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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**01/11/2021**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

PATRICK MAGEE

Applicant

and

CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Respondent

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Mr Southey QC and Mr Summers (instructed by KRW Law) for the Applicant
Dr McGleenan QC and Mr McEvoy (instructed by Crown Solicitor) for the Respondent

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Before: Treacy LJ, Scoffield J and Sir Declan Morgan

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Sir Declan Morgan (delivering the judgment of the court)

[1] This is a case stated by His Honour Judge Devlin at the direction of the Court of Appeal. There were some typographical errors in the Order directing the Case Stated but the question for the court is:

> "Whether the learned judge erred in law in not transferring the case to the High Court under Order 78 Rule 1A of the Rules of the Court of Judicature (NI) 1980 despite having found that the material sought under the specific discovery application of the Plaintiff satisfied the legal test for relevancy, of being necessary for the fair disposal of the present cause and/or for the due administration of justice and that it would be of substantial assistance to the court?"

Background

[2] The applicant was arrested on 2 June 2011 by servants and agents of the respondent under section 41 of the Terrorism Act 2000. Proceedings were issued by way of an ordinary civil bill on 27 March 2013 for damages for personal injuries, loss,

damage, distress, upset and inconvenience sustained by the plaintiff arising out of his allegedly unlawful arrest and his subsequent detention at Antrim Serious Crime Suite.

[3] A notice requiring discovery was served on the respondent dated 13 November 2013. Belfast County Court issued an order for discovery verified by affidavit on 27 January 2014. On 30 April 2014 the solicitor for the applicant at that time confirmed by affidavit that the respondent had not complied with the previous order of the court. On 12 May 2014 Belfast County Court issued an Unless Order providing that the respondent's defence would be struck out if a list of documents verified by affidavit was not furnished within 28 days.

[4] On 24 July 2014 the respondent served a list of documents verified by affidavit. The list of documents referred to four intelligence documents within Part 3 of the Schedule which the respondent objected to produce on the grounds that their production would cause real damage to the public interest. No Public Interest Immunity ("PII") certificate was served at this time.

[5] By letter dated 29 April 2015 the applicant wrote to the respondent requesting discovery of the documents contained within Part 3 of the Schedule in their full and unredacted form, or alternatively that the respondent supply a PII certificate. The respondent was advised that in the absence of either of those an application would be made for their discovery.

[6] By correspondence dated 9 June 2015 the respondent declined to disclose the documentation requested. The respondent further asserted that the Chief Constable would:

> "… move to obtain a certificate from the Minister once you have issued an application for specific discovery of the aforementioned documents and he is under no obligation to do so until such an application has issued."

[7] The applicant issued an application for specific discovery on 17 June 2015. The parties did not progress the application for discovery until the Court of Appeal decision in Cunningham v Chief Constable [2016] NICA 58 was available. A PII certificate was signed by John Penrose MP, Minister of State for Northern Ireland on 23 January 2019. On 17 November 2019 HHJ Devlin heard the specific discovery application. During the course of the hearing the judge met with two PSNI disclosure officers in chambers without either counsel present. The subsequent judgment on the requisition to state a case stated that:

> "… he heard explanations from the disclosure officers as to the significance of the contents of the redacted portions…. and as to the risks which disclosure…. might be likely to give rise to."

[8] On 20 November 2019 the judge handed down judgment dismissing the applicant's specific discovery application. On 10 December 2019 the applicant lodged a requisition asking the judge to state a case for the consideration of the Court of Appeal. On 4 February 2020 the judge refused the application in respect of each of the six proposed questions. The Court of Appeal subsequently directed that the question posed at paragraph [1] above should be stated.

Justice and Security Act 2013 ("the 2013 Act")

[9] The 2013 Act provides in section 6 a procedure to ensure that the High Court or Court of Appeal may make a declaration on the application of the Secretary of State or any other party to civil proceedings or of its own motion that a closed material application may be made to the court. Section 8 provides that a closed material application is one in which permission may be sought from the court not to disclose material otherwise than to the court, any person appointed as a special advocate and the Secretary of State if not already a party to the proceedings.

