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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Maloney's (Peter) Application (Judicial Review) [2016] NIQB 74

IN THE MATTER OF JOSEPH PETER MALONEY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE FAILURE OF THE POLICE SERVICE OF NORTHERN IRELAND TO CONSIDER THE EFFECTS OF THE WITNESS PROTECTION ARRANGEMENTS ON PERSONS OTHER THAN THE PROTECTED WITNESS

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MAGUIRE J

Introduction

[1] This is an application for leave to apply for judicial review. The applicant is Joseph Peter Maloney. He is currently a prisoner at Her Majesty's Prison Maghaberry, serving sentences of imprisonment for manslaughter, robbery and theft. He was convicted of these offences in March 2012 and sentenced to a total of 13 years in custody to be followed by 2 years on probation. His earliest date for release is June 2017.

[2] The applicant is a married man and he has two children now aged 9 and 7. He has not seen his children since September 2010.

[3] It is not in dispute that the applicant's wife entered a Witness Protection Programme in or about December 2013. She, together with the couple's two children, now live at an address unknown to anyone but the police. The reason for this is that it is the view of the police that Mrs Maloney is at risk of harm, if her whereabouts were known to the applicant, his family or his associates.

[4] The applicant issued proceedings in the Family Court seeking an order in his favour for contact with his children. After a two day hearing, the court declined to grant him direct contact but did grant indirect contact, against Mrs Maloney's wishes. In the course of those proceedings, the court heard from the applicant, Mrs Maloney, a police officer of Detective Inspector rank, who was head of the Witness Protection Programme and a social worker with knowledge of the children's circumstances. The court expressed itself as satisfied that there was a good reason for the mother being on a Witness Protection Programme and accepted that the mother was at significant risk from the applicant, his family or associates because she had provided information to the police which had led to the applicant's arrest and incarceration. The court's reasoning was that "primary significance must be given to the vindication of the arrangements, as otherwise there would be likely to be a significant level of risk to the personal safety of both the mother and the children". Consequently, "the security of the wife and children [was] a factor which, in the court's view, outweighed the weight which would usually be given to the desirability of promoting direct contact between the non-resident parent and his children". Contact could only take place which would be consistent with the security requirements.

[5] The regime of indirect contact, which the court put in place, was set out at paragraph [27] of the court's judgment and was as follows:

> "The court is prepared to order indirect contact in accordance with the following conditions:
>
> - That the applicant father be given the opportunity twice per year – once at Christmas and once in July – to write each child a short letter; provide a gift to each child.
> - Such letters and gifts will be the subject of censoring by the police to ensure that there is nothing in the contents of the letters or gifts which would be likely to compromise the security of the arrangements under the Witness Protection Programme.
> - The letters and gifts will be provided to the police who will then superintend their transmission onwards to the mother who will be required to pass them on to her children.
> - The children and each of them will be given the opportunity to write a short letter to their father twice a year, once in January and once in August. If the children wish it they, and each of them, can provide a drawing or something of that character. As before, the police will have to act as a censor of these communications and will superintendent their

passage to the prison for onward transmission to the father."

[6] It appears that after the judgment the applicant for a period set his mind against making any use of the facility of indirect contact but he has sought, the court has been told, to make use of it latterly.

[7] In his affidavit in these proceedings the applicant has stated that his ultimate aim is see more of his children.

[8] There is no reference in the applicant's grounding affidavit to the following:

(a) Recognition that the Family Court decision was concerned with the welfare of the children as the paramount consideration.

(b) Acknowledgment that the Family Court is the forum in which issues to do with the legal rights of parents to have access to their children is ordinarily determined.

(c) Appreciation that there can be changes in circumstances which can affect the prospects of contact being granted in the Family Court or varied where it already exists.

(d) Reflection on the fact that within the context of the Family Court a very wide range of potential orders may be sought by a non-resident parent and granted. For example, in this case the court did order that each child's end of year school report should be provided to the applicant subject to any need to redact anything which could compromise the arrangements of the Witness Protection Programme.

[9] It is against this background that the court will consider the applicant's case for judicial review as put before it.

