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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY LUKE O'NEILL FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE NORTHERN IRELAND PRISON SERVICE

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COLTON J

[1] I am obliged to counsel in this matter for their assistance and their helpful written and oral submissions. Mr Ronan Lavery QC led Aidan McGowan for the applicant. Dr Tony McGleenan QC led Rachel Best for the respondent.

Background

[2] In his Order 53 Statement the applicant sought the following relief:

> "(a) An Order of Certiorari quashing the decision of NIPS to house the applicant in Quoile House in HMP Maghaberry.
>
> (b) A declaration that the decision of the NIPS to house the applicant in Quoile House is unlawful …"

[3] The applicant was remanded to Maghaberry Prison on 27 September 2016. Along with three others he was charged with offences of attempting to murder police officers in the period 30 August to 2 September 2016 and with the possession of explosives.

[4] On his remand he was housed in Quoile House. He sought to challenge that decision by way of judicial review and maintained at all times that he should be housed in Roe House.

[5] A central plank of his challenge was that the decision to house him in Quoile House placed his safety at risk and was a breach of his rights under Article 2 ECHR "in all the circumstances of the case". A fundamental element relied upon by the applicant in support of the alleged breach of Article 2 related to a threat which was reported to the prison authorities on 11 October 2016 and which was the subject matter of a Security Information Report ("SIR"). The application was originally managed by Mr Justice Maguire who also dealt with contentious disclosure issues in the case. The respondent in the application objected to disclosure of the SIR but pursuant to an order from Mr Justice Maguire the following enhanced gist was provided in relation to that report:

> *"A prisoner reported that a sum of money, from an unidentified source, had been offered to him and other prisoners 'to do in' the applicant. The sum of money referred to in the report was £50,000. This information emanated from a source viewed as 'untested'. The prisoner would not provide further details."*

[6] The applicant also relied on other matters in support of the alleged breach of Article 2 which are not germane to this judgment.

[7] The applicant's judicial review was heard by me on 23 June 2017 and I delivered judgment on 14 July 2017 dismissing the application.

[8] The applicant appealed to the Court of Appeal. The case was heard on 23 January 2018. The Court of Appeal remitted the case back to me and I have been provided with a transcript of the court's deliberations which led to the remittal of the matter.

[9] The Court of Appeal took the view that the information before me when I determined the matter in relation to an assessment of the threat issued on 11 October 2016 was insufficient. It was the Court of Appeal's view that the bare information provided in the gist would be insufficient for the court to come to an independent assessment as to whether or not there was a proper assessment carried out by the respondent of the alleged threat. In those circumstances the court could not make an independent assessment as to whether the Article 2 threshold had been met.

[10] The Court of Appeal was also concerned as to how further disclosure would be managed. The Lord Chief Justice in particular referred to the recent judgment in the case of **Flynn v The Chief Constable** which encouraged parties handling sensitive information to adopt a collaborative bespoke approach to such issues and where possible address them by way of gisting or admission of facts so as to avoid closed material procedures or PII applications. He indicated this may mean that, as

was the case with the initial hearing, certain issues would need to be determined by a judge other than the one hearing the case but this was a matter to be considered by the court to whom the matter was remitted.

[11] After the matter was remitted to me the respondents served four further affidavits, namely an affidavit from Governor McCready dated 26 February 2018, from Governor Watterson dated 26 February 2018, from Chief Inspector Singleton of the PSNI dated 21 February 2018 and from D/Chief Inspector Ballantine of the PSNI dated 27 February 2018. These affidavits provided further detail as to how the assessment in relation to the October 2016 threat was dealt with.

[12] In summary Governor McCready confirmed that the officer receiving the original SIR conducted an analysis and grading of the information. She gave it a grading "E4" in accordance with the national security grading system. This means that the source providing the information was untested (E) and reliability of the information could not be judged (4).

