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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Nelson's (Allen) Application [2013] NIQB 131

AN APPLICATION BY ALLEN NELSON FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE POLICE SERVICE OF NORTHERN IRELAND

TREACY J

Facts

[1] Mr Nelson served with the police Reserve from 21 November 1983 until 5 September 2011.

[2] When the Reserve was phased out Mr Nelson applied for employment with Resource which required PSNI vetting. Employment with 'Resource' would have entailed the Applicant working on/guarding the police estate. The relevant police vetting required was 'Level 2'. As part of the application for security clearance the Applicant specifically consented to his application being checked against police records etc.

[3] On 1 December 2011 the PSNI informed Mr Nelson that he had failed police vetting. No reasons were given however the letter did advise the applicant that an appeal mechanism was available which would entail a fresh decision on eligibility taken by a senior police officer.

[4] On 14 December 2011 the Applicant invoked the appeals process by way of letter.

[5] On 15 February 2012 the PSNI advised the Applicant by way of letter that the vetting policy was being reviewed and that his appeal would be dealt with at the conclusion of that review process.

[6] On 29 March 2012 the Applicant was advised by letter that a meeting with a Detective Chief Inspector would be required to advance the vetting issue.

[7] This meeting was held on 24th April 2012 with Detective Chief Inspector Ball.

[8] In the course of this meeting DCI Ball asked Mr Nelson why he thought he had failed the vetting process. Mr Nelson offered a suggestion however this suggestion was not correct. DCI Ball informed Mr Nelson that the reason for his failure was that:

> 'Intelligence indicates that you, whilst a serving officer, had been associated with a known criminal and that further to this intelligence indicates that you passed information to this individual'.

DCI Ball indicated that this information related to 2005. The Applicant deposed that he was never subject to any disciplinary action as a result of this intelligence.

[9] At the end of the meeting DCI Ball indicated that he would write to Mr Nelson when the notes were typed up. However, the notes were not made available to the Applicant until Sept 2012.

[10] Some days after this meeting Mr Nelson contacted DCI Ball by phone as he 'remained dissatisfied about the information provided to [him] in the course of the appeal process'. Mr Nelson further deposed that during this conversation he asked DCI Ball why his contracts would have been renewed (they were renewed every 3 years between 1983 and 2005 and thereafter every 12 months) if there was a belief that he had passed information to a criminal. DCI Ball did not provide any further information. DCI Ball avers that he has no record of this conversation but to the best of his recollection he believes that he told Mr Nelson that he was not able to provide any further information about the vetting decision.

[11] Also after the meeting, the Applicant's local representative, Mr Ian McCrea MLA wrote on behalf of the Applicant to Assistant Chief Constable George Harrison seeking factual information about the 2005 allegation and asking why if no action was taken in response to it in 2005, was it considered to be relevant in the vetting procedure of 2011.

[12] On 22 May 2012 the PSNI responded as follows:

> 'Your constituent Mr Nelson attended our Vetting Branch on 24 April. During that interview he was read a form of words relating to intelligence known to the police. D/Chief Inspector Ball has assessed his response to this and has decided that his response does not satisfy the Police Service sufficiently to eliminate the doubt that exists over his comment to a known criminal.
>
> I can confirm that the source of information was known to us during Mr Nelson's service and was considered for further investigation. This was not however progressed.'

[13] The Applicant wrote to the PSNI on 10 July 2012 pointing out that he had been given no notice of the adverse information, which related to an incident approximately 7 years previously and which had not given rise to proceedings at the time.

[14] The PSNI responded by letter of 7 August 2012 indicating that the Applicant had been provided with as much information as possible in relation to the reasons for the decision to refuse his appeal.

[15] On 31 August 2012 solicitors for the Applicant wrote to the PSNI highlighting the recent decision in R (A) v Chief Constable of B Constabulary [2012] EWHC 2141 Admin which decided that the vetting of non-police personnel was amenable to judicial review and that the police authority could not lawfully rely upon a policy of blanket refusal to give any information to any person who had been rejected for security clearance. The PSNI was requested to provide adequate reasons to allow the Applicant to avail of a fair appeal process.