[10] There are two conditions that must be satisfied before such a declaration under section 6 can be made. The relevant first condition in this case is that a party to proceedings would be required to make such a disclosure were it not for the possibility of a claim for public interest immunity in relation to the material. The second condition is that it is in the interests of the fair and effective administration of justice and the proceedings to make a declaration (section 6(5) of the 2013 Act).

[11] Section 6(7) provides that the court must not consider an application by the Secretary of State for a declaration unless it is satisfied that the Secretary of State has, before making the application, considered whether to make, or advise another person to make, a claim for public interest immunity in relation to the material on which the application is based.

[12] Section 14(2) provides that nothing in sections 6 to 13 of the 2013 Act affects the common law rules as to the withholding, on grounds of public interest immunity, of any material in any proceedings or is to be read as requiring a court or tribunal to act in a manner inconsistent with Article 6 of the Human Rights Convention.

[13] The County Court has no power to make a declaration under section 6 but the Lord Chancellor has exercised his rule-making powers under both the Rules of the Court of Judicature ("RCJ") and the 2013 Act to amend Order 78 of the RCJ by adding Rule 1A:

> "1A. Where in proceedings before a county court the court considers that there is a real possibility that a party would in the course of the proceedings be required to disclose material the disclosure of which would be

> damaging to the interests of national security, the court must transfer the proceedings to the High Court."

[14] The interpretation of this Rule was considered by the Court of Appeal in Cunningham v Chief Constable [2016] NICA 58. The appellant in that case had also been arrested under section 41 of the Terrorism Act 2000 on the basis of intelligence suggesting his involvement in a "tiger kidnapping." The appellant sought disclosure of the intelligence material. A Public Interest Immunity Certificate was issued. The appellant submitted that it followed that there was a real possibility that the respondent would be required to disclose material the disclosure of which would be damaging to the interests of national security. Accordingly, the County Court had to transfer the proceedings to the High Court.

[15] The Court of Appeal rejected that submission and its approach to the interpretation of the Rule is set out at paragraph [30] of the judgment of Weatherup LJ:

> "[30] Order 78 Rule 1A concerns County Court proceedings where the court considers there is a real possibility of disclosure that would be damaging to national security. The court must transfer the proceedings to the High Court. The threshold is the "real possibility" of disclosure. The threshold is not the raising of a claim of public interest by a party with control of the documents nor is it the rejection by the court of the public interest claim. It is an intermediate stage of "real possibility" of disclosure. That requires an assessment of the claim for disclosure and the claim for public interest and the prospects for success or rejection of the competing claims. The "real possibility" of disclosure may not be immediately apparent but may emerge as the application for the disclosure of the documents progresses. The court hearing the application may never consider that disclosure is a "real possibility." In that event the public interest claim will prevail, the application will be dismissed and there will be no disclosure. The County Court will proceed to hear the claim in the absence of the documents. On the other hand, there may come a point at which the court considers that disclosure is a "real possibility" and the court must transfer the proceedings. In that event the court will not reach a decision on disclosure but will transfer the proceedings. The prospect of the closed material procedure will come into play."

The judgment

[16] Judge Devlin stated that it was common case that the applicant had been arrested by police on 2 June 2011. The defence case was that there was information suggesting that the applicant had been involved in the abandonment of a car bomb left on the A1 bypass outside Newry on 7 April 2011. In light of the Cunningham decision the trial judge considered the PII application. It was conceded on behalf of the respondent that the documents possessed sufficient potential relevance.

[17] He then examined Order 15 Rule 1(6) of the County Court Rules (Northern Ireland) 1980 which provided that discovery should not be ordered if and so far as it appeared that it was not necessary either for disposing fairly of the proceedings or for saving costs. He identified the test as being whether the material was of substantial assistance to the court.

[18] The judge then decided that he should inspect the documentation and held an *ex parte* hearing during which the non-redacted documents were provided and explained by two police disclosure officers who provided assistance to enable the judge to better understand the redactions which had been made. As already noted above, neither counsel was present during this hearing.

