Neutral Citation no. [2007] NIQB 111

Ref:	**GILC7004**

Judgment: approved by the Court for handing down

Delivered:	**14/12/07**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY
X (a minor) BY
Y his mother and next friend
FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE
POLICE OMBUDSMAN FOR NORTHERN IRELAND

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GILLEN J

Introduction

[1] In this matter the applicant seeks an order of certiorari to quash a decision of the Police Ombudsman for Northern Ireland (PO) on the grounds that the PO failed, when considering a complaint by the applicant with reference to his arrest on 3 June 2007, to determine the complaint in a manner which complied with the Police (Northern Ireland) Act 1998 and that accordingly the matter should be reconsidered and determined according to law.

Background

[2] There is a measure of factual dispute as to the events of 3 June 2007. The respondent, relying on statements from the police officers involved and copy command and control details, concluded that on 3 June 2007 two police constables Smyth and Sanderson were tasked to investigate the theft of a strimmer belonging to a Mr Patrick Duffy. Mr Duffy gave a description of the alleged culprit and the police officers searched the area. During the course of their investigation the police officers observed Mr Duffy in conversation with the applicant. Mr Duffy indicated to the police that this was the person

whom he described earlier. The police spoke to him and requested his name and address. Allegedly the applicant initially gave address A and informed the police that at that stage he was staying at a friend's house at address B. Constable Smyth declared in a statement of 9 June 2007 that he was not satisfied that he had been given the correct name and address and accordingly at 2145 hours on 3 June 2007 arrested the applicant. Constable Smyth stated that the applicant later indicated that his mother lived at address C. The police officers called to that address. The applicant's mother Y identified her son and upon being so satisfied the arrest was terminated. Mr Duffy had allegedly informed the police that the applicant had offered to retrieve the strimmer from an associate and return for payment. The allegation made by Mr Duffy is denied by the applicant. He also denies providing the police with misleading addresses (see affidavit of Mr Heaney 11 September 2007).

[3] The application for leave for judicial review in this matter had challenged the necessity for the arrest of the applicant. That application was adjourned on 21 September 2007 and was re-listed on 5 October 2007 to enable the applicant's solicitors to take further instructions. In a letter of 27 September 2007 he wrote to the Director of Legal Services for the PO indicating that in light of the considerable degree of dispute that existed between the applicant and the proposed respondent it was no longer intended to pursue a challenge to the conclusion of the PO on the issue of the necessity for the arrest pursuant to Article 26(4) of the Police and Criminal Evidence (Northern Ireland) Order 1989 (as amended by the Police and Criminal Evidence (Amendment) (Northern Ireland) Order 2007). However the applicant was maintaining a challenge to the determination of the applicant's complaint in a manner which he alleged failed to comply with the 1998 Act. Accordingly the application on this issue under Order 53 Rule 3(2)(a) of the Rules of the Supreme Court (Northern Ireland) as amended on 5 October 2007 was granted leave on 22 October 2007.

The statutory framework

<u>Police (Northern Ireland) Act 1998(the 1998Act)</u>

[4] Where relevant Section 58 of the 1998 Act as amended provides as follows:

> "58.-(1) The Ombudsman shall consider any report made under Section 56(6) or 57(8) and determine whether the report indicates that a criminal offence may have been committed by a member of the police force.

(2) If the Ombudsman determines that the report indicates that a criminal offence may have been committed by a member of the police force, he shall send a copy of the report to the Director together with such recommendations as appear to the Ombudsman to be appropriate."

I pause to observe that Section 56(6) refers to a form of investigation by the person appointed to conduct the investigation by the Ombudsman and who shall then submit a report on the investigation to the Ombudsman. Section 57(8) is not relevant to this instance in that it deals with a formal investigation by a police officer.

[5] Section 59 of the 1998 Act, as amended, and where relevant provides as follows:

"59.-(1) Where –

(a) the Director has dealt with the question of criminal proceedings; or
(b) the Ombudsman determines that the report under Section 56(6) or 57(8) does not indicate that a criminal offence may have been committed by a member of the police force,

then the Ombudsman shall consider the question of disciplinary proceedings.

Sub section 1(B) applies if –

(a) the Director decides not to initiate criminal proceedings in relation to the subject matter of a report under Section 56(6) or 57(8) sent to him under Section 58(2); or
(b) criminal proceedings initiated by the Director in relation to the subject matter of such a report have been concluded.