[16] The PSNI responded by letter of 18 September, which letter enclosed the following documents:

- PSNI policy directive entitled 'Service Vetting Policy (SVP) for the Police Community; (unprotected sections only).
- Document entitled 'Interview with Mr Allen Nelson regarding vetting appeal'.
- The judgment in the A case.

[17] In the body of the letter, under the heading 'Response to the matter being challenged', the Crown Solicitor, on behalf of the PSNI noted that the basis for refusing the applicant's vetting was that the applicant:

> '... had been associated with a known criminal and that further to this, intelligence indicated that he passed information to this individual.'

[18] The letter describes the meeting of the 24 April 2012 wherein DCI Ball read out the reason for the Applicant's refusal to Mr Nelson. Further in relation to that meeting the letter goes on:

> 'The Applicant named a [Y] as being someone he believed to be a criminal [ ] The Applicant initially denied passing any information to [Y], however he did admit that he would joke with him about whether or not he was handling stolen property, [ ], and that other things could have slipped out inadvertently. He also admitted saying to [Y] that he knew that he was a criminal and into drugs. He learnt this information from briefings that he had received in his capacity as a police officer.
>
> DCI Ball explained to the Applicant that the problem lay with him informing a person, whom he believed to be a criminal, that he had come to the attention of the police. The Applicant stated that this was not intentional and agreed in hindsight that he should not have done this.
>
> On 7th August 2012 in response to a further enquiry by the Applicant, DCI Ball wrote to him informing him that he was unable to provide any further information by way of reasons for refusing his vetting appeal.
>
> DCI Ball on behalf of the Respondent provided the Applicant with as much information as he was able to. Indeed, he actively sought to provide as much detail as possible so that he could explain his decision to him'.

[19] Finally, the letter notes that the Respondent will rely on the A case and in particular para 45 of same.

Relief Sought

[20] The relief sought is:

(a) An order of certiorari to quash the decision of the Police Service of Northern Ireland by which it refused the applicant's police vetting appeal.

(b) A declaration that the said decision is unlawful, ultra vires and of no force or effect.

(c) An order that the matter be reconsidered and determined in accordance with law.

(d) Such further or other relief that shall seem just.

(e) Costs.

(f) All necessary and consequential directions

Grounds on which relief sought

[21] Relief is sought on the following grounds.

[22] That, where the intelligence information was available to the PSNI for 6 years while the Applicant was a serving reserve police officer and during that time the intelligence did not prompt any action against the Applicant, it was then Wednesbury unreasonable and irrational to subsequently use the same intelligence information as a basis to refuse police vetting for a non-police personnel role.

[23] Further or in the alternative, the use of intelligence information relating to 2005 was a disproportionate interference with the applicant's right to respect for private life (engaged in this case by the systematic retention of information about the applicant) contrary to section 6 Human Rights Act 1998 read together with article 8 ECHR.

[24] The PSNI failed to afford the Applicant procedural fairness for the following reasons:

- The adverse information was not conveyed to the Applicant at all before the initial refusal of a police vetting application.

- In the course of the appeal the existence of the adverse information was conveyed to the Applicant in a manner that did not provide him a fair opportunity to know and respond to it.

- The PSNI failed to afford the Applicant procedural fairness in that the gist of the intelligence information provided was inaccurate and/or misleading.

Relevant Policy

Service Vetting Policy

[25] In section 2 of this document, entitled 'Policy Statements', the following is of relevance:

> 'The … PSNI is committed to the maintenance of the highest levels of honesty and integrity and to the prevention of dishonest, unethical and unprofessional behaviour. The purpose of the Service Vetting Policy (SVP) is to support that commitment by creating an understanding of the principles of vetting in the police community thereby establishing uniformity in vetting procedures.'
>
> 'Vetting exists to protect the Service, its assets and data from persons and organisations both internal and external, which may cause harm or detract from its central purpose, vision and values. It is the aim of the PSNI through the agency of the Service Vetting Unit to provide an appropriate level of assurance as to the trustworthiness, integrity and probably reliability of all staff and Non-Police Personnel (NPP) working within the police estates.'

