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Judgment: approved by the Court for handing down | *Delivered:* **23/02/2006**
(subject to editorial corrections)

IN THE CROWN COURT OF NORTHERN IRELAND

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THE QUEEN

-v-

EDWARD MAGILL AND OTHERS

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DEENY J

[1] The application with which I am currently dealing arises from the evidence of Mrs Dolores Noble, who is the directing officer of the case in question in the Public Prosecution Service. In the course of the application by the defence for a stay of these proceedings based on allegations of delay and prosecutorial manipulation she was tendered for cross-examination by the Crown. She gave evidence on 6 February 2006. She confirmed in the course of that that the decision to proceed by way of Notice of Transfer under Article 3 was made on the 21 December 2004 or between then and 23 December when a letter was written to the defence and to the court. The significance of 21 December was that the two junior counsel then instructed for the Crown, attended with Mrs Noble on that date. They conveyed that the advice of Mr Gordon Kerr QC, who then led for the Crown, was to proceed by way of Notice of Transfer rather than by way of committal as had hitherto being contemplated. It has been pointed out that the note which was disclosed on foot of my direction (item 30) suggests that Mr Kerr QC agreed with the advice of his juniors rather than the other way around.

[2] However it was common case that the papers were not ready for a committal hearing by 21 December. The witness lists had not been completed nor had the exhibit lists and nor had the charges been finalised. Mrs Noble, however, believed that she had drafted charges herself sometime in late October or November of 2004 and that they had been sent to counsel and indeed had been considered at a consultation. Given her evidence that the decision to transfer was made in December, although at one point she did say that she had formed the opinion that there was sufficient evidence to commit the accused in November 2004, (see p. 63 of defence transcript of her evidence), Mr Kearney sought disclosure of the draft charges to which she

had several times referred, to assist the court in seeing whether the power under Article 3(1) of the Order had been validly exercised. Mr Millar for the Crown asked for time to consider that point. In the events that happened, including the unavoidable adjournment caused by counsel's commitments in the Court of Appeal, the issue did not come back before me until Thursday 16 February. By then Mr John Thompson QC had been instructed on behalf of the Crown leading Mr Geoffrey Millar and Mr David McAughey. He informed the court from the Bar that there was a document, the date of which was unclear, which referred to specific charges but which also contained the comments of one or more lawyers within or acting for the Public Prosecution Service. He claimed legal professional privilege for this draft charges document, as I shall call it. Furthermore he informed the court that in his opinion it did not assist the defence or undermine the prosecution case. Although he relied on the technical point that no defence statement in the main trial had been served and therefore, he submitted, statutory disclosure did not cover this document, he did acknowledge his continuing duty of disclosure, which he was anxious to perform, reinforced by para 10(ii)(b) of the Attorney General's Guidelines.

[3] One of the points subsequently taken by defence counsel was that legal professional privilege had not been claimed for items 30 and 31 (the notes regarding the decision to proceed by way of transfer) nor by Mrs Noble nor by prosecuting counsel in the course of her evidence. While this is quite correct it does not seem to me that it precludes Mr Thompson from taking the point, now that he is instructed in the case, although it is a rather fine point given that Mrs Noble is in the course of giving her evidence and has repeatedly referred to these draft charges. Equally well I do not think Mrs Noble could waive any privilege by referring to the document. If privilege exists it is the privilege of the client. Mr Thompson wisely submitted that the client here was the Public Prosecution Service and not the Customs and Excise or indeed Mrs Noble. The Public Prosecution Service Northern Ireland are entitled to avail of the privilege. See Phipson on Evidence 16th Edition 23-41.

[4] I take this opportunity to say that counsel for Edward Magill did initially seek the disclosure of items 25 to 28 on the Schedule presented by the Crown of three pages and 56 items. However, having heard the submissions of the Crown with reference to authority they accepted that these documents were covered by legal professional privilege and did not pursue that application.

[5] One question which I have to consider is the effect of Article 3(3) of the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988. Article 3 is the equivalent of section 4 of the Criminal Justice Act 1987. Article 3(3) reads:

> "A designated authority's decision to give notice of transfer shall not be subject to appeal or liable to be questioned in any court."