[19] The final part of the hearing was carrying out the balancing test. The judge set out his assessment at paras [23] and [25]:

> "23. In the assessment of the Court, this material, which the Court has viewed, does not the consist of and contain material which could properly be said to be necessary for fairly disposing of the present cause and/or the due administration of justice, in that this material would give substantial assistance to the Court in determining at least some of the facts on which the decision and outcome in this action would depend. The test to be applied here is of course "substantial assistance" to the court rather than substantial assistance to the plaintiff. Whilst the redacted material as to source and/or grading is in the assessment of the court unlikely to be of much or indeed of any particular assistance to the plaintiff in these proceedings, nevertheless that is not the test which the court must apply here. The test is one of "substantial assistance" to the court, and this Bundle A documentary material on source and grading does satisfy that test. It is therefore this part of the Bundle A material in respect of which the court must now proceed to carry out the balancing exercise….

> 25. … The Court, having viewed the Bundle A material in so far as it relates to both source and grading, does not consider that it would give the plaintiff any particular assistance in advancing his case for negligence, breach of statutory duty, assault, battery, or trespass to the person. Indeed, upon one view, the non-disclosure of the material in question and its resultant inability to be relied upon by the defendant in its defence of the plaintiff's claims in these proceedings is much more likely to be of some at least potential detriment to the defendant, rather than the reverse."

[20] Accordingly, the judge dismissed the application.

Submissions

[21] The principal argument advanced on behalf of the applicant was that the approach taken by the County Court judge was not in accordance with Article 6 of the Convention. It was submitted first, that the procedure whereby the applicant was required to issue a notice for specific discovery of the redacted materials placed a significant and unreasonable burden in circumstances where the applicant was not aware of the reasons for the redactions. County Court practice is that the claim for disclosure of the redaction of sensitive material is made in the discovery list. If a notice for discovery of those materials is issued a PII certificate is sought from the Minister. The County Court Rules (Northern Ireland) 1981, as amended, provide that the party and party costs for the issue, service and filing of a notice for discovery is £122.12.

[22] The second argument concerned the fairness of the procedure for dealing with a PII claim made in a County Court case. The applicant contended that it was open to the court to depart from the reasoning in Cunningham and to adopt the position that the "real possibility" test was satisfied as soon as the application for PII was made. In those circumstances the judge would simply transfer the case to the High Court without any consideration of the PII claim. The High Court would then be in a position to determine whether to make a declaration that a closed material procedure application could be made.

[23] The alternative approach upon which the applicant relied was that the County Court judge should consider the PII claim. It was submitted that in any case where the judge did consider such a claim it was necessary for a special advocate to be appointed. The County Court judge might accept or reject the PII claim but should also consider a third option, removing the case to the High Court where a closed material procedure determination might be made on the basis that a closed material procedure might achieve greater fairness.

[24] The applicant contended that where the PII claim was successful Cunningham meant that the County Court could not transfer the proceedings to the High Court. No application for a closed material procedure could be made before the County Court and the applicant would have no way of knowing whether he had a basis for relying on the High Court's power under section 31(5) of the Judicature (Northern Ireland) Act 1978 to remove County Court proceedings to the High Court. Any such application would be entirely speculative.

[25] Mr Southey also relied upon Article 14 of the Convention. He submitted that County Court litigants have a status and that their status is analogous to litigants in the High Court. They have the same interests in a fair procedure. Whereas those in the High Court can avail of a closed material procedure such an option is not available in the County Court. That is the difference in treatment upon which the applicant relies. That difference has not been justified, he submitted.

[26] It is common case that none of these arguments was advanced in this form before the learned County Court judge. We concluded, however, that we should deal with the question posed as the alternative was to leave the state of the law in some uncertainty while a further case made its way through the system.

Consideration

[27] In support of his contention that the requirement to issue a notice of discovery imposed an excessive burden upon the applicant reliance was placed on the decision of the European Court of Human Rights ("ECtHR") in Barbotin v France (Application No. 25338/16). In that case the applicant was awarded compensation of €500 for detention in prison conditions in breach of Article 3 of the Convention. In the course of the proceedings he asked the judge to appoint an expert to ascertain the state of each cell that he had occupied within the remand centre. The cost of the expertise amounted to €773.57.

[28] That amount was charged to the State at first instance. On review it was contended that the costs were unnecessary as an expert had reported on the cells in question in another case. The expert costs were awarded against the applicant. The end result was that the applicant became a debtor to the State. The court concluded that the effectiveness of the remedy in that case should be assessed taking into account the net amount of the sums allocated by the domestic courts. In those circumstances the court found a breach of Article 13 of the Convention on the basis that the remedy was not effective.