The Order 53 Statement

[10] The Order 53 Statement appears to be targeted at the witness protection arrangements for which the Police Service of Northern Ireland is responsible. It seeks in terms of the principal relief sought:

- A declaration that the failure of the PSNI to consider the effects of the witness protection arrangements on persons other than the protected witness is unlawful.

- A declaration that the failure of the police to have in place a policy of review with regard to the position of family members of protected witnesses is unlawful.

- An order of mandamus requiring the police to devise and introduce a properly formulated policy in the exercise of its powers under Chapter 4 of Part II of the Serious Organised Crime and Police Act.

- An order of mandamus requiring that the police reconsider the appropriateness of further contact between the applicant and his children.

[11] The grounds of judicial review set out in the Order 53 are:

> "(i) The failure of the respondent to consider the effect of witness protection arrangements on persons other than the protected witness in breach of Section 6 of the Human Rights Act [1998] read together with Article 8 ECHR.
>
> (ii) The failure of the respondent to consider the effect the witness protection arrangements have on persons other than the protected witness which is inconsistent with the public law principle that requires a decision maker to have regard to all legally relevant considerations.
>
> (iii) The failure of the respondent to consider the effect of the witness protection arrangements on persons other than the protected witness is in breach of Section 82(4) of the Serious Organised Crime and Police Act 2005 insofar as it has failed to have regard to all legally relevant considerations."

Pre-Proceedings Correspondence

[12] This application for judicial review has for long been in gestation. There appears to have been an exchange of correspondence between the applicant's solicitors and the police beginning in October 2013, within two months of the judgment of the Family Court. The police reply to that correspondence is dated 4 November 2013. That reply stated that the police did not have a specific policy in place in respect of children who are in a Witness Protection Programme. However, the reply goes on to point out that all police actions in respect of children are governed by PSNI Directive 13/06 "Policing with Children and Young People". On the facts of the case, the author of the police letter notes that the children in this case were in the Witness Protection Programme because their mother had custody of them.

[13] On 11 November 2013 a pre-action protocol letter was sent by the applicant's then solicitor. It indicated that the solicitor had been instructed to challenge

15 different decisions relating to this matter. The court does not propose to set these out here. The gravamen seems to be that the police needed to establish a policy for children who are part of its Witness Protection Programme.

[14] No response to the pre-action protocol letter appears to have been sent. There is, however, a letter dated 8 August 2014 from the police which indicated that the author had no record of having received the pre-action protocol letter of mid-November 2013. The author, on behalf of the police, noted that "before we could respond, you should send us a pre-action protocol letter issued by you as the applicant's current legal advisers". The applicant apparently had changed solicitors. This did indeed lead to a further pre-action protocol letter of 3 December 2015. This was largely in line with the contents of what is now contained in the Order 53 Statement. This letter attracted a response from the police dated 8 December 2015. The author of the police response noted that "PSNI does not have a bespoke policy for every single area of activity in which it is involved". The author then referred to PSNI Policy Directive 13/06 (referred to in the earlier correspondence between the applicant and the police two years before). This, the author stated, "sets out the legal and other relevant standards to be applied in all [the police's] dealings with children". The author then referred to the decision of the Family Court and commented that "in the event the PSNI have a specific policy concerning the discrete issue of contact between prisoners and their children when the parent with custody had entered into a protected person programme, it would be entirely subservient to a judgment of the High Court". The author then made the suggestion that if the applicant was not content with any aspect of the contact between himself and his children, the proper avenue for him was to raise this *via* family contact proceedings.

The Leave Hearing

[15] The court is grateful for the written and oral submissions of Mr Ronan Lavery QC (who appeared with Mr Bassett BL) for the applicant and the oral submissions of Ms Murnaghan QC who appeared on behalf of the intended respondent, the PSNI.

The Witness Protection Arrangements

[16] It appears from the applicant's skeleton argument that the witness protection arrangements in this case derive from the powers of the PSNI conferred by Section 82 of SOCPA. This states that:

> "82. **Protection arrangements for persons at risk**
>
> (1) A protection provider may make such arrangements as he considers appropriate for the purpose of protecting any person if he reasonably believes that the person's safety is at risk in view of the criminal conduct or possible criminal conduct of another person.

