

# Judicial Communications Office

22 October 2018

## BOSTON TAPES APPLICATION DISMISSED

### Summary of Judgment

The Divisional Court today dismissed an application for an injunction by Anthony McIntyre restraining the Director of Public Prosecutions or the PSNI from making any further use of the interview materials obtained from the “Boston Tapes” project.

#### Background

Anthony McIntyre (“the applicant”) was convicted of membership of a proscribed organisation, the Irish Republican Army, and sentenced on 9 December 1974 to a period of two years’ imprisonment. He was subsequently convicted of one count of murder, three counts of attempted murder, one count of hijacking and one count of possession of a weapon with intent to endanger life. He was sentenced to life imprisonment with a recommended minimum term of 25 years. He appealed in respect of the murder charge and in 1979 the recommended minimum term was reduced to 20 years’ imprisonment.

In 2001 the applicant became involved in an academic oral history project known as the “Belfast Project” with the journalist and author Ed Moloney who was the project director. The project was sponsored by Boston College, Massachusetts, USA. The object of the project was to collect and preserve for academic research the recollections of members of republican and loyalist paramilitary organisations. The methodology was to gather first-hand testimony by way of voice recordings from participants. The project lasted from 2001 until May 2006. It began with interviews of former members of the Provisional IRA and was subsequently expanded to include interviews with former members of the Ulster Volunteer Force. The applicant was a researcher. He interviewed past participants in the conflict recording their personal recollections. Each participant gave the content of the recordings into the possession of Boston College for preservation. Access to the tapes was to be restricted until after the interviewee's death except where they provided prior written authority for their use otherwise. The applicant maintains that it was always understood that the contents of the interviews might be accessible after death and that it was never envisaged that the contents would be accessed by the Police Service of Northern Ireland (“PSNI”) for the purposes of criminal investigation or prosecution.

In February 2011 mutual legal assistance was sought by the PSNI from the authorities in the USA to obtain tapes held by Boston College relating to interviews conducted with Republican participants touching upon the abduction and death of Jean McConville. This was resisted on the basis of the risks to the well-being of the researchers but the US court concluded that some of the materials should be provided to the UK authorities. In 2012 the applicant instituted proceedings in this jurisdiction seeking to prevent the PSNI from obtaining confidential archive material provided to the Trustees of Boston College Massachusetts USA but that application was dismissed in October 2012.

The applicant gave an interview to the BBC's Spotlight programme broadcast in May 2014 in which he stated that he had provided an interview on tape to the organisers of the Boston College Project and that he had exposed himself “to exactly the same risks as anybody else was exposed to”. The PSNI interpreted that statement as suggesting that the applicant had disclosed criminal conduct in

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his interview on tape. On 3 September 2014 the PSNI requested that the Public Prosecution Service (“PPS”) issue an International Letter of Request (“ILOR”) in respect of a criminal investigation it was carrying out into the following matters:

- A bomb attack on a house at Rugby Avenue on 6 February 1976. The PSNI claimed to have received information on that date the applicant was involved in the bomb attack. The applicant, however, maintains that he was in fact the target of the attack and that in any event if the attack was on the date alleged he was in police custody throughout that day;
- The detection in 1978 in the applicant's possession of an imitation firearm while in custody in circumstances suggesting that he may be planning an escape from custody. The applicant states that this is a reference to an incomplete wooden gun in two parts which was found in a search cubicle in prison reception. He was questioned at the time of its discovery but not charged with any offence and
- Membership of an illegal organisation. That concerned *inter alia* intelligence allegedly suggesting that the applicant debriefed members of the Provisional IRA after their release from custody and was an officer of that organisation.

## The International Letter of Request (“ILOR”)

The ILOR was issued on 9 February 2015 by the PPS to the Central Authority of the United States of America. The letter described the applicant and indicated that the PSNI was investigating the commission of a number of offences and grounded its investigation on the following information:

- “(i) In 1974 the police received information that Anthony McIntyre was a member of the Official Irish Republican Army in the Markets area of Belfast;
- (ii) In 1975 Anthony McIntyre was convicted of membership of an illegal organisation—namely the Irish Republican Army - and was sentenced to two years imprisonment;
- (iii) In 1975 Anthony McIntyre was convicted of an offence of armed robbery carried out on behalf of the Irish Republican Army, he was sentenced to three years imprisonment,
- (iv) In 1975 the police received information that Anthony McIntyre was a member of the Provisional Irish Republican Army,
- (v) In 1976 the police received a report that Anthony McIntyre was the leader, or Officer Commanding, the Provisional Irish Republican Army in the Ormeau Road area of Belfast;
- (vi) In 1976 the police received information that Anthony McIntyre was involved in a bomb attack on a house in Rugby Avenue, Belfast;
- (vii) In 1976 the police received information that Anthony McIntyre was conducting debriefing sessions on behalf of the Provisional Irish Republican Army with persons who had been arrested and questioned by the British Army;
- (viii) In 1976 Anthony McIntyre was convicted of the murder of Kenneth Lenaghan in Donegal Pass, Belfast. The PSNI believes that this murder was carried out by the Provisional Irish Republican Army, Anthony McIntyre was sentenced to life imprisonment for this offence; and
- (ix) In 1978, in a prison transport vehicle, Anthony McIntyre was found to have a concealed imitation firearm. The PSNI believes this was to have been used in an escape attempt.”