[26] In the introduction section (s3):

> 'A robust vetting process not only safeguards our intelligence, operational and financial assets, but also preserves the health, safety and welfare of our staff and those with whom we work in partnership thus increasing public confidence.'
>
> Policy Aims: 'This policy defines the vetting terms used within the police community and will establish a vetting level for every person within the PSNI.'

> Application: 'This policy will provide structured and accountable processes for the vetting of all persons working within the police community including police and Non Police Personnel.'

[27] The policy notes PSNIs commitment to Human Rights.

Applicant's Arguments

[28] The Respondent has fallen foul of its duty to make adequate disclosure before a decision is taken. Adequate disclosure is disclosure which is:

(a) before the hearing in order that the person involved can prepare his answers; and

(b) of sufficient detail to enable the making of 'meaningful and focussed representations'.

Further adequate disclosure should allow the person involved to 'controvert, correct or comment on other evidence or information that may be relevant to the decision and influential material on which the decision-maker intends to rely' (De Smith's Judicial Review (6th edition, 2007) para 7-057).

[29] It is permissible in certain exceptional circumstances for a decision maker to rely on undisclosed material. The legality of relying on such undisclosed material relies on there being a 'need for withholding details in order to protect other overriding interests' (De Smith's Judicial Review (6th edition, 2007) para 7-059). That is, the test for withholding detail is a necessity to protect a legitimate interest. The Applicant submits that this test is not made out in the instant case and further that if no such necessity exists any gist which omits the detail which would make up adequate disclosure is prima facie inadequate.

[30] In the instant case the applicant was given no notice of the gist in advance of the appeal meeting. The gist was read to the Applicant during that meeting.

[31] The gist provided in the appeal meeting was inaccurate in relation to the relevant date on which the Applicant allegedly 'associated with a known criminal and … passed information to [that] individual'. Throughout the meeting DCI Ball referred to 2005 while the second gist says 'A [ ] criminal was to be involved in criminality during the Christmas Period. It is now being alleged that he cancelled this criminality after he was tipped off by a Police Officer', which, the Applicant submits, suggests that the 'tipping off' actually occurred in the Christmas period 2004.

[32] The Applicant acknowledges that the recent case R (A) v Chief Constable of B Constabulary [2012] EWHC 2141, while not binding, does recognise that in the vetting of non-police staff, the Police Authority is entitled to take an ultra precautionary standard. The Applicant submits that if such a stance is required for non police personnel it should apply a fortiori to the retention in service of a Full Time Reserve Constable. In circumstances where this information was available to the PSNI while the Applicant was in full time service and no action was taken, the Applicant invites the court to conclude that 'the inference to be drawn from this situation is that the intelligence information was not considered to merit action; and that the adoption of a different stance in respect of the applicant's police vetting application is disproportionate and without rational basis.'

[33] The Applicant invites the court to consider R (Wright and others) v Secretary of State for Health and another [2009] UKHL 3 and conclude that the Applicant's Article 6 ECHR rights have been breached in that the process, in its unfairness, does not offer the applicant to answer the allegations made against him, 'before imposing upon [him] possible irreparable damage to [his] employment or prospects of employment'.

[34] Counsel for the Applicant also suggests that the Applicant's Article 8 rights may be engaged in circumstances where damage might be done to the Applicant's reputation resulting from his failure of the vetting process, especially where that failure is as a result of allegations which may turn out to be unfounded.

Respondent's Arguments

[35] The Respondent argues that there is a clear contextual distinction between what might be done with intelligence information in relation to a person who is a serving police reservist on the one hand, and the approach that may be adopted with a person seeking, as an external candidate, clearance to work in and guard the police estate on the other. The intelligence information available in relation to Mr Nelson was clearly relevant to the decision DCI Ball had to consider. It would have been an obvious failing if he had simply excluded the information from consideration. The Respondent thus contends that the impugned decision is not Wednesbury unreasonable.