(1A) – Sub section 1(B) also applies if the Ombudsman determined that a report under Section 56(6) or 57(8) does not indicate that a criminal offence may have been committed by a member of the police force and –

(a) he determines that the complaint is not suitable for resolution through mediation under Section 58(A); or

(b) he determines that the complaint is suitable for resolution through mediation under that Section but –

(i) the complainant or the member of the police force concerned does not agree to attempt to resolve it in that way; or
(ii) attempts to resolve the complaint in that way have been unsuccessful.

(1B) The Ombudsman shall consider the question of disciplinary proceedings –

(2) The Ombudsman shall send the appropriate disciplinary authority a memorandum –

(a) his recommendation as to whether or not disciplinary proceedings should be brought in respect of the conduct which is the subject of the investigation;
(b) a written statement of his reasons for making that recommendation; and
(c) where he recommends that disciplinary proceedings should be brought, such particulars in relation to the disciplinary proceedings which he recommends as he thinks appropriate.

[6] Subsequent to the 1998 Act being passed, the Secretary of State, after consulting the Ombudsman, the Police Authority and the Police Association for Northern Ireland, in accordance with Section 64(4) of the 1998 Act made the Royal Ulster Constabulary (Complaints etc.) Regulations 2000 (the 2000 Regulations).

[7] Where relevant Regulation 25 provides as follows:

"25.-(1) Where the Ombudsman is of the opinion –

(a) that a complaint is an anonymous or a repetitious one within the meaning of paragraph 2 or 3 of the Schedule or that a

> complaint is vexatious, oppressive or otherwise an abuse of the procedures for dealing with complaints or that it is not reasonably practicable to complete the investigation of a complaint, within the meaning of paragraph 4 thereof; and
>
> (c) that, in all the circumstances, the requirements of Part VII of the Act to the extent that they have not already been satisfied should be dispensed,
>
> the Ombudsman may dispense with the said requirements as respects the complaint."

The Schedule gives further definition of what amounts to complaints which are anonymous, repetitious or incapable of investigation.

<u>The central issue in this case</u>

[8] It was common case that by way of letter of 10 July 2007 the Police Ombudsman, through the complaints officer Martin McCaffrey, had written to the solicitors for the applicant indicating that the PO had been unable to identify any police misconduct and did not intend to take any further action in relation to the complaint. The wording of that letter was carefully scrutinised in this hearing and accordingly I shall set it out in extenso the relevant paragraphs :

> "The Police Ombudsman has since received documentation from the PSNI in relation to the incident from which your client's complaint arises. After careful consideration of all the available information regarding (X)'s complaint, the Police Ombudsman has been unable to identify any police misconduct.
>
> The role of the Police Ombudsman is to deal with specific allegations of misconduct by individual police officers and to determine if police have acted appropriately.
>
> Upon review of your client's complaint, the Police Ombudsman has concluded that the arrest of (X) was lawful as police reasonably suspected that an arrestable offence had been committed and reasonably suspected that X could be connected to this matter. Furthermore where an officer does not

> know a person's address, cannot readily ascertain it, or has reasonable grounds for doubting the address given to be the real address of the person, the necessity criterion for arrest under Article 26(5)(b) of PACE has been met.
>
> I must therefore inform you that, in these circumstances, the Police Ombudsman does not intend to take any further action in relation to the above complaint and now considers the matter closed."

[9] Apart from invoking the Salem principle to which I shall shortly turn, Mr Fee QC, who appeared on behalf of the respondent with Ms Hughes, submitted that the PO had in fact invoked Regulation 25 of the 2005 Regulations in this instance albeit no express reference had been made to this in the correspondence. He argued that the provisions of Section 58, 58A and 59 of the 1998 Act only came into use after preliminary investigation has been carried out by the PO in discharge of its investigative role. Accordingly the PO will as a preliminary step look to Regulation 25 of the 2000 Regulations which permit a dispensation from the requirements to follow the procedure outlined in the Act.

[10] Counsel submitted that the applicant's case was terminated as being "ill founded" and had been categorised as such within the Ombudsman's office on 10 July 2007. Mr Fee asserted this amounted to a finding that further investigation would be oppressive under the terms of Regulation 25. Whilst the term "oppressive" as it appears in Regulation 25 is undefined by statute the respondent relied upon its natural meaning as found in the Oxford English dictionary, namely "hard and authoritarian" and "weighing heavily on the mind or spirits". In his submission an oppressive complaint within the meaning of regulations must, in this case, be either oppressive to the person under investigation, in this case Constable Smyth, or to the office of the respondent. He advanced the argument firstly that the continued investigation of an officer against whom there is no foundation or evidence upon which to pursue that investigation must in itself be oppressive. Secondly he submitted that the burden upon the respondent's officer of having to continue to pursue complaints which were without foundation was also oppressive and therefore incapable of investigation in the manner set out in at Part VII of the 1998 legislation.