There were a number of errors in the ILOR including reference to the incorrect date of birth of the applicant, the incorrect section of legislation in respect of an offence, an assertion that the applicant had been convicted of armed robbery in 1975 and sentenced to a period of imprisonment of three years when in fact there was no evidence to support that assertion and an incorrect date of

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conviction for the offence of membership of a proscribed organisation. Although the proceedings in the US were sealed the PPS asked the authorities on 16 June 2016 to unseal certain submissions in order to correct the errors in advance of the issue by the court of its Order later the same day. The US court carried out an *in camera* review of the material and ordered that portions of the interviews were to be made available to the PSNI.

## Leave

The applicant sought an injunction restraining the DPP or PSNI from taking any further steps in the utilisation of the interview materials. An interim Order to that effect was made by the Divisional Court and leave was granted to pursue grounds raising the following issues:

- The DPP had no reasonable grounds for suspecting that any or all of the specified offences had been committed by the applicant or that any investigation was being carried out in respect of them in advance of the issuance of the ILOR for the applicant's interview materials;
- The DPP failed to satisfy himself that the doctrines of *autrefois acquit* and *autrefois convict* were not applicable to any of the specified offences prior to the issuance of the ILOR;
- The DPP failed to promulgate guidelines or to have regard to other published guidelines relating to the proper approach to be adopted with respect to ILORs;
- The PSNI and DPP had not acted in good faith and there was a breach of the duty of candour by the PPS, particularly in not transmitting to the US Central Authority exculpatory material provided by the applicant;
- The PSNI had acted unreasonably by engineering an investigation into moribund offences or offences which had already progressed to conviction or acquittal for the sole purpose of obtaining the relevant materials.

## Consideration

The statutory conditions enabling the PPS to request assistance are: it must appear to the PPS that there are reasonable grounds for suspecting that an offence has been committed; that the offence is being investigated; and that the assistance sought is assistance in obtaining evidence specified in the request for use in the investigation. The Divisional Court accepted that the inference to be drawn from the materials is that there was no active investigation in respect of the applicant's alleged criminal conduct prior to the Spotlight interview in May 2014. It considered, however, that the evidence presented to the court established that an investigation had been commenced between May and September 2014 and that in light of the intelligence material disclosed to the court the first two conditions were satisfied. There was some criticism of the suggestion that the requested material was likely to be of substantial value. The PPS indicated to the court that it "had no idea what it might contain" but the Divisional Court was satisfied that the evidence indicated that the assistance was sought in connection with the investigation, was judged to be likely to be relevant to the manner in which that investigation was pursued and that it was considered that its receipt would influence the course of the investigation. Accordingly the material sought was for use in the investigation and the third condition was also satisfied.

The Court referred to two recent cases which discuss the further obligations to which a requesting state is subject<sup>1</sup>. The core of the applicant's complaint in this case was that there had been a breach of

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<sup>1</sup> *Re Rea's Application* [2015] NICA 8 and *R (Hafner) v City of Westminster Magistrates' Court* [2009] 1 WLR 1005

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the duty of good faith and that a duty of candour had been owed to him which had also been breached. As evidence of the breach of good faith the applicant relied on the errors within the ILOR. The applicant pointed to the secrecy attaching to the process and complained about the reluctance of the respondents to disclose the ILOR until late in the proceedings. The Divisional Court did not accept that the preservation of confidentiality in the course of a criminal investigation is evidence of a breach of the duty of good faith but we are satisfied that the content of the ILOR could and should have been disclosed at an earlier stage in these proceedings. The Court did agree that there was a “disappointing lack of care” in the preparation of the ILOR but it did not accept that evidence of such a lack of care translates into breach of the duty of good faith which applies in such cases:

“The applicant sought to undermine the evidence that an investigation was ongoing and that the PPS had reasonable grounds for requesting the evidence in connection with an investigation into offences committed by the applicant by adducing evidence from him and the householder in Rugby Avenue supporting the identification of the culprits as loyalists. The basis, however, for the investigation of the applicant’s involvement in the bomb attack is intelligence based. The fact that exculpatory evidence was introduced on behalf of the applicant did not diminish the importance of the intelligence led evidence. The submission of the PSNI to the PPS dated 3 September 2014 was clear evidence that an investigation into the applicant’s criminal conduct was ongoing, that it was largely intelligence based, that it concerned offences in connection with the bomb attack at Rugby Avenue in 1976, the circumstances in which the applicant had certain items in his possession while being transported from the prison in 1978 and his alleged membership of the Provisional IRA. We do not accept that the criticisms set out above provide any basis for the conclusion that there was a breach of the duty of good faith. The offences in respect of which the materials were to be used had to be set out comprehensively since any use in respect of other offences was prohibited ... unless the requested authority consented to that use.”

