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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **22/10/2018**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY ANTHONY MCINTYRE

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AND IN THE MATTER OF A DECISION OF THE DIRECTOR OF PUBLIC PROSECUTIONS UNDER SECTION 7(5) OF THE CRIME (INTERNATIONAL CO-OPERATION) ACT 2003

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Before: Morgan LCJ, Weatherup LJ and Weir LJ

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MORGAN LCJ (delivering the judgment of the court)

[1] The applicant was convicted of membership of a proscribed organisation, namely the Irish Republican Army, contrary to section 19 of the Northern Ireland (Emergency Provisions) Act 1973 and sentenced on 9 December 1974 to a period of two years imprisonment. He was subsequently arrested on 28 February 1976 and convicted of one count of murder, three counts of attempted murder, one count of hijacking and one count of possession of a weapon with intent to endanger life. He was sentenced to life imprisonment with a recommended minimum term of 25 years. He appealed in respect of the murder charge and in 1979 the recommended minimum term was reduced to 20 years imprisonment.

[2] In 2001 he became involved in an academic oral history project known as the "Belfast Project" with the journalist and author Ed Moloney who was the project director. The project was sponsored by Boston College, Massachusetts, USA. The object of the project was to collect and preserve for academic research the recollections of members of republican and loyalist paramilitary organisations. The methodology was to gather first-hand testimony by way of voice recordings from participants.

[3] The project lasted from 2001 until May 2006. It began with interviews of former members of the Provisional IRA and was subsequently expanded to include interviews with former members of the Ulster Volunteer Force. The applicant was a researcher. He interviewed past participants in the conflict recording their personal recollections. His experience as a journalist and a participant gave him access to those people and enabled them to repose a degree of trust in him which they might not otherwise have had.

[4] Each participant gave the content of the recordings into the possession of Boston College for preservation. Access to the tapes was to be restricted until after the interviewee's death except where they provided prior written authority for their use otherwise. The applicant maintains that it was always understood that the contents of the interviews might be accessible after death, primarily for academic purposes. He says that it was never envisaged that the contents would be accessed by the Police Service of Northern Ireland ("PSNI") for the purposes of criminal investigation or prosecution.

[5] In February 2011 mutual legal assistance was sought by the PSNI from the authorities in the USA to obtain tapes held by Boston College relating to interviews conducted with Republican participants touching upon the abduction and death of Jean McConville. A series of subpoenas was issued by the US District Court requiring Boston College to deliver up the materials. This was resisted on the basis of the risks to the well-being of the researchers. The US court concluded, however, that some of the materials should be provided to the UK authorities. In 2012 this applicant then instituted proceedings in this jurisdiction seeking to prevent the PSNI from obtaining confidential archive material provided to the Trustees of Boston College Massachusetts USA. That application was dismissed in October 2012.

[6] The applicant gave an interview to the BBC's Spotlight programme broadcast in May 2014 in which he stated that he had provided an interview on tape to the organisers of the Boston College Project. In the interview he stated that he had exposed himself "to exactly the same risks as anybody else was exposed to". The PSNI interpreted that statement as suggesting that the applicant had disclosed criminal conduct in his interview on tape.

[7] Detective Chief Inspector Montgomery indicated that the PSNI was conducting a criminal investigation into matters in which the involvement of the applicant was suspected. The first was a bomb attack which DCI Montgomery said occurred on 6 February 1976 on a house situated at Rugby Avenue, Belfast. It is common case that there was a bomb attack on a house at Rugby Avenue in 1976 in respect of which the applicant was detained and questioned by the Army following the attack. PSNI maintain that they received information that the applicant was involved in the bomb attack and that the information linking the applicant to the attack was received on 6 February 1976. The applicant maintains that he was in fact the target of the attack and that in any event if the attack was on the date alleged he was in police custody throughout that day.

[8] The second matter stated by DCI Montgomery to be under investigation was the detection in 1978 in the applicant's possession of an imitation firearm while in custody in circumstances suggesting that he may be planning an escape from custody. The applicant states that this is a reference to an incomplete wooden gun in two parts which was found in a search cubicle in prison reception. He was questioned at the time of its discovery but not charged with any offence.

[9] The third matter said to be under investigation was membership of an illegal organisation. That concerned *inter alia* intelligence allegedly suggesting that the applicant debriefed members of the Provisional IRA after their release from custody and was an officer of that organisation.

The International Letter of Request ("ILOR")

[10] On 3 September 2014 the PSNI requested that the PPS issue an ILOR in respect of the matters set out above. The ILOR was issued on 9 February 2015 pursuant to section 7(5) of the Crime (International Cooperation) Act 2003 which provides:

> "In relation to England and Wales or Northern Ireland, a designated prosecuting authority may itself request assistance under this section if—
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> (a) it appears to the authority that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed, and
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> (b) the authority has instituted proceedings in respect of the offence in question or it is being investigated."