[29] The County Court Rules provide a series of scale fees which are designed to be proportionate to those cases which fall within the financial limits of that court. The present financial limit on the award of damages is £30,000. The costs involved in the issue of a notice for discovery in the County Court are modest. The solution envisaged by the applicant is that the PII certificate is produced before the discovery list is provided. The certificate must, of course, be personally considered by the

Minister who signs it. That inevitably will introduce some element of delay, cost and administrative inconvenience.

[30] The solution envisaged in County Court practice ensures that the list can be provided without the need to engage the Minister in those cases where there is no dispute about the redactions. The applicant is legally aided. The County Court judge has a discretion as to whether the modest costs should be visited upon the applicant. That discretion must be exercised on the basis of fairness to all parties. Against that background the requirement to issue the notice does not in our view lead to any structural unfairness in the conduct of the proceedings. None of this gives rise to any unlawfulness in domestic law. Article 13 of the Convention is not one of the Convention rights incorporated in domestic law by the Human Rights Act 1998 but as the matters set out show its values are already part of, and accommodated by, our system of law and procedure in this area.

[31] We do not accept the submission that when considering a claim for PII the court is bound to ensure the instruction of a special advocate. Mr Southey sought to support that submission by reference to R (AHK) v Secretary of State for the Home Department [2009] 1 WLR 2049. That was a test case in which the applicant had been refused British citizenship on the ground that he had failed to demonstrate that he was of good character. In support of that ground of refusal the Secretary of State relied on sensitive material. The case plainly preceded the passing of the 2013 Act. The court was concerned with devising a common law procedure whereby sensitive documents could be provided to the court for the purpose of determining the outcome of the proceedings. AHK indicated that where documents were being put before the court for that purpose a special advocate should be appointed unless the judge could readily resolve the issues one way or the other by reading the material.

[32] The consideration of a PII claim does not involve the judge taking into account material which one or more of the parties does not see in determining the outcome of the claim. AHK notes the general principle that a party to litigation is entitled to be given full reasons for a decision and see all the material which the decision maker has available. At paragraph [19] the court notes that there are exceptions to the principle where the court is looking at the documents on an application to withhold disclosure on the ground that their disclosure would damage the public interest. Paragraph [20] makes it clear that there is no suggestion that in such a case it is necessary or appropriate to instruct a special advocate.

[33] We also consider that this approach is consistent with the jurisprudence of the ECtHR. In Regner v Czech Republic (2018) 66 EHRR 9 the court noted that rights under Article 6(1) were not absolute, nor was the right to disclosure of relevant evidence an absolute right where there were competing interests such as national security or the need to protect witnesses at risk of reprisals or to keep secret police methods of investigation of crime. Where an application to withhold evidence was made it was necessary that the domestic courts had the necessary independence and impartiality, had unlimited access to all the classified documents justifying the

decision and were empowered to assess the merits of the decision to withhold (Regner at paragraph [152]). The Court also stated the desirability for domestic courts to explain, if only summarily, the extent of the review they carried out and the accusations against the applicant. In our view all of those features were satisfied, as both evidenced by and explained in the comprehensive and careful judgment of Judge Devlin.

[34] In light of Cunningham where a PII claim is made the County Court judge is required to consider the unredacted documents which it is proposed to withhold. In order to carry out that task it is necessary to understand, if necessary by probing, the extent to which disclosure of the documents would harm the public interest. In this case that exercise was carried out by agreement between the parties when the County Court judge met with two police officers and established by questioning his understanding of the nature of the documents.

[35] In our view it was entirely appropriate for the judge to examine the police officers for the stated purpose. However, the officers should have been accompanied by counsel for the respondent who will know and understand the issues which are likely to emerge in the case. In such an *ex parte* application counsel has a duty to ensure that all material and argument in favour of and against withholding should be brought to the attention of the judge. There is no suggestion that the police officers misled the judge in any way but counsel's presence is a necessary safeguard to ensure that all aspects of the relevance of the documents to issues which may emerge in the course of the proceedings are before the judge conducting the *ex parte* hearing and that the judge is given a fair and balanced summary of the position, including points adverse to the respondent's application. That duty of disclosure in the *ex parte* hearing, and the expertise to discharge it effectively, was not imposed upon or to be expected of the police officers, although they were obviously subject to a duty not to mislead the court.

