicious and was informed that he should take the threat very seriously. That afternoon police returned to indicate that they had received anonymous information suggesting that action was going to be taken against the applicant for not obeying instructions. The message contained information in relation to the employment of the applicant's son and daughter.

[9] On 1 November 2008 police again received information stating that if the applicant's wife did not leave her place of employment action would be taken against her family including the applicant. Members of the family were advised to review their personal security. The applicant discussed these threats with the police officers who conveyed the information to them. The police officer indicated that he did not know where they were coming from but speculated that it probably was from southeast Antrim paramilitaries. On 3 November 2008 police advised that they had received a telephone call from Crimestoppers indicating that a device had been left or thrown at the applicant's house. They searched the front and rear of the home and nothing was found. The applicant indicated that he wished to proceed with his challenge to the decision of 12 September 2008 rather than wait for any further reassessment.

The Limited Home Protection Scheme

[10] The Scheme is a limited, non-statutory, discretionary scheme under which physical protection measures can be provided at public expense at the homes of certain people who are assessed to be at severe or substantial threat of terrorist attack. The purpose of the Scheme is to protect those individuals whose death or injury as a result of terrorist attack could damage or seriously undermine the democratic framework of government, the effective administration of government and/or the criminal justice system or the maintenance of law and order. Where the threat to a candidate is assessed as severe or substantial and where they also fall within a list of specified occupations or public appointments they are automatically admitted to the Scheme. In other cases the Minister has a discretion. In exercising the discretion the Minister will pay particular attention to whether or not a real and immediate risk to life exists so as to engage the State's positive obligations under article 2 of the ECHR.

[11] Admission to the scheme comes at public expense. Where the threat level to the individual is assessed as severe there is a delegated budget of up to £50,000 to provide home protection measures. Where the level of threat is assessed as substantial or where a person at moderate threat is admitted to the Scheme in the discretion of the Minister there is a delegated budget of up to £15,000. The Minister has discretion to increase these amounts in a particular case in accordance with advice. The respondent also points to the fact that the Chief Constable will deploy resources as he considers appropriate and will respond accordingly where he has specific intelligence of an anticipated attack on an individual and that a guide to personal security was also made available to the applicant and his family. Patrols were asked to pay passing interest to the applicant's property.

[12] Police messages in relation to threats to life are issued as part of the duty to protect life imposed on police by section 32(1)(a) of the Police (Northern Ireland) Act 2000. Anonymous information is difficult to assess and there can be no objective verification by PSNI of the motive behind it. Such information is treated as giving rise to a real and immediate threat. The police message is designed to enable the individual to take steps in relation to their behaviour.

[13] The threat assessments with which this application is concerned were conducted by the Security Service. The Security Service took over this responsibility in October 2007. The assessment is designed to establish the intent and capability of attack and provide a statement of the assessed probability of attack. It looks at current intelligence, the current security situation, current and past intelligence in respect of similar targets, past attacks on the target and a profile of the individual. Assessments are categorised as critical where an attack is imminent, severe where it is highly likely, substantial where it is a strong possibility, moderate where it is possible but not likely and low where it is unlikely.

[14] In determining the measures required from the State by way of positive obligation under article 2 of the ECHR the Minister takes into account the protective steps already taken or available, the likely effectiveness of any particular step, the resources aspect of taking any particular action and any public interest issues. In balancing the risk to the applicant against the reasonable measures available to the State to reduce it, the Minister took into account the nature and extent of the threat concluding in March 2008 that the applicant could be viewed as a potential target for dissident republican terror groups and in September 2008 that it was possible that there had been a chance sighting of the applicant's wife at her place of work by loyalist paramilitaries. The Minister was also advised that this decision could create a precedent requiring large numbers of people under moderate threat to be protected as a result of which money might have to be moved from front-line

policing. The applicant was offered a visit by the Crime Prevention Officer on a number of occasions but has declined that offer.

The Submissions of the Parties

[15] For the applicant Mr McGleenan submitted that the first assessment carried out by the PSNI was focused on the threat to the applicant at his home. The second and third assessment carried out by the Security Service did not assess risk in relation to the applicant's home but rather in relation to the applicant generally. In those circumstances it was contended that the assessment failed to focus on the relevant issue. Secondly Mr McGleenan criticised the reliance within the second submission on the fact that the State did not create the risk. This was not a legitimate factor to take into account. Thirdly the applicant criticised the reliance on precedent as a reason for not admitting into the Scheme. The applicant maintains that resources are material for individual cases where a maximum of £15,000 has been identified but not otherwise. The applicant points to the fact that threat levels are not static and merely give a broad indication of the likelihood of a terrorist attack. In those circumstances the increasing number of threats to the applicant required a proportionate response by way of admission to the Scheme.