Counsel for the Public Prosecution Service did not claim that this prohibited all consideration by the court of the actions of the Public Prosecution Service in regard to transfer under Article 3(1). Indeed counsel drew my attention to paragraph 1(41) of Archbold: Criminal Pleading Evidence in Practice (2006) which cited R v Salford Magistrate's Court, ex parte Gallagher [1994] Crim LR 374 DC as authority for the proposition that the decision to transfer a case to the Crown Court was susceptible to judicial review if one of the pre-conditions in section 4(1) has not been satisfied, not withstanding section 4(3). In fact if one reads the judgment one sees that this point was conceded by junior counsel for the Crown Prosecution Service. Watkins LJ in his judgment then went on to consider whether there was a possible case against the transfer under the equivalent of our Article 3(1) and concluded that there was not. He then goes on to say:

> "That being so, further consideration of section 4(3) becomes unnecessary."

What he did hold, which is relevant to other related issues in these preliminary applications is that the applicant had not lost anything by being subject to Transfer Notice rather than having a committal because he was:

> "… as likely to persuade the judge that the Crown has no prima facie case against him as he would the stipendiary magistrate or justices if committal proceedings were to be held."

Applying that to this case would mean he was of the view that Article 5 of the 1998 Order provided a remedy for any error under Article 3.

[6] It seems to me that my approach to Article 3 is guided, as Mr Thompson submitted, by the decision of the House of Lords in Anisminic Limited v The Foreign Compensation Commission and Another [1969] 1 All ER 208. In that case their Lordships were considering the effect of section 4(4) of the Foreign Compensation Act 1950 which was in these terms:

> "The determination by the Commission of any application made to them under this Act shall not be called in question in any Court of Law."

In his judgment Lord Reid of Drem, with whom the majority agreed, at p. 212, said that he did not think:

> "that it is necessary or even reasonable to construe the word 'determination' as including everything which purports to be a determination but which is in fact no determination at all. And there are no degrees of nullity. There are a number of reasons why the law will hold a purported decision to be a nullity. I do not see how it could be said that such provision protects some kinds of nullity but not others; if that were intended it would be easy to say so."

Lord Reid went on to consider the matter further and outline the ways in which a purported determination could be set aside by the court despite a statutory provision of this kind:

> "But there are many cases, where, although the tribunal had jurisdiction to enter on the enquiry it has failed to do something in the course of the enquiry which is of such a nature that its decision was a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for a decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

Applying that authority to the initial issue of disclosure of the draft charges document it seems to me that Article 3(3) does not, therefore, assist the Crown. If the document which Mr Thompson QC referred to is in fact the document that Mrs Noble was referring to, which we do not yet know, it seems to me entirely possible that it might reveal that she, as the designated officer of the Public Prosecution Service, was taking into account some matter which she ought not to have taken into account or, possibly, the obverse of that. In doing that it is clear that I would not purport to carry out a

qualitative assessment of Mrs Noble's decision, at this stage. I would apply the approach of the administrative court in judicial review matters, in effect, which is not a review on the merits. However, obviously, in so far as any of the accused have made applications under Article 5 of the Criminal Justice Order 1988 I will then consider whether it appears to me that the evidence against the applicant would or would not be sufficient for a jury properly to convict them. In doing so I will be considering the evidence myself rather than attempt to reassess whatever approach Mrs Noble adopted.

