

# Judicial Communications Office

1 November 2021

## COURT DELIVERS DISCOVERY GUIDANCE

### Summary of Judgment

The Court of Appeal<sup>1</sup> today delivered a judgment in which it gave guidance to county court judges dealing with claims for discovery of sensitive documents for the purpose of civil litigation.

Patrick Magee (“the applicant”) was arrested in June 2011 under section 41 of the Terrorism Act 2000. In 2013, he issued civil proceedings against the Chief Constable (“the respondent”) for damages for personal injuries, loss, damage, and distress arising out of his allegedly unlawful arrest and subsequent detention at Antrim Serious Crime Suite. The applicant sought the discovery of specific intelligence documents. In January 2019, the Minister of State signed a Public Interest Immunity (“PII”) certificate in respect of the documents.

In November 2019, a county court judge heard the applicant’s application for specific discovery of the documents. During the course of the hearing, the judge inspected the documents and heard from two PSNI disclosure officers in chambers who explained the nature of the redactions that had been made. Having viewed the material, the judge said he did not consider it would give the applicant any particular assistance in advancing his case and dismissed the application. The applicant then lodged an application to state a case for the consideration of the Court of Appeal in the terms of whether the judge erred in law in not transferring the case to the High Court under Order 78, rule 1A of the Rules of the Court of Judicature (NI) 1980 (“the RCJ”).

#### Legislative Background

Section 6 of the Justice and Security Act 2013 (“the 2013 Act”) provides a procedure to ensure that the High Court or Court of Appeal may make a declaration on the application of the Secretary of State or any other party to civil proceedings or of its own motion that a closed material application may be made to the court. There are two conditions that must be satisfied before such a declaration can be made. The relevant first condition in this case is that a party to proceedings would be required to make such a disclosure were it not for the possibility of a claim for PII in relation to the material. The second condition is that it is in the interests of the fair and effective administration of justice and the proceedings to make a declaration.

The county court has no power to make a declaration under section 6 of the 2013 Act but the Lord Chancellor exercised his powers to amend Order 78 of the RCJ by adding rule 1A which provides that: “Where in proceedings before a county court the court considers that there is a real possibility that a party would in the course of the proceedings be required to disclose material the disclosure of which would be damaging to the interests of national security, the court must transfer the proceedings to the High Court”.

The Court of Appeal previously set out its approach to the interpretation of Order 78, rule 1A in *Cunningham v Chief Constable* [2016] NICA 58. It stated that the threshold for transfer of proceedings

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<sup>1</sup> The panel was Lord Justice Treacy, Mr Justice Scofield and Sir Declan Morgan. Sir Declan Morgan delivered the judgment of the court.

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to the High court is the “real possibility” of disclosure and not the raising of a claim of public interest by a party with control of the documents or the rejection by the court of the public interest claim. The court said the “real possibility” of disclosure may not be immediately apparent but may emerge as the application for the disclosure of documents progresses.

## Submissions

The principal argument advanced on behalf of the applicant was that the approach taken by the county court judge was not in accordance with Article 6 of the European Convention on Human Rights (“ECHR”) as the procedure whereby he was required to issue a notice for specific discovery of the redacted materials placed a significant and unreasonable burden in circumstances where he was not aware of the reasons for the redactions. The second argument concerned the fairness of the procedure for dealing with a PII claim made in a county court case. The applicant contended that it was open to the court to depart from the reasoning in *Cunningham* and to adopt the position that the “real possibility” test was satisfied as soon as the application for PII was made. In those circumstances, the judge would simply transfer the case to the High Court without any consideration of the PII claim. The High Court would then be in a position to determine whether to make a declaration that a closed procedure application could be made.

The alternative approach upon which the applicant relied was that the county court judge should consider the PII claim. He contended that where the PII claim was successful *Cunningham* meant that the county court could not transfer the proceedings to the High Court. The Court said that none of these arguments was advanced in this form before the county court judge. It concluded, however, that it should deal with the question posed in the case stated as the alternative was to leave the state of the law in some uncertainty.

## Consideration

The solution envisaged by the applicant was that the PII certificate is produced before the discovery list is provided. As the certificate must be personally considered by the Minister who signs it, this will introduce some element of delay, cost and administrative inconvenience. The Court noted that the solution envisaged in county court practice ensures that the list can be provided without the need to engage the Minister in those cases where there is no dispute about the redactions. It said that in this case the applicant is legally aided and the county court judge has a discretion as to whether the modest costs should be visited upon the applicant:

“Against that background the requirement to issue the notice does not in our view lead to any structural unfairness in the conduct of the proceedings. None of this gives rise to any unlawfulness in domestic law.”

The Court did not accept the submission that when considering a claim for PII the court is bound to ensure the instruction of a special advocate. It said the general principle is that a party to litigation is entitled to be given full reasons for a decision and see all the material which the decision maker has available. In the exception where the court is looking at the documents on an application to withhold disclosure on the ground that disclosure would damage the public interest there is no suggestion in the case law that it is necessary or appropriate to instruct a special advocate. The Court considered this approach is consistent with the jurisprudence of the European Court of

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Human Rights (“ECtHR”). In *Regner v Czech Republic*<sup>2</sup>, the ECtHR held that where an application to withhold evidence was made it was necessary that the domestic courts had the necessary independence and impartiality, had unlimited access to all the classified documents justifying the decision and were empowered to assess the merits of the decision to withhold. It also said it was desirable for domestic courts to explain, if only summarily, the extent of the review they carried out and the accusations against the applicant. The Court said all of those features were satisfied in this case, as both evidenced by and explained in the comprehensive and careful judgment of the county court judge.