[11] The Public Prosecution Service ("PPS") is the designated public authority and it issued the ILOR to the Central Authority of the United States of America on 9 February 2015. The letter described the applicant and indicated that the PSNI was investigating the commission of the following offences:

(i) Attempted murder contrary to Common Law and Article 5 of the Criminal Attempts and Conspiracy Order (Northern Ireland) 1983. Upon conviction on indictment this offence is punishable by a maximum sentence of life imprisonment.

(ii) Membership of a proscribed organisation contrary to section 19 of the Northern Ireland (Emergency Provisions) Act 1973. Upon conviction on indictment this offence is punishable by a maximum sentence of five years imprisonment.

(iii) Membership of a proscribed organisation contrary to section 21(1) of the Northern Ireland (Emergency Provisions) Act 1978. Upon

conviction on indictment this offence is punishable by a maximum sentence of ten years imprisonment.

(iv) Possession of explosives with intent to endanger life contrary to section 3 of the Explosive Substances Act 1883. Upon conviction on indictment this offence is punishable by a maximum sentence of life imprisonment.

(v) Conspiring to cause an explosion likely to endanger life contrary to section 3 of the Explosive Substances Act 1883. Upon conviction on indictment this offence is punishable by a maximum sentence of life imprisonment.

(vi) Possession of an imitation firearm with intent to commit an indictable offence contrary to section 18 of the Firearms Act (Northern Ireland) 1969. Upon conviction on indictment this offence is punishable by a maximum sentence of life imprisonment.

[12] The information on which the PSNI grounded its investigation was set out at paragraph 11 of the ILOR:

> "(i) In 1974 the police received information that Anthony McIntyre was a member of the Official Irish Republican Army in the Markets area of Belfast;
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> (ii) In 1975 Anthony McIntyre was convicted of membership of an illegal organisation- namely the Irish Republican Army - and was sentenced to two years imprisonment:
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> (iii) In 1975 Anthony McIntyre was convicted of an offence of armed robbery carried out on behalf of the Irish Republican Army, he was sentenced to three years imprisonment,
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> (iv) In 1975 the police received information that Anthony McIntyre was a member of the Provisional Irish Republican Army,
>
> (v) In 1976 the police received a report that Anthony McIntyre was the leader, or Officer Commanding, the Provisional Irish Republican Army in the Ormeau Road area of Belfast:
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> (vi) In 1976 the police received information that Anthony McIntyre was involved in a bomb attack on a house in Rugby Avenue, Belfast:

(vii) In 1976 the police received information that Anthony McIntyre was conducting de-briefing sessions on behalf of the Provisional Irish Republican Army with persons who had been arrested and questioned by the British Army;

(viii) In 1976 Anthony McIntyre was convicted of the murder of Kenneth Lenaghan in Donegal Pass, Belfast. The PSNI believes that this murder was carried out by the Provisional Irish Republican Army, Anthony McIntyre was sentenced to life imprisonment for this offence; and

(ix) In 1978, in a prison transport vehicle, Anthony McIntyre was found to have a concealed imitation firearm. The PSNI believes this was to have been used in an escape attempt."

[13] There were a number of errors in the ILOR. The month of the applicant's date of birth was incorrect but that was not material. It was alleged that the PSNI were carrying out an investigation in respect of an allegation of a breach of section 18 of the Firearms Act (Northern Ireland) 1969 ("the 1969 Act"). That section deals with the offence of trespassing with a firearm. The offence of possessing an imitation firearm with intent to commit an indictable offence is provided for in section 16 of the 1969 Act. On 3 May 2016 the US authorities were advised of the error and that the investigation was in respect of an offence under section 16 for which the maximum period of imprisonment was fixed at 14 years.

[14] The ILOR asserted that the applicant had been convicted of armed robbery in 1975 and sentenced to a period of imprisonment of three years. In fact there was no evidence to support the assertion that there was any such conviction and the US authorities were so advised on 15 June 2016. On the same date the US authorities were advised that the date of the conviction for the offence of membership of a proscribed organisation was not 1975 but 9 December 1974.

[15] Although the proceedings in the United States were sealed the PPS asked the US authorities to unseal certain submissions made in the application. As a result we have been provided with a copy of a submission to the court made by the US Government on 16 June 2016 at 8.37am correcting these errors in advance of the issue by the court of its Order later the same day. In accordance with its usual practice the US court carried out an *in camera* review of the material and assessed whether it should make the requested disclosure by reference to the test of standard relevance. By its Order the court made available portions of the interviews and these were collected on behalf of the PSNI and transmitted to Northern Ireland initially into police custody.