[7] In considering whether to order disclosure of the draft charges document it is appropriate to assess the significance of that with regard to the exercise of the power under Article 3(1) of the 1988 Order. The exercise of that power not only requires that a person has been charged with an indictable offence under 3(1)(a) but also that in the opinion of, in this case an officer of the Public Prosecution Service "acting on the authority's behalf the evidence of the offence charged – (1) would be sufficient for the person charged to be committed to trial;". As indicated the Crown here have repeatedly referred to the decision to proceed by way of transfer being taken on or by 21 December 2004. But the Notice of Transfer is dated 8 March 2005. Mr Miller submitted that the reference to the offence charged is to the offence in the Schedule of Charges which will accompany and does accompany and did accompany the Notice of Transfer. Therefore the fact that the offence which Mrs Noble may have been considering when the substantive decision to transfer was made differed is not of significance. There may well have been, as there appears to have been, some variation in the precise charges between December 2004 and March 2005. (Mrs Noble firmly stated that she did not apply her mind to the two money laundering charges against Edward Magill in December 2005). This point arose with regard to the Crime and Disorder Act 1998 in R (Salubi) v Bow Street Magistrates Court [2002] 1 WLR 3073; [2002] 2 CAR 40. This decision of the Divisional Court is persuasive authority, in both senses of that term, for the contention that the word charged in a section of this sort does not refer only to charges proffered at a police station or on the first appearance in court but to subsequent added charges. On the basis of this authority, which some counsel for the defence were not minded to dispute, the fact that Mrs Noble's substantive opinion was formed at a time before the charges were finalised was not, with the exception of the money laundering charges, significant.

[8] I turn to the final point on the skeleton argument of 16 February produced by counsel for the Crown. In their final paragraph they contend that legal professional privilege attaches to the said material. They refer to the passage in Blackstone's Criminal Practice 2006 at F9.15 in support of that. The provision of a document proposing particular criminal charges, with any comments on those charges by either counsel or in house lawyers is, prima facie, covered by legal professional privilege. I cannot see that it is otherwise

and I accept the contention that in house lawyers are covered by the privilege also.

[9] There have been several recent authorities with regard to legal professional privilege which are cited in Blackstone. I observe that although the authorities, with one exception stem from the civil sphere there seems no doubt that the privilege is co-extensive in the criminal law with its prominence in the civil law. The Crown rely on R v Derby Magistrates Court ex parte B [1995] 4 All ER 426. The facts in that case are important and striking. In 1978 the appellant was arrested on suspicion of murdering a young girl. The following day he admitted being responsible for the murder and was charged. In October 1978, before his trial commenced he changed his story and made a statement alleging that he and his stepfather had been present when the girl was killed, that his stepfather had carried out the murder and that he had taken some part but only under duress. At his trial in November he was acquitted but when subsequently interviewed by the police he stated that he alone had killed the girl. He later retracted that statement and made a further that his stepfather had carried out the murder. In 1992 the stepfather was arrested and charged with the murder of the girl. At the stepfather's committal proceedings the appellant was called as a witness by the Crown. Counsel for the stepfather attempted to cross-examine him about instructions he, the appellant, had given to his solicitors in 1978 between his initial confession that he alone was responsible and his subsequent statement implicating his stepfather, because the instructions were clearly inconsistent with the subsequent statement implicating the stepfather. When the appellant declined to waive his privilege, counsel for the stepfather applied to the stipendiary magistrate to order the appellant and his solicitor to disclose the factual instructions, but excluding advice given by the solicitors and counsel. The magistrate issued such a summons. The appellant applied for judicial review of that decision which the Divisional Court refused and the appellant appealed to the House of Lords.

[10] The appeals were allowed. Mr Thompson relied on the passage in the judgment of Lord Lloyd of Berwick at page 541. "A balancing exercise is not required in individual cases, because the balance must always come down in favour of upholding [legal professional] privilege, unless, of course, the privilege is waived." In his judgment Lord Taylor of Gosforth LCJ, with whom the other Law Lords agreed said at page 540:

> "Mr Richards, as amicus curiae acknowledged the importance of maintaining legal professional privilege as the general rule. But he submitted that the rule should not be absolute. There might be occasions, if only by way of rare exception, in which the rule should yield to some other consideration of even greater importance. He