(2) A protection provider may vary or cancel any arrangements made by him under subsection (1) if he considers it appropriate to do so.

(3) If a protection provider makes arrangements under subsection (1) or cancels arrangements made under that subsection, he must record that he has done so.

(4) In determining whether to make arrangements under subsection (1), or to vary or cancel arrangements made under that subsection, a protection provider must, in particular, have regard to –

(a) the nature and extent of the risk to the person's safety,

(b) the cost of the arrangements,

(c) the likelihood that the person, and any person associated with him, will be able to adjust to any change in their circumstances which may arise from the making of the arrangements or from their variation or cancellation (as the case may be), and

(d) if a person is or might be a witness in legal proceedings (whether or not in the United Kingdom), the nature of the proceedings and the importance of his being a witness in those proceedings.

(5) A protection provider is –

…

(c) the Chief Constable of the Police Service of Northern Ireland."

Directive 13/06 PSNI

[17] The above is the PSNI's Policy Directive in respect of policing with children and young persons. It is a substantial document running to some 46 pages. While much of it is not relevant for present purposes, the document asserts a number of principles which are relevant to the carrying out by police officers of their duties. For example, it is stated that officers shall protect human dignity and uphold human rights. This, it notes, applies equally to children and young people as it does to adults. In addition, it refers to the UN Convention on the Rights of the Child which

it says should be applied in its entirety. Particular attention was given, however, to core principles, such as the best interests of the child must be paramount; the duty of the state to protect children from all forms of violence; and the rights of children to be heard and have their opinions taken into account. A survey of the relevant parts of UNCRC is provided in an appendix to the document.

The Court's Assessment

[18] In the court's estimation this application for judicial review reflects a contrived and tangential approach to the applicant's true concern, which is his inability to have direct access to his children.

[19] As indicated earlier, the applicant's aim is to see more of his children. This is understandable but, in the court's view, the legal means of achieving this aim lies in proceedings before the Family Court not in a judicial review of the type now before the court.

[20] In the court's view, the above must be so because any judgment about access will fall to be determined by reference to the principles of family law, especially the core principle of the court acting to ensure that the best interests of the child are vindicated.

[21] The best interests of the child will necessarily be judged at the time when the relevant application is under consideration by the Family Court.

[22] It also appears to the court that the operation of the Family Court is flexible and can and does cater for any significant issue which may arise touching on the welfare of young children. In his argument on behalf of the applicant, Mr Lavery QC, claimed that the applicant had no means of knowing at present important factors relating to his children: for example, whether they were in good health or suffered from a serious illness. He argued that there should be a police policy dealing with such situations. In the court's view, this approach fails to take into account that someone in the applicant's position retains access to the Family Court and can make an application for a suitably composed specific issues order which the court can then, if appropriate, grant. Such orders as are required can and are made by the Family Court and this is, to the court's mind, the way for a non-resident parent to deal with such concerns, whether or not the children are subject at the relevant time in their lives to living with a parent who is on a Witness Protection Programme.

[23] Turning to the relief sought and the grounds of judicial review put forward, the court is not satisfied, the onus of proof being on the applicant, that any arguable case for judicial review has been established.

[24] It is well established in judicial review proceedings there is no onus on the intended respondent at the leave stage in the proceedings. This is important in cases

where it is asserted that the decision maker has failed to have regard to material considerations. Such a contention, the Court of Appeal, indicated in Re SOS (NI) Limited's Application [2003] NIJB 252 at paragraph [19] was required to be proved by "some evidence or a sufficient inference" before a case has been made out for leave to apply for judicial review. In this case, in the court's view, the above *dictum* is in point as there is no evidence before the court that the intended respondent has failed to consider the effects of the witness protection arrangements on persons other than the protected witness or that the police, in any material context, has failed to review the position of family members of protected witnesses.

[25] The position in this case, as it seems to the court, is that it was inevitable that when Mrs Maloney joined the witness protection arrangement that not only her and her children's position would have to be considered but also that the position of the applicant fell for consideration. As the only available parental carer of the children the need to accommodate the children's requirements within the mother's arrangements simply could not have been overlooked. Their interests were and continue to be central to the arrangements as:

(i) their safety has to be considered;

(ii) an attack on the mother may well endanger the children;

(iii) they have to be accommodated with their mother;

(iv) they have to be placed in schools; and

(v) welfare arrangements in their place of residence have to be put in place.

