

**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 GERARD O'CALLAGHAN  
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

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**HIGGINS J**

[1] This is an application for leave to bring judicial review proceedings. The statement pursuant to Order 53 of the Rules of the Supreme Court was lodged on 9th December 2002. The relief sought, is an order quashing a decision of the Police Ombudsman for Northern Ireland dated the 7th October 2002, whereby the Ombudsman determined not to submit a report in respect of a complaint against certain police officers by the Applicant until criminal proceedings against the Applicant were concluded.

[2] The Applicant is charged with three offences; disorderly behaviour, assault on a Constable and resisting a Constable. The offences are alleged to have been committed on the 6th July 2002, on which date the Applicant was arrested. The Applicant made a complaint to the Police Ombudsman that during his arrest and thereafter at a police station he was assaulted and suffered a large laceration to his head for which he received hospital treatment.

[3] The Police Ombudsman appointed an officer to investigate the Applicant's complaint. On the 4th October 2002 the Applicant's solicitor wrote to the Ombudsman enquiring as to progress of the Applicant's complaint and at the same time expressing concern that, with the passage of time, any summons that might be issued against the police officer for common assault might become time barred. Article 19 of the Magistrates' Courts Order specifies that a complaint in respect of a summary offence must be made within six months from the date of the commission of the offence. Whether alerted by this letter, or otherwise, the investigating officer on 6 November 2002 took out a Complaint under Article 20 of the Magistrates' Courts (NI) Order 1981 on behalf of the Ombudsman. The complaint is against a Constable in the Police Service of Northern Ireland and it alleges

that the Constable assaulted the applicant contrary to section 42 of the Offences Against the Person Act 1861. The Complaint was taken out under Rules 7 and 17 of the Magistrates' Court Rules and is in the terms of Form 1 in those Rules. It was referred to as a Protective Form 1 Notice, taken out in respect of potential proceedings against a police officer. It would be open to the Director of Public Prosecutions to direct that any criminal proceedings against a police officer be on indictment, should the circumstances so warrant it. The allegation that the Applicant sustained a large laceration, which required hospital treatment, would permit a charge of assault occasioning actual bodily harm, or wounding. The Applicant's solicitor's letter also referred to the undesirability of the criminal proceedings being heard before the Ombudsman's investigation was complete. This was the substance of the application for judicial review.

[4] On the 7th October 2002, the investigating officer replied that -

"my enquiries will continue regardless of the position of your client's court case. I will not, however, be submitting my report into the incident, to the Director of Public Prosecutions until your client's court case has being completed. This is in accordance with our policy in cases where there are related criminal proceedings".

[5] Further correspondence ensued in which the Applicant's solicitor expressed his surprise and concerns at this policy. The Ombudsman's legal officer replied, that the proposed course of action and policy were in accordance with the statutory framework. In particular, the legal officer pointed out, that the facts in issue in the criminal case against the Applicant were relevant to facts in issue in the complaint, and that the investigation of the complaint would encompass the criminal proceedings against the Applicant. Only when the investigation was complete, would the Ombudsman submit a report to the Director of Public Prosecution. The Applicant challenges this decision and the policy of the Ombudsman relating to investigations where there are ongoing and related criminal proceedings.

[6] In her letter of the 6th November 2002, the legal officer pointed out, that the submission of the report to the Director of Public Prosecution before the completion of the related criminal proceedings, would be seen as undermining the Ombudsman's statutory independence and any material in the report might be used by the prosecution to undermine the applicant's defence.

[7] Mr Reid who appeared on behalf of the Applicant submitted that the Ombudsman was acting beyond her powers, and that the policy adopted, which had the effect of fettering her discretion, was not in accordance with

the statutory scheme. He submitted further that the decision of the Ombudsman was unreasonable and failed to take account of the time limits on summary proceedings in the Magistrates' Court. He argued that it was unreasonable to withhold potentially relevant material, from another agency relating to a possible criminal offence, particularly if that information was exculpatory of the person charged or potentially so. He also submitted that the legislation under which the Ombudsman Office was established, does not empower the withholding of a report, nor did it support the contention that to do so, would undermine the Ombudsman's independence.

[8] Mr Larkin QC, who appeared on behalf of the Respondent, submitted that there was no basis upon which leave could be granted. He referred to the relevant statutory provisions and submitted that a distinction required to be drawn between the report of the Ombudsman and any information obtained in the course of an investigation. In relation to information obtained which was likely to be of assistance to a person defending criminal proceedings, he referred to the Ombudsman's Guidance Document, paragraph 2.82 of which requires the Ombudsman "to bring such information immediately to the notice of the Director of Public Prosecution". In relation to the report, he submitted that the Ombudsman had followed the relevant statutory procedure. In particular he submitted that a relevant part of any investigation should include the criminal proceedings against the Applicant, where the credibility of various witnesses may be tested.

[9] The Office of Ombudsman was established by the Police (Northern Ireland) Act 1998. The relevant sections for the purposes of this application are Section 56 and 58.

"56.-(1) Where a complaint or matter is to be formally investigated by the Ombudsman under section 54(2) or (3)(a) or 55(3), (5) or (6), he shall appoint an officer of the Ombudsman to conduct the investigation.

(6) At the end of an investigation under this section the person appointed to conduct the investigation shall submit a report on the investigation to the Ombudsman."

