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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

Rea's (Winston Churchill) Application [2015] NICA 8

IN THE MATTER OF AN APPLICATION BY WINSTON CHURCHILL REA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Before: Coghlin LJ, Horner J and Maguire J

COGHLIN LJ (delivering the judgment of the court)

[1] This is a renewed application by Winston Churchill Rea ("the applicant") for leave to apply for judicial review of a decision by the Director of Public Prosecutions ("DPP") to issue an International Letter of Request ("ILOR") to the Central Authority of the USA in accordance with the provisions of Section 7(5) of the Crime (International Co-Operation) Act 2003 ("the 2003 Act") seeking mutual assistance from the Central Authority in respect of material held by Boston College Massachusetts pertaining to the applicant. An initial application for leave was made by the applicant to Treacy J based upon a number of grounds. By decision dated 9 February 2015 Treacy J dismissed the application and the applicant subsequently made a fresh application for leave to this court. On the 10 February the applicant sought the assistance of this court as a matter of urgency since it had been learned that, subsequent to the hearing at first instance, PSNI officers had travelled to Boston for the purpose of taking possession of the materials sought. For the purpose of this application the applicant was represented by Mr Ronan Lavery QC and Mr Dornan, Mr Peter Coll QC appeared on behalf of the DPP and Dr McGleenan QC appeared on behalf of the notice party the Chief Constable of the Police Service of Northern Ireland ("PSNI"). The court wishes to acknowledge the assistance that it derived from well analysed and carefully prepared oral and written submissions advanced by all counsel. After hearing some detailed initial argument this court granted leave to the applicant in relation to the sole ground considered by this court to be arguable, namely:

"That on a proper interpretation of Section 7(5) of the 2003 Act there is a requirement to demonstrate the relevance of the requested material."

The applicant was given leave to file an amended Statement of Grounds and the respondent was given leave to file an affidavit from Mr Burnside. The applicant lodged a Notice of Incompatibility and, having regard to the urgency of the matter, the application then proceeded as a rolled up hearing by way of appeal.

Background facts

[2] It appears that the applicant, together with a number of other individuals, took part in a series of interviews to be known as the "Belfast Project". The Belfast Project has been described as an oral history having as its goal the documentation of recollections of members of the Provisional Irish Republic Army, Provisional Sinn Fein, the Ulster Volunteer Force and other paramilitary and political organisations active during the "Troubles" period of history from 1961 onwards. Oral testimony from the participants was recorded by way of voice recordings which were subsequently transmitted to Boston College Massachusetts in the United States of America. The interview materials were kept within the secure confines of the John J Burns Library of Rare Books and Special Collections at Boston College.

[3] In an affidavit sworn on 15 January 2015 the applicant confirmed that in or around June 2005 he was interviewed for the purposes of the Belfast Project and his testimony was provided to a researcher by way of a voice recording. At paragraph 5 of the said affidavit the applicant made the following assertions:

> "My clear understanding was that my testimony was recorded, conveyed, and deposited at the Burns Library, Boston College under the strictest conditions of confidentiality and would be retained there under the same duty of confidentiality which Boston College had promised me in return for my testimony. I gifted the contents of my recordings to Boston College for preservation and access to my testimony was to be restricted until after my death unless I provided prior written authority for their use, which authority has never been provided."

[4] Mr Wilson McArthur, one of the researchers and interviewers for the Belfast Project has sworn an affidavit herein confirming that the participants agreed to transfer possession of the interview recordings and transcripts to Boston College and that the agreements contained the following clause:

> "Access to the tapes and transcripts shall be restricted until after my death except in those cases where I have provided prior written approval for their use following consultation with the Burns Librarian, Boston College. Due to the sensitivity of content, the ultimate power of release shall rest with me. After

> my death the Burns Librarian of Boston College may exercise such power exclusively."

