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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

IN THE MATTER OF AN APPLICATION BY McNAMEE and McDONNELL LLP FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

McCLOSKEY J

I INTRODUCTION

[1] The Applicants have served Notice of Appeal against the order of this court dated 9th December 2009 whereby leave to apply for judicial review was granted on certain grounds and refused on others. This written judgment has been stimulated in consequence. The question of whether a valid appeal exists is addressed at a later stage of this judgment.

[2] The order against which the Applicants purport to appeal is the product of an oral *inter-partes* leave hearing of the kind which is commonplace in this jurisdiction. At the hearing in question, the Applicants were represented by senior counsel (Mr. Larkin QC) and the proposed Respondent, the Chief Constable of the Police Service of Northern Ireland (for convenience, hereinafter described as "*the PSNI*")was also represented by counsel (Mr. McGleenan). The stance adopted on behalf of the PSNI was an entirely passive one, the reason proffered being that there was an uncompleted police investigation related to the challenge. In the events which ensued, neither party referred the court to any statutory provision or decided case, reported or unreported.

II THE JUDICIAL REVIEW CHALLENGE

[3] In the Statement filed under Order 53, Rule 3 and accompanying affidavit, the Applicants describe themselves as a firm of solicitors. The Statement formulates the impugned PSNI decision in the following terms:

> "*A decision of the* [PSNI] *made on or about 27th October 2009 whereby it determined that an arrested person could not be afforded access to a solicitor of the Applicant firm*".

As appears from paragraph 2 of the affidavit sworn by Mr. McNamee, described as the principal in the solicitors' firm in question, it is asserted that the impugned decision was that a detained person was not to be afforded access to *Mr. McNamee* for a purpose described as "*to represent him during police interview*".

[4] On the basis of the aforementioned affidavit, it appears that the context within which the impugned decision unfolded was stimulated by the arrest of one Mr Creegan on 27th October 2009. He is described as a former bank manager and it is averred that his arrest was based on a suspicion of involvement in fraud and money laundering offences. The affidavit continues:

> "*Initially, I believe that he was questioned without any solicitor …* [and] *later advised and assisted by Mr. Kieran Rafferty, solicitor of Rafferty and Company …*
>
> *However, later that week, there were suggestions from Mr Creegan's family that he had requested a solicitor from my firm to attend upon him while he was being questioned but that, for some reason, this had not occurred*".

There follows an averment that an unidentified member of Mr. Creegan's family informed the deponent that "*… the police had informed Mr. Creegan that he could not have a member of my firm as his legal adviser*". While mindful of the Civil Evidence (Northern Ireland) Order 1997, I note, in passing, that this is triple hearsay. I would further observe that an averment deposing to another person's "*understanding*" is not in compliance with Order 41, Rule 5 of the Rules of the Court of Judicature, which requires that the "*sources and grounds*" of any deponent's averment of information or belief be specified. This is followed by certain double hearsay averments, the stated sources of the information being Mr. Creegan and Mr. Rafferty. The essence of these averments is that Mr. Creegan's request that the Applicants be contacted by the police to represent him was refused on the ground that they were "*deemed unsuitable*" because the deponent had previously worked for the firm of Tiernans (which is not disputed).

[5] The impetus for the initiation of these proceedings was a letter dated 3rd November 2009 to the PSNI and the response thereto. Bearing in mind that such letters are governed by the Protocol (infra), the language of the second paragraph of the former letter seems a little intemperate, particularly since the correspondent was clearly professing to be less than fully informed about the subject matter. At the stage when the letter was written, it appears that Mr. Creegan's legal representatives were solicitors other than the Applicants. Notably, the letter does not advance any

complaint on behalf of Mr. Creegan. Rather, the Applicants are the sole complainant: I shall address the implications of this presently. The letter demanded a reply by 4.30pm the following day and concludes in these terms:

> "*Please treat this letter as an abbreviated version of that prescribed by the judicial review pre-action protocol*".

It is unclear why only an *abbreviated* version of the pre-action letter required by the Judicial Review Court Protocol was transmitted. This is not explained in either the affidavit or the letter itself. It is clear from paragraph 11 of the Protocol that the "*standard form*" of the pre-application letter is to be employed. The letter fails to comply with the standard form in Annex A to the Protocol in several material respects. In the result, a *prima facie* violation of the Protocol has occurred. This will have to be fully explained by the Applicants in due course.

[6] The Applicants' letter dated 3rd November 2009 elicited a response by letter dated 11th November 2009, in which a Detective Chief Inspector stated, *inter alia*:

> "*We note the contents of your correspondence but, as you infer, Mr. Creegan is not a client of your practice so we are loath to enter into any detailed communications in respect of the investigation …*
>
> *Other legal representatives who having been involved in dealings with the subject suspect's transactions had been informed that in the interests of all parties and to avoid any potential conflict of interests did not represent the suspect……..Indeed we can confirm that we are receipt of a letter from one such firm being not only appreciative of the position but also offering assistance*".