[36] The Respondent further submits that the Court should be slow to find irrationality on this limb given the specialist nature of the PSNI's role in handling, assessing and determining how best to balance the factors in dealing with intelligence.

[37] The Respondent argues that the Applicant's Article 8 rights have not been breached in the instant case as the interest of the police is ensuring that 'those

working in the police setting maintain the highest levels of integrity to the benefit of the community … and to ensure the reliability of those working in the police estate'. In this context the Respondent submits that information giving rise to legitimate concerns, particularly where that information is assessed as reliable is sufficient to justify withholding of vetting'. The Respondent relies on R (A) v Chief Constable of B Constabulary [2012] EWHC 2141 (Admin) to assert that in circumstances such as the present case the Police authority is entitled to adopt an *'ultra precautionary standard'*.

[38] In relation to the argument advanced in relation to procedural fairness the Respondent notes that the demands of fairness are not immutable and depend on the specifics of the situation.

[39] In order to make out his argument the Applicant in the instant case must show that the procedure adopted was actually unfair, not merely that there is a better or fairer procedure.

[40] The Respondent notes that the context of sensitive intelligence information is relevant to the assessment of the contextual demands of fairness in a given case.

[41] In relation to the instant case the Respondent argues that the Applicant had the opportunity to make representations in writing and orally before the operative decision being made (which, per the Respondent's submission was the outcome of the appeal meeting). Further the Respondent avers that during the meeting of April 2012 the Applicant did not complain, seek an adjournment and did not make any further insights into the gist after the hearing.

[42] The Respondent relies on R v Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531 and Re Conlan's Application [2002] NIJB 35 which expands and refers to Doody in relation to what the requirements of fairness may be in any given case. In particular the Respondent refers to the 'flexible nature' of the principals in Doody. Attention is drawn to Re Conlan's Application wherein it was held that (in relation to prisoners) there was no general rule as to the timing, or the form of the reasons given, except to give the relevant person 'sufficient information to permit him to understand why he was removed from association and why the visitors accept that his removal should continue'.

[43] The Respondent goes on to observe that despite the relevant date now being clarified, the Applicant has not offered any further information to clarify or refute the intelligence. Related to this the Respondent avers that had the Applicant done what he is alleged to have done in the intelligence reports, he would remember it without the need for reference to the month and year in which it occurred.

[44] The Respondent argues that as the Applicant does not suggest that now, with the benefit of the further gist, he has any further information to add, there was no actual unfairness visited on the Applicant by any inadequacy in the original gist.

[45] In conclusion the Respondent posits that the reliance upon the intelligence and the resulting decision was reasonable, rational and proportionate in accordance with article 8 ECHR, and that criticisms of the procedure employed can be more properly categorised as relating to best practice rather than actual unfairness.

Discussion

Rationality Challenge

[46] This ground of review is not accepted. The position of a serving police reservist, and an external applicant for a position are not analogous. In the first instance, the rights attaching to a serving member of the police force to his job and his livelihood are more substantial than the rights of a person applying externally for a job. The only rights attaching to the latter are that his application be considered fairly, he has no right to an actual job.

[47] This being the case, the demands of fairness place a higher probative burden on the employing force in the first scenario than in the second. The evidence required to extinguish or challenge through disciplinary measures the employee's employment rights must be of a much higher standard than the evidence which the police authority are entitled, and required, to take into account when considering the suitability of an external candidate.

[48] On the evidence provided by X, when the information came to light in 2005 it was given weight, it was assessed and it was kept on file pending any further reporting. The reasons given for not taking further action against the Applicant at the time i.e. the ongoing investigation into the named criminal and the risk that if disclosed to the Applicant the information would go back to that named criminal, are compelling.

[49] Finally it is accepted that DCI Ball had to consider all the information that was forthcoming from the vetting procedure and would have been in breach of his duty if he did not do so.