[5] On 3 January 2012 the Belfast Telegraph Newspaper published an interview conducted by one of its journalists with the applicant who was described therein as a leader of the Red Hand Commando. During the course of the interview the applicant is recorded as wishing to have the material that he contributed to the Belfast Project returned.

[6] It appears that the PSNI are currently investigating a number of serious offences believed to have been committed by the applicant including murder, attempted murder, conspiracy to murder, robbery and membership of a terrorist organisation, namely, the Red Hand Commando. In furtherance of that investigation, on 11 September 2014, the DPP issued an ILOR pursuant to the Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America 1996 on mutual legal assistance in criminal matters in accordance with the provisions of Section 7(5) of the 2003 Act. For the purposes of that Act the DPP is a designated prosecuting authority. It is the decision to issue that request for assistance which the applicant now seeks to judicially review.

The legislative framework

[7] The 2003 Act has its origins in the European Conventions on Mutual Assistance in Criminal Matters of 1959 and 2000. The preamble to the 2000 Convention refers to the Member States common interest in ensuring that mutual assistance between the Member States is provided in a fast and efficient manner compatible with the basic principles of their national law, and in compliance with the individual rights and principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). Two relevant protocols have been agreed by the Council of Europe for the purpose of supplementing the Convention. The only reference contained in the various European provisions to the need to indicate the relevance of the requested information occurs in the articles of the 2001 Protocol relating to requests for information on banking transactions. Article 2 of the 2001 Protocol is headed "Requests for Information on Banking Transactions" and provides at paragraph 3 that:

> "3. The requesting Member State shall in its request indicate why it considers the requesting information relevant for the purpose of the investigation into the offence."

Article 3 is headed "Request for the Monitoring of Banking Transactions" and sub-paragraph (2) provides as follows:

> "(2). The requesting Member State shall in its request indicate why it considers the requested information relevant for the purpose of the investigation into the offence."

It seems clear that banking information is regarded as particularly sensitive and Article 7 under the heading "Banking Secrecy" provides that:

> "A Member State shall not invoke banking secrecy as a reason for refusing any co-operation regarding a request for mutual assistance from another Member State."

[8] The relevant sections of the 2003 Act are as follows:

> "**7. Requests for Assistance in Obtaining Evidence Abroad**
>
> (1) If it appears to a judicial authority in the United Kingdom on an application made by a person mentioned in sub-section (3) –
>
> (*a*) That an offence has been committed or that there are reasonable grounds for suspecting that an offence had been committed, and
>
> (*b*) That proceedings in respect of the offence have been instituted or that the offence is being investigated, the judicial authority may request assistance under this section.
>
> (2) The assistance that may be requested under this section is assistance in obtaining outside the United Kingdom any evidence specified in the request for use in the proceedings or investigation.
>
> (3) The application may be made –
>
> (*a*) In relation to England and Wales and Northern Ireland, by a prosecuting authority …
>
> (5) In relation to England and Wales or Northern Ireland, a designated prosecuting authority may itself request assistance under this section if –

(*a*) It appears to the authority that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed,

(*b*) The authority has instituted proceedings in respect of the offence in question or it is being investigated.

'Designated' means designated by an order made by the Secretary of State …

(7) If a request for assistance under this section is made in reliance in Article 2 of the 2001 Protocol (request for information on banking transactions) in connection with the investigation of an offence, the request must state the grounds on which the person making the request considers the evidence specified in it to be relevant for the purposes of the investigation. …

10 Domestic Freezing Orders

(1) If it appears to a judicial authority in the United Kingdom, on an application made by a person mentioned in sub-section (4) –

(*a*) That proceedings in respect of a listed offence have been instituted or such an offence is being investigated.

(*b*) That there are reasonable grounds to believe that there is evidence in a participating country which satisfied the requirements of sub-section (3).

(*c*) That a request had been made or will be made under Section 7 for the evidence to be sent to the authority making the request.