The Applicants did not seek to engage with this reply in any way. They sought no elucidation or elaboration of its contents. Nor did they challenge the accuracy of the letter. Furthermore, they did not seek any clarification of the explanation proffered. Rather, the next step which they took was to initiate these proceedings. When the affidavit was sworn one week later, they stated that their firm was "*now*" representing Mr. Creegan.

[7] In paragraph 21 of the solicitor's affidavit, the deponent avers that he is "*… not entirely sure what this sentence is supposed to mean*", with reference to the sentence beginning "*Other legal representatives …*", reproduced above. Given this averment, I consider that it would have been manifestly preferable for the Applicants to rejoin to the PSNI letter dated 11th November 2009. Why they did not do so is unexplained. There was no detectable urgency preventing this. Regrettably, I must record that the Applicants' management of the pre-application correspondence in these proceedings was in clear disharmony with both the letter and spirit of the Protocol.

III THE GRANT OF LEAVE

[8] The Detective Chief Inspector's letter was the stimulus for the formulation of a total of seven grounds of challenge. In the event, in the circumstances outlined in paragraph [2] above, I was satisfied, notwithstanding some misgivings, that the threshold governing the grant of leave to apply for judicial review was overcome in respect of the following three grounds:

(a) Infringement of the Applicants' rights under Article 8 ECHR and/or Article 1, First Protocol.

(b) Infringement of the same ECHR rights in conjunction with Article 14.

(c) The intrusion of an immaterial consideration (or material error of fact) consisting of a belief that the Applicants had previously "*… been involved in dealings with the subject suspect's transactions …*".

I was persuaded that, by a narrow margin, the first and second of these three grounds disclosed a case fit for further investigation. Ditto the third, which is referable to paragraph 21(i) of the solicitor's affidavit. The grounds on which leave was refused are addressed in the ensuing paragraphs.

Wednesbury Unreasonableness

[9] There was no suggested refinement or dilution of the familiar ***Wednesbury*** standard in argument. Rather, this ground was advanced as unvarnished irrationality. In my view, whatever might be said critically of the impugned decision, it is not arguably irrational. An explanation to which this condemnatory label cannot arguably be applied has been advanced. While this explanation might conceivably prove to be legally defective in certain other respects, it is not, in my view, arguably infected by the extreme stigma of irrationality. The ***Wednesbury*** principle has several facets and, in the context of the present challenge, I consider that the facet which is in truth engaged is that reflected in the final ground of the Order 53 Statement – paragraph 3(e) – representing the third ground on which I have been satisfied that leave should be granted. A recent exposition of this dimension of the ***Wednesbury*** principle is conveniently found in the opinion of Lord Bingham in ***Re Duffy*** [2008] NI 152 and [2008] UKHL 4, paragraph [28]:

> "*I feel bound to conclude that the decision … was one which a reasonable Secretary of State could not have made if properly directing himself in law,* ***if seised of the relevant facts*** *and if taking account of considerations which, in this context, he was bound to take into account.*"

[My emphasis].

This passage neatly encapsulates that dimension of the ***Wednesbury*** principle which, in my view, is truly engaged in the present matrix.

Reasons

[10] The argument advanced at the leave hearing was that the impugned decision was invalidated by a failure to provide any or adequate reasons. This argument was couched in the terms of procedural unfairness. I considered it misconceived, firstly, because the impugned letter does not lack an explanation of the Applicants' complaint: see paragraph [6], *supra*. Moreover, by the terms of their affidavit, the Applicants profess to understand this explanation – incidentally, in a manner which harmonizes with the court's comprehension – and it is, therefore, intelligible. Thirdly, the context must be considered . Insofar as the proposed Respondent had any obligation to provide reasons for the impugned determination, I concluded, bearing in mind the context, that this was duly discharged.

[11] Whether the aforementioned assumption, which is in favour of the Applicants, is correct may arise to be determined in some future case. In this respect, it was not suggested that the PSNI were under any statutory duty to provide reasons of any kind for the impugned decision. Moreover, no authority was cited in support of any common law obligation to this end. Finally, the supreme importance of context falls to be considered. Any suggestion of an obligation on behalf of the PSNI, in circumstances where the liberty of the citizen is at stake and in the context of a live investigation into suspected serious crime, to engage in a process of disclosing information to a solicitors' firm in the position of the Applicants, inviting representations and then evaluating anything submitted in consequence, to be followed by a reasoned written decision, seems to me wholly unreal, impractical and demonstrably distant from what procedural fairness may truly require in such a context.

PACE Rights of Client

[12] Paragraph 3(d) of the Order 53 Statement recites:

> "*The PSNI's decision* ***was in breach of the arrested person's rights*** *to consultation with a solicitor of his choice at common law and/or pursuant to Article 59 of the Police and Criminal Evidence (Northern Ireland) Order 1989.*"

[Emphasis added].