> referred by analogy to the balancing exercise which is called for where documents are withheld on the ground of public interest immunity and cited the speeches of Lord Simon of Glaisdale in D v NSPCC [1977] 1 All ER 589 at 607, and Wall v BRB [1979] 2 All ER 1169 at 1175 and 1176. But the drawback to that approach is that once any exception to the general rule is allowed, the client's confidence is necessarily lost. The solicitor, instead of being able to tell his client that anything which the client might say would never in any circumstances be revealed without his consent, would have to qualify his assurance. He would have to tell the client that his confidence might be broken if in some future case the court were to hold that he no longer had "any recognisable interest" in asserting his privilege. One can see at once that the purpose of the privilege would thereby be undermined.
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> As for the analogy with public interest immunity, I accept that the various classes of case in which relevant evidence is excluded may, as Lord Simon suggested, be regarded as forming part of a continuous spectrum. But it by no means follows that because a balancing exercise is called for in one class of case, it may be also allowed in another. Legal professional privilege and public interest immunity are as different in their origin as they are in their scope. Putting it another way, if a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the 16th Century, and since then has applied across the board in every case, irrespective of the client's individual merits. … For this reason I am of the opinion that no exception should be allowed to the nature of legal professional privilege, once established."

[11] One notes that what was being protected here was what the client said to the lawyer rather than the advice which the lawyer gave to the client. There is also a difference between a lay client and a body of legally qualified persons. Nevertheless the unanimous view of the House is emphatic and binding upon me.

[12] A recent decision in similar tone is that of The Queen v Grant [2005] All ER (D) 44; [2005] EWCA Crim 1089. That decision of the Court of Appeal, per Laws LJ involved the quashing of a conviction for conspiracy to murder because the police had carried out covert and unlawful surveillance of the privileged communications between the convicted person and his solicitor while in the exercise yard of a police station. It should be noted that this happened although it was not established that the covert surveillance had led to any evidence of assistance to the Crown and the subsequent conviction of the accused. As Laws LJ said at page 14 of the transcript:

> "True it is that nothing gained from the interception of solicitor's communications was used as, or (however indirectly) gave rise to evidence relied on by the Crown at the trial. Nor, as we understand it, did the intercepts yield any material which the Crown might deploy to undermine the defence case. But we are in no doubt but that in general unlawful acts of the kind done in this case, amounting to a deliberate violation of a suspected persons right to legal professional privilege, are so great an affront to the integrity of the justice system, and therefore the rule of law that the associated prosecution is rendered abusive and ought not to be countenanced by the court."

It is important to note that at paragraphs 55-57 of the judgment it is recognised that not every misdemeanour by the police will justify a stay on grounds of abuse. The court has a balance to strike. I might add that the court is always faced with the difficulty that it is the public who are punished by the release of an otherwise properly convicted prisoner, guilty of a crime, on foot of a misdemeanour by the police. One might take the view that that was as offensive to the rule of law as surveillance to privileged conversations which did not in fact lead to any prejudice to an accused. However that was not the view that the court took from the particular facts there.

[13] I have also considered the decision of the House of Lords in The Queen (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax [2003] 1 AC 563. At paragraph 7 of his opinion, Lord Hoffman said:

> "First, legal professional privilege is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts

> before the advisor without fear that they may afterwards be disclosed and used as prejudice. Cases establishing this principle are collected in the speech of Lord Taylor of Gosforth CJ in R v Derby Magistrates Court, op cit. It has been held by the European Court of Human Rights to be part of the right of privacy guaranteed by Article 8 of the European Convention for the Protection of Human Rights etc."

At paragraph 16 Lord Hoffman, with whom the other members of the Judicial Committee agreed said:

> "But LPP does not involve such a balancing of interest. It is absolute and is based not merely upon the general right to privacy but also upon the right of access to justice."

It is right to say that Lord Hoffman, at paragraph 38, acknowledged the exceptional case in which it appears that the client obtained legal advice for the purpose of enabling himself better to commit a crime as a sufficient reason for overriding LLP (R v Cox [1884] 14 QBD 153, [1881-5] All ER REP 68). I put this to Mr Thompson who agreed that such an exception must exist for prosecutors equally. It should be borne in mind that although a short list of prosecutors is defined in the 1988 Order a not inconsiderable number of public bodies have prosecutorial powers. They may be prosecutors one day and defendants the next and civil litigants the third. I asked Mr Thompson what if he became aware of misconduct such as misleading the court, which might ground an application for a stay, from a document which was covered by legal professional privilege. He assured the court that he and his juniors would not tolerate such a situation and would draw it to the attention of the court. I observe, however, that the privilege as he himself contended, is the privilege of the client. What if the client insisted on maintaining the privilege? It may be that all that counsel or solicitors could do would be to withdraw from the case.