Conclusions

[11] I have come to the conclusion that I must accede to the applicant's case for the following reasons:

[12] The Salem principle

I reject the submission of Mr Fee that the core issue which I have identified above was now a dead issue. Principles governing this issue are well set out in a widely cited and applied formulation in R v. Secretary of State for Home Department ex p Salem [1999] AC 450 where Lord Slyn stated:

> ". . . In a cause where there is an issue involving a public authority as to a question of public law, Your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se. . . The discretion to hear disputes, even in the area of public law, must, however be exercised with caution and appeals which are academic between the parties should not be heard unless there is good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

[13] I am also conscious of the views expressed by Munby J in R (Smeaton) v Secretary of State for Health [2002] 2 FLR 146 at paragraph 22 where he said that the constitutional function of courts is to:

> "Resolve real problems and not disputes of merely academic significance. Judges do not sit as umpires of controversies in the Academy, however intellectually interesting or jurisprudentially important the problem and however fierce the debate which may be raging in the ivory towers or amongst the dreaming spires".

[14] Mr Fee relied on the letter of 27 September 2007 from the solicitor acting on behalf of the applicant to the Ombudsman where he addressed the issue as follows:

> "The application for leave to apply for judicial review was adjourned on 21 September 2007 and has been listed on 5 October 2007, in order that I might have an opportunity to take instructions on the information you provided.

> I have taken those instructions, and can indicate that a considerable degree of dispute exists between the minor applicant and proposed respondent in respect of the factual circumstances of the minor applicant's arrest.
>
> Having regard to this development, and mindful that judicial review is not best suited to the resolution of disputed factual issues, I wish to formally indicate that it is not intended to pursue a challenge to the conclusion of the Police Ombudsman on the issue of the necessity criterion. Additionally, please note that damages in respect of unlawful arrest and detention are not sought in the course of the present proceedings.
>
> However the challenge to the determination of the minor applicant's complaint in a manner which failed to comply with the Police (Northern Ireland) Act 1998 is maintained. Indeed, the disputed factual circumstances involved serve to highlight the importance of determining the minor applicant's complaint in accordance with law."

[15] Mr Fee submitted that these paragraphs amounted to recognition by the applicants that the essential complaint that this applicant had been arrested unnecessarily was now obsolete. In those circumstances the court should not be asked to deal with the manner in which the complaint was to be determined once it is accepted that it has no basis.

[16] I do not find this construction of the letter of 27 September 2007 very compelling. In my view this letter responsibly recognises that judicial review is not suited to the resolution of disputed factual issues and that accordingly the necessity criterion should not be pursued at this level. Equally so however, it is clearly asserted that the disputed factual circumstances should be determined in the appropriate forum which, in this case, would have been disciplinary proceedings. Mr Sayers, who appeared on behalf of the applicant, forcefully argued that far from being a recognition of hopelessness on the part of the applicant, this letter asserted the strength of his argument that the proper venue for the factual determination would have been the disciplinary tribunal to which the Ombudsman should have referred her conclusions under Section 59 of the 1998 Act. I consider that argument is well made and is worthy of this court's determination

[17] I have therefore concluded that there is no substance to the Salem principle point.

[18] Procedural propriety

I am satisfied that any textual analysis and proper construction of the 1998 Act and the 2000 Regulations reveal that Parliament has provided expressly for the procedure to be followed by the PO in the course of dealing with complaints. I consider that when Parliament has laid down a statutory requirement for the exercise of legal authority – in this case to investigate complaints – it expects the authority to comply with that procedure. Accordingly, I am satisfied that the steps to be taken vis a vis criminal proceedings and disciplinary proceedings by the PO must be those couched in mandatory terms and set out in Sections 58 and 59 of the 1998 Order. The only circumstances where the Ombudsman may dispense with such requirements is where in the opinion of the Ombudsman Regulations 25(a) and (c) have been complied with.

[19] Mr Fee advanced the argument that whilst a complaint does not become properly characterised as oppressive simply because it is not upheld, if it is discovered to be without foundation then it can be legitimately categorised as ill founded. It was his case that "ill founded" in this case is nothing more than a sub division of the broad meaning of the term oppressive (see paragraphs 9 and 10 supra).