Article 59 of PACE provides:

> *"**59.** [F1]— (1) A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time.*
>
> *(2 Subject to paragraph (3), a request under paragraph (1) and the time at which it was made shall be recorded in the custody record.*
>
> *(3) such a request need not be recorded in the custody record of a person who makes it at a time while he is at a court after being charged with an offence.*
>
> *(4) if a person makes such a request, he must be permitted to consult a solicitor as soon as is practicable except to the extent that delay is permitted by this Article.*
>
> *(5) In any case he must be permitted to consult a solicitor within 36 hours from the relevant time, as defined in Article 42(2).*
>
> *(6) Delay in compliance with a request is only permitted—*
>
> *(a) in the case of a person who is in police detention for a serious arrestable offence; and*
>
> *(b) if an officer of at least the rank of superintendent authorises it.*
>
> *(7) An officer may give an authorisation under paragraph (6) orally or in writing but, if he gives it orally, he shall confirm it in writing as soon as is practicable.*
>
> *(8) [F2Subject to paragraph (8A)] an officer may only authorise delay where he has reasonable grounds for believing that the exercise of the right conferred by paragraph (1) at the time when the person detained desires to exercise it—*
>
> *(a) will lead to interference with or harm to evidence connected with a serious arrestable offence or*

interference with or physical injury to other persons; or

(b) will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it; or

(c) will hinder the recovery of any property obtained as a result of such an offence.

[F3(8A) An officer may also authorise delay where he has reasonable grounds for believing that—

(a) the person detained for the serious arrestable offence has benefited from his criminal conduct, and

(b) the recovery of the value of the property constituting the benefit will be hindered by the exercise of the right conferred by paragraph (1).

(8B) For the purposes of paragraph (8A) the question whether a person has benefited from his criminal conduct is to be decided in accordance with Part 4 of the Proceeds of Crime Act 2002.]

(9) If the delay is authorised -

(a) the detained person shall be told the reason for it; and

(b) the reason shall be noted on his custody record.

(10) The duties imposed by paragraph (9) shall be performed as soon as practicable.

(11) There shall be no further delay in permitting the exercise of the right conferred by paragraph (1) once the reason for authorising delay ceases to subsist.

(12 Nothing in this Article applies to a person arrested or detained under the terrorism provisions."

[13] I considered this discrete ground of challenge manifestly unarguable, for the simple reason that Article 59 confers rights on detained suspects rather than solicitors. This seems to me to follow inexorably from the statutory language which, on elementary principles, must attract the same construction in every litigation context. Furthermore, the correctness of this proposition is confirmed in ***Coyle –v-***

Reid and Another [2000] NI 7 where precisely the same contention was rejected by the Court of Appeal. As recorded at p. 11:

> "[The] *major thesis was that the Appellant had a statutory right to be admitted to the police station in order to fulfill her functions under Article 59 of PACE of giving advice to her client and to exercise additional rights conferred upon her by the Code of Practice …*".

Rejecting this argument, Carswell LCJ stated, at p. 13:

> "*We do not find it helpful to analyse the relationship between the police and a solicitor visiting a client in a police station in terms of the solicitor's rights.* ***By the terms of PACE certain rights are conferred on a person detained in police custody, but none are specifically given to the solicitor.***"

[My emphasis].

At the leave hearing, the court enquired whether there is any authority either calling into question the proposition which I formulated during counsel's submissions or challenging the correctness of the decision in ***Coyle***. None was cited.

[14] During the leave hearing, I also drew attention to an *ex tempore* decision of the Divisional Court, in which Carswell LCJ presided, to the same effect. I would add that, in my view, the correctness of the decision in ***Coyle*** is confirmed by the decision of the House of Lords in ***Cullen –v- Chief Constable*** [2002] NI 375 and [2003] UKHL 39 where Lord Hutton, forming part of the majority, stated:

> "*[31] The right given by Section 15 to a person detained by the police to consult a solicitor is an important right which Parliament has expressly given to him*".

[Section 15 NIEPA 1987 is the statutory precursor of Article 59 PACE].

The speeches of both the majority and the minority speak consistently of the *right conferred on the detainee*. This central theme seems to me irreconcilable with any suggestion that a detainee's putative solicitor has standing to invoke an alleged violation of Article 59 as a ground for applying for judicial review. I consider this misconceived. While I decline to predict that the court would *never* in some future case be persuaded that someone other than the detained person (for example, the parent of a detained child) *might* have standing to assert an infringement of Article 59 in an application for judicial review, I conclude without hesitation that the Applicants have no such standing in the present case - and no argument to the contrary was developed.

[15] The language of Section 18(4) of the Judicature (Northern Ireland) 1978 is "*sufficient interest*". In the present proceedings, the only interest in the impugned decision which is advanced is that of the Applicants. It is framed in terms exclusive and personal to them. They do not purport to advance, protect or vindicate any other person's interest or rights. This is clear from their pre-application letter dated 3rd November 2009 and the grounding affidavit, in particular paragraphs 16-17 and 21. The Applicants bring these proceedings accordingly. Furthermore, bearing in mind the relief claimed in the Order 53 Statement, if the Applicants succeed ultimately it is in the highest degree unlikely that they will secure other than purely declaratory relief – and they would, on this hypothesis, be the sole beneficiaries thereof. The incongruity inherent in granting to *the Applicants* declaratory (or other) relief to the effect that *another person's rights* (under Article 59 PACE) were infringed is stark.