[16] For the respondent Mr Maguire QC noted that there were a substantial number of threats over a lengthy period. In view of the age of some of the threats no substantial weight could be given to them. Since 2001 all of the threats had come about as a result of anonymous calls with no codewords. The Secretary of State had considered the most recent threats and on 19 November 2008 concluded that the decision should remain the same. The positive obligation required the State to take reasonable steps and that inevitably involved operational choices. Those advising the Minister had a high level of expertise in assessment which the court must respect. Similarly the court must also respect the judgment of Ministers in issues relating to the allocation of resources. The Minister had to bear in mind that if he admitted the applicant to the scheme there may be others in a similar position.

Discussion

[16] There are 2 helpful decisions of the House of Lords in relation to the positive duty imposed by article 2 of the ECHR. The first of those is Re Officer L [2007] UKHL 36. That was a case in which certain police witnesses attending the Hamill Inquiry challenged a ruling preventing them from getting anonymity in respect of their attendance at the inquiry. Lord Carswell reviewed the European jurisprudence and said at paragraphs 20 and 21:

> "20. Two matters have become clear in the subsequent development of the case-law. First, this

positive obligation arises only when the risk is "real and immediate". The wording of this test has been the subject of some critical discussion, but its meaning has been aptly summarised in Northern Ireland by Weatherup J in *Re W's Application* [2004] NIQB 67, where he said that:

> '… a real risk is one that is objectively verified and an immediate risk is one that is present and continuing'.

It is in my opinion clear that the criterion is and should be one that is not readily satisfied: in other words, the threshold is high. There was a suggestion in paragraph 28 of the judgment of the court in *R (A and others) v Lord Saville of Newdigate* [2002] 1 WLR 1249, 1261 (also known as the *Widgery Soldiers* case, to distinguish it from the earlier case with a very similar title) that a lower degree would engage article 2 when the risk is attendant upon some action that an authority is contemplating putting into effect itself. I shall return to this case later, but I do not think that this suggestion is well founded. In my opinion the standard is constant and not variable with the type of act in contemplation, and is not easily reached…

21. Secondly, there is a reflection of the principle of proportionality, striking a fair balance between the general rights of the community and the personal rights of the individual, to be found in the degree of stringency imposed upon the state authorities in the level of precautions which they have to take to avoid being in breach of article 2. As the ECtHR stated in paragraph 116 of *Osman*, the applicant has to show that the authorities failed to do all that was reasonably to be expected of them to avoid the risk to life. The standard accordingly is based on reasonableness, which brings in consideration of the circumstances of the case, the ease or difficulty of taking precautions and the resources available. In this way the state is not expected to undertake an unduly burdensome obligation:"

It is important to recognise that in these paragraphs Lord Carswell is dealing first with the engagement of article 2 which is not in issue here and then with the nature of the balancing exercise upon which the decision maker must engage.

[17] The second case in which this issue has been discussed is Van Colle v Chief Constable [2008] UKHL 50. That was a case in which the victim was required to give evidence for the prosecution at the trial of a former employee on a charge of theft. There was a series of threats and incidents of interference with witnesses and intimidation of the victim and other prosecution witnesses. The police were informed of that intimidation but took no action. The defendant in the prosecution then murdered the victim. One of the issues which arose in that case was whether the nature of the duty on by the State differed according to the status of the victim as a witness. This was dealt with by Lord Bingham at paragraph 34 of his opinion:

> "34. The principle that a test lower than the ordinary *Osman* test is appropriate where a threat to the life of an individual derives from the State's decision to call that individual as a witness was based on a passage in the judgment of the Court of Appeal in *R(A and others) v Lord Saville of Newdigate and others* [2001] EWCA Civ 2048, [2002] 1 WLR 1249. The issue in that case was whether soldiers or former soldiers should be called to give evidence to the "Bloody Sunday" Inquiry in Londonderry, where their lives were at risk from terrorist violence, or in some other place where the risk was smaller. In upholding the Divisional Court's decision that the witnesses should not be required to testify in Londonderry, the Court of Appeal referred to the *Osman* test of "real and immediate" risk and said (in para 28 of its judgment):
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> > 'Such a degree of risk is well above the threshold that will engage article 2 when the risk is attendant upon some action that an authority is contemplating putting into effect itself. It was not an appropriate test to invoke in the present context.'
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> While I have no doubt that the Court of Appeal's decision in that case was correct, I would respectfully question whether that observation was correct."