The judicial authority may make a domestic freezing order in respect of the evidence.

(3) The requirements are that the evidence –

(*a*) Is on premises specified in the application in the participating country.

(*b*) Is likely to be of substantial value (whether by itself or together with other evidence) to the proceedings or investigation.

(*c*) Is likely to be admissible in evidence at a trial for the offence.

(*d*) Does not consist of or include items subject to legal privilege.

13 Request for Assistance from Overseas Authorities

(1) Where a request for assistance in obtaining evidence in a part of the United Kingdom is received by the territorial authority for that part, the authority may –

(*a*) If the conditions in Section 14 are met, arrange for the evidence to be obtained under Section 15.

(*b*) Direct that a search warrant be applied for under or by virtue of Section 16 or 17 …

15 Nominating a Court etc to Receive Evidence

(1) Where the evidence is in England and Wales or Northern Ireland, the Secretary of State may by a notice nominate a court to receive any evidence to which the request relates which appears to the court to be appropriate for the purpose of giving effect to the request.

51 General interpretation

(1) In this Part –

'evidence' includes information in any form and articles, and giving evidence includes answering a question or producing any information or article

[9] Article 8 of the ECHR provides as follows:

"**Right to Respect for Private and Family Life**

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others."

Counsel's submissions

[10] On behalf of the applicant Mr Lavery submitted that requests for assistance in obtaining evidence abroad in accordance with Section 7(5) must be read subject to the applicant's Article 8 rights. He argued that the applicant's donation of material to the Boston College archive clearly engaged his Article 8 rights to privacy. In such circumstances in order to obtain access to the material the respondent would have to show that any interference was in accordance with the law and *necessary* in a democratic society for one of the purposes specified in Article 8.2. This, he submitted, involved a requirement for the respondent to show, to an appropriate standard, that the material was relevant to the investigation being conducted. He drew the attention of the court to the Crown Prosecution Service ("CPS") Guidelines in England and Wales citing the following passage:

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

- Legal basis for the request; is the proposed inquiry permitted under CICA? Is it permitted under the relevant Convention, treaty or other international instrument?

Information from the investigator:

- Has the investigator given enough information about the case or the assistance to be sought?

- Is the nexus between the facts of the case and the assistance requested established? Particularly where coercive measures such as

> a search warrant are required, the executing judicial authority will want the letter of request to indicate clearly that such a measure is necessary, appropriate and proportionate.
>
> Nature of the request:
>
> - Does the assistance sought amount to a little more than a 'fishing expedition' or is it, as it should be, a request to obtain specific evidence? A letter of request must not be a request to a foreign authority for the latter to conduct an investigation on our behalf."

Mr Lavery conceded that these guidelines were not binding upon the respondent and that no equivalent guidelines existed in this jurisdiction. However, he submitted that the guidelines should be taken as an indication of best practice. Mr Lavery noted the judicial procedures in the US that had been instituted as a consequence of the request but submitted that:

(*1*) The respondent could not delegate its responsibility to comply with the applicant's Article 8 rights to a foreign country.

(*2*) In any event, there was insufficient information about the detail of the processes adopted in the US.

Pressed by the court to indicate what level of relevance he submitted would constitute an adequate safeguard for the applicant, Mr Lavery ultimately submitted that it was necessary for the respondent to establish that the material was of "substantial value" consistent with the requirement in respect of Domestic Freezing Orders in accordance with Section 10(3) of the 2003 Act. While the amended grounds also referred to Article 10 ECHR, Mr Lavery accepted that it did not add any protection that was not available under Article 8 and did not address any additional submissions to the court in relation to that Article.

[11] On behalf of the DPP Mr Coll submitted that it was clear that the respondent complied with the formal requirements of Section 7(5) of the 2003 Act that namely:

(a) It was the designated authority.

(b) That the respondent had reasonable grounds for believing that offences had been committed.

(c) The respondent was engaged in the investigation of such offences.