<u>Irrelevant Consideration</u>

[16] Paragraph 3(e)(i) of the Order 53 Statement avers:

> "*The PSNI took into account irrelevant considerations, namely …*
>
> *its own view as to whether or not the Applicant firm was conflicted …*".

This discrete ground is traceable to the penultimate paragraph of the Detective Chief Inspector's letter dated 11th November 2009. Notably, this ground of challenge does not assert any factual misdirection or error. The words "*conflict of interest*" are to be understood in their particular context. It is evident that, in simple terms, the correspondent was suggesting that it would be inappropriate for the detained person whose transactions were the subject of the suspected fraud and money laundering offences to be legally represented by a firm of solicitors believed to have connections with the suspect transactions. This suggestion seems unexceptional: it is clear that the police officers concerned were simply taking the eminently sensible and precautionary step of avoiding unnecessary complications in circumstances were they could not exclude the possibility that the Applicants might have some future involvement in their investigations, in whatever capacity.

[17] As this ground of challenge makes clear, what is in issue here is the "*view*" which the police formed of this matter. This view cannot, in my estimation, be challenged as arguably irrelevant. I consider that this "view" was plainly a permissible consideration, in the sense discussed in ***Administrative*** Law (Wade and Forsyth, 10th Edition), p. 321 and ***Re Findlay*** [1985] AC 318 (per Lord Scarman, at pp. 333-334). Further, it seems to me that this "*view*" formed part and parcel of the impugned decision, to be contrasted with a mere factor taken into account. I concluded that this ground of challenge is insubstantial and makeweight in nature and refused leave accordingly.

IV UNSUCCESSFUL GROUNDS: CONCLUSION

[18] It is unfortunate that this matter may be proceeding to the Court of Appeal (in whatever guise) at this early stage, having regard to the manner in which the case was presented, as recorded in paragraph [2] above, with the consequence that the court received no assistance on the various issues of law addressed in this judgment. Furthermore, though given an opportunity to rectify this following the leave hearing and before preparation of this judgment, both parties, surprisingly, declined to engage further with the court. I am mindful, of course, of the nature of the leave threshold, which is conveniently formulated in the joint opinion of Lords Bingham and Walker in ***Sharma –v- Antoine*** [2006] UKPC 57 and [2007] 1 WLR 780, in paragraph 14(4):

> "*The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy …*
>
> *But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application …*
>
> *It is not enough that a case is potentially arguable …*".

While a brusque and summary approach may be appropriate in certain leave applications, practitioners are well aware that others can involve a more detailed examination of the issues. This was one such case, as the terms of this judgment make clear. I consider that there was nothing unforeseeable about the exploration of the issues in which the court chose to engage. While a request for an adjournment (which would, of course, have been granted) was one conceivable possibility in these circumstances, none was made. The costs implications of conducting litigation in this manner are disturbing. It is opportune to remind all practitioners of the overriding objective enshrined in Order 1, Rule 1A, which has long had an acknowledged application beyond the framework of the Rules of the Court of Judicature.

V LEAVE TO APPEAL?

[19] As recorded at the outset of this judgment, the outcome of the leave hearing in this matter was an order granting leave to apply for judicial review on specified grounds and refusing leave on others. The Applicants are now purporting to challenge this order in the Court of Appeal. This raises the question of appeal

rights. It seems to me that there are two competing possibilities. The first is that there is an automatic right of appeal. The second is that no appeal lies without the permission of this court or the Court of Appeal. Through a second invitation from the court, the parties were invited to make submissions on this issue. Both declined to do so. Accordingly, the court received no assistance on this issue either. I repeat the concerns expressed in paragraph [18] above.

[20] The subject of appeals from the High Court to the Court of Appeal is regulated by Section 35 of the Judicature (Northern Ireland) Act 1978 ("*the 1978 Act"*), which provides:

> *"35 (1) Subject as otherwise provided in this or any other statutory provision, the Court of Appeal shall have jurisdiction to hear and determine in accordance with rules of court appeals from any judgment or order of the High Court or a judge thereof.*
> *(2) No appeal to the Court of Appeal shall lie-*
>
> *(a) except as provided by the following provisions of this Part from any judgment of the High Court in any criminal cause or matter;*
> *(b) from an order allowing an extension of time for appealing from a judgment or order;*
> *(c) from an order of a judge giving unconditional leave to defend an action;*
> *(d) from an order or judgment of the High Court or any judge thereof where it is provided by or by virtue of any statutory provision that that order or judgment or the decision or determination upon which it is made or given is to be final ;*
> *(e) from a decree absolute for the dissolution or nullity of marriage by a party aggrieved thereby who, having had time and the opportunity to appeal from the decree nisi on which the decree absolute was founded, has not appealed from that decree nisi ;*
> *Judicature (Northern Ireland) Act 1978 c. 23, 19*
> *(f) without the leave of the court or judge making the order. from an order of the High Court or a judge thereof made with the consent of the parties or as to costs only;*
> *(g) without the leave of the judge or of the Court of Appeal, from any interlocutory order or judgment made or given by a judge of the High Court, except in the following cases namely: -*
>
> > *(i) where the liberty of the subject or the custody of minors is concerned;*