Lord Hope described the threshold set by Osman as very high at paragraph 69 and Lord Brown considered the test set by the European Court of paragraph 115 of his opinion:

> "115. The test set by the European Court of Human Rights in *Osman v United Kingdom* (1998) 29 EHRR 245 and repeatedly since applied for establishing a violation of the positive obligation arising under article 2 to protect someone from a real and immediate risk to his life is clearly a stringent one which will not easily be satisfied. This is hardly surprising given, as the *Osman* judgment itself recognises (at para 116), "the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources". It is, indeed, some indication of the stringency of the test that even on the comparatively extreme facts of *Osman* itself—rehearsed by Lord Bingham at para 56—the Strasbourg court found it not to be satisfied."

[18] I accept that the applicant was correct to criticise the respondent for taking into account the issue of whether or not the threat was created by the State. It is clear from the opinion of Lord Carswell in Re Officer L which was approved by a number of their Lordships in Van Colle that the Osman standard is constant and not varied by whether or not the State created the risk. This factor emerged from the decision of the Court of Appeal in R (A and others) v Lord Saville and others [2001] EWCA Civ 2048 and was subsequently adopted by the Court of Appeal in this jurisdiction in Meehan [2003] NICA 34. Where the factor was present those cases tended to suggest that the level of risk which would engage article 2 was reduced. They were not, therefore, concerned with the question of whether or not the steps taken to satisfy the duty were reasonable. In this case the applicant and respondent had both proceeded on the assumption that article 2 is engaged by virtue of the real and immediate risk to which the applicant has been exposed as a result of the anonymous threats. He has suffered no disadvantage as a result of the consideration of whether the risk was created by the State. That consideration could not, therefore, in any way call into question the validity of the decision.

[19] Although the applicant criticises the approach of the Security Service to the consideration of threat in this case I do not consider that the criticism is justified. The threat assessment is carried out to establish whether there is a real and immediate risk to the applicant. In this case the assessment by those who are expert in the field is that an attack is possible but not likely and the threat level is thereby considered moderate. As explained in the affidavits the Minister proceeded on the assumption that this gave rise to a real and immediate risk. The State's duty of assessment inevitably called for an assessment of threat to this applicant both inside and outside the home. Having established the threat the issue for the Minister was the nature of the

reasonable response. The material generated by the Security Service was clearly highly relevant and properly informed the decision which the Minister had to make.

[20] It is common case that the availability of resources is material to the reasonable steps which the State is required to take in order to satisfy the positive obligation under article 2 of the ECHR. The applicant says, however, that one should leave out of account the implication for the State of any precedent which this case might set. I do not consider that the submission is sustainable having regard to the views of the ECHR in Osman at paragraph 116:

> "116. For the court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising."

It is clear from this passage that the reference to priorities and resources refers not just to individual circumstances but encompasses the availability of resources generally to the State and the use which the State may choose to make of those resources. It is clear that the Minister would have been intimately aware of the competing demands for what were limited resources and it is clear that the court must give appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice (see Re E [2008] UKHL 66 at paragraph 13). It was resources in that sense that Lord Carswell was referring to in paragraph 21 of his opinion in Re Officer L. If the applicant were right in his submission the State would effectively be prohibited from balancing the manner in which it should deploy operational resources for public protection.

[21] Finally it is contended on behalf of the applicant that the increasing number of threats should lead to a proportionately different response. It is clear that there has been an increasing number of threats but it is also clear that the nature of the threats has continued to come by way of anonymous information. Of itself, therefore, that does not necessarily indicate any appreciable change in threat. The Minister, however, has been careful to ensure that on each occasion when a new decision was made he obtained a fresh assessment of the threat in relation to the applicant. It is not the function of this court to carry out a threat assessment and there is in my view

no basis upon which to contend that the assessments carried out by the Security Service were other than appropriate. I do not consider that the volume of threats of itself imposed on the Minister any requirement to take a different course.

[22] In the circumstances I do not consider that the applicant has demonstrated any failure on the part of the Minister to satisfy the positive obligations imposed by article 2 of the ECHR and accordingly I dismiss the application.