Judicial Communications Office

24 June 2019

COURT REFUSES MEDIA LEAVE TO APPEAL

Summary of Anonymized Judgment

The Court of Appeal[1] refused a number of media organisations leave to appeal to challenge a restriction on contemporaneous reporting of the fact finding trial of a person found unfit to be tried. The reporting restriction orders made by the Crown Court on 10 May 2018, 19 December 2018 and 6 March 2019 and by the Court of Appeal on 3 April 2019 ("the reporting restriction orders") remain in force until the conclusion of the fact finding trial or further order whichever comes first but those orders have been varied by order dated 24 June 2019 solely to permit publication of and reporting of the anonymized judgment delivered by the Court of Appeal on 7 June 2019 under the title "The Queen v HNC."

Background

On 19 December 2018, Mr Justice Colton made an order under section 4(2) of the Contempt of Court Act 1981 ("the 1981 Act") to prohibit reporting of a fact finding trial until its completion or further order of the court. The terms of the order made are: "*That there be no reporting of [the decision of 19 December 2018] or subsequent proceedings, save for the fact that there will be a hearing concerning the counts alleged against the defendant under Article 49A of the Mental Health (Northern Ireland) Order 1986 to determine whether the defendant did the acts charged against him. This Order shall remain in force until the completion of the proceedings or further order of the court*." This order was challenged by a number of media organisations who sought to have the restriction discharged so they could report the fact finding trial contemporaneously. On 6 March 2019 Mr Justice Colton rejected the application and ruled that the order should remain in place. The media organisations[2] sought leave to appeal this decision to the Court of Appeal. On 8 April 2019, the Court refused leave to appeal and today delivered its reasons for so doing. The Court said it was clear from the judgment of 6 March 2019 that the judge was in the alternative maintaining the order of 19 December 2018 under Article 3 ECHR and section 6 of the Human Rights Act 1998 ("HRA"). The application for leave to appeal therefore proceeded on the basis that the order of 6 March 2019 was made not only under section 4(2) of the 1981 Act but was also made under Article 3 ECHR and section 6 HRA.

The effect of the Reporting Restriction Orders

It was suggested that the orders prohibited "press" reports. The Court, however, said that the orders affect everyone and are not confined to reports by members of the press. Accordingly, anyone attending court and listening to the evidence is restrained from "reporting". A report would include an oral report of the hearing and would also include publication on the internet. The Court said the orders should be brought to the attention of anyone attending the fact finding trial. It also considered that the orders postpone reporting until completion at first instance of the fact finding trial. It commented that if there is an appeal after the conclusion of the trial, the orders would not

[1] The panel was Lord Justice Stephens, Lord Justice Deeny and Lord Justice Treacy. Lord Justice Stephens delivered the judgment of the court.

[2] The media organisations are the BBCNI, UTV, the Irish News, Mirror Group Newspapers, the Belfast Telegraph, the Irish Times and The Detail.

apply to the appellate proceedings and any application in respect of any appellate proceedings should be made to the Court of Appeal.

Jurisdiction of the Court to hear the application for leave to appeal

The application for leave to appeal was brought pursuant to section 159(1) of the Criminal Justice Act 1988 ("the 1988 Act"). Section 159 provides a right to apply to the Court of Appeal for leave to appeal in relation to orders restricting or preventing reports or public access to Crown Court proceedings. For there to be an appeal under section 159(1)(a) there has to be both an order under section 4 or 11 of the 1981 Act and the order has to have been made in relation to a trial on indictment. In this case the orders were all made under section 4 of the 1981 Act and the issue on appeal therefore related to the second condition, namely "is an order made in relation to a fact finding trial an order made in relation to a trial on indictment?."

The media organisations also relied on section 159(1)(c) which does not require that the order restricting publication is made under the 1981 Act and which would therefore be relevant in this case as the orders were also made under Article 3 ECHR and section 6 HRA. Again, two conditions have to be met: there has to be an order restricting publication of any report and the restriction has to be "of the whole or any part of a trial on indictment or any such ancillary proceedings". In this case the first condition has been met and the issue on appeal was whether a fact finding trial is part of, or ancillary to, a trial on indictment.

The Court agreed that the fact finding trial was not a trial on indictment on the basis that the trial terminated following a finding of unfitness under Article 49A of the 1986 Order and that any finding by the jury that the accused did the act charged is not a conviction. The question therefore was whether the fact finding trial is a proceeding which is ancillary to a trial on indictment.