[13] He went on to say that in light of the content of the information provided the officer determined that further consideration of the assessment was required. The information was therefore placed in the computer system and a Form A was completed which is a national security document for onward transmission via Security Information Branch ("SIB") of the Police Service for Northern Ireland for its analysis and assessment. Governor Watterson confirms that he did receive the Form A and in accordance with the Memorandum of Understanding between the respondent and the PSNI he forwarded it to the PSNI Prison Liaison Officer on 13 October 2016 to "process". Governor Watterson avers that:

> "*I heard nothing further from the PSNI in relation to this. I understand the position to be that, had it been considered to be a credible threat, the PSNI would have reported back to the Prison Service.*"

Chief Inspector Singleton confirmed that the SIR was passed to the Service Intelligence Bureau. It was then entered into the police systems and fed into the relevant intelligence HUB. At that stage the relevant D/Sergeant and D/Inspector reviewed it and evaluated it in terms of threat management.

[14] That review and evaluation is referred to in the affidavit of D/Chief Inspector Ballantine who avers that the SIR was in fact received and as per standard procedure it was disseminated internally to the relevant section for consideration. He says:

> "2. … *At that stage the relevant checks were conducted and an analysis was made as to the SIR in terms of threat management for the applicant.*

> *3. The result of the enquiries and review was that it was considered that no further action was required at this time in relation to the SIR. The record was logged on the system for reference requirements. There has been nothing further of note in relation to the applicant reported to PSNI."*

[15] On receipt of these affidavits the applicant sought further discovery from both the respondent and the PSNI (who were not a party to the judicial review). In response to the discovery applications correspondence was exchanged between the parties and the respondent ultimately provided some further discovery consisting of an SIR log and the gist of the approach taken by the PSNI.

[16] The SIR log indicated that the location of the source of the threat was Quoile House, which is where the applicant was housed at the relevant time. The further gist provided by the PSNI on 16 May 2019 indicated that:

> "Appropriate departments in PSNI considered the information received in respect of a threat against Mr O'Neill in October 2016. Noting that he was currently a remand prisoner, it was determined that there was no requirement to conduct a threat management process at that time."

[17] The applicant remained dissatisfied with the extent of the disclosure and sought a further 10 items which were detailed in an initial summons for discovery against the respondent dated 19 April 2018 and from the PSNI in a summons dated 31 January 2019.

[18] There was some further correspondence between the parties on this issue without any progress being made. It is the respondent's position that what can be provided in relation to this applicant has in fact been provided and if the court requires further material to be produced then some form of closed material procedure process or PII application will need to be adopted.

[19] In the meantime the applicant's circumstances have altered significantly. At the time this matter was considered by the High Court and by the Court of Appeal the applicant continued to be remanded in custody and was detained in Quoile House. Subsequent to the hearing before the Court of Appeal the applicant was released on bail in March 2018.

[20] The applicant was re-committed to prison in Maghaberry by the Crown Court on 28 June 2019. He applied to be housed in Roe House on 29 June 2019. This request was duly considered and granted. The applicant was transferred to Roe House on 10 July 2019. He has resided there ever since and according to Governor McCready there have been no reported incidents or issues about the applicant. His expected date for release is 21 December 2020.

[21] This change of circumstances has resulted in an application by the respondent that the proceedings should now be dismissed on the grounds that they are academic. This matter was first raised in correspondence in the course of the disclosure issues by the respondent on 12 April 2018 and was the subject matter of a formal application issued on 28 May 2019.

[22] It has not been possible to resolve the issues and the matter was heard before me on 6 January 2020. The respondent relies on the well-established principles set out in the case of **R(Salem) v Secretary of State for Home Department** [1999] 1 AC 450. In the much cited passage in that judgment Lord Steyn held that the courts do have a discretion to hear judicial review proceedings which have become academic but that it should be exercised with caution. He held:

> *"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 a good reason in the public interest for doing so, as for example (but only way of example) where 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."*

[23] The factual basis for the Salem point taken by the respondent is obvious. The relief sought is an order quashing the decision of the respondent to house the applicant in Quoile House in HMP Maghaberry. In fact he currently resides in Roe House which was the underlying purpose of the initial application. Thus, the factual situation which gives rise to the dispute no longer applies and has not done so since March 2018.