While Mr Coll accepted that the statute did not authorise 'fishing' expeditions, he argued that the standard to be established in respect of the material sought was simply that the evidence specified in the request should be "for use" in the

proceedings or investigation in accordance with Section 7(2) of the 2003 Act. Mr Coll referred to the affidavits sworn by the applicant and Mr McArthur which confirmed that the objective of the 'Boston Project' had been, inter alia, to collect and preserve for academic research the recollection of members of Republican and Loyalist paramilitary organisations active during the 'Troubles', gathering and preserving the stories of individual participants who had become personally engaged in violent conflict. He also referred to the affidavit sworn by Mr Burnside on behalf of the respondent, the individual authorised to prepare and issue the ILOR. At paragraph 5 of his affidavit Mr Burnside observed:

> "Whilst not specifically required by the statute, I addressed my mind to the issue of nexus and relevance, in the context of the exercise of my discretion as to whether to make the international request for assistance. I was aware that the applicant had conducted interviews as part of the Boston College project relating to his experience in connection with the conflict as was the subject of the project."

At paragraph 7 of his affidavit Mr Burnside confirmed that he had borne in mind that any request for assistance would be assessed by the US prosecution authorities and, in due course, by the US courts, applying their own domestic law standards to the same. That had occurred in respect of previous letters of request, such as those in respect of the investigation into the death of Jean McConville. He pointed out that the legal test applied by the US authorities was that of 'probable cause' noting that if the court had not been satisfied that the ILOR demonstrated probable cause then the subpoena would not have been issued. Mr Coll emphasised that the proceedings were only at the investigation stage and that the DPP had a duty in accordance with Article 2 of the ECHR to properly and effectively investigate offences, such as murder, committed during the course of terrorist activities in the interests of victims and the general public.

[12] On behalf of the Chief Constable Dr McGleenan also relied upon the clear and unequivocal wording of Section 7 of the 2003 Act. In his submission the statutory test articulated in Section 7 was purely one of 'utility'. He emphasised that such a heightened threshold of relevance as contended for by the applicant did not appear in any of the European Conventions/Protocols from which the 2003 Act had originated. In his submission the 'substantial value' threshold contained in Section 10 of the 2003 Act relating to Domestic Freezing Orders and the requirement to state the grounds of relevance of the evidence contained in Section 7(7) relating to information on banking transactions simply reinforced the argument that Parliament had not intended to apply any such requirement or threshold to material sought in accordance with Section 7(5). Both Section 7(7) and Section 10 could be traced back to European instruments specifying an enhanced approached in respect of certain specific types of information/orders.

[13] Dr McGleenan drew the attention of the court to the decision of the US Court of Appeal for the First Circuit of 31 May 2013 dealing with a similar request from the Government of the UK also in respect of Boston College materials. It is clear from that judgment that the court was acutely sensitive to the need for judicial supervision with regard to enforcing subpoenas issued pursuant to an international treaty. In the course of giving his judgment the U.S. Circuit Judge observed that:

> "If we were to accede to the Government's position and hold that courts must always enforce a commissioner's subpoenas, we would be:
>
> (1) Allowing the executive branch to virtually exercise judicial powers by issuing subpoenas that are automatically enforced by the courts.
>
> (2) Impairing our powers by acceding to act as rubber stamps for commissioners appointed pursuant to the treaty. Such subservience is constitutionally prohibited and, *ergo*, we must forcefully conclude that preserving the judicial power to supervise the enforcement of subpoenas in the context of the present case, guarantees the preservation of a balance of powers."