[36] Where a County Court judge is considering a PII claim in accordance with Cunningham the court's obligation is to assess the balance between the public interest in withholding the material and the rights of the claimant. Each of those interests may vary. The most straightforward case is where the public interest is substantial and there is little or no detriment to the claimant. In other cases both the public interest and the rights of the claimant may be substantial.

[37] We consider that the County Court judge faced with a PII claim should proceed as follows:

(i) If upon consideration of the PII claim concerning documents the disclosure of which would be damaging to the interests of national security the judge forms the view that the PII claim should not or may not be upheld the real possibility of disclosure of the documents arises. In those circumstances the proceedings must be transferred to the High Court pursuant to Order 78 Rule 1A.

(ii) If upon consideration of such documents the judge forms the view that the PII claim should be upheld and that the undisclosed documents are of no substantial value to the other parties the judge should make the ruling on the PII claim and proceed with the case in the usual way.

(iii) There may be some cases where the court is faced with a powerful PII claim such as the protection of the identity of an informer but also has a concern that the non-disclosure of the material might affect the fair and effective administration of justice and the proceedings. In those circumstances, even if the court is minded to uphold the PII claim, the court should be alert to the real possibility of disclosure and transfer to the High Court for further consideration of the correct approach.

[38] It is also necessary to bear in mind that by virtue of Article 60 (1) of the County Court (Northern Ireland) Order 1980 a party may appeal to the High Court against any decree made by the County Court judge. A decree includes any order, decision or determination of the County Court judge. On an appeal to the High Court the 2013 Act is directly in play. Such an appeal is by way of full rehearing. The alternative method of appeal is by case stated and that was what was used in this case. In the interests of prohibiting multiple appeals the statute requires a party to choose one or other appeal route.

[39] We do not consider that any of this gives rise to a breach of Article 6 of the Convention and it follows that we do not consider that there is any requirement to revisit the interpretation of Cunningham to ensure that it is Convention compliant. The County Court is designed to provide a procedure for the determination of claims of moderate value and complexity with a procedure and scale of costs that is proportionate to those cases. Such cases are likely to proceed with greater expedition and less cost than cases in the High Court. This tier provides an important safeguard for those who seek to vindicate their rights without the delay and expense of High Court proceedings.

[40] Order 78 Rule 1A requires the County Court to consider the question of disclosure. PII is plainly relevant to that question. There is no reason why PII should not be considered by the County Court judge as part of the exercise in addressing the disclosure question. If the case was removed to the High Court as soon as the PII claim was made the High Court judge would be required to examine the PII application. If the High Court judge upheld the PII claim and rejected any application for a closed material procedure declaration costs and delay would inevitably arise. We are satisfied, therefore, that to remove the case from the County Court without consideration of the PII claim by that tier would simply increase costs and lead to delay in the determination of the action. There is no reason to depart from Cunningham and, in cases such as the present case, where the County Court can confidently deal with the matter in the manner set out at paragraph [37](ii) above, to require the case to be transferred to the High Court would not be in the

interests of justice. An aggrieved party's rights are in any event preserved by their right of appeal to the High Court, as set out at paragraph [38] above.

[41] Finally, we consider that there is no basis for the Article 14 claim. Applying the approach set out at paragraph [37] above the question to be determined is essentially the same whether the proceedings are in the County Court or the High Court. There is no material difference of treatment.

[42] In this case the judge explained his analysis of the PII claim. He also examined the impact on fairness to both parties. He was satisfied that upholding the PII claim would not deprive the plaintiff of any particular advantage in pursuing his claim. He considered it much more likely that there was potential detriment to the defendant. This was a case in which the judge concluded that the PII claim was clearly made out and it is clear from the judge's findings that there was no basis for concluding that the fairness of the proceedings required a closed material procedure. It was an entirely suitable case for determination by the County Court.

Conclusion

[43] For the reasons given we answer the question posed at para [1] above "No."