[16] There were two further matters which occupied some of the affidavit evidence. The applicant sought to support his contention that he was the victim of

the bomb attack at Rugby Avenue Belfast with an affidavit from the householder supporting his contention that the attack was conducted by loyalists. The PSNI response is that this is not consistent with the intelligence information received by them. Secondly, the applicant raised an issue about whether there was in fact a continuing investigation in respect of the charge of membership of a proscribed organisation. He had been convicted of an offence contrary to the 1973 Act in December 1974. In 1982 he had been charged with membership of the IRA between 31 December 1974 and 1 January 1976 but was acquitted in 1983. That acquittal was not referred to in the ILOR. The PSNI case was that he was a member during the period 28 January 1976 to 1978. It was alleged that this covered the period of the bombing, an allegation that he had debriefed members of the IRA detained for questioning by the security forces, that he was an officer in the Provisional IRA and his involvement in the murder of one person and the attempted murder of three others on 27 February 1976.

[17] On foot of a direction from this court the US authorities were provided with affidavits from the PSNI and the PPS dealing with the errors and the issues raised at paragraph [16] above which were the subject of a further government submission to the US court on 19 August 2016 before the materials were collected. Affidavits from the applicant and his solicitor were also provided on the direction of the court to the US authorities in September 2016 although one affidavit which was confusingly marked was not included. The PPS confirmed to the US authorities that the PSNI could not verify the content of those affidavits other than to state that they would form part of the PSNI's ongoing criminal investigation and did not require correction of the ILOR.

Leave

[18] The applicant sought an injunction restraining the DPP or PSNI from taking any further steps in the utilisation of the interview materials requested from the United States Central Authority. An interim Order to that effect was made by the Divisional Court and leave was granted to pursue grounds raising the following issues:

(i) Contrary to section 7(5) a) of the Crime (International Cooperation) Act 2003 ("CICA") the DPP had no reasonable grounds for suspecting that any or all of the specified offences had been committed by the applicant or that any investigation was being carried out in respect of them in advance of the issuance of the ILOR for the applicant's interview materials;

(ii) The DPP failed to satisfy himself that the doctrines of *autrefois acquit* and *autrefois convict* were not applicable to any of the specified offences prior to the issuance of the ILOR;

(iii) The DPP failed to promulgate guidelines or to have regard to other published guidelines relating to the proper approach to be adopted with respect to International Letters of Request;

(iv) The PSNI and DPP had not acted in good faith and there was a breach of the duty of candour by the PPS, particularly in not transmitting to the United States Central Authority exculpatory material provided by the applicant;

(v) The PSNI had acted unreasonably by engineering an investigation into moribund offences or offences which had already progressed to conviction or acquittal for the sole purpose of obtaining the relevant materials.

Mr Lavery QC and Mr Dornan appeared for the applicant, Mr Coll QC appeared with Mr Sayers for the PPS and Mr McGleenan QC appeared with Mr Egan for the PSNI. We are grateful to all counsel for their helpful written and oral submissions.

Submissions

[19] For the purposes of this case it was common ground that the DPP had to have reasonable grounds to suspect that an offence had been committed and was being investigated before issuing the ILOR. By virtue of section 7(2) of CICA the assistance requested had to relate to evidence sought for use in that investigation. The applicant maintained that there were no reasonable grounds to suspect that the applicant had committed the offence of attempted murder or possession of explosives with intent to endanger life in relation to any bomb incident in Rugby Avenue, Belfast.

[20] The first basis for the submission concerned the date of the incident. The ILOR stated that in 1976 the police received information that the applicant was involved in a bomb attack on a house in Rugby Avenue, Belfast. No specific date for the attack was stated. The police report dated 3 September 2014 which requested the ILOR was eventually produced on discovery. It indicated that intelligence was received on 6 February 1976 that the applicant was believed to have been involved in a pipe bomb attack on a house at Rugby Ave, Belfast.

[21] In his second replying affidavit Detective Chief Inspector Montgomery of the Legacy Investigations Branch of the PSNI asserted that the bomb attack occurred on that date. It is not disputed that the applicant was in fact in police custody for the entire day on 6 February 1976. An affidavit on behalf of the relevant householder in Rugby Avenue was lodged on behalf of the applicant. This disclosed that a pipe bomb exploded at her house on 10 January 1976. The applicant had been visiting the house, left approximately five or six minutes before the explosion and had been detained by the Army shortly thereafter.

[22] The second contention advanced by the applicant was that the PPS was entirely disingenuous in stating that there were reasonable grounds for suspecting the applicant's involvement in the offence. It is the applicant's case that the pipe bomb was a loyalist attack in which he was the intended target. The householder has sworn an affidavit in which she says that a family member was told by police officers a few days after the bomb that it was carried out by loyalists from the Village

area of Belfast. It is apparent that no one has ever been made amenable for the offence.

