

Neutral Citation No. [2015] NIQB 60

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*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

Delivered: 30/06/2015

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Morgan's (Barry) Application [2015] NIQB 60

IN THE MATTER OF AN APPLICATION BY BARRY MORGAN  
FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE NORTHERN IRELAND  
LEGAL SERVICES COMMISSION AND THE FAILURE OF THE DEPARTMENT  
OF JUSTICE TO MAKE PROVISION FOR THE REPRESENTATION OF  
DEFENDANTS IN APPLICATIONS FOR LEAVE TO PRESENT A VOLUNTARY  
BILL OF INDICTMENT

Before: Morgan LCJ, Girvan LJ and Gillen LJ

**MORGAN LCJ (delivering the judgment of the court)**

[1] This is an application for judicial review of a decision by the Northern Ireland Legal Services Commission that the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 provide legal aid for defendants where an application by the Crown for leave to present a Voluntary Bill of Indictment is made in order to reverse a ruling by the trial judge disposing of some or all of the charges in respect of which the original legal aid certificate was issued by entering a direction of "No Bill" in respect of those charges. The applicant also seeks judicial review of the failure of the Department of Justice to make provision for his representation in an application for leave to present a Voluntary Bill of Indictment. This judgement is solely concerned with whether or not the application is a criminal cause or matter. Mr Macdonald QC and Mr Devine appeared on behalf of the applicant and Mr Philip

McAteer for the respondents and we are grateful to all counsel for their helpful oral and written submissions.

### **Factual background**

[2] On 20 December 2005 offences including conspiracy to rob and possession of firearms with intent to commit an indictable offence were committed (the 2005 offences) and several individuals were arrested, charged and convicted. They have all now served their sentences. In February 2009 the applicant was notified by his solicitors that police wanted to speak to him in connection with the 2005 offences. On 12 February 2009 he was arrested in respect of those offences but on 26 August 2009 the prosecution withdrew the charges against him.

[3] On 7 December 2011 the applicant was interviewed in connection with offences of conspiracy to rob and kidnapping which allegedly occurred on 31 October 2011. He was later charged with those offences and was further interviewed on 29 February 2012 in respect of the 2005 offences. In April 2013 he received a copy of the PE papers from the PPS which notified the applicant that it was the prosecution's intention to hold a preliminary enquiry in respect of both the 2005 and 2011 offences.

[4] In April 2014 the applicant was returned for trial at Downpatrick Crown Court. The charges included conspiracy to rob and possession of firearms and ammunition with intent to commit an indictable offence arising from the 2005 incident. On 18 September 2014 His Honour Judge Grant directed a "No Bill" on the 2005 charges. The remaining counts arising from the 2011 incident were fixed for trial on 2 February 2015.

[5] On 28 January 2015 the prosecution placed before the Crown Court at Downpatrick an application for leave to present a Voluntary Bill of Indictment in respect of both the 2005 and 2011 offences. The applicant submitted that the Voluntary Bill constituted fresh proceedings in respect of which legal aid was not available to him. On 2 February 2015 His Honour Judge Fowler adjourned both the trial and the Voluntary Bill application until June 2015 to enable the judicial review application to be pursued.

### **The submissions of the parties**

[6] Both parties accepted that the conventional test in this jurisdiction was that set out by Weatherup J at paragraph 9 of Re JR 14's Application [2007] NIQB 102:

"What is a criminal cause or matter? I define the test in these terms - Is the application before the Court ancillary or incidental to a substantive process which

places the Applicant at risk of a criminal charge or punishment before a Court?"

That test was approved by the Divisional Court in Re JR 27 [2010] NIQB 12.

[7] The substantive process in this case is the application for the Voluntary Bill and the judicial review application concerns the provision of free legal assistance to enable the applicant to defend that application. The provision of such assistance is expressly guaranteed by Article 6(3)(c) of the European Convention on Human Rights. On conventional principles such an issue is plainly ancillary or incidental to the underlying criminal proceedings.

[8] Mr Macdonald noted the historical position. The High Court has no original criminal jurisdiction but has consistently exercised some supervisory jurisdiction in assorted cases of a criminal character. The Judicature Act (Ireland) 1877 provided at Section 50 for the exercise of that High Court jurisdiction in relation to questions of law arising in criminal trials. He submitted that it was questionable whether the interpretation placed upon the phrase "criminal cause or matter" in Amand v Home Secretary [1943] AC 147 was really consistent with that historical background. He submitted that Amand did not attempt to define the meaning of the phrase or lay down governing principles.

[9] He submitted that the present state of the law was unsatisfactory. We agree with that view and this court indicated in JR 27 that there was no longer any need to maintain the distinction between civil and criminal causes or matters or to have different appeal rights in relation to them. This could be achieved by a relatively straightforward statutory amendment to the Judicature (Northern Ireland) Act 1978. Mr Macdonald submitted that the issue in this case was the statutory construction of the provision and had nothing to do with the criminal law or the jurisdiction of the Crown Court. He submitted that there was recent case law which supported the view that this should be dealt with as a civil matter. We now turn to those cases.