The applicant also contended that there was a duty of candour requiring the disclosure to the requested state of any exculpatory material available to the investigators. The Divisional Court, however, did not accept that the respondents were subject to such a duty in respect of disclosure. Section 32 (1)(d) of the Police (Northern Ireland) Act 2000 it is the general duty of the police to take measures to bring the offender to justice where an offence has been committed. In doing so the investigation will often disclose inculpatory and exculpatory material and it is the responsibility of the police to conduct its investigation by reference to all the evidence. Where an ILOR is requested, that may be for an inculpatory or exculpatory purpose. The Divisional Court held that the use to which the material is put is clearly a matter for the police. The duty of good faith applies to the requesting authorities and would be breached in circumstances where the request relied upon evidence which had been so undermined by other material that it did not provide a *bona fide* basis for the investigation. The Court said that was not the case in these proceedings:

“The material upon which the police rely for the pursuit of this case is intelligence material. The applicant contends that the intelligence material is mistaken but that does not undermine the relevance of the intelligence material to the investigation. Since the exculpatory material advanced by the applicant could not undermine the relevance of the request for the investigation the duty of good faith did not require its disclosure.”

The Divisional Court in Northern Ireland considered in 2015 that the creation and publication of guidelines for prosecutors seeking international assistance might be of assistance bearing in mind that Article 8 was engaged. The Divisional Court in this case agreed that the publication of such

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guidelines would be of assistance and it encouraged the PPS to take up this suggestion. The Court, however, went on to review the relevant parts of the guidance on extradition published by the Crown Prosecution Service (“CPS”). The guidelines applicable to requests for international assistance indicate that there should be a nexus between the facts of the case and the assistance requested. If coercive measures such as a search warrant are required the letter of request should indicate clearly that such measures are necessary, appropriate and proportionate. The guidance also indicates that the request should relate to specific evidence rather than being a “fishing expedition”. The Court held that the request in this case was necessary, appropriate and proportionate in the investigation of crime and was in respect of specific evidence.

The guidance further indicates that a summary of the case should be available which satisfies the prosecutor that an offence has been committed or that there are reasonable grounds for suspecting this to be the case. Confirmation is also required that the alleged criminality is under formal investigation. The Divisional Court was satisfied that the PSNI request of 3 September 2014 met those tests. It was suggested that there should have been a request to this applicant to consent to the provision of the material but the Court said it was clear that this applicant who had previously resisted attempts to secure such evidence in other cases would do the same in his own case.

The final issue raised was the engagement of Article 8. The Divisional Court considered that, assuming there is an interference with the private life of the applicant, it is for the purpose of the prevention of crime, it is in accordance with law and that this internationally recognised system provides the only method of securing the material. The interference in this case is potentially limited by the need to show relevance in the requested state, the obligation under the statute to return the material in the event that it is not used and the application by the PPS of the evidential and public interest tests before it could be used in a prosecution:

“The public interest in the investigation and, if appropriate, prosecution of serious terrorist offences significantly outweighs the interference with private life in this case.”

## Conclusion

The Divisional Court concluded:

- At the time of the written request by the PSNI to the PPS on 3 September 2014 an investigation into the applicant’s criminal involvement in the explosion at Rugby Avenue, Belfast, his possession of an imitation firearm and his membership of the IRA was ongoing and continues;
- The PSNI and the PPS sought the interview tapes for use in those investigations;
- The errors in the ILOR were due to a distinct and surprising lack of care on the part of the PSNI and the PPS;
- The errors in the ILOR were not indicative of bad faith;
- The errors in the ILOR were not material to the request except insofar as the wrong section of the 1969 Act was included and that was corrected before the Order of the US court;
- There is not a duty of candour which required the disclosure by the PPS to the US Central Authority of any exculpatory material put forward by the applicant;
- The exculpatory material introduced by the applicant does not undermine the entitlement of the PSNI to investigate the matters contained in the intelligence material pointing to the involvement of the applicant in the offences;

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- There is a duty of good faith on the PPS and PSNI in respect of the pursuit of an ILOR request but there was no breach of that duty;
- The US District Court had no role in determining whether a particular line of PSNI enquiry was appropriate and in this case the exculpatory material upon which the applicant relies was not relevant to the determination of the request;
- As the exculpatory material did not undermine the basis of the request or suggest any bad faith in pursuing the ILOR its disclosure to the US authorities was not required;
- There was no breach of Article 8 of the Convention.

The application was dismissed.

## NOTES TO EDITORS

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 (<https://judiciaryni.uk>).

**ENDS**

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