Judicial Communications Office

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COURT DISMISSES APPEAL CHALLENGING ACCOUNT FREEZING ORDERS

Summary of Judgment

The Court of Appeal today dismissed an appeal challenging the validity of account freezing orders made in respect of bank accounts held by Amanda Duffy, Sharon Jordan and Damien McLaughlin.

Background

On 6 May 2021, as part of a joint Police Service of Northern Ireland ("PSNI") and London Metropolitan Police Service ("LMP") investigation into the finances of terrorism in Northern Ireland and in England and Wales, an application was made by LMP to Westminster Magistrates' Court ("WMC") for Account Freezing Orders ("AFOs"). The AFOs were in respect of a number of bank accounts including accounts in banks and Credit Unions held by Amanda Duffy, Sharon Jordan and Damien McLaughlin ("the appellants"). AFOs were granted but on 17 May LMP contacted the court to say that the orders should have been applied for in Northern Ireland and, as a result, the orders were set aside. On 19 May, the PSNI applied to Belfast Magistrates' Court ("BMC") for AFOs in respect of the applicants' accounts. These were granted (the AFOs for the bank accounts were for a period of six months and the AFOs for the Credit Union accounts were for three months).

On 17 September 2021, the PSNI applied for a variation of the AFOs in relation to the Credit Union accounts to extend them until 19 November 2021, to align with the expiry date of the AFOs in relation to the bank accounts. In the course of the variation hearing, the applicants challenged the validity of the AFOs. On 13 September 2021, the applicants lodged an application for leave to apply for judicial review.

The Statutory Background

The Anti-Terrorism, Crime and Security Act 2001 ("the 2001 Act") provides extensive powers enabling the authorities to seize assets used by terrorists or for terrorist purposes. This includes powers to freeze accounts and obtain forfeiture orders in respect of monies held in such accounts. Paragraph 10 of Schedule 1 to the 2001 Act sets out the process for applying for, making and varying and setting an AFO. There is also a Code of Practice ("COP") for Officers Acting under Schedule 1 to the 2001 Act detailing the obligations of all officers involved in making an application for an AFO.

The High Court decision

On 13 December 2021, the trial judge dismissed the application for judicial review of the decision to vary the AFOs in respect of the Credit Union accounts. Counsel for the applicants submitted that the applications had not been properly brought as the 2001 Act required "the senior officer" who authorised the application to consult with HM Treasury ("HMT"). Counsel accepted that HMT appeared to have been consulted by LMP prior to the applications to WMC but contended that there had been no consultation by PSNI with HMT in advance of the applications to BMC. The trial judge accepted that there had not been precise compliance with the requirement of paragraph 10Q(3)(b) of

Schedule 1 to the 2001 Act, however, he concluded that there had been substantial compliance, sufficient to establish the lawfulness of the authorisation, the applications and the subsequent orders of the court. The trial judge said the case had to been seen in the context where there clearly was a statute compliant consultation in relation to an identical application a short time beforehand and in those circumstances, notification by both the LMP and the PSNI to HMT was appropriate.

Court of Appeal

The first question for the Court of Appeal was whether there had been a failure to comply with the statutory requirement for a senior officer in the PSNI to consult with HMT prior to authorising the applications to BMC giving rise to the impugned orders. The court concluded, as did the High Court, that there had been non-compliance but went on to consider what the consequence of the failure to consult was. The court said this rested on the statutory construction of paragraph 10Q(3) of Schedule 1 to the 2001 Act, ascertaining the unexpressed intention of the legislature.

The next question for the court was "what are the particulars and substance of the non-observance by the Police Service of the requirement to consult with HMT … in this particular case". It said the simple answer was that the senior PSNI officer did not undertake the requisite consultation at all. However, the court considered that it must consider the consequences flowing from this failure in light of all material circumstances: "This in our view requires an intensely fact sensitive exercise. In this exercise the court must identify all facts and considerations legitimately bearing on the quest to ascertain the unexpressed parliamentary intention [regarding the consequences of such non-compliance]".

The court said it was necessary to consider the legal meaning and import of the requirement to "consult" specified in paragraph 10Q(3), namely why did parliament prescribe this specific consultation requirement. It considered that in this provision the legislature had stipulated that one identified public authority must consult another but without spelling out the particulars of the requisite consultation or its purpose. It was therefore necessary to consider the context. The court said it was necessary to consider the duty imposed on the Police Service to take into account all material facts and considerations and to identify the purpose of the consultation:

> "We consider that the regime established by paragraphs 10Q and 10S of the 2001 Act is designed to operate in the typical case in the following way. In the first place, the enforcement officer concerned will make an assessment of the merits and viability of the contemplated application to the court. This will entail consideration of all available material evidence through the prism of the statutory criterion of having "reasonable grounds for suspecting that money held in an account maintained with a bank or building society" falls within either paragraph 10Q(1)(a) or (1)(b). If the outcome of this exercise is positive, the enforcement officer will confer with a "senior officer" for the purpose of obtaining the authorisation required by paragraph 10Q(3)(a). One would expect this discrete exercise to replicate the substance of the first exercise carried out. In determining whether to grant the necessary authorisation the senior officer will exercise a discretion. It will be incumbent on the enforcement officer to ensure that the senior officer does so on the most fully informed basis possible. This will entail bringing to the senior officer's attention all material facts and considerations, while disregarding everything immaterial and extraneous."