The judge subsequently proceeded to consider whether the court should review the application under an "ordinary relevance" or a "direct relevance" standard. The approach of the court in that case was to apply the "ordinary standard" when considering whether the information was relevant to a bona fide criminal investigation and, having done so, it ordered that 11 interviews should be made available pursuant to the ILOR. Dr McGleenan pointed out that, in the present case, the District Court for the District of Massachusetts conducted an *in camera* review of the 'Rea transcripts' pursuant to the principles laid down by the Court of Appeal in United States v The Trustees of Boston College (2013). The court conducted a relevance review of the materials against the contents of the letter of request and ordered:

> "Having concluded such a review, the material shall be returned to Boston College which shall within 30 days of the date of this Order, deliver copies of these materials in their entirety to the designated official of the United States."

Dr McGleenan submitted that, in the circumstances, the United States system was the proper place for a relevance review to be conducted under the mutual assistance arrangements.

Discussion

[14] Paragraph 12 of the ILOR specifically states that the PSNI has evidence and information indicating that the applicant has a long involvement in organising and participating in terrorist activities in Northern Ireland. He has been convicted of at least one terrorist offence in respect of which he received a substantial sentence of imprisonment. At paragraph 11 of the ILOR the respondent has identified a number of specific offences with regard to which the PSNI has information indicating the involvement of the applicant. The information sought is any material held by Boston College which would be of assistance to the investigations and specific offences identified in the ILOR. It is clearly important to bear in mind that these matters are still at the "investigation stage" and that, as a consequence of the circumstances in which the material sought was compiled and transferred to Boston College, the PSNI cannot identify specific aspects of the material which may or may not be relevant to the offences being investigated other than it purports to be an account of terrorist activities carried out by an organisation of which the PSNI hold information indicating that the applicant was a member.

[15] In R v Secretary of State ex p Fininvest Spa [1997] 1 WLR 743, at 752, Simon Brown LJ when considering the meaning of the word 'evidence' in the predecessor legislation, s. 4 Criminal Justice (International Co-operation) Act 1990, said:

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

In that case the learned Lord Justice rejected the claim that the request constituted a "fishing" expedition and accepted that the legislation created a scheme under which it would plainly be necessary to examine altogether more material than would ultimately constitute evidence at any trial.

[16] It is also important to bear in mind the comity expressed in Article 1.1 in the original European Convention of 1959 in the following terms:

> "The Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences, the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting party."

While it was not enacted for the purpose of bringing either the 1959 or the 2000 Convention into the domestic law of the United Kingdom there can be no doubt that

the primary aim of the 2003 Act was to promote co-operation between countries in respect of criminal procedure and investigations.

[17] Mr Lavery's primary submission was that, in order to comply with the Article 8 rights of the applicant, it was necessary for the court to read into the wording of Section 7(2) of the 2003 Act the requirement to satisfy a particular standard of relevance before the request for assistance could be granted. Dr McGleenan reminded the court of the specific wording of Section 7(2) which referred to "… obtaining outside the United Kingdom any evidence specified in the request for *use* (our emphasis) in the proceedings or investigation". He argued that this was simply a reference to utility and did not imply the need for any specific standard of relevance. As noted above, Mr Lavery ultimately sought to adopt the standard of "substantial value" contained in Section 10(3)(*b*) of the 2003 Act. However, that wording occurs within a section limited to Domestic Freezing Orders and it seems clear that it was fixed by Parliament specifically for such orders which have the potential to significantly affect the economic resources of individuals or corporations. In view of the fact that Parliament has not considered it appropriate to specify any such standard in relation to evidence sought in accordance with Section 7 we reject Mr Lavery's argument that such a standard should be adopted.