[50] For these reasons, it was not irrational or unreasonable to give the information different weight in the different contexts.

Procedural Unfairness

[51] Ample authority has been put before the court confirming that the question of procedural fairness is not a fixed concept, but one which demands a practical judgment balancing the rights of all parties affected.

[52] In the instant case the person hearing the appeal was required to consider the right of the applicant to not be excluded unfairly or unjustifiably from the post applied for, the need to protect the Service, its personnel, data, assets, and intelligence through the vetting policy, and the need of the broader community to have a police force which is trustworthy. These three important interests required and require to be taken into account when considering what 'procedural fairness' entails in these circumstances.

[53] The duty to give adequate disclosure has been considered in various contexts, including extensively in relation to decisions touching on parole board decisions and prison discipline. In McAree's Application [2010] NIQB 79 at para 35 I made the following observations:

> "The presumptive requirement of sufficient disclosure to enable meaningful and focussed representations is well known. A useful summary of the principles is contained at para 7-057 and para 7-058 of de Smith's Judicial Review [1]. Para 7.059 of de Smith recognises that to the general requirement of sufficient disclosure there are exceptions including where disclosure would be injurious to the public interest or where disclosure is sought of sensitive intelligence information."

[54] The Applicant, in the same vein, submits that the test for relying on undisclosed material demands a 'need for withholding details in order to protect other overriding interests' (De Smith's Judicial Review (6th Edition, 2007) para 7-059). In deciding whether such a need exists, it is proper in the circumstances to leave a wide discretion to the Police Authority who have an in depth understanding of what they seek to protect and how it is best protected. In circumstances involving a named criminal, an informant and an ex-police officer there are obviously a range of legitimate interests that may need protecting. In decisions such as these the court should only intervene and question the existence of such a necessity in the most exceptional of cases.

[55] In circumstances where there is a genuine inability to give full disclosure, the court must turn its attention to whether there were adequate safeguards in place to preserve the fairness of the procedure.

[56] Later in McAree I observed that:

> 'In principle, the material which can be disclosed should be disclosed to the prisoner in advance of the conference/hearing at which he is going to be given the opportunity to make representations'

[57] While it is accepted that the police authority have a discretion as to what information they will disclose in the interests of upholding the purpose of the vetting policy, that information that they do disclose must be disclosed in as fair a manner as possible, and the 'presumptive requirement of sufficient disclosure to allow for meaningful and focussed representations' will apply to any information that is provided. Once DCI Ball knew that he could disclose the gist, that gist should have been provided to the Applicant in advance of the appeal meeting in order to give Mr Nelson as full an opportunity as possible to make 'meaningful and focussed representations'. No reason has been given for the failure to give the gist of the information to the Applicant before the appeal meeting and as such I must conclude that the failure to do so is an unjustified intrusion on the Applicant's right to procedural fairness.

[58] The further gisting provided by the Respondent at this stage isolates a very particular time frame in which the 'tipping-off' is alleged to have occurred - that is, the Christmas of 2004. This key information was not part of the gist which was provided to the Applicant and in fact, in the appeal meeting, Mr Nelson was consistently asked to direct his mind to a different time period - 2005. In the appeal meeting notes it is recorded that Mr Nelson observed that the 2005 date was throwing him off, he could not think of any relevant occasions in that time period.

[59] Clearly if a gist is to operate as a safeguard in circumstances where full disclosure is deemed to be impossible on the basis of the protection of another legitimate interest, it must be an effective safeguard that compensates fully or partly for the lack of full disclosure. If the gist actually detracts from the Applicant understanding the full facts by misleading him, that gist is not performing its function and is not adding to the fairness of the proceedings.

[60] For the above reasons, while I accept that the Police Authority has a wide discretion to withhold information where there are other legitimate interests to protect, any safeguards provided must be effective. The safeguards employed in the instant case were not effective and as a result there was a breach of the Applicant's right to procedural fairness.

Conclusion

[61] For the above reasons I quash the original decision of the Police Authority and direct that the matter be decided afresh in light of the above.