[23] In any event the applicant claimed that there was no active investigation in relation to this offence at the time that the ILOR was submitted. Building on the contention that the bomb attack at Rugby Avenue was carried out by loyalists he contended that the ILOR was a device to gain access to the applicant's interview tapes to see whether they disclosed any criminal offences. If correct, that would lead to the inference that there was no ongoing investigation in respect of the applicant's conduct at the time of the request.

[24] It was in answer to that submission that the PSNI disclosed their written request to the PPS dated 3 September 2014 to pursue the ILOR. The PSNI request indicated that the applicant had given an interview to the BBC Spotlight programme in May 2014 in which he said:

> "I am one of the people who was interviewed, I am on tape, I am saying no more. I won't go into any detail, but I exposed myself to exactly the same risks as anybody else was exposed to…. Why would I put my own interviews in Boston College if I thought the police were going to maybe at some point look at them for to prosecute me?"

[25] The request indicated that there was intelligence information that the applicant was believed to have been involved in the pipe bomb attack on a house at Rugby Avenue, Belfast, evidence that he was found to have concealed an imitation firearm in his shoes on 29 June 1978 while *en route* to an appeal hearing for his murder conviction and information indicating that he had been an officer in the Provisional IRA. Since he feared that prosecutions might arise as a result of his disclosures on tape it was submitted on behalf of the PSNI that there was reason to believe that the tapes may assist in pursuing these serious crimes.

[26] The applicant submitted that any attempt to prosecute in relation to an attempt to escape as a result of the incident in June 1978 was doomed to failure. There was no escape and the so-called imitation firearm comprised two blocks of wood. There is no indication that those materials are even available now. In respect of the allegation that the PSNI were investigating an offence of membership of a proscribed organisation it is common case that the applicant was convicted of that offence on 9 December 1974. He was also acquitted in 1983 of a similar offence contrary to the 1978 Act for the period between 31 December 1974 and 1 January 1976. The investigation in this case concerns the period from 28 January 1976 to 1978. The initial failure of the PSNI and PPS to ascertain the applicant's acquittal is relied upon by the applicant as demonstrating the absence of any investigation.

[27] The CPS in England and Wales has provided guidance to prosecutors seeking international assistance. No such guidelines have been issued in this jurisdiction. In Re Rea's Application [2015] NICA 8 this court dealt with an application for judicial

review in respect of a decision by the PPS to issue an ILOR to the Central Authority of the USA in respect of material held by Boston College concerning another applicant. At paragraph [26] of its judgment the court noted the desirability of the provision of such guidelines in this jurisdiction:

> "During the course of the hearing counsel drew our attention to the existence of CPS guidelines relating to the proper approach to be adopted with respect to ILORs issued under the provisions of the 2003 Act. The court was informed that no such guidelines exist within this jurisdiction although it was not clear whether such an omission was as a result of a considered decision or simply a matter of being overlooked. We note that the Serious Fraud Office's "Guide to Obtaining Evidence from UK" was considered by the court in J P Morgan Chase Bank National Association and Others v The Director of the Serious Fraud Office and Others [2012] EWHC 1674 (Admin) and The Mutual Legal Assistance Guidelines issued by the Secretary of State were discussed in Ismail v Secretary of State for the Home Department [2013] EWHC 663 (Admin). The creation and publication of appropriate guidelines for this type of application might well assist designated authorities, practitioners and individuals likely to be affected by the exercise of the powers afforded by the 2003 Act in this jurisdiction bearing in mind that Article 8, as a qualified right, attracts the "quality of law" requirements of the Convention."

[28] The applicant noted that although the ILOR was drafted in advance of the judgment in Rea it was not actually prosecuted in the United States until well over a year later. Corrections to the ILOR continued even after the proceedings were initiated. The applicant relied particularly on the following passages from the CPS guidance on extradition:

> "The duty of candour
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> 35.51. Prosecutors must bear in mind that the description of the conduct contained in an extradition request will usually be the only information upon which the extradition proceedings (including decisions on such matters as the question of bail) will be based.
>
> 35.52. It is therefore of the utmost importance that the description of the conduct alleged is framed with the

greatest care; it is an essential protection to the person whose extradition is sought.

35.53. Whether or not evidence in support of the request is required to be submitted under the extradition scheme in question, the prosecution case must always be put accurately and fairly.

35.54 If there is a variance between the case as outlined in the extradition request and that which is subsequently put in court following the accused's extradition, there is a risk that the proceedings may be stayed on the grounds of abuse of process.