Counsel for the accused submitted that the fact finding trial was not ancillary but was in fact "instead of" a trial on indictment. The Court considered the purpose of section 159(1) is to facilitate appeals by media organisations in order to enhance open justice and said that the construction of what is ancillary to a trial on indictment should be informed by that purpose. It said it is not possible to have a fact finding trial without first commencing proceedings by serving an indictment on the accused. The indictment together with the anticipated trial on indictment is a necessary pre-condition to the subsequent fact finding trial: "In that sense the fact finding trial grows out of and is incidental to the trial on indictment". The Court also noted that if an accused recovers then in certain circumstances he/she can be remitted to the Crown Court for a full criminal trial and a trial on indictment can in these circumstances be subsequent to a fact finding trial. Further, if an accused becomes unfit during the course of a trial on indictment, the jury may determine whether he/she did the act charged on the evidence already given in the trial and in that way the finding of fact would be further linked to or ancillary to a trial on indictment:

> "For all of these reasons we consider that the reporting restriction in relation to the fact finding trial is a reporting restriction in relation to proceedings which are ancillary to a trial on indictment within the meaning of section 159(1)(c) of the 1988 Act."

The role of the Court on an appeal under section 159(1) of the 1998 Act

The Court said that when exercising the section 159(1) jurisdiction it was not merely reviewing the decision of the trial judge, but coming to its own independent conclusions on the material placed

before it. Counsel for the media submitted that this permitted the organisations to place additional material before the court by making legal submissions that were not made at first instance. The Court rejected this submission. It said that if this was the case then criminal trials or fact finding trials in the Crown Court could be disrupted by unnecessary delay with new points being taken on appeal and this would not be in the public interest. The court noted that it has discretion as to whether a new point can be taken on appeal and said there were two discretions in play in this case:

> "The first is whether to grant leave to appeal which is the statutory discretion and the second is discretion as to whether to allow a point not taken at first instance to be taken on appeal. A factor affecting both discretions must be the impact on the administration of justice in the Crown Court."

Article 3 ECHR and the principle of open justice

Article 3 ECHR provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". Counsel for the media organisations conceded that a criminal trial can amount to treatment within Article 3 ECHR whilst emphasising that it must attain a minimum level of severity. Case law provides that the assessment of the minimum level depends on all the circumstances of a case. In respect of anticipated treatment, a threat of conduct prohibited by Article 3 provided it is sufficiently real and immediate may fall foul of that provision. The Court agreed that the burden is on the person alleging the infliction of treatment proscribed by Article 3 to establish that there is a real and immediate risk. Article 3, however, makes no provision for exceptions and no derogation from it is permissible under Article 15(2) ECHR even in the event of a public emergency threatening the life of a nation. Once facts have been established that lead to the conclusion that here has been or that there is a real and immediate risk of inhuman and degrading treatment then there can be no question of a balance with the principle of open justice.

The Court noted, however, that there is an anterior stage when consideration is being given as to whether the treatment is proscribed by Article 3 and that the importance of the principle of open justice comes into play. At that stage a court is obliged to consider ways in which the risks can be mitigated and the treatment ameliorated so as to leave open the conclusion either that the treatment will not meet the minimum level of severity required or that the risk is no longer real or immediate. This obligation on the court is of particular importance where, as here, both the prosecution and the accused agree that there should be a derogation from the principle of open justice:

> "At the anterior stage the court must take into account the constitutional importance of open justice by careful scrutiny of, and if necessary evidence as to, mitigating or ameliorating measures. The constitutional imperative of open justice should drive a careful search for those measures so that open justice is maintained without a breach of Article 3."

The submissions

Counsel for the media organisations submitted that the judge ought to have but failed to consider mitigating or ameliorating measures so as to maintain open justice without a breach of Article 3. Further, he submitted that the judge when considering whether a reporting restriction was "necessary" ought to have but failed to apply the tests by which to determine the matter. He accepted, however, that none of the mitigating or ameliorating measures had been suggested to the judge and accordingly none of the facts in relation to the potential measured had been determined.

Counsel and the Court agreed that there can be no criticism of the judge in circumstances where as here the issue was not raised before him. Counsel also recognised that the failure of the media organisations to raise this issue meant that the Court of Appeal could not form a view as to whether the measures could lead to the reporting restriction being removed. This meant the only potential course of action open to the Court, if leave to appeal was granted and if the appeal was allowed on this ground, would be to remit to the judge to hear further evidence which might include hearing again from medical witnesses. Counsel recognised that a remittal would most probably lead the accused to renew his application for a stay and result in the substantive fact finding hearing being adjourned.