(ii) where an injunction or the appointment of a receiver is granted or refused;
(iii) in the case of a decision determining the claim of any creditor or the liability of any contributory or the liability of any director or other officer under the Companies Act (Northern Ireland) 1960 in 1960 c. 22 respect of misfeasance or otherwise ; (N.I.).
(iv) in the case of a decree nisi in a matrimonial cause or a judgment or order in an admiralty action determining liability;
(v) in the case of an order on a special case stated under the Arbitration Act (Northern Ireland) 1937; 1937 c. 8 (N.I.).
(vi) in such other cases as may be prescribed being cases appearing to the Rules Committee to be of the nature of final decisions;

(h) from the decision of the High Court on any question of law, whether on appeal or otherwise, under sections 107 to 136 of the Representation of the People Act 1949; 1949 c. 68.
(i) from a decision granting or refusing a certificate under section 12 of the Administration of Justice Act 1969. 1969 c. 58.
(3) An order refusing unconditional leave to defend an action shall not be deemed to be an interlocutory order within the meaning of this section.
(4) Subject to subsection (3), any doubt which may arise as to what orders or judgments are final and what are interlocutory shall be determined by the Court of Appeal.
(5) Notwithstanding any provision of this section or of any other statutory provision, where any decision of a court in Northern Ireland involves the decision of any question as to the validity of any provision made by or under an Act of the Parliament of Northern Ireland or a Measure of the Northern Ireland Assembly and the decision is not otherwise subject to any appeal 20 c. 23 Judicature (Northern Ireland) Act 1978 to the Court of Appeal or the House of Lords an appeal shall lie to the Court of Appeal by virtue of this subsection.
(6) Where under any statutory provision passed or made before the commencement of this Act an appeal, either by way of case stated or upon a point of law only, lies from any lower deciding authority to the High Court or to a judge of the Supreme Court and the decision of any such court or judge is expressed to be final, such appeal shall lie

> *instead to the Court of Appeal, and the decision of that court shall be final."*

Subsection (2)(g) is potentially applicable to the order made in the present case.

[21] Thus by virtue of Section 35(2)(g) of the Judicature Act, an appeal to the Court of Appeal against an interlocutory order or judgment of the High Court requires the permission of either the court below or the appellate court. Related to this is Order 59, Rule 14(4), which provides:

> "*Where under these Rules an application may be made either to the court below or to the Court of Appeal, it shall not be made in the first instance to the Court of Appeal, except where there are special circumstances which make it impossible or impracticable to apply to the court below*".

Where the order of the High Court is interlocutory in nature, a more stringent time limit is engaged. The Notice of Appeal must be served within twenty-one days of the order or judgment in question, the period being calculated from the date of filing: see Order 59, Rule 4(1)(a). In contrast, in any other case the time limit is one of six weeks, per Rule 4(1)(c).

[22] Section 35(1)(g)(vi) contemplates the possibility of prescription by the Court of Judicature Rules Committee. This power has been exercised in judicial review proceedings: see the limited provision in Order 53, Rule 10 RCC , of no application in the present context. In England and Wales, the Rules Committee has exercised its corresponding power under Section 60 of the Supreme Court Act 1981. This resulted in the insertion of a new Rule 1A in Order 59, with effect from 1st October 1988. Notably, in Northern Ireland, the Court of Appeal is the final arbiter of what constitutes an interlocutory order, per Section 35(4) of the 1978 Act (*supra*).

[23] I consider the starting point to be the elementary proposition that the Court of Appeal has no *inherent* jurisdiction to entertain any appeal. The alternative formulation of this proposition, to the same effect, is that no litigant possesses any *implied or inherent* right to challenge the judgment of an inferior court by appealing to an appellate court. In my view, there is no right of appeal in any litigation context unless conferred by statute. Thus the answer to the question posed above must lie within the compass of Section 35, properly construed.

[24] The guiding principles set out immediately above find support in the following passage in Civil Proceedings in the Supreme Court (Valentine), where the author states, at paragraph 20.01:

> "*The substantive jurisdiction of the Court of Appeal is statutory and it has no inherent jurisdiction to hear an appeal where no statute confers it. It has no original jurisdiction, except on certain ancillary and procedural*

matters such as amendment, enforcement or contempt of its proceedings".

The author also endorses the elementary proposition that rules of court cannot confer a right of appeal. The overarching principle is expressed with particular clarity in Halsbury's Laws of England (4th Edition Re-issue) Volume 37, paragraph 1501:

> "*An appeal is an application to a superior court or tribunal to reverse, vary or set aside the judgment, order, determination, decision or award of an inferior court or tribunal in the hierarchy of courts or tribunals on the ground that it was wrongly made or that as a matter of justice or law it requires to be corrected.* ***A right of appeal is conferred by statute or other equivalent legislative authority; it is not a mere matter of practice or procedure and neither the superior nor the inferior court or tribunal nor both combined can create or take away such a right***".

