

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN’S BENCH DIVISION (JUDICIAL REVIEW)**

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**DIVISIONAL COURT**

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**Walsh’s (John Christopher) Application (Leave Stage) [2011] NIQB 27**

**AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY  
JOHN CHRISTOPHER WALSH**

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**Before Mr Justice Weatherup and Mr Justice Weir**

**WEATHERUP J**

[1] This is an application for leave to apply for judicial review of three decisions. First of all, the decision of the Department of Justice on an application by the applicant under section 133 of the Criminal Justice Act 1988 for compensation for wrongful conviction. Secondly, the decision of the Chief Constable of the Police Service of Northern Ireland on the conduct of the prosecution of the applicant at his trial in 1992 and on appeals to the Court of Appeal. Thirdly, the decision of the Northern Ireland Human Rights Commission on the applicant’s requests for assistance with the appeals against conviction and in the aftermath of the appeals. In addition the Court required that the Public Prosecution Service be made a Notice Party to the application by reason of the issues raised in relation to the prosecution of the applicant and the appeals against his conviction. The applicant appeared in person and Mr McGleenan appeared for the Department of Justice, the Chief Constable and the Public Prosecution Service and Mr Scoffield appeared for the Northern Ireland Human Rights Commission.

[2] The applicant's affidavit outlines that he was convicted at Belfast Crown Court on 7 December 1992 on a charge of possessing a coffee jar bomb with intent, contrary to Section 3 of the Explosives Substances Act 1883. The trial Judge was HH Judge Petrie and the applicant was sentenced to 14 years imprisonment. On 7 January 1994 the Court of Appeal dismissed the applicant's appeal, the judgment being delivered by MacDermott LJ. On 27 March 2000 the Criminal Cases Review Commission referred the case back to the Court of Appeal. On 7 January 2002 the Court of Appeal dismissed the appeal, the judgment being delivered by Carswell LCJ. In January 2007 in the Court of Appeal Kerr LCJ granted leave to reopen the appeal. On 10 March 2010 the Court of appeal upheld the appeal and quashed the conviction, Morgan LCJ delivering the judgment. The quashing of the conviction led to the applicant's application for compensation.

[3] In relation to the Department of Justice, the application for compensation was responded to by a letter from the Department of 23 June 2010 which took the position that the applicant had failed to establish that there had been a miscarriage of justice in the sense of showing that the applicant was "demonstrably innocent". The letter concluded "... we believe Mr Walsh is ineligible for compensation" and invited a response on behalf of the applicant.

[4] The Department says that no decision has yet been made in respect of the application for compensation and that the applicant's challenge is premature. However the Department has decided that eligibility for compensation requires the applicant to show that he is demonstrably innocent. This approach is to adopt the narrow test for compensation for wrongful conviction rather than the broad test that an applicant should not have been convicted. The appropriate test to be applied is an issue that is presently before the Supreme Court in McCartney and MacDermott's Application [2010] NICA 10 and a judgment is awaited. In the circumstances we propose to defer a decision on the leave application against the Department pending the decision of the Supreme Court.

[5] There is a related matter, as far as the applicant is concerned, concerning the manner in which the Court of Appeal dealt with the applicant's appeals. The trial Judge drew an adverse inference against the applicant at his trial in 1992 by reason of his failure to mention to police at an interview, which was conducted without a lawyer present, the presence of another person at the scene of the finding of the bomb that was the subject matter of the charge.

[6] In 2002 the Court of Appeal set aside that adverse inference on the basis that it was not reasonable to have expected the applicant to mention the fact in the course of his police interview. Had the Human Rights Act 1998 applied at the relevant time the unwarranted drawing of that adverse

inference would have impacted on the applicant's fair trial rights under article 6 of the Convention. However the Court of Appeal in 2002 found that, if there had been a breach of the article 6 fair trial rights, nevertheless the conviction was not unsafe. The applicant regards this conclusion as unjustified as effectively excluding the applicant from the right to a fair trial. This issue has been a central concern of the applicant ever since the decision of the 2002 Court of Appeal.

[7] The 2010 Court of Appeal upheld the applicant's appeal for reasons related to the forensic evidence and the credibility of a witness and it did not address the issue of the adverse inference. The 2010 Court of Appeal no longer needed to consider the issue of the adverse inference because that issue had been removed from the case by the decision of the 2002 Court of Appeal.

[8] The applicant seeks to overturn the conclusion of the 2002 Court of Appeal that, if there had been a breach of the applicant's right to a fair trial in relation to the adverse inference, the conviction was nevertheless not unsafe. He contends that the approach of the 2002 Court of Appeal has found its way into the thinking of the Department in the letter of 23 June 2010. By the terms of the letter the applicant believes that he was adjudged by the Department to be guilty of the charge without affording him any right to a trial.

[9] The applicant's views as set out above lead on to the role of NIHRC. The applicant sought assistance from NIHRC to take up his concerns about his conviction and the appeals in 2002 and 2010 and the aftermath of the 2010 appeal. He contends that NIHRC has been in breach of section 70 of the Human Rights Act 1998 which provides the power of NIHRC to provide assistance. On the other hand NIHRC contends that it has dealt adequately with such requests for assistance as the applicant has made. It is right to say that relations between the applicant and NIHRC have been fraught. The applicant has been aggrieved by his sense of lack of support from NIHRC for his challenges in the Court of Appeal up to March 2010 and following the decision.

