

Judicial Communications Office

Wednesday 8 February 2012

COURT GRANTS ANONMITY TO FORMER PSNI OFFICER IN PROCEEDINGS RELATING TO A MISCONDUCT HEARING

Summary of Judgment

Mr Justice McCloskey, sitting today in the High Court in Belfast, granted anonymity to a former police officer in judicial review proceedings relating to a misconduct hearing.

The applicant brought an application for leave to apply for judicial review when he was a serving police officer. He was subject to a misconduct charge