[Emphasis added].

To like effect is the following passage in The Supreme Court Practice 1991, Volume 1, at paragraph 59/0/2:

> "*The constitution, jurisdiction and powers of the Court of Appeal are governed by the Supreme Court Act 1981, Sections 1-3, 15-17 and 53-58 …*
>
> ***The creation of a right of appeal is an act which requires legislative authority. Neither the inferior nor the superior tribunal nor both combined can create such a right.***"

[My emphasis].

[25] The guiding principles set out above are traceable through judicial authorities of some pedigree. These begin with ***Attorney General –v- Sillem*** [1864] 10 HL. CAS 704, where the question was whether Section 26 of the Queen's Remembrances Act 1854 created a right of appeal to the Court of Exchequer. Lord St. Leonards stated:

> "*Now it is clearly laid down that no right of appeal can be given except by express words …*
>
> *No such right can arise by implication or inference …*
>
> [P. 748] *Now I agree that to create such a right, it is not necessary to use the word 'appeal'. But some equivalent*

> *terms must be used. And if this be the rule where Parliament is executing its own purpose, how powerfully must it operate where it is delegating its legislative functions!* ***We have a right to expect a clear and unambiguous expression of its intention, open to no doubt or cavil, nothing left to interference or implication.****"*

[Emphasis added].

To like effect is the statement of Lord Wensleydale at pp. 755-756.

In ***Scottish Widows Assurance Society –v- Blennerhassett*** [1912] AC 281, the Earl of Halsbury formulated the governing principle in these terms (at p. 286):

> *"It is a principle of law that you cannot have an appeal unless there is either a pre-existing right of appeal at law or a right of appeal conferred by statute."*

[26] In ***White –v- Brunton*** [1984] QB 570, Sir John Donaldson MR reviewed the leading authorities and noted, in particular, the competition which had evolved between the so-called "order" and "application" approaches. He observed that in ***Salaman –v- Warner*** [1891] 1 QB 734, the Court of Appeal held that –

> *"… a final order is one made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation. Thus the issue of final or interlocutory depended upon the nature of the application or proceedings giving rise to the order and not upon the order itself. I refer to this as the 'application approach'"*.

Continuing, the Master of the Rolls stated (at p. 573):

> *"The court is now clearly committed to the application approach as a general rule …"*.

The Judicature Act does not attempt to define an interlocutory order. However, Mr. Valentine offers the following formulation [*op. cit.* paragraph 11.00]:

> *"An order is only final if made on an application which must determine the action however it is decided. Thus an order is interlocutory if the application has been or could have been decided in such a way that the action continues."*

[27] As noted by Professor Anthony, the question of whether an appeal lies to the Court of Appeal against an order of the present kind only with the leave of either

court is a point of procedure that is "*unclear*". [See Judicial Review in Northern Ireland, paragraph 3.32]. One can, of course, find instances where the Court of Appeal has entertained appeals of this *genre*. However, such cases provide no reliable guide to the correct answer. In ***Re Downes' Application*** [2006] NICA 24, the opportunity arose for the Court of Appeal to pronounce on this subject. However, in the particular circumstances, the court determined to defer the issue: see paragraphs [22] – [24], ending with the following statement by the Lord Chief Justice:

> "[Counsel] *accepted that it was open to this court to grant leave to the Appellant to appeal even if as was the case) no application had been made to the judge at first instance. We have concluded that if leave is required, we should grant it. We will defer for a future occasion, therefore, a final decision on the interesting argument that* [counsel] *has raised on this issue since we consider that rather fuller consideration of it than was possible on this appeal is warranted*".

Shortly afterwards, in ***Re Hill's Application*** [2007] NICA 1, the Court of Appeal considered another "appeal" of the present species, as appears from paragraphs [11] and [12]. It would appear from the judgment that the question of whether leave to appeal was required was not raised.

[28] This debate may also be informed to some extent by reflecting on the High Court's ability in applications for judicial review to permit initially unsuccessful grounds of challenge to be revisited at the substantive hearing. The legal rules governing this discrete issue appear to be judge made. In ***Smith –v- Parole Board*** [2003] EWCA 1014, Lord Woolf MR stated, at paragraph []:

> *"It is not unusual for a situation to arise even in the course of a hearing where it becomes apparent to the judge conducting the hearing that the interests of justice would be best served by the hearing taking into account arguments and matters which relate to a ground in respect of which permission has been refused. There are going to be situations where good sense makes it clear that the argument should be wider than it would otherwise be if it was confined to the grounds where permission had been granted. As long as the judge recognises the need for there to be good reason for altering the view of the single judge taken at the permission stage no further sensible guidance can be provided."*

This discrete issue was considered at some length by Girvan J in ***Re Drummond's Application*** [2006] NIQB 69, paragraph [6]:

