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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY ROSALEEN McCORLEY FOR JUDICIAL REVIEW

KERR J

Introduction

On 2 March 1992 Rosaleen McCorley, the applicant, was an inmate of HMP Maghaberry. On that date a search of the prison took place. The applicant and a number of other female prisoners allege that they were forcibly strip searched. They have issued proceedings against the Northern Ireland Office and the Governor of HMP Maghaberry, claiming damages for trespass to the person. The applicant's civil bill came on for hearing before the Recorder of Belfast, His Honour Judge Hart QC, on 4 March 1999. It was not possible to proceed with an uninterrupted hearing and the case has continued on several various days since then. On 8 June 1999 the Recorder gave a ruling whereby he rejected in part a claim to public interest immunity made on behalf of the defendants to the civil bill. That claim had been made by the Minister of State, the Right Honourable Paul Murphy MP, in a certificate issued on 5 June 1999. The defendants

appealed to the Court of Appeal against the ruling of the Recorder by way of case stated. The Court of Appeal heard the appeal on 29 November 1999 and reserved judgment.

On 7 December 1999 the applicant applied for and was granted leave to apply for judicial review of the certificate of the Minister on the ground that he ought to have sought advice from counsel for the plaintiff as well as counsel for the defendant before deciding that the certificate should be issued.

Background

The hearing of the case before the Recorder had proceeded for a number of days before the dispute about discovery which gave rise to the issue of the public interest immunity certificate arose. The plaintiff's case had closed and the defendants had called several witnesses. Discovery had been furnished by the defendants on foot of an order made on 16 February 1999. No reference had been made in the List of Documents filed on behalf of the defendants to a report of a Governor Hall, now deceased. The existence of this report was revealed during cross examination of a defence witness, Governor William Meredith, on 25 May 1999. It was accepted by counsel for the defendants that this report was discoverable, subject to any claim for public interest immunity. The case was adjourned until 7 June 1999. During the period of the adjournment the report, with portions excised, was discovered to the plaintiff. A certificate claiming public interest immunity for the excised portions dated 5 June 1999 and signed by Mr Murphy was produced to the court when the hearing resumed on 7 June 1999.

Paragraph 6 of the certificate was in the following terms :-

> "6. I have considered any possible impairment of the court's ability to administer justice in these proceedings if the information referred to in paragraph 4 is not disclosed. [This was material

> which, according to the Minister, would assist in identifying the source of the intelligence that led to the search, how the intelligence came to light and how it had been considered]. I have reflected particularly on the question whether non-disclosure of the said information to the plaintiff might diminish her prospects of succeeding in her legal claim. In balancing the aforementioned interests and considering the said question, I have sought and obtained the advice of counsel to which I have had regard. Having carefully weighed the foregoing matters, I have formed the view that non-disclosure of the information in question should not impair the court's ability to administer justice in this case. I have concluded that there is a clear balance of public interest in favour of the non-disclosure of the redacted material."

The Recorder inspected the documents for which public interest immunity had been claimed and rejected that claim save for any references to the name of the person who supplied the information which led to the search.

The judicial review application

For the applicant it was argued that counsel for the plaintiff was "well placed" to advise the Minister on the materiality of the evidence contained in the excised portions of the discovered report. The Minister had been advised on this by counsel for the defence only. If the Minister formed the view, as a result of the advice given, that the contents of the report were so material to the plaintiff's case that they ought to be revealed, notwithstanding the countervailing public interest that the identity of the provider of the intelligence be protected, then public interest immunity would not be claimed. It was vital, therefore, counsel for the applicant suggested, that the applicant have the opportunity at this critical stage, of influencing the Minister's decision. This was especially necessary because considerable weight was given by the courts to the certificate of a Minister of the Crown.