35.55. In order to comply with their duty of candour, prosecutors should if possible seek to review unused material before a request for extradition is submitted, or as soon as possible thereafter.

35.56. Once extradition has been requested, the prosecutor should continue to review the prospects of securing a conviction. This is important in all cases, but particularly where there is a significant delay between the extradition request being made and extradition. Where information comes to light after the request has been made that significantly alters the basis of the prosecution case, this should be disclosed to the foreign authorities handling the extradition request. If the further information is such as to weaken the prosecution case to the point where there is no longer a realistic prospect of conviction, this should be disclosed to the relevant authorities in the territory to which the request is addressed and the request withdrawn as matter of urgency. If appropriate, the accused's legal representatives in the UK and any victims/witnesses associated with the case should also be notified too.

35.57. Unused material that comes to light after extradition has been requested should be reviewed as a matter of urgency and consideration given as to whether it is appropriate to maintain/withdraw the request. ”

The CPS also published guidelines on international evidence and the applicant relied on the following:

"The following are starting points as to what should be taken into account by the prosecutor when exercising the discretion to request assistance:

- Legal basis for the request;
- Is the proposed enquiry permitted under CICA?
- Is it permitted under the relevant convention, treaty or other international instrument?
- Information from the investigator:
- Has the investigator given enough information about the case or the assistance to be sought?
- Is the nexus between the facts of the case and the assistance requested established? Particularly where coercive measures such as a search warrant are required, the executing judicial authority will want the letter of request to indicate clearly that such a measure is necessary, appropriate and proportionate.
- Nature of the request:
- Does the assistance sought amount to little more than a 'fishing expedition' or is it, as it should be, a request to obtain specific evidence? A letter of request must not be a request to a foreign authority for the latter to conduct an investigation on our behalf.
- What value will the assistance sought have for the investigation or proceedings? MLA is a time-consuming process, not only for the issuing authority (i.e. the prosecutor) but especially for the executing judicial authority, for whom it can be both resource intensive and costly. The success of the MLA process relies to a large extent upon goodwill. Prosecutors should explain in the letter of request what bearing the assistance sought will have upon the case.
- Can the assistance be obtained by other means? Prosecutors should not use MLA for enquiries that could be made by other means ensure that

the information cannot be obtained by other forms of co-operation.

Investigators

Prosecutors asked to issue a letter of request must know enough about the case under investigation not merely to be able to properly exercise their discretion but also because case planning and strategy is of particular importance whenever a case has an international dimension.

In cases with an international dimension the prosecutor must be fully familiar with the case even during the investigative stage. Prior to considering a letter of request the prosecutor should require a written report from the investigator containing the following information:

- Summary of the case which should satisfy the prosecutor that an offence has been committed or that there are reasonable grounds for suspecting this to be the case; to satisfy CICA section 7;
- Confirmation that the alleged criminality is under formal investigation; also to satisfy CICA section 7;
- Confirmation that the proposed enquiries have been authorised by a senior officer;
- Offences under investigation;
- Subject(s) of the investigation: full details including names, addresses, dates of birth, nationalities, passport numbers (if known);
- Assistance sought and its relevance to the investigation:
- Witness evidence must include full details of witnesses, preferably with an indication of their willingness to provide evidence; and a list of questions to be asked and topics to be covered;

- Banking evidence full details of the bank, its address, and relevant account numbers including IBAN number;
- Searches:
- Full address details;
- Details of how the place to be searched is connected with the suspected or accused person;
- Why the evidence is thought to be on the particular premises or in the possession of the particular person concerned;
- An explanation of why the material requested is considered both relevant and important evidence to the investigation or proceedings;
- Why the material could not be produced by less coercive measures such as by production order. The request should also include any other information which would be of operational use to the executing authority in connection with the execution of the request."

[29] It was submitted that these passages supported the applicant's overall complaints about the nature of the investigation. It was also submitted that the court should exercise careful scrutiny of the conduct of the PSNI and PPS since it was the PPS who had sought to ensure that the proceedings in the United States were under seal and therefore not open. Given the blatant errors in the ILOR, the failure to identify the applicant's acquittal in respect of membership of a proscribed organisation in 1983 and the piecemeal approach to correction the court should not be satisfied that the interference with the applicant's right to privacy was in accordance with law or necessary for the prevention of crime.

Consideration

[30] The Government of the United Kingdom entered into a treaty with the United States of America on the provision of mutual legal assistance on 6 January 1994. By virtue of that treaty assistance included the provision of documents and evidence. No issue is taken in this case in respect of compliance with any treaty obligations. The applicant notes that Article 7 of the treaty provides that the requested party shall keep confidential any information which might indicate that a request has been made or responded to if so requested by the requesting party. In this case the PPS asked that the proceedings in the United States be kept under seal in order to preserve that confidentiality.