[10] This grievance against NIHRC ties in with the applicant's complaint against the Department in relation to, in the first place, his application for compensation and secondly, his attempt, as he sees it, to rectify the finding of the 2002 Court of Appeal, which he considers has been carried over into the approach of the Department to his compensation claim. As we are deferring the challenge to the decision of the Department pending the decision of the Supreme Court in McCartney and MacDermott's Application we propose to do the same in relation to NIHRC.

[11] The third decision concerns the Chief Constable. The applicant seeks an investigation by the Chief Constable of certain aspects of the applicant's prosecution in 1992 and of the conduct of the appeals thereafter, which the

applicant contends involved criminal conduct. In particular the applicant focuses his criticisms on prosecuting Counsel. In the applicant's affidavit he sets out his particular complaints. First of all, the alleged coaching of witnesses prior to the trial, being a reference to exchanges between Counsel and the military witnesses. Secondly, the alleged perjury of Counsel, by concealing the whereabouts of a witness, being a reference to Private Boyce, who Counsel stated to the Court of Appeal could not be found. Thirdly, the alleged doctoring and fabricating of evidence to help secure a wrongful conviction against the applicant. This refers to photographs which the applicant said were available in 1992 but which both the police and prosecutor denied were available to them, which photographs were produced subsequently at the later appeal. Further, the applicant refers to the non disclosure of evidence in the course of the trial in relation to the arrest of "a senior IRA figure" near the scene of the offence, being a person whom the applicant contends was believed to be connected to the presence of the coffee jar bomb.

[12] The Chief Constable replied to the requests for an investigation in a letter dated 12 October 2010 and indicated that the appropriate step to be taken in relation to allegations of misconduct against a police officer would involve reference to the Office of the Police Ombudsman for Northern Ireland which has responsibility for investigating such matters. Further, in so far as the complaint related to the conduct of the prosecution the Chief Constable referred the applicant to the Public Prosecution Service.

[13] The Police Ombudsman did consider the matter and by an email of 26 October 2010 indicated to the applicant that he was unable to discern any misconduct on the part of the police. As far as the prosecution was concerned the Police Ombudsman referred the applicant to the Public Prosecution Service. There was an internal Public Prosecution Service inquiry conducted by Raymond Kitson, an Assistant Director, and he did not find any misconduct in relation to the conduct of the prosecution.

[14] One issue relates to the coaching of witnesses. There can be debate as to whether contact with a witness involves the permitted preparations for a witness giving evidence or whether the contact went beyond permitted contact and amounted to coaching the witnesses as to the evidence to be given. Such inquiries as have taken place have not established any impropriety on the part of Counsel. In any event if there is to be any further investigation of alleged misconduct in this regard it is matter for the Bar Council.

[15] Another issue relates to the photographs. The inquiry into this matter established that the photographs had not been disclosed to the prosecution until 1998, that is, after the trial and first appeal. Therefore Counsel could not have had the photographs at the trial. The later handling of this issue has not

drawn adverse comment from the Court of Appeal. Again if there is to be any further investigation of alleged misconduct in this regard it is a matter for the Bar Council.

[16] A further issue relates to the arrest of the IRA figure. That arrest was not disclosed to the defence at the trial. This non disclosure was an issue before the Court of Appeal in 2010. The Lord Chief Justice, at paragraph [28] of his judgment, referred to prosecuting Counsel's submission to the Court that the material did not pass the test for disclosure. By way of response the Lord Chief Justice stated that there was considerable force in the submission made by Counsel. However it was concluded that it was a matter that ought to have been disclosed. While there may be debate as to whether the arrest should or should not have been disclosed, the non disclosure does not constitute a criminal offence. It is not an issue for investigation by the police.

[17] The final matter relates to the whereabouts of a Private Boyce. He made a second statement in 1998 which was in different terms to his evidence at the trial. That second statement appeared during the investigation by the Criminal Cases Review Commission. The witness was not traced for the third Court of Appeal in 2010 and prosecuting Counsel's disclosure of that to the Court of Appeal is the subject of the criticism.

[18] Ultimately these complaints relate to Counsel's conduct of the prosecution. They concern the appropriate contact with witnesses, the appropriate information that Counsel ought to provide to the Court and the appropriate disclosure that ought to be made by the prosecution. The conduct cannot amount to perjury as Counsel was not giving evidence to the Court. As far as there may be police involvement in the matters complained about, and the prosecuting authority obtains the information through the police, it is for the Police Ombudsman to determine if there has been police misconduct. The Police Ombudsman has not found that there was any misconduct. As far as the complaints concern the conduct of the prosecution it is for the Public Prosecution Service in the first instance to determine if there has been misconduct on the part of the prosecutor. The Public Prosecution Service has not found that there was any such misconduct. In so far as the judgment of the Police Ombudsman and the Public Prosecution Service are in question as a result of these findings, neither the Police Ombudsman nor the Public Prosecution Service is under challenge in this application for judicial review. If Counsel has acted improperly in relation to the conduct of the prosecution it may be a matter of complaint to the Bar Council but that it is not an issue that has arisen in this judicial review.

[19] We conclude that there are no arguable grounds for requiring the Chief Constable to conduct any further enquiry in relation to these issues.

[20] Accordingly we dismiss the application for leave to apply for judicial review of the decision of the Chief Constable. We adjourn the application for leave to apply for judicial review of the decisions of the Department and NIHRC pending the decision of the Supreme Court in McCartney and MacDermott's Application.