### **The case-law**

[10] The first of the decisions was that given by the House of Lords in Government of the United States of America v Montgomery [2001] 1 WLR 196. The issue in that case was whether a confiscation order and an earlier protective freezing or restraining order against a person in the High Court under the Criminal Justice Act 1988 in favour of the US Government following that person's conviction in the United States for fraud were orders in a criminal cause or matter. Lord Hoffmann gave the leading judgment. He indicated that in most cases it would be right to regard orders made by way of enforcement of orders made or to be made in criminal proceedings as part and parcel of those proceedings. He did not accept, however, that the nature of the proceedings in which the original order was made would necessarily determine whether the machinery of enforcement through the courts was

a criminal cause or matter. The consequences of an order in criminal proceedings may be a claim or dispute which is essentially civil in character. He concluded that the claim in question mirrored proceedings for civil debt recovery or enforcing a proprietary claim and did not, therefore, constitute a criminal cause or matter. Lord Hobhouse who gave the only other judgment suggested that the test involved asking whether the court making the order in question was exercising or claiming a criminal jurisdiction.

[11] Lord Neuberger reviewed this and a wide range of other jurisprudence in which this issue had been discussed in R(Guardian News and Media Limited) v Westminster Magistrates' Court [2011] EWCA Civ 1188. He concluded that the state of the law was less than satisfactory. He stated that any sort of final coherence in relation to the scope and effect of what constitutes a criminal cause or matter could only be provided by the Supreme Court. That case concerned an application by a newspaper for an order that it be provided with copies of various documents to which reference had been made by counsel but which had not been read out during the hearing of extradition proceedings. The court concluded that the newspaper's application was wholly collateral to the extradition proceedings themselves and that was highlighted by the fact that the original application was made by someone who was not a party to those proceedings and the order sought did not involve the court invoking its criminal jurisdiction or making an order which would have any bearing on the extradition proceedings.

[12] The third of the cases is Khalid Al Fawwaz v Secretary Of State for the Home Department [2015] EWHC 468 (Admin). Mr Fawwaz was on trial in New York on charges of conspiracy relating to terrorist attacks. The New York court asked the Secretary of State to disclose material relating to him said to be held by the Security Service. The Secretary of State refused to provide the material on national security grounds and Mr Fawwaz sought judicial review of her decision.

[13] By virtue of section 6 (1) of the Justice and Security Act 2013 the court seised of relevant civil proceedings may make a declaration that the proceedings are proceedings in which a closed material application may be made to the court. The judge found that the conditions for the making of such an order were satisfied and the only issue was whether these were civil proceedings. He concluded that the definition in the 2013 Act had to be interpreted in its statutory context and that context compelled the conclusion that this judicial review should not be excluded from the ambit of the Act. Accordingly he made the order.

## **Consideration**

[14] We do not consider that these cases give rise to a different approach to the question of whether proceedings constituted criminal cause or matter. They do, however, emphasise that in considering whether proceedings are incidental or ancillary to underlying criminal proceedings it is important to recognise that it is not

sufficient that the proceedings in question are collateral to the criminal proceedings. The answer to the question must also take into account the context in which the proceedings arise.

[15] Mr Macdonald submitted that the context in this case was the statutory construction of a provision in the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 which had nothing to do with the criminal law or the jurisdiction of the Crown Court. We do not agree. The context of this case is the requirement for the applicant to be afforded the opportunity for free legal representation in the proceedings against him before the Crown Court. This is one of the specific fair trial rights protected by Article 6 of the ECHR. The issue may turn on the construction of the relevant statutory provision but its resolution is directly relevant to the conduct of the Crown Court proceedings.

[16] In support of the view that this was not a criminal cause or matter the applicant and the respondent drew attention to the decision in Re Brownlee [2014] UKSC 4. In that case the issue concerned the sufficiency of the fees payable in relation to certain types of work in the Crown Court. The context was, therefore, essentially civil in character. The impact upon the applicant arose from the fact that none of the lawyers approached by him were willing to act for the available fee. There is no doubt that the applicant's involvement in the criminal process was what gave him standing but in our view there is a perfectly respectable argument for the view that the issue in that case was collateral to the criminal proceedings.

## **Conclusion**

[17] This is another example of wasteful litigation concerned with whether or not proceedings constitute a criminal cause or matter. There is a straightforward legislative solution to avoid such litigation. We acknowledge that the parties in this case have sought to persuade the court to a legal policy which would confine the supervision of the High Court to something similar to that which was contemplated by the Judicature (Ireland) Act 1877. We do not consider that we are free to take that approach. We are satisfied that these proceedings constitute a criminal cause or matter.