"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.

(3) Where a report is sent to the Director under subsection (2), the Ombudsman shall, at the request of the Director, ascertain and furnish to the Director all such further information in relation to the complaint or matter dealt with in the report as appears to the Director to be necessary for the discharge of his function under the Prosecutions of Offences (Northern Ireland) Order 1972.

(4) In this section and section 59 'the Director' means the Director of Public Prosecutions for Northern Ireland."

[10] Thus section 56 (1) empowers the Ombudsman to appoint an officer to conduct an investigation where a complaint is to be formally investigated. Section 56 (6) requires that officer to conduct the investigation and to submit a report to the Ombudsman at the end of the investigation. By section 58 (1) the Ombudsman shall consider any report made under Section 56 (6) and determine whether the report indicates that a criminal offence may have been committed by a member of the police force. If the Ombudsman determines that the report indicates that a criminal offence may have been committed by a member of the police force, section 58 (2) requires that a copy of the report shall be sent to the Director of Public Prosecutions. The Director of Public Prosecutions may request further information and by section 58 (3) the Ombudsman is under a duty to ascertain and furnish any further information so requested. Thereafter, or where no further information is requested, the role of the Ombudsman is complete and the matter remains in the hands of the Director of Public Prosecutions. The Guidance Document, *supra*, provides a means whereby information, that may be of assistance to the defence of a person charged with a criminal offence, can be made available to him for that purpose before any report is sent to the Director of Public Prosecutions.

[11] An applicant for leave to bring judicial review proceedings must show that he has an arguable case that the impugned decision was contrary to law, or irrational (that is Wednesbury unreasonable) , or that the decision maker took into account irrelevant material or failed to take into account relevant material. In this case it is argued that the Ombudsman's decision was both contrary to law, that is contrary to the Police Act 1998, was irrational and was

taken without taking into account the effect delay might have on the opportunity to prosecute a police officer in the Magistrate's Court for a summary offence.

[12] This application raises an important issue relating to the role of the Ombudsman in carrying out an investigation into a complaint made against a police officer, when there are ongoing and related criminal proceedings against the person who makes that complaint to the Ombudsman. In particular it questions whether the Ombudsman's investigation should include the related criminal proceedings against the person who makes the complaint to the Ombudsman. Much may depend on the circumstances in which the complaint against the police officer has arisen. In this case the applicant was arrested for disorderly behaviour, assault on a constable and resisting a constable. He alleges that during the course of his arrest and thereafter that he was assaulted. Thus there is or may be a significant relationship between the charges and the complaint. Once the charges have been laid they require to be determined. If there is to be a trial of those charges, the evidence given on the hearing of such charges and the determination of them may be very relevant circumstances relating to the complaint made to the Ombudsman, which the Ombudsman should consider.

[13] The answer to the question whether the Ombudsman's investigation should include the hearing of the criminal charges against the complainant seems to me to be this. Where there are relevant criminal proceedings pending, in which the facts at issue in the criminal case, or some of them, are also in issue in the complaint being investigated (or indeed vice versa), an investigation by the Ombudsman into a complaint should include, indeed must include, the relevant criminal proceedings. Until those proceedings are at an end, the investigation could not be concluded and a report submitted to the Ombudsman to determine whether it indicates that a criminal offence may have been committed by a member of the police force. In this case the Ombudsman has followed the provisions of the Police Act and could not be said to be acting *ultra vires* or contrary to law. In adopting the policy of not submitting a report until the criminal proceedings are concluded the Ombudsman is not acting contrary to the terms of the Police Act nor is that decision generally, or in the circumstances of this case, irrational. Equally the Ombudsman is entitled to protect the independence of that office. Where a complainant is the subject of relevant criminal charges, it seems to me eminently sensible that any investigation by the Ombudsman into his complaint should include the criminal proceedings into those relevant criminal charges.

[14] If summary proceedings are contemplated against a member of the police force, following an investigation under section 56 of the Police Act (Northern Ireland) 1998 by the Ombudsman into a complaint, the issue of a Complaint in Form 1 under Article 20 of the Magistrates' Courts Order 1981,

is sufficient protection of the interest of anyone concerned with that investigation by the Ombudsman. Should the Ombudsman send a report recommending a prosecution to the Director of Public Prosecutions or should the Director decide to prosecute, the issue of a complaint in the terms of Form 1 will ensure that the prosecution will not fail by reason only of the time limits, imposed by the Magistrate's Courts Order relating to the prosecution of summary offence in that court, having been exceeded. In taking out a complaint in Form 1, it could not be said that the Ombudsman has failed to take into account the statutory time limits on proceedings in the Magistrates Court. Indeed the evidence is to the contrary. The Ombudsman has taken that into account by taking out the Form 1 Complaint. In this application the Statement filed under Order 53 of the Rules of the Supreme Court, was filed after the expiry of the time limit for the issue of summary proceedings. Absent the Form I Protective Notice, no order of this court could change that position.

[15] The threshold of the test to be applied in an application for leave to bring judicial review proceedings is a low one. Nonetheless in this application the Applicant has not demonstrated an arguable case that the impugned decision was contrary to law, irrational or made having failed to take relevant information into account or made having taken irrelevant information into account. Mr Larkin submitted that the decision of the Ombudsman in this case is unimpeachable. I agree and the application for leave is dismissed.