

# Judicial Communications Office

20 December 2017

## COURT DISMISSES APPLICATION BY DENNIS HUTCHINGS

### Summary of Judgment

The Divisional Court, sitting today in Belfast, dismissed an application by Dennis Hutchings challenging a decision by the Director of Public Prosecutions that requires him to be tried without a jury. Dennis Hutchings was a soldier serving with the Life Guards Regiment in Northern Ireland. He has been charged with the offences of attempted murder and attempted grievous bodily harm with intent relating to the death by shooting of John Patrick Cunningham (“the deceased”) on 15 June 1974 near Benburb, County Armagh.

Dennis Hutchings (“the applicant”) challenges the decision by the Director of Public Prosecutions (“DPP” or “the Director”) to issue a Certificate under Section 1 of the Justice and Security (Northern Ireland) Act 2007 (“the 2007 Act”) (“the Certificate”). The effect of the Certificate is to prevent the applicant being tried by a jury and instead requires that he be tried by judge alone. The applicant contends that the Director erred in law and/or exceeded his jurisdiction by issuing the Certificate; that he acted in breach of his duty to act in a procedurally fair manner; that his decision was *Wednesbury* unreasonable and that the Director misdirected himself as to the appropriate legal principles which applied. The applicant seeks to quash the decision of the Director and an order that the Director reconsider the decision in accordance with any judgment or direction of this court.

#### The 2007 Act

The purpose of the 2007 Act was to provide measures which were deemed necessary to deliver a commitment to security normalisation in Northern Ireland. The Government considered that some arrangements were necessary to ensure that jurors in Northern Ireland are protected from intimidation and the 2007 Act provided for a new system of non-jury trial. The presumption was for jury trial in all cases but in a small number of exceptional cases, the Director would have a discretion to require a trial to take place without a jury if certain conditions are met.

Section 1 of the 2007 Act provides for the Director to issue a certificate that a trial on indictment is to be conducted without a jury if he **suspects** that one of four conditions is met and he is **satisfied** that in view of this there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury. The first three conditions relate to proscribed organisations. **Condition 4** is where the offence “was committed ... as a result of, in connection with or in response to religious or political hostility of one person or group of persons towards

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another person or group of persons". Religious or political hostility is defined as meaning hostility based to any extent on –

- (a) religious belief or political opinion,
- (b) supposed religious belief or political opinion,  
or
- (c) the absence or supposed absence of any, or any particular, religious belief or political opinion.

Section 7 of the 2007 Act provides that no court can entertain proceedings questioning any decision of the Director in relation to the issue of a certificate under section 1, except on the grounds of dishonesty, bad faith, or other exceptional circumstances (including in particular exceptional circumstances relating to lack of jurisdiction or error of law). Under section 8(3) of the 2007 Act the provisions of Sections 1-7 apply in relation to offences committed before the coming into force of the provisions of the Act.

## **The Director's response to the challenge of the applicant**

The Director filed an affidavit with the court which confirmed that he suspected that Condition 4 was met. He said there was no suggestion that the soldier was any part of the 'sectarian divide', nor was he involved in any proscribed organisation. He suspected that the offence was committed in connection with or in response to "the political hostility of members (or suspected members) of the Provisional IRA towards those who believe that Northern Ireland should remain a part of the United Kingdom". It was his contention that section 1 of the 2007 Act is worded sufficiently widely for him to have reasonably suspected that Condition 4 was met and that he was satisfied that there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury. He said he reached his decision on the basis of all the material before him and in a careful analysis of the facts, circumstances and senior counsel's opinion.

The Director noted that the applicant had suggested that the issuing of a certificate in this prosecution was a statement that no member of the security forces can have a trial by jury but said that this is a decision he takes on a case by case basis and only upon application: "The issuing of a certificate in this case is by no means a pronouncement as to the mode of trial in future cases involving members of the security forces or the police."

The Director's Office advised the Court that the Director suspected that Condition 4 in Section 1 of the 2007 Act was satisfied on the basis of information provided by the police coupled with a commentary and assessment of that information, and analysis of the facts and circumstances of this case and the advice of senior counsel. He considered that the risk arises from the possibility of a biased juror or jury having regard to the particular circumstances of this case. He reflected on whether the risk

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could be mitigated by application to the court to screen the jury, sequester the jury or transfer the trial to a different venue but felt that, even if granted, these measures might not be sufficiently effective in preventing or significantly reducing the potential risk posed to the administration of justice in this case.

The Court noted two additional issues that arose in the course of the hearing. The first was that in the Director's skeleton argument it was asserted that the deceased "was suspected of being a terrorist and there was a suspicion that he may have been armed". Counsel on behalf of the applicant took issue with this assertion given that the prosecution had not made this case before the Crown Court. The Court invited a further affidavit from the Director on this matter. In this it was stated that the applicant did not make a case that he suspected that the deceased was a terrorist in his interview with the police and the evidence was that another soldier present at the scene believed that the deceased had a concealed weapon and that he was called upon to stop by soldiers but failed to do so. Counsel for the applicant objected to the admission of the affidavit contending that it was an explanation after the original decision letter and no contemporaneous document whatsoever had been produced to justify or record the decision-making process.