The court said that the test to be applied by the senior officer in deciding whether to provide the requisite authorisation can be reasonably deduced from the state of mind which the enforcement officer must form prior to proceeding with an application to the court, namely the "reasonable grounds" test. Where the senior officer is satisfied the next step will entail consulting HMT: "This step must precede the grant of an authorisation". The court said it is at this stage of the analysis that the purpose of the requirement to consult with HMT must be identified but the statute is silent. Paragraph 31 of the COP for officers acting under Schedule 1 to the 2001 Act details that the agency within the HMT which is to be consulted is one specialising in counter-terrorist sanctions and financial sanctions. Paragraph 31 also spells out that one specific purpose of the consultation is to consider whether an AFO is the most suitable or whether another would be more appropriate. This is not necessarily the sole purpose.

Giving effect to this analysis the court considered that the legislature contemplated that HMT would be an advisory consultee: "a body with presumptive expertise having the capacity to contribute to the advisability of the contemplated application to the court". The court said this would, in principle, enhance the quality of the PSNI decision making and could result in the evidence grounding the proposed application being augmented or varied. The court commented that this highlighted the importance of context and lent support to the view that the PSNI consultation with HMT under paragraph 10Q of Schedule 1 to the 2001 Act is of a distinctive species, to be contrasted with other contexts, such as threatened hospital or OPH closures:

> "We consider that it is primarily designed to protect and further the public interests embedded in the overarching statutory aims … The scenario contemplated by the legislature is that of two public authorities, each possessing presumptive expertise within their respective spheres and having common aims and interests, conferring in the context of the statutory aims and purposes noted. … One would readily infer a parliamentary intention that the consultation should be undertaken conscientiously and with an open mind, with the Police Service weighing the HMT input prior to making final decisions on pursuit of the proposed application and the grant of the requisite authorisation for that purpose. The institutional and constitutional independence of the two agencies must also be reckoned."

Conclusions

The court reached the following conclusions:

- It agreed with the trial judge that the nature and extent of the non-compliance under scrutiny was modest rather than grave. The court said there been very recent consultation involving LMP and HMT in the specific context of the contemplated applications to WMC for the orders made (and then set aside) which were later made by BMC.

- There was no basis for concluding that the failure of the PSNI chief superintendent to consult with HMT prior to authorising the applications to BMC had any material consequences for the substance and grounds of those applications and, hence, the ensuing BMC orders.

- It accepted the trial judge's assessment that one of the main purposes of the statutory consultation requirement was to determine whether other kinds of action may be preferable. The court said it could identify no grounds for concluding that PSNI/HMT consultation would have resulted in the identification of some other option.

- The appellants could point to no real prejudice to them flowing from the non-observance of the statutory consultation requirement. The court said this had no material consequences for the substance and grounds of the applications giving rise to the impugned AFOs or the orders themselves. Furthermore, the appellants had subsequently exercised their right to make variation applications and continued to have the mechanism of applying to BMC for an order setting aside the AFOs under paragraph 10T of Schedule 1 to the 2001 Act. The court said that, properly analysed, the failure of the PSNI to observe the statutory consultation requirement had generated for the appellants the windfall benefit of deploying this in opposition to the variation applications and in having to resort to their judicial review challenges: "It has added to their armoury of legal rights".

- The court accepted that the PSNI personnel concerned were at all times acting in good faith and in furtherance of the overarching statutory aims and objectives. Furthermore, it said it was not for the court to review the quality of the consultation undertaken with HMT by LMP.

- There was an unmistakable public interest favouring the assessment that total invalidity should not be the consequence of non-observance of the statutory consultation requirement which was under scrutiny in this fact sensitive case. McCloskey LJ added:

> "While, in common with [the trial judge], this court would emphasise the importance of scrupulous adherence to statutory requirements in every context, a judicial assessment that non-compliance with the statutory consultation requirement of the kind which occurred in this case leads to outright invalidity would in our view be antithetical to the public interest, would constitute an outcome of disproportionate dimensions and, fundamentally, would be antithetical to the presumed intention of the legislature."

The court affirmed the order and judgment of the trial judge and dismissed the appeal.

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

If you have any further enquiries about this or other court related matters please contact:

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