[14] Certainly a key point in the submissions of counsel for Mr Goodman was that if the Crown were right there was no judicial oversight of the Crown's duty of disclosure regarding its own actions. They maintained that this was particularly important in this case where the two documents, items 30 and 31 regarding the decision to proceed by way of Notice of Transfer, had only come to light after the court had ordered a schedule of documents, the defence had applied to see some of those documents and the prosecution had furnished them to the court for a ruling on whether or not they were to be disclosed. I raised the possibility that the solution was to be found in Section 8(5) of the Criminal Procedure and Investigations Act 1996 dealing with an

application by the accused for disclosure. Material must not be disclosed under Section 8 to the extent that a court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly. As can be seen from the brief citation of authority hitherto the view has been advanced that legal professional privilege may be part of a continuous spectrum. Is it a particularly strong example of public interest which will, save in wholly exceptional circumstances, be protected by the courts? I note that at page 38 of the transcript Mrs Noble says that this was her own view ie that the advices possibly fell within legal privilege and the court should decide whether or not they should be disclosed. This seems to be an arguable position. However I have concluded that a decision by me on the dichotomy between an absolute bar on any disclosure and a consideration under Section 8(5) as a species of public interest immunity is not required. This is not only because of the high authority already cited. It seems to me that the precise nature of the draft charges document, provided it exists in some form, is not so crucial to the fairness of a trial here that an exception should be made to the binding rule of protecting legal professional privilege. Even if the officer of the Public Prosecution Service erred in her exercise of her power under Article 3 the accused have a remedy under Article 5. Vigorous applications have been made by counsel on behalf of a number of the accused in that respect. Indeed I take into account the strength of some of their points in raising a doubt in my own mind as to the precision with which the decision to go for transfer was taken. Therefore even if legal professional privilege is not absolute it does not seem to me such a wholly exceptional situation to require here a departure from the general rule.

[15] I would just make one further observation. There is before me an application to exercise my discretion to stay these proceedings because of delay and abuse of process. While the desire of the PPS to establish or re-establish the principle of legal professional privilege for their internal communications is understandable, they may wish to consider whether they should in fact agree to a waiver in this particular case. I say that because there is undoubtedly a measure of delay in this case and in addition a belated switch of approach from procedure by committal to procedure by way of Notice of Transfer. This, no doubt, led the Crown to tender Mrs Noble with regard to her exercise of her power under Article 3(1). Defence counsel have suggested that, if unsuccessful in their main submissions regarding disclosure of this document, as they have been, an alternative would be for it to be seen by the court alone. This is something that the prosecution may wish to consider to avoid any impression that there is, in truth, something being hidden here. I certainly consider that Mrs Noble having referred to there being such a document a number of times in her evidence, without any attempt by Crown counsel to prevent her answering, or any objection on her own part, as a qualified barrister, that she should be asked to confirm that the document in the possession of Mr Thompson is one that she has seen before and, neutrally, whether it is the document in question. If she says it is not she

should be given the opportunity to expeditiously find the document to which she is referring. I consider this necessary for a fair and balanced hearing.

[16] I have had the assistance of helpful skeleton arguments and oral submissions from counsel in regard to this point and have taken them all into account even if they are not all expressly referred to in this ruling.

[17] I have considered whether the privilege here has been waived by Mrs Noble in her evidence but I have concluded that it was not save to the extent of proving that a document exists, not least because it was not her privilege to waive. I have taken into account R v Bowden [1999] 4 All ER 43, [1999] 1 WLR 823.

[18] I have been informed by Mr Thompson, just before giving this ruling, that the draft charges document he had, seems to date from January 2005, but that Mrs Noble had herself located the earlier document. This does not affect my ruling but reinforces what I said above at paragraph [15].