[18] Sections 13, 14 and 15 of the 2003 Act apply to the reverse situation to this case, namely, requests for assistance from overseas authorities for the provision of evidence on the part of the UK. In R (Hafner and Another) v City of Westminster Magistrates' Court [2009] 1 WLR 1005 a Divisional Court in England and Wales had to consider two letters of request to the Home Secretary from the Australian Corporate Compliance Authorities sent in accordance with Sections 13 to 15 of the 2003 Act for the purpose of obtaining evidence in connection with a criminal investigation being carried out in Australia. The request was, inter alia, for the production of documents, including confidential documents or information, emanating from the claimants, a Swiss lawyer and his Swiss-based law firm. In accordance with Section 15 of the 2003 Act the Home Secretary had nominated a Magistrates' Court to receive the evidence and the claimants, concerned that disclosure of the information would breach their Article 8 rights, sought judicial review in an attempt to prevent the court from proceeding until a procedure had been put in place to protect their interests. The claimant sought judicial review of the decision by the District Judge that the material obtained complied with the Australian request and that the claimant's Article 8 rights were not engaged in any way. In delivering the judgment of the court Lord Phillips of Matravers CJ emphasised that there could be no doubt that the compulsory acquisition of the relevant documents and information engaged the Article 8 rights of the claimants. At paragraph 22 the learned Chief Justice endorsed the following propositions of law contained in the claimants' skeleton argument:

> "(*1*) The fact that the correspondence is of a business character does not exclude the protection of Article 8 in respect of both 'private life' and

'correspondence': Funke v France (1993) 16 EHRR 297 and Niemietz v Germany (1992) 16 EHRR 97.

(2) The fact the documents are sought in proceedings in which the claimants were not initially concerned does not exclude the protection of Article 8: Z v Finland (1997) 25 EHRR 371.

(3) Public authorities which obtained documents by compulsion engage the right to respect for the private life and correspondence in respect of each step of such measures (i.e. obtaining, storage and subsequent use of the material): Amann v Switzerland (2000) 30 EHRR 843."

The learned Chief Justice saw the nomination of a court in accordance with Section 15 in order to receive the evidence as a safeguard against abuse in the case of the exercise of the powers granted by the 2003 Act and in related judicial review proceedings.

[19] At paragraph 26 of the judgment in Hafner the learned Chief Justice made the following observations:

"26. It is for the nominated court to decide upon the appropriate procedure where a decision has to be made as to the application of Article 8(2). In so doing the court will consider whether to give notice of the application to and hear submissions from any person whose Article 8 rights will be or may be infringed by giving effect to the application. In many cases it will be appropriate to give notice to parties whose Article 8 rights appear to be engaged. The court must be particularly careful to see that legal professional privilege is not infringed. As a general principle privacy rights under Article 8(1) are unlikely to prevail in the face of Article 8(2) where a disclosure of document or information is necessary for the prevention of crime, but the court should protect documents or information that go beyond that which is necessary for this purpose."

[20] If the request for mutual assistance had been made to another Member State the DPP, as a designated authority, would be entitled to rely upon a presumption that, in accordance with the Convention, any such Member State would have proper regard to the need to protect the applicant's Article 8 rights possibly by some form of judicial supervision similar to that provided by Section 15. As a public authority,

it is the responsibility of this court to ensure that the applicant's Article 8 rights are properly observed and effectively protected. However, Article 8 is not an abstract provision and this court exercises its supervisory powers by carefully scrutinising all of the relevant circumstances in the particular case.

[21] In this case we consider the following matters to be of relevance:

(*1*) The clear statutory conditions specified in Section 7 of the 2003 Act are satisfied insofar as the DPP is a designated authority, there are reasonable grounds for suspecting that offences have been committed and proceedings in respect of those offences are being investigated.

(*2*) The ILOR confirms at paragraph 11 that the PSNI has evidence and information indicating that the applicant has a long involvement in organising and participating in terrorist activities in Northern Ireland including the specific offences set out therein.

(*3*) The authorised representative of the PPS with responsibility for the preparation of the ILOR has confirmed on affidavit that he has addressed his mind to the issue of nexus and relevance in making the request for the Boston College materials provided by the applicant and, that, in the light of the material of which he was made aware it was likely that the Boston College material would assist in the investigations.