"[6] The leave stage of a judicial review application serves as a useful check to ensure that an applicant has sufficient standing to bring an application and that the application is arguable. Under Order 53 rule 34 the court may direct or allow the applicant's statement to be amended on such terms as it thinks fit. Under section 18(2)(c) of the Judicature (Northern Ireland) Act 1978 where leave is obtained the grounds relied on and the relief granted shall be only those specified in the application. The court has under section 18 (2)(c) power to direct or grant leave for the application to be amended to specify different or additional grounds or relief. It is thus clear that in this jurisdiction the court has power to grant leave subject to striking out some of the grounds relied on and has power to permit amendment of the application to specify different or additional grounds. Whatever the earlier position may have been in England the position is similar now by virtue of CPR 54.12(1)(b) under which the court may give permission subject to conditions on certain grounds only. The law in the two jurisdictions is thus essentially the same. Some guidance as to the proper approach of the court in a case such as this is to be found in <u>Smith v Parole Board</u> [2003] EWCA 1014. In that case a prison applicant sought to challenge the Board's failure to hold an oral hearing on the basis of articles 5 and 6 of the Convention. At the oral hearing of his leave application the judge granted permission under article 6 but not under Article 5 at the substantive application the judge refused permission for the Article 5 ground to be argued even though three authorities were advanced of which the claimant had been unaware at the permission stage. The Court of Appeal allowing the appeal accepted that where, on an application for leave, the judge has heard detailed argument before the grant of permission the judge at the substantive hearing would require significant justification before taking a different view in respect of the grounds which the claimant sought to advance. However if, bearing in mind the interests of the defendant, good reasons are shown the judge can allow arguments to be advanced which relate to a ground upon which permission had been refused. This is not limited to cases where fresh material arises or where there has been material change of circumstances although of course there has to be real justification for adopting this course and the parties are obliged to give as much notice as possible for their full case and bring forward their full arguments from the start."

In short, where it is in the interests of justice to do so and good cause is shown, initially unsuccessful grounds can be reopened at the substantive hearing of an application for judicial review.

VI CONCLUSION

[29] In the present case, the court granted leave to apply for judicial review on limited grounds only. This order ,plainly, did not finally determine the proceedings. The Applicants' contention is that leave should have been granted on all of the grounds advanced. If this had been the outcome of the leave hearing, this alternative order would not have finally determined the proceedings either. Rather, in common with every leave hearing which does not result in an order of dismiss, the order made would simply have operated as a preliminary ruling. In my view, it follows that the order under challenge is interlocutory in nature. It operates as a prelude to a substantive hearing . It is properly described as a threshold order.

[30] I would add that while Section 35(2)(g) specifies certain exceptions to the requirement to obtain leave to appeal against an interlocutory order, none of these arises in the present instance.

[31] The effect of this conclusion is that there is no valid appeal in existence. Moreover, there will be no appeal unless either this court or the Court of Appeal grants leave to appeal. If the Applicants wish to seek leave to appeal, they will have to apply to this court first, by virtue of Order 59, Rule 14(4), unless they seek to make the case that there are "*… special circumstances which make it impossible or impracticable …*" to do so. No such circumstances are apparent at present. The upshot being that the "Notice of Appeal" is a nullity, an issue of extending time also arises, potentially engaging Order 3, Rule 5 and/or Order 59, Rule 15. Both parties will have the opportunity to address the court on this issue and any other consequential issues.

VII POSTSCRIPT – 26/02/10

[32] Following consideration of this judgment, the Applicants maintained the position that leave to appeal to the Court of Appeal against a judgment of the present *genre* viz. one entailing a partial grant and partial refusal of leave to apply for judicial review is not required. Notwithstanding, while adopting this stance, they nonetheless applied to this court for permission to appeal.

[33] I consider this to give rise to two issues. The first is whether an extension of time is required, having regard to Order 59, Rule 4(1). This Rule speaks of "*the date on which the judgment or order of the court below was filed*", calculating time from such date. The measurement is one of twenty-one days in the case of an interlocutory order and six weeks "*in any other case*" – subject to the specific types of order addressed expressly in the Rule. The Rules do not expressly regulate applications to the court for the grant of leave to appeal to the Court of Appeal. However, logically and by necessary implication, I consider that any such application must obviously

be made prior to the expiry of the twenty-one day time limit for serving Notice of Appeal.

[34] In the present case, the "*order*" drawn up following the oral *inter-partes* leave hearing was filed on 9th December 2009 while a written judgment, with reasons, was provided subsequently, on 16th February 2010. In these circumstances, it appears to me that no question of "*filing*" the judgment arises. While Rule 4(1) contemplates that, in certain circumstances, the *judgment* of the court below may be filed, in the present case an order has been duly drawn up and filed. No separate, independent filing of the judgment is required. Furthermore, the Judicial Review Office has confirmed that no act of filing of this judgment has occurred. Accordingly, the date of delivery of the written judgment does not, in my view, have any impact on the time period of twenty-one days, which began to run on 9th December 2009 and, accordingly, expired almost two months ago. The Applicants did not advance any argument to the contrary.