[24] It is correct to say that the judicial review application related specifically to a period of time from October 2016 until December 2016 when the applicant was housed in Quoile House. This was a matter expressly referred to by the Court of Appeal who made it clear that they would only consider issues relating to that timescale. Mr Lavery points out that the Court of Appeal did not treat the matter as academic when it was before it even though it was examining an issue of a real and immediate risk during a defined period which had passed.

[25] However, it is clear from my full reading of the transcript of the Court of Appeal's deliberations that it was conscious of the applicant's ongoing situation at that time. Thus, Morgan LCJ expressly referred to the potential for another "ongoing" judicial review at that time in relation to Mr O'Neill's request for a transfer to Roe House. Lord Justice Deeny also raised issues about a date for the applicant's trial and the "*ongoing issue therefore about him still possibly being removed to Roe House as a remand prisoner*". So whilst the court was focussed on a specific period

it was clearly conscious and alive to the ongoing detention of the applicant in Quoile House.

[26] I would be very slow indeed to accede to an argument that a point raised was academic when it was specifically referred back to the court by the Court of Appeal. The appeal still stands extant awaiting outcome of the remittal decision.

[27] Nonetheless, it is clear that there has been a fundamental change of circumstances since this matter was considered by the Court of Appeal and I consider this court should not "duck" the responsibility of deciding whether there is merit in the respondent's argument in light of that fundamental change.

[28] Obviously, the **Salem** principle does not impose an absolute rule. The first issue is whether or not in fact the matter is academic. Mr Lavery submits that if there has been a breach of Article 2 the applicant is entitled to such a declaration and would be entitled to seek just satisfaction and damages.

[29] Dr McGleenan points out that no damages claim has ever been advanced in the proceedings. I note that no such claim is contained in the Order 53 Statement.

[30] I bear in mind that a declaration is a discretionary public law remedy. In this case is there a good reason in the public interest for continuing these proceedings with a view to granting a declaration? Such a declaration will not result in making an effective order as the applicant is no longer residing in Quoile House and in fact is housed in his house of choice within the prison.

[31] The example given in the **Salem** case in terms of a discrete point of statutory construction does not arise. Mr Lavery submits that there clearly is a public interest in the court assessing the manner in which the prison service and the PSNI assess threats of this nature. However, there is nothing to suggest that there is a large number of similar cases which exist or are anticipated.

[32] I bear in mind the dicta from Carswell LCJ in the case of **R (McConnell's Application)** [2000] NIJB 116 at page 120 where he says:

> "*It is not the function of the courts to give advisory opinions to public bodies, but if it appeared that the same situation was likely to recur frequently and the body concerned had acted incorrectly they might be prepared to make a declaration, to give guidance which would prevent the bodies from acting unlawfully and avoid the need for further litigation in the future.*"

[33] This is a further expression of the second limb of the example given in **Salem**.

[34] It is my view that a declaration in this case would serve only as an advisory opinion on an issue of historical importance and one which is fact specific to the applicant's unusual circumstances. There is no suggestion or evidence before the court that there are a large number of similar cases pending in the system which are likely to raise the same or similar issues. This is not an issue that would require adjudication in the near future on the same or similar facts.

[35] I also bear in mind the "overriding purpose" set out in Order 1 Rule A of the Rules of the Court of Judicature. If this matter is to proceed further it will be necessary to consider a bespoke disclosure procedure to consider sensitive material which relates to the applicant's situation some three years ago. In my view, the full panoply of a PII or a closed material procedure would be disproportionate in the circumstances where there has been one substantive hearing in the High Court, and where the circumstances have so radically changed.

[36] I have therefore come to the conclusion that because of the change in circumstances that no useful purpose can be served by the continuation of these proceedings. There is no utility in granting a declaration in circumstances where it will not achieve a useful objective and where the real issue between the parties is no longer alive. The relief sought in the Order 53 Statement has in effect been achieved.

[37] For these reasons I dismiss the application for judicial review.