[31] The PPS is a designated prosecuting authority for the purposes of section 7(5) of CICA. The statutory conditions enabling the PPS to request assistance are first, that it must appear to the PPS that there are reasonable grounds for suspecting that an offence has been committed, secondly, that the offence in question is being investigated and thirdly, that the assistance sought is assistance in obtaining evidence specified in the request for use in the investigation.

[32] We accept that the inference to be drawn from the materials is that there was no active investigation in respect of the applicant's alleged criminal conduct prior to the Spotlight interview in May 2014. We consider, however, that the submission by the PSNI to the PPS dated 3 September 2014 together with the affidavit evidence of Detective Chief Inspector Montgomery established that an investigation had been commenced between May 2014 and September 2014 and that in light of the intelligence material disclosed in that submission the first two conditions were satisfied. Mr Burnside indicated that he confirmed that the police were content with the information provided before he made the ILOR request. He considered the requested material and the PSNI investigation and the relevance of that material to that investigation. He was of the view that the requested material was likely to be of substantial value to the PSNI investigation.

[33] There was some understandable criticism of the suggestion that the requested material was likely to be of substantial value since Mr Burnside had no idea what it might contain and what benefit it might bring to the investigation. We are satisfied, however, that the evidence indicates that the assistance was sought in connection with the investigation, was judged to be likely to be relevant to the manner in which that investigation was pursued and that it was considered that its receipt would influence the course of the investigation. Accordingly the material sought was for use in the investigation and the third condition was also satisfied.

[34] In addition to the statutory tests there are two recent cases which discuss the further obligations to which a requesting state is subject. Rea's Application was similar to this case. In January 2012 a newspaper published an interview with Mr Rea in which he was described as the leader of the Red Hand Commando. The interview disclosed that he had provided an interview for the Belfast Project. In September 2014 the PPS issued an ILOR seeking access to the interview in connection with investigations into murder and other specific serious terrorist offences.

[35] It was contended that Article 8 of the Convention was engaged in respect of private life. The court noted the decision of the Divisional Court in England and Wales in R (Hafner) v City of Westminster Magistrates' Court [2009] 1 WLR 1005 approving the proposition in Amann v Switzerland (2000) 30 EHRR 843 that public authorities which obtained documents by compulsion engaged the right to respect for private life and correspondence in respect of each step of such measures (i.e. obtaining, storage and subsequent use of the material).

[36] The court rejected the submission that it was necessary for the requesting authority to establish that the material was of substantial value, a test which had been imposed in respect of domestic freezing orders under section 10(3) of CICA. Since the matters in question were still at the investigation stage the PSNI could not identify specific aspects of the material which may or may not be relevant to the offences being investigated other than that it purported to be an account of terrorist activity and that there was an allegation that the applicant was a leading member of such a group which had claimed responsibility for the commission of serious terrorist offences.

[37] In examining what constituted evidence the court relied on the observations of Simon Brown LJ in R v Secretary Of State ex p Fininvest Spa [1997] 1 WLR 743 in respect of the predecessor legislation:

> "Inevitably there is some flexibility in the whole concept of evidence…..When, therefore, one is speaking of 'evidence' in the course of a criminal investigation, the permissible area of search must inevitably be wider than once that investigation is complete and the prosecution's concern is rather to prove an already investigated and 'instituted' offence"

Those observations are plainly relevant where, as here, it is contended that the request made by the PSNI constituted a "fishing expedition".

[38] The court concluded that the statute imposed a standard of substantial value to the investigation in respect of access to bank accounts under section 43 and domestic freezing orders under section 10 but no such standard could be implied into other requests made under section 7 of CICA. It considered the following matters relevant to any argument that any interference with Article 8 did not strike a fair balance:

> "(*1*) The clear statutory conditions specified in section 7 of the 2003 Act are satisfied insofar as the DPP is a designated authority, there are reasonable grounds for suspecting that offences have been committed and proceedings in respect of those offences are being investigated.
>
> (*2*) The ILOR confirms at paragraph 11 that the PSNI has evidence and information indicating that the applicant has a long involvement in organising and participating in terrorist activities in Northern Ireland including the specific offences set out therein.
>
> (*3*) The authorised representative of the PPS with responsibility for the preparation of the ILOR has

> confirmed on affidavit that he has addressed his mind to the issue of nexus and relevance in making the request for the Boston College materials provided by the applicant and, that, in the light of the material of which he was made aware it was likely that the Boston College material would assist in the investigations.
>
> (*4*) In this case the material sought has been the subject of judicial consideration by the District Court in Massachusetts which conducted an *in camera* review pursuant to the principles laid down by the Court of Appeal in United States v Trustees of Boston College (2013). In so doing that court will have applied the ordinary standard of relevance before determining that all of the materials should be provided. There has been no appeal against that decision."