In light of *Cunningham*, where a PII claim is made the county court judge is required to consider the unredacted documents which it is proposed to withhold. In order to do this task it is necessary for the judge to understand, if necessary by probing, the extent to which disclosure of the documents would harm the public interest. In this case that exercise was carried out by agreement between the parties when the county court judge met with two police officers and established by questioning his understanding of the nature of the documents. The Court said it was entirely appropriate for the judge to do this but said the officers should have been accompanied by counsel for the respondent who would know and understand the issues which are likely to emerge in the case:

“In such an *ex parte* application counsel has a duty to ensure that all material and argument in favour of and against withholding should be brought to the attention of the judge. There is no suggestion that the police officers misled the judge in any way but counsel’s presence is a necessary safeguard to ensure that all aspects of the relevance of the documents to issues which may emerge in the course of the proceedings are before the judge conducting the *ex parte* hearing and that the judge is given a fair and balanced summary of the position, including points adverse to the respondent’s application. That duty of disclosure in the *ex parte* hearing, and the expertise to discharge it effectively, was not imposed upon or to be expected of the police officers, although they were obviously subject to a duty not to mislead the court.”

The Court went on to give the following guidance on how a county court judge should proceed when considering a PII claim in accordance with *Cunningham*:

- If upon consideration of the PII claim concerning documents the disclosure of which would be damaging to the interests of national security the judge forms the view that the PII claim should not or may not be upheld the real possibility of disclosure of the documents arises. In those circumstances the proceedings must be transferred to the High Court pursuant Order 78 Rule 1A.
- If upon consideration of the documents the judge forms the view that the PII claim should be upheld and that the undisclosed documents are of no substantial value to the other parties the judge should make the ruling on the PII claim and proceed with the case in the usual way.
- There may be some cases where the court is faced with a powerful PII claim such as the protection of the identity of an informer but also has a concern that the non-disclosure of the material might affect the fair and effective administration of justice and the proceedings. In those circumstances, even if the court is minded to uphold the PII claim, the court should be

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<sup>2</sup> *Regner v Czech Republic* (2018) 66 EHRR 9

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alert to the real possibility of disclosure and transfer to the High Court for further consideration of the correct approach.

The Court said it is necessary to bear in mind that by virtue of Article 60(1) of the County Court (Northern Ireland) Order 1980 (“the 1980 Order”) a party may appeal to the High Court against any decree made by the county court judge. On appeal to the High Court the 2013 Act is directly in play and such an appeal is by way of full rehearing. The alternative method of appeal is by case stated and that was what was used in this case. In the interests of prohibiting multiple appeals the 2013 Act requires a party to choose one or other appeal route.

The Court did not consider that any of this gave rise to a breach of Article 6 of the ECHR and did not consider that there is any requirement to revisit the interpretation of *Cunningham* to ensure it is ECHR compliant:

“The county court is designed to provide a procedure for the determination of claims of moderate value and complexity with a procedure and scale of costs that is proportionate to those cases. Such cases are likely to proceed with greater expedition and less cost than cases in the High Court. This tier provides an important safeguard for those who seek to vindicate their rights without the delay and expense of High Court proceedings. Order 78 Rule 1A requires the county court to consider the question of disclosure. PII is plainly relevant to that question. There is no reason why PII should not be considered by the county court judge as part of the exercise in addressing the disclosure question. If the case was removed to the High Court as soon as the PII claim was made the High Court judge would be required to examine the PII application. If the High Court judge upheld the PII claim and rejected any application for a closed material procedure declaration costs and delay would inevitably arise.”

The Court was satisfied, therefore, that to remove the case from the county court without consideration of the PII claim by that tier would simply increase costs and lead to delay in the determination of the action. It said there is no reason to depart from *Cunningham* and, in cases such as this one, where the county court can confidently deal with the matter requiring that the case be transferred to the High Court would not be in the interests of justice. An aggrieved party’s rights are in any event preserved by their right of appeal to the High Court under Article 60(1) of the 1980 Order.

The Court considered there was no basis for the claim by the applicant that he had been subject to different treatment in accordance with Article 14 of the ECHR in that county court litigants should be analogous to litigants in the High Court. It said that by applying the approach set out above the question to be determined is essentially the same whether the proceedings are in the county court or the High Court and that there is no material difference of treatment:

“In this case the judge explained his analysis of the PII claim. He also examined the impact on fairness to both parties. He was satisfied that upholding the PII claim would not deprive the plaintiff of any particular advantage in pursuing his claim. He considered it much more likely that there was potential detriment to the defendant. This was a case in which the judge concluded that the PII claim was clearly made out and it is clear from the judge’s findings that there was no basis for concluding that the fairness of the proceedings required a closed material procedure. It was an entirely suitable case for determination by the County Court.”

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## Conclusion

The Court concluded that the county court judge had not erred in law in not transferring the case to the High Court.

## NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://judiciaryni.uk>).

ENDS

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