[35] It follows that the Applicants are driven to seek an extension of time for appealing. This engages the provisions of Order 3, Rule 5 and Order 59, Rule 15 of the Rules of the Court of Judicature. In these circumstances, the court is enjoined to consider the principles formulated by Lowry LCJ in ***Davis –v- Northern Ireland Carriers*** [1979] NI 19. The Applicants did not have any submissions to make with regard to the ***Davis*** principles. In the application of these principles to the present context, it seems to me that the main considerations are that a hearing on the merits of the issues addressed and determined in Chapter III of this judgment has taken place; that the prospective Appellant was given a further opportunity post-hearing to contribute to the court's determination of those issues; that the prospective Appellant was also given a full opportunity to contribute to the court's determination of the further, procedural issue considered and determined in Chapter V of this judgment; that the court must give due weight to the considerations of expedition, certainty and finality; that the court can take into account the overall conduct of the litigation by the Applicants, as highlighted above; and that the values and principles expressed in the over-riding objective enshrined in Order 1, Rule 1A of the Rules, in my opinion, militate against extending time in the particular circumstances.

[36] If the only issues in play were those considered and determined in Chapter III of this judgment, I would refuse the application to extend time. The court has ruled that the unsuccessful grounds of challenge are devoid of merit to the extent that they do not overcome the threshold of arguability and, having regard also to the factors identified in paragraph [35] above, an extension of time would not be warranted. However, I acknowledge that this judgment determines a further issue, in Chapter VI. I distinguish the court's determination of this discrete issue from its determination relating to the unsuccessful grounds of challenge. As the terms of this judgment make clear, the point decided in relation to the requirement for leave to appeal is one of some novelty, possesses a certain importance and will predictably have broader application. Furthermore, I recognise that I did not determine this

further issue in the *ex tempore* judgment delivered initially at the conclusion of the *inter partes* leave hearing. Thus the initial "Notice of Appeal" did not embrace it. Accordingly, having regard to these two factors, I exercise my discretion to extend time for applying to this court for leave to appeal.

[37] The second question to be addressed is whether leave to appeal should be granted. The decision whether to grant leave to appeal entails the exercise of a judicial discretion and the present context is not unlike that where a discretion is exercised on whether to state a case for the opinion of the Court of Appeal. As noted by McGonigal LJ in ***Woods –v- Armagh County Council*** [1972] NI 89, Palles CB stated in ***McQuade –v- McQuade*** [1881] 15 ILTR 49:

> "*I cannot state a case on a point in relation to which I myself have no doubt whatever in my own mind*".

Logically, having regard to the modest leave threshold, a refusal by the court to grant leave to apply for judicial review on a specified ground or grounds operates as a reflection of the court's confident evaluation of a manifest lack of merit and substance. Accordingly, in such a situation, to grant leave to appeal would, as a general rule, be intrinsically inconsistent with the court's rejection of the ground/s in question.

[38] In the present case, the decision on whether to grant leave to appeal overlaps with the first question, since both entail an evaluation of (*inter alia*) the importance of the issue/s which, it is said, should properly be considered by the Court of Appeal. In the particular circumstances of this case, consistent with the main reason given for extending time, I am prepared to grant leave to appeal. In my view, the only issue worthy of the grant of leave to appeal is the procedural issue determined in Chapter V of this judgment. If it were clear that it is open to this court to grant leave to appeal on a restricted basis, I would confine the grant of leave to this issue. However, this entitlement is not entirely clear and may require argument on some future occasion. In the particular circumstances, I shall leave it to the Court of Appeal to decide whether they wish to entertain the appeal on a more expansive basis and, if considered appropriate, to clarify the question raised immediately above. I take into account also that to grant leave at this stage will enable the Court of Appeal to process this matter in a more expeditious and cost efficient fashion, without fragmentation, and is, therefore, harmonious with the overriding objective.

[39] I would add the following observation. In cases where leave to appeal to any appellate court is a pre-requisite, the court below will almost invariably require to be satisfied that the point to be canvassed before the appellate court is of sufficient importance to justify the grant of permission. The first instance court acts as a filter and, clearly, the legislative intention is that there is a threshold to be overcome. The grant of leave to appeal will never be a formality. As a general rule, it seems to me unlikely that the court below will be disposed to grant leave to appeal in respect of an issue upon which the prospective Appellant has declined to fully and properly

engage, notwithstanding an express invitation from the court to do so. It is demonstrably incongruous that, having adopted this stance, the prospective Appellant should then seek to argue that the point thus neglected is one of substantial importance. It seems to me that, in most cases, this will contra indicate the propriety of granting leave to appeal. It follows that the grant of leave to appeal in the present case is, properly analysed, exceptional.

[40] Consequent upon the extension of time granted above and the grant of leave to appeal, the Notice of Appeal should be (a) redated and (b) served and filed by close of business on 5 March 2010, as it is presently a nullity. The application for judicial review is adjourned generally in the meantime. The costs of the hearing conducted on 25 February 2010 are reserved.