These protections are remarkably similar to those in this case and the court concluded that even on the assumption that the issue of the ILOR may have infringed the applicant's right to privacy it was entirely satisfied that any such interference was in accordance with law and necessary in the interests of the prevention of crime.

[39] The core of the applicant's complaint was that there had been a breach of the duty of good faith and that a duty of candour had been owed to the applicant which had also been breached. As evidence of the breach of good faith the applicant relied first on the errors within the ILOR. No explanation was offered for the inclusion of the allegation of conviction of armed robbery which it is now accepted is incorrect. There is, however, no basis for any suggestion that the alleged conviction was material to the decision that the requested court had to make. The conviction did not relate directly to the offences in respect of which the interview tapes were sought and formed at most part of the background. That strongly pointed in the direction of careless error rather than bad faith. The reference to the wrong section of the 1969 Act again showed a surprising degree of carelessness in relation to such an important document. The mistake was relevant to one of the offences being investigated but it is difficult to see any way in which it harmed the interest of the applicant. The substance of the offending behaviour alleged was set out in the ILOR and it was corrected prior to the US court's decision. This was clearly a careless error but not an indication of bad faith.

[40] The applicant pointed to the secrecy attaching to the process and complained about the reluctance of the respondents to disclose the ILOR until late in the proceedings. We do not accept that the preservation of confidentiality in the course of a criminal investigation is evidence of a breach of the duty of good faith but we

are satisfied that the content of the ILOR could and should have been disclosed at an earlier stage in these proceedings.

[41] We certainly agree that there was a disappointing lack of care in the preparation of the ILOR but we do not accept that evidence of such a lack of care translates into breach of the duty of good faith which we accept applies. The applicant sought to undermine the evidence that an investigation was ongoing and that the PPS had reasonable grounds for requesting the evidence in connection with an investigation into offences committed by the applicant by adducing evidence from him and the householder in Rugby Avenue supporting the identification of the culprits as loyalists. The basis, however, for the investigation of the applicant's involvement in the bomb attack is intelligence based. The fact that exculpatory evidence was introduced on behalf of the applicant did not diminish the importance of the intelligence led evidence.

[42] The submission of the PSNI to the PPS dated 3 September 2014 was clear evidence that an investigation into the applicant's criminal conduct was ongoing, that it was largely intelligence based, that it concerned offences in connection with the bomb attack at Rugby Avenue in 1976, the circumstances in which the applicant had certain items in his possession while being transported from the prison in 1978 and his alleged membership of the Provisional IRA. We do not accept that the criticisms set out above provide any basis for the conclusion that there was a breach of the duty of good faith. The offences in respect of which the materials were to be used had to be set out comprehensively since any use in respect of other offences was prohibited by section 9(2) of CICA unless the requested authority consented to that use.

[43] The applicant also contended that there was a duty of candour requiring the disclosure to the requested state of any exculpatory material available to the investigators. It is common case that the first two affidavits of the applicant and his solicitor were available prior to 16 June 2006 when the US court made its decision.

[44] We do not accept that the respondents were subject to such a duty in respect of disclosure for the reasons set out in R (Unaenergy Group Holding Pte Ltd) v Director of the Serious Fraud Office [2017] EWHC 600 (Admin). In this jurisdiction by virtue of section 32(1)(d) of the Police (Northern Ireland) Act 2000 it is the general duty of the police to take measures to bring the offender to justice where an offence has been committed. In doing so the investigation will often disclose inculpatory and exculpatory material and it is the responsibility of the police to conduct its investigation by reference to all the evidence.

[45] Where an ILOR is requested, that may be for an inculpatory or exculpatory purpose. The use to which the material is put is clearly a matter for the police. The requested state has no function in determining how the material is used although in this case the domestic law of the requested state required the application of a standard relevance test before authorising disclosure. The duty of good faith applies to the requesting authorities and would be breached in circumstances where the

request relied upon evidence which had been so undermined by other material that it did not provide a *bona fide* basis for the investigation.

[46] That is not this case. The material upon which the police rely for the pursuit of this case is intelligence material. The applicant contends that the intelligence material is mistaken but that does not undermine the relevance of the intelligence material to the investigation. Since the exculpatory material advanced by the applicant could not undermine the relevance of the request for the investigation the duty of good faith did not require its disclosure.