(*4*) In this case the material sought has been the subject of judicial consideration by the District Court in Massachusetts which conducted an *in camera* review pursuant to the principles laid down by the Court of Appeal in United States v Trustees of Boston College (2013). In so doing that court will have applied the ordinary standard of relevance before determining that all of the materials should be provided. There has been no appeal against that decision.

[22] The intention of Parliament is expressed in the clear wording of the 2003 Act. Parliament has chosen to require the grounds upon which the evidence is considered to be relevant to be stated with regard to banking transactions at Section 7(7) and for the evidence to be of substantial value in relation to the application to make a Domestic Freezing Order in accordance with Section 10. No similar requirement has been included in relation to a request for assistance in obtaining evidence abroad under Section 7 other than the evidence is for 'use in the proceedings or investigation'. In our view it is difficult to see how such evidence could be of use if it was irrelevant but that is very far from reading into the Act any particular standard of relevance. Dr McGleenan submitted that, to do so, might well be perceived as amounting to judicial legislation, a clear breach of the doctrine of separation of powers.

[23] However, this court bears in mind that the process of statutory interpretation is no longer dominated by a search for the intention of Parliament

since, in Section 3(1) of the Human Rights Act 1998, Parliament has decreed that the first duty of the court, as a public authority, is to ensure that the interpretation adopted is compatible with the Convention rights – see the observations of Lord Bingham at paragraph 28 of Attorney General's Reference (No. 4 of 2002) [2005] 1 AC 264 explaining the effect of Ghaidan v Godin-Mendoza [2004] 2 AC 557.

[24] We note the judicial debate as to the strength of the Section 3(1) obligation. In R v A (No. 2) [2002] 1 AC 45 Lord Steyn observed at paragraph [44]:

> "In accordance with the will of Parliament as reflected in Section 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of expressed language in a statute but also the implication of provisions. A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so."

In applying that approach Lord Steyn concluded that Section 3 required courts to 'subordinate the niceties of the language' of the statutory restriction to broader considerations of relevance judged by logical and common sense criteria. In the same case Lord Hope dissented saying that he would find it "very difficult" to accept so substantial an implication by way of interpretation: the rule is only a rule of interpretation. "It does not entitle to judges to act as legislatures". However we note that Lord Steyn's approach was subsequently expressly approved by Lord Bingham in Attorney General's Reference (No. 4 of 2002).

[25] Bearing in mind the statutory duty imposed by Parliament in accordance with Section 3(1) we have carefully considered all of the circumstances of this application including, in particular, the factors set out at paragraph [21]. In addition this court, in exercising its supervisory function has had the benefit of carefully prepared and eloquently delivered written and oral submissions from counsel in relation to the applicant's Article 8 rights. Our conclusion is that even on the assumption that the issue of the ILOR may have infringed the applicant's right to privacy we are entirely satisfied that any such interference was in accordance with law and necessary in the interests of the prevention of crime in accordance with Article 8(2) and, accordingly, the application will be dismissed.

[26] During the course of the hearing counsel drew our attention to the existence of CPS guidelines relating to the proper approach to be adopted with respect to ILORs issued under the provisions of the 2003 Act. The court was informed that no such guidelines exist within this jurisdiction although it was not clear whether such an omission was as a result of a considered decision or simply a matter of being overlooked. We note that the Serious Fraud Offices "Guide to Obtaining Evidence from UK" was considered by the court in J P Morgan Chase Bank National Association and Others v The Director of the Serious Fraud Office and Others [2012]

EWHC 1674 (Admin) and The Mutual Legal Assistance Guidelines issued by the Secretary of State were discussed in Ismail v Secretary of State for the Home Department [2013] EWHC 663 (Admin). The creation and publication of appropriate guidelines for this type of application might well assist designated authorities, practitioners and individuals likely to be affected by the exercise of the powers afforded by the 2003 Act in this jurisdiction bearing in mind that Article 8, as a qualified right, attracts the "quality of law" requirements of the Convention..