Counsel referred to a paper prepared on behalf of the Attorney General in the wake of the Scott Report in December 1996. (This was exhibited to an affidavit filed on behalf of the

respondent). The paper outlined three steps to be taken by the government before deciding to make a PII claim. First a decision is made on whether the document is relevant. Then it must be determined whether a public interest arises about which a PII claim might be made. That involves a decision as to whether disclosure would cause “real damage”. The third step was described in the paper in this way :-

> "This step applies to some claims, including those made by ministers. If the document attracts PII, the decision-maker will consider (so far as he can judge it) the strength of the public interest in disclosing the document. This will require an assessment of the issues in the case. The decision-maker performs what is described in this report as the Wiley balancing exercise, [this is a reference to the decision in *R -v- Chief Constable of West Midlands ex parte Wiley* [1994] 3All ER 420] usually after taking advice from counsel in the case or Treasury Counsel. If the balance appears to him to favour disclosure, he is entitled to disclose the document. If the balance appears to go the other way, or if the decision-maker is uncertain, he will put a certificate to the court explaining clearly his reasons for asserting PII; and the court will then be invited to determine whether disclosure should be made."

Counsel for the applicant suggested that there was nothing in the paper which precluded the minister from taking advice from counsel for the plaintiff and since it was accepted by the respondent that, before taking the decision, the minister required to be fully informed, he ought also to have sought the advice of plaintiff's counsel.

Counsel also argued that the right to a fair hearing required that everyone who is a party to the proceedings should have a reasonable opportunity of presenting his case to the court under conditions which did not place him at a substantial disadvantage *vis-a-vis* his opponent. There should be 'equality of arms' between the parties. This fundamental rule required that the applicant have an equal opportunity to that available to the defendants to seek to influence a

decision-maker *viz* the minister, whose determination on whether to claim PII could have a crucial influence on the outcome of the applicant's case.

For the respondent it was submitted that there was no duty to consult the applicant's counsel. Legitimate expectation of consultation only arose in certain well defined circumstances, none of which applied here. There was no statutory duty to consult, no promise of consultation nor was there an established practice of consulting. Further, there was no need to consult counsel for the plaintiff. The minister formed a view as to whether PII should be claimed. He was not the ultimate arbiter of the success of that claim. That was a matter for the court to decide.

Conclusions

Counsel for the applicant did not seek to argue that she was entitled to rely on the doctrine of legitimate expectation to found her claim to be consulted by the minister. Rather he based that claim on the proposition that fairness demanded that there should be an equal opportunity available to both the plaintiff and the defendant to influence the minister either way on the issue of materiality. He suggested that the minister played a potentially pivotal role in the outcome of the case. Counsel for both parties should have equal access to him, therefore, so that the requirements of fairness would be met.

It appears to me that the matter of crucial importance here is the role performed by the minister. He must make a decision as to whether to claim PII. That involves him in making some assessment of the materiality of the documents for which PII may be claimed. His judgment on that will have to be informed by some reliable information about the issues in the case but it does not require to be definitive. The ultimate decision as to the potential materiality

of the documents will lie with the court. Whether the documents should be disclosed is also a matter, in the final analysis, for the court.

The distinction between the role of the minister and that of the court can be expressed simply. The minister has to decide whether to make the claim. The court must decide whether the claim succeeds or fails. It is at the stage that a determination of the validity of the claim to PII is made that the plaintiff must be allowed to make her contribution, not at the stage when a decision is being made as to whether the claim should be put forward.

In approaching this question, it is, perhaps useful to reflect on what the situation would be if the plaintiff was the proposed recipient of advice from counsel for the defendant. It could not be the case that defendant's counsel should be entitled to advise the plaintiff not to challenge the PII claim. Nor can it be the case that plaintiff's counsel is entitled to advise the minister not to issue the PII certificate. Such a case might possibly be made if the minister's decision was final. It is not; it is merely a determination to make a claim to the court which may or may not be upheld.

There is no inequality of arms involved in denying the applicant the opportunity to advise the minister because there was not, at that time, any clash of arms. On the issue of whether the PII claim should prevail, the parties were merely preparing for battle at the time that the minister was receiving advice from counsel for the defendants. In my view, it is not until the later stage when a decision on the validity of the PII claim is to be determined (*i.e.* when the judge is called upon to decide the issue) that the applicant must have the opportunity to make her case. In this case, not only did she have that opportunity, she was successful in persuading the Recorder that

the claim to PII should be rejected. I am satisfied, therefore, that the applicant was not entitled to advise the minister as to whether a PII certificate should be issued.

The application for judicial review is dismissed.

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JUDGMENT

OF

KERR J