In turn these factors affect the cost of the arrangements and the need to take account of the children's ability to adjust to the change in their circumstances.

[26] The statutory scheme also caters for consideration of these points. These points also feed into the discretion the police have to vary or cancel witness protection arrangements.

[27] The court has no reason to believe that the police have been or are neglecting to keep the position of the children and their relationship with their mother and father under review. As occurred in this case, the police were involved in the proceedings which took place in the Family Court. A senior police officer gave evidence before the court and was cross examined by counsel on behalf of the now applicant. That evidence did not just embrace the reason for Mrs Maloney being placed on the scheme but also embraced the risks to the children and what steps could be taken to maintain family ties (including and in particular with the father) consistently with security requirements.

[28] A particular feature of the applicant's case, emphasised by Mr Lavery in his submissions, was what he alleged to be the defective nature of the statutory scheme found in section 82 *supra*. In his submission the scheme engages and interferes with the applicant's right to respect for his family life under Article 8 of the ECHR. In these circumstances, any such interference he argued had to be justified. It was further submitted that the arrangements could not be justified and failed what he described as the "quality of law" test.

[29] In support of this last argument reliance was placed on the Northern Ireland Court of Appeal's decision in Canning, Fox and McNulty [2013] NICA 19, especially at paragraphs 46-50.

[30] It was submitted that it was not enough for the statutory scheme to have a basis in domestic law, as it was accepted that the witness protection arrangements have. There needed to be put in place the sort of requirements referred to in Canning *viz* rules to ensure that the arrangements put in place were not arbitrary. Mr Lavery argued that there needed to be a Code of Practice, which laid down suitable safeguards. The court should, it was submitted, declare that the power under section 82 could not be exercised in a Convention compliant manner without a valid and effective Code of Practice.

[31] The court does not consider that there is a direct read across between the approach taken by the Court of Appeal in Canning *et al* and the present case. Canning was dealing with the powers given to the security forces to effect stops and searches and allied activities. The powers were provided in extremely wide terms and were aimed at the person against whom they were used. In the legislation, moreover, there was an express power enabling Codes of Practice to be devised about how the powers might be used.

[32] In contrast, in the present case what section 82 is providing for are arrangements designed to enable statutorily defined protection providers to make arrangements "for the purpose of protecting a person's safety" because that person is at risk from the criminal conduct of another person. Those arrangements can only be operated with the consent of the person or persons who require the protection and serve *inter alia* to vindicate the Article 2 rights of that person. This scenario, in the court's opinion, is quite different from the context in Canning *et al* where there arose a significant risk of powers being used oppressively.

[33] There is, moreover, no provision in the SOCPA legislation requiring consideration to be given by the protection provider to the publication of a Code of Practice.

[34] A still further difference is that in SOCPA there is an explicit list of factors laid down by Parliament which the protection provider must consider. Such a list invites expressly or by implication consideration of how dependent children and a non-resident parent would be affected and it is also plain that the protection

provider is to consider variation or cancellation as appropriate. The list, moreover, does not exclude the consideration of other relevant factors.

[35] The court is of the view that the scheme of section 82 would be unlikely to result in an unjustified interference with Article 8 rights and would meet the "in accordance with law" test. The court also bears in mind that the operation of provisions was the subject of proceedings in the Family Court in 2013 and there was no suggestion either that the outcome of the proceedings breached Article 8 of the Convention or that the Article 8 rights of the father had been overlooked. Insofar as the issue of the quality of law test might arise, if it arises at all, it is the view of the court that section 82 is not deficient.

[36] However, if the above analysis is wrong, the court considers that the existence of Directive 13/06 PSNI is relevant and its emphasis on human rights and, in particular, on the rights of the child, can make good any deficiency in the context of quality of law.

Conclusion

[37] In the light of the foregoing, the court is unconvinced that there is an arguable case in respect of which the court should grant leave in this case. Accordingly, it dismisses this application for leave.