[20] I find no evidence in this case that the complaints officer or the PO addressed their minds to Regulation 25 of the 2000 Regulations. In the decision letter of 10 July 2007 no reference whatsoever is made to the Regulations. Perhaps more significantly, no attempt is made to borrow any of the wording or phraseology contained within the Regulations. I find it inconceivable that if Mr McCaffrey had been following the appropriate procedure whereby he had decided to dispense with the procedural steps under Section 59 of the 1998 Act, and invoke Regulation 25 of the 2000 Regulations, some reference to that exercise would not have become manifest in the letter of 10 July 2007. I am fortified in that conviction by the failure of the respondent to file an affidavit from Mr McCaffrey or the PO asserting that this had been done notwithstanding the lack of reference to such a process in the correspondence.

[21] Whilst there are good arguments of public law and of public administration in favour of a general duty to give reasons, it is axiomatically not, or not yet, part of our law. See R v. Higher Education Funding Council, ex p Institute of Dental Surgery [1994] 1 WLR 242 at 259A-B. Nonetheless it is a fact that public confidence in the decision making process of the PO is likely to be enhanced by knowledge that supportable reasons have been given. Express reference to the statutory powers being exercised serves to impose a discipline which may not only encourage transparency but may contribute to concentrating the decision maker's mind on the right questions. In this case it

would have demonstrated that the issues had been conscientiously addressed thus leaving the applicant in no doubt why the decision had been made.

[22] I am unpersuaded by Mr Fee's argument that the conclusion of the PO that there was no foundation for this complaint was tantamount to a finding that this amounted to the oppressive circumstances adumbrated in the Regulations. The ordinary dictionary meaning of the word "oppressive" in the short Oxford English dictionary is "unjustly burdensome". This clearly connotes circumstances beyond a mere finding that a complaint is unfounded or without foundation.

[23] Turning to the full contents of Regulation 25 the ejusdem generis principle, whereby words having literally a wide meaning are treated as reduced in scope by the verbal context, is of assistance in this case. "Oppressive" is used in the context here of other genus-describing terms such as "vexatious", "otherwise an abuse of the procedures for dealing with complaints" or "that is not reasonably practicable to complete the investigation of a complaint". I believe these expressions overlap and each in a sense helps to explain the other. They add a further descriptive dimension to the concept of unduly burdensome in this context. Read together they reflect the underlying concern of the Regulation that only conduct which has elements of injustice or abuse contained therein and which will be unduly burdensome because of these aspects will be sufficient to dispense with the normal statutory procedures under the 1998 Act. I do not consider that any of the wording of the decision making letter of 10 July 2007 connotes the strength of terminology contained within Regulation 25 or the underlying mischief which the Regulation seeks to address.

[24] In so concluding I do not dismiss the notion that there may be instances where cases are so ill founded and so self-evidently lacking in merit that they could come within the remit of Regulation 25. Mr Fee argued that this case manifestly comes within such a category. Given that I have formed the view that Regulation 25 was not appropriately addressed at all in this instance, I am not prepared to conclude that the failure to specifically invoke Regulation 25 makes no difference to the outcome of the process. Borrowing the principles set out by Bingham LJ in R v. Chief Constable of Thames Valley Police ex parte Cotton [1990] IRL 64, I consider that unless the decision maker has specifically addressed Regulation 25 it may not be easy to know what his decision would have been had he so done. Experience shows that that which is confidently expected is by no means always that which happens. Decision makers must be receptive to the precise wording and terms of statutory declarations and too casual an approach to their content is fraught with danger. I conclude on this issue by indicating that this is a field in which appearances are generally thought to matter and the transparency of the decision making process of the Ombudsman is a matter of some public importance.

Remedy

[25] I recognise that a reconsideration of this matter by the PO may well result in the same decision even after Regulation 25 of the 2000 Regulations has been properly considered. Nothing that I have said about this matter indicates any view that I hold about the eventual outcome of the process which my decision will invoke and should have no influence whatsoever on the decision making process.

[26] Order 53 Rule 9(4) declares:

> "(4) Where –
>
> (a) the relief sought is an order of certiorari, and
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> (b) the court is satisfied that there are grounds for quashing the decision in issue,
>
> the court may instead of quashing the decision, remit the matter to the lower deciding authority concerned, with a direction to reconsider it and reach a decision in accordance with the ruling of the Court or may reverse or vary the decision of the lower deciding authority."

[27] In the exercise of my discretion, and recognising that the decision may remain unchanged on the facts of this case after reconsideration, I have decided that instead of quashing the decision, I will remit the matter to the Police Ombudsman with a direction to reconsider it and reach a decision expressly in accordance with 1998 legislation and the 2000 Regulations.