Counsel for the prosecution emphasised the potential disruption to the fact finding hearing which should be seen in the context not only of the public interest in the trial proceeding but also because the family of the victim in this case would not be aware of the content of some of the evidence except during the fact finding trial. He also noted that there were substantial difficulties in organising witnesses to attend the fact finding trial.

Discussion and Conclusion

The Court said there is a requirement for the judge to consider the way in which the risks can be managed and whether those risks could be overcome by some less restrictive measures. It noted the order that was made was one that was envisaged as being a relatively short postponement of reporting of the fact finding trial until it was concluded at first instance. The Court took this into account in the exercise of its discretion but also noted that if the proceedings are more protracted than envisaged or if there is some other material change of circumstance such an application to stay the proceedings then there can be a further application by the media organisations to the trial judge to remove or vary the reporting restriction orders on foot of the liberty to apply. The Court concluded that a significant factor in the exercise of discretion was the point raised by the media organisations as to mitigating and ameliorating measures but as this was not raised before the judge at first instance it could not be raised on appeal. If there was to be an appeal, further evidence would have to be called which could lead to an application to stay the fact finding trial:

> "We consider that it is imperative that there should be no delay to the fact finding trial. This is the most significant factor in the exercise of discretion."

Conclusion

The Court of Appeal refused leave to appeal.

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).

ENDS

If you have any further enquiries about this or other court related matters please contact:

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Appendix – Court Orders

Date	Court Order (Excerpt)
10 May 2018	Before Belfast Crown Court on 10 May 2018 The Court ordered that the medical issues heard iro the defendant's medical condition are not to be reported in any publication of any sort This Order is made under Section 4(2) of the Contempt of Court Act 1981
19 Dec 2018	Before Belfast Crown Court on 19 December 2018 The Court ordered that there be no reporting of today's decision or subsequent proceedings save for the fact that there will be a hearing concerning the counts alleged against the defendant under Article 49A of the Mental Health (NI) Order 1986 to determine whether the defendant did the acts charged against him. This order shall remain in force until the completion of the proceedings or further order of the Court. This Order is made under Section 4(2) of the Contempt of Court Act 1981
6 Mar 2019	Before Belfast Crown Court on 6 March 2019 The Court ordered that the Reporting Restriction made 19/12/18 is to remain in place.
24 Jun 2019	Before Belfast Court of Appeal on 24 June 2019 **AND** the said having duly lodged an appeal to the Court of Appeal in respect of these said proceedings - THE COURT: 1. AFFIRMS that (subject to the limited variation set out below) the reporting restrictions orders so that they remain in force until the conclusion of the fact finding trial or further order whichever comes first;. 2. VARIES the reporting restriction orders solely to permit publication of and reporting of the anonymized judgment; 3. GRANTS liberty to apply to discharge or to vary any of the reporting restriction orders. This Order is made under Section 4(2) of the Contempt of Court Act 1981

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Date	Court Order (Excerpt)
24 Jun 2019	**HM COURT OF APPEAL IN NORTHERN IRELAND** CRIMINAL APPEAL (NORTHERN IRELAND) ACT 1980 Monday the 24th day of June 2019 Before THE RIGHT HONOURABLE LORD JUSTICE STEPHENS THE RIGHT HONOURABLE LORD JUSTICE DEENY THE HONOURABLE LORD JUSTICE TREACY UPON this court considering whether to amend the reporting restriction orders made by the crown court on 10 May 2018, 19 December 2018 and 6 March 2019 and by this court on 3 April 2019 ("the reporting restriction orders") in order to permit the publication of the anonymized judgment of this court delivered on 7 June 2019 "The Queen v HNC" ("the anonymized judgment"); AND UPON HEARING Counsel on behalf of the prosecution and Counsel on behalf of the defendant, THE COURT: 1. AFFIRMS (subject to the limited variation set out below) the reporting restrictions orders so that they remain in force until the conclusion of the fact finding trial or further order whichever comes first; 2. VARIES the reporting restriction orders solely to permit publication of and reporting of the anonymized judgment; 3. GRANTS liberty to apply to discharge or to vary any of the reporting restriction orders; 4. MAKES no order as to costs between the parties.