[47] The court in Rea's Application considered that the creation and publication of appropriate guidelines for this type of application might well assist those likely to be affected by the exercise of the powers afforded by the 2003 Act in this jurisdiction bearing in mind that Article 8 attracted the quality of law requirements of the Convention. No such guidelines have subsequently been introduced. It is common case that the ILOR in this case was issued prior to the delivery of the judgment in Rea although the matter was prosecuted before the US court after the Rea judgment. We agree that the publication of such guidelines would be of assistance and would encourage the PPS to take up the suggestion made by Coghlin LJ. It is, however, clear that the court in that case considered that the quality of law requirements of the Convention were satisfied and we also take the view that the statutory provisions together with the relevant case law are sufficient to satisfy those requirements.

[48] We have, however, reviewed those parts of the CPS guidance upon which the applicant placed particular emphasis. The first set of guidelines relates to extradition cases and is entitled "The Duty of Candour". It requires that the conduct alleged is framed with the greatest care and the prosecution case must always be put accurately and fairly. We have already criticised the lack of care in respect of the background materials but the conduct alleged in the prosecution case has satisfied those tests. The next part of the extradition guidance deals with the requirement to keep the case under review and if further information is such as to weaken the prosecution case to the point where there is no longer a realistic prospect of conviction this should be disclosed to the relevant authorities in the requested state. In a similar passage it is indicated that consideration should be given in light of new information as to whether it is appropriate to maintain or withdraw the request. We do not consider that the exculpatory material provided by the applicant required such a reconsideration. Even if these guidelines applied, which they do not, we do not consider that they assist the applicant.

[49] In respect of the guidelines applicable to requests for international assistance the guidelines indicate that there should be a nexus between the facts of the case and the assistance requested. If coercive measures such as a search warrant are required the letter of request should indicate clearly that such measures are necessary, appropriate and proportionate. The guidance indicates that the request should relate to specific evidence rather than being a "fishing expedition". The request in this case was in our view necessary, appropriate and proportionate in the investigation of crime and was in respect of specific evidence.

[50] The guidance indicates that a summary of the case should be available which satisfies the prosecutor that an offence has been committed or that there are reasonable grounds for suspecting this to be the case. Confirmation is also required that the alleged criminality is under formal investigation. As set out above we are satisfied that the PSNI request of 3 September 2014 satisfied those tests. It is also indicated that an explanation of why the material requested is considered relevant and important evidence and could not be produced by less coercive measures is necessary. The memorandum of 3 September 2014 fairly read plainly indicates why the material was considered relevant and important. It was suggested that there should have been a request to this applicant to consent to the provision of the material but it is clear that the judgement that this applicant who had previously resisted attempts to secure such evidence in other cases would do the same in his own case was plainly correct. We do not consider that there is anything in the CPS guidance which raises any issue of unlawfulness in respect of this request.

[51] The other issue raised in Rea was the engagement of Article 8. Assuming as was the case in Rea that there is an interference with the private life of the applicant we consider that it is for the purpose of the prevention of crime, that it is in accordance with law and that this internationally recognised system provides the only method of securing the material. The interference in this case is potentially limited by the need to show relevance in the requested state, the obligation under the statute to return the material in the event that it is not used and the application by the PPS of the evidential and public interest tests before it could be used in a prosecution. The public interest in the investigation and, if appropriate, prosecution of serious terrorist offences significantly outweighs the interference with private life in this case.

Conclusion

[52] We have concluded:

(i) At the time of the written request by the PSNI to the PPS on 3 September 2014 an investigation into the applicant's criminal involvement in the explosion at Rugby Avenue, Belfast, his possession of an imitation firearm and his membership of the IRA was ongoing and continues;

(ii) The PSNI and the PPS sought the interview tapes for use in those investigations;

(iii) The errors in the ILOR were due to a distinct and surprising lack of care on the part of the PSNI and the PPS;

(iv) We do not consider that the errors in the ILOR were indicative of bad faith;

(v) We do not consider that the errors in the ILOR were material to the request except insofar as the wrong section of the 1969 Act was included and that was corrected before the Order of the US court;

(vi) We do not consider that there is a duty of candour which required the disclosure by the PPS to the US Central Authority of any exculpatory material put forward by the applicant;

(vii) We do not accept that the exculpatory material introduced by the applicant undermined the entitlement of the PSNI to investigate the matters contained in the intelligence material pointing to the involvement of the applicant in the offences;

(viii) We accept that there is a duty of good faith on the PPS and PSNI in respect of the pursuit of an ILOR request but we are satisfied that there was no breach of that duty;

(ix) The US District Court had no role in determining whether a particular line of PSNI enquiry was appropriate and in this case the exculpatory material upon which the applicant relies was not relevant to the determination of the request;

(x) As the exculpatory material did not undermine the basis of the request or suggest any bad faith in pursuing the ILOR its disclosure to the US authorities was not required

(xi) Although we are minded to accept that there was an interference with the private life of the applicant we are satisfied that there was no breach of Article 8 of the Convention.

[53] For the reasons given the application is dismissed.