Secondly, the Court noted that the applicant had written to the PPS specifically requesting disclosure of all material that the Director considered in making his decision to issue a certificate. The PPS replied to say that disclosure was not necessary in order to resolve the matters.

The Divisional Court referred to the case of *Arthurs' (Brian and Paula) Application* which states that it is necessary to determine the true effect of the conditions which, if satisfied, justify the withholding of a defendant's right to a jury trial. If the Director forms a **suspicion** that one or more of the conditions under section 1 are met he must reach an evaluative conclusion whether in the view of that suspicion there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury. The case further states that the tests of suspicion and risk to justice are set at a modest level and call for a personal judgment by the Director in light of the information available to him. The rationale behind the need to narrowly construe section 1 was the strong presumption that a right to jury trial is not intended to be taken away and that in itself leads to a strict construction of any statutory restriction or limitation on the right to a jury trial. The Divisional Court, however, also said it is absolutely clear that the purpose of the 2007 legislation is to take away the right to jury trial in circumstances and the conditions which are set out in clear and unambiguous terms:

"The object is to generate fair trials. It does not require comments from parliamentarians at the time of the passing of the legislation to provide any explanation of them. The words of the legislation speak for themselves. Our task of construction is to see what is the intention expressed by the words enacted. A reading of the contents

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of the Act makes it clear that the scope is widely framed. This court must remain faithful to the wording of the statute and its context notwithstanding the need to narrowly and strictly construe section 1 of the Act.”

The Court noted that the tests of suspicion and risk to justice are set at a modest level. Suspicion consists of matters which may not be able to be put in evidence whereas *prima facie* proof consists of admissible evidence. The nature of the statutory conditions (suspicion and a risk to the interests of justice) involves matters of impression and evaluation and judgement on the part of the Director. The Divisional Court noted that the decision had been taken by a highly experienced former criminal law practitioner appointed on that basis to this important post of Director of Public Prosecutions.

The Court said that Condition 4 has to be read in its full context. It said that the width of the definition of “religious or political hostility” means it could be based on “supposed religious belief or political opinion”. The reach of Condition 4 is also extended so that references to persons and groups of persons need not include a reference to the defendant or to any victim of the offence or offences. This means that neither the applicant nor the victim needs to be a member of the IRA. The wording of Condition 4 envisages looking at the circumstances leading up to the offence being considered. The Court said the significance of the wording that the offence “was committed to any extent (whether directly or indirectly)” cannot be underestimated:

“It clearly widens the bracket of connective circumstances that can be embraced between the offence itself and the religious or political hostility. The breadth of this phraseology confounds the assertion that the words “immediately” should be imported into the section so that the offence in question had to be committed immediately after the initial offence. Not only could Parliament have easily drafted this precise wording into the section if it was meant to apply, but to have done so would have been incongruous with the phraseology that has been included. We see no basis for adopting such an interpretation. Political hostility can apply to “supposed” political opinion, again widening the reach of the section. It could not be plausibly disputed that the IRA as an organisation was politically hostile to another group of people who were opposed to the concept of a united Ireland and in that context attacks were made on members of the British army. The phrase “political hostility” is in use daily in Northern Ireland and is easily understood.”

The Court concluded that the wording of the statute is manifestly wide enough to embrace the scenario of the British Army engaging with suspected members of the IRA. The test for the Director was whether he *suspected* the impugned offence was

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directly or indirectly *to any extent* connected with this situation. It said that Condition 4 clearly excludes a number of circumstances where members of the British Army might be involved, for example, two soldiers fighting in a bar and said this was an illustration that the condition is not wide enough to cover every action by a member of the British Army. Each incident involving the army must be looked at individually on a case by case basis.

“In our view the assertion of the Director that it was the intention of Parliament to provide that “the sub-section should be broadly interpreted”, whilst it could have been more felicitously worded, does not necessarily contradict the proposition that it is necessary to construe Section 1 narrowly and strictly. The wording of Condition 4 is such that Parliament clearly intended to include a broad reach of circumstances whilst at the same time recognising that any legislation removing jury trial needs to be tightly construed.”

## **Section 1(a) of the 2007 Act**

The Divisional Court said the Director was entitled to consider all the facts, circumstances and information before him in forming the necessary statutory suspicion. It noted that the Army patrol in question had been attacked with gunfire two days previously by members of the IRA. The incident therefore occurred in what was clearly a difficult and potentially dangerous area for this patrol and the regiment insofar as the IRA were hostile and clearly intent on killing such soldiers. It said the incident where the deceased lost his life cannot be divorced from the context of the previous incident and the background situation in this area:

“Had incident occurred in the *immediate* aftermath of the earlier shooting incident, Condition 4 would clearly have been invoked. The brief temporal gap of two days in our view is more than sufficient to retain the connection between the incidents in question. Such a conclusion was not *Wednesbury* unreasonable and there is no basis for considering that the Director left out of account relevant considerations or took into account irrelevant matters.”

## **Section 1(b) of the 2007 Act**

Counsel for the applicant also contended that the Director’s suspicion, even if properly formed, could not have led him to be satisfied that there was a risk that the administration of justice might be impaired if the trial were to be conducted with a jury. He submitted that no reasons had been given to make this finding. He argued that that we need to trust juries and that some evidence would have been necessary to establish that there was a risk of bias particularly in circumstances where the Director had refused to disclose all the information before him.

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The Divisional Court did not agree with this contention. It stated that the Director did not look at this matter in a vacuum and that he considered the judgments in the case of *In re Pearse Jordan* which dealt with the Coroner's decision to hear the inquest with a jury. The Court of Appeal specifically asserted that it would be idle to ignore the problems both of jury intimidation and perverse verdicts in Northern Ireland and said this risk albeit reduced, exists to the present time."

The Court said that in this case the Director, having considered possible precautionary measures, was entitled to ask himself if there was a real possibility that a jury would be biased in a case of this nature: "Was there not a real possibility that in the fractured society in which we live in Northern Ireland someone or more on the jury might entertain a prejudice against or a partiality in favour of a soldier fighting terrorism?" It said it was satisfied that the facts of this case alone provide a solid basis for the Director to be satisfied that there was a risk of a biased juror in this case.

"We find no reason in this instance to dispute his conclusion that, where the context is of a soldier shooting an innocent bystander against the background of an IRA attack a short time before, this circumstance carries in its wake the risk of a partisan juror or jurors in at least parts of this province with all the attendant dangers of impairment of the administration of justice if that trial were to be conducted with a jury. Accordingly we do not consider that the determination of the Director was *Wednesbury* unreasonable and there is no basis for considering that the Director left out of account relevant considerations or took into account irrelevant matters."

The Court noted however Counsel for the applicant's arguments that the Director had failed to provide appropriate reasons for his decisions and failed to disclose materials upon which his reasoning was based. The Court considered that greater care could have been given by the Director to setting out in more detail the nature of his reasoning for both his suspicion and his satisfaction and urged him to consider the need for such care in all future cases. It added, however, that the obligation to give reasons does not demand a full legal and factual audit of every matter considered by the decision maker and that it was content in this case that the facts are self-evident and in many ways speak for themselves:

"The degree of reasoning outlined by the Director, relying as he did on the facts and circumstances of the instant case, point clearly to a connection with the political hostility of the IRA to those who believed that Northern Ireland should remain a part of the United Kingdom. The temporal and geographical proximity between the two incidents is conclusive. Hence his reliance on those facts alone provides sufficient basis for his conclusions."

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The Court did not consider that the additional affidavit from the Director did anything other than *clarify* a matter that was not clear and added that the court will not always limit itself to considering material that was before the decision maker. It said that the factual background and the guidance given in *Jordan's* case were more than sufficient to ground a satisfaction on the part of the Director that there was a risk that the administration of justice might be impaired if the trial were to be conducted with a jury.

In respect of the issue of insufficient disclosure, the Court recognised that it will often be appropriate for underlying documents to be supplied in support of a decision that is subject to judicial review where an issue of proportionality arises. The Court said it had some difficulty understanding why disclosure in this case was not made of matters which were specifically referred to as informing the decision such as the police report (even in summary form) and “the other material” which the Director expressly indicated he had analysed:

“The duty of candour is an exacting one and we entertained some doubts as to whether sufficient consideration was given in this case by the Director as to what documents could have been provided in the interests of transparency and explanation. In the event however, given the specific facts of this case, we are not satisfied that anything turns on this. As we have earlier indicated, hopefully in clear terms, the background circumstances of this case alone were more than sufficient to provide a solid foundation for the twin decision-making process carried out by the Director and we fail to see how any of the documents which were sought could have materially added to the applicant’s understanding of the reasoning in question.”

Counsel for the applicant also asserted that the applicant had been given no opportunity to make representations before the issue of the certificate. The Divisional Court stated, however, that not every decision making process demands procedural fairness in the sense of requiring the decision maker to consult the party affected or to make him aware of the nature of the evidence being relied on when reaching a decision adverse to him. It considered there was no procedural impropriety in failing to afford the applicant an opportunity for representations before the decision was made.

## **Section 7 of the 2007 Act**

Both parties made submissions on Section 7 of the Act which places limitations on the challenge to the issue of a certificate. The Divisional Court, however, was satisfied that the Director did have appropriate jurisdiction and made no error of law in that he properly exercised his discretion to issue a certificate having applied the appropriate tests to the conditions set out in Section 1 and thereafter concluded

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that the administration of justice might be impaired if the trial were to be conducted with a jury.

## Conclusion

The Divisional Court dismissed the applicant's case.

## NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website ([www.judiciary-ni.gov.uk](http://www.judiciary-ni.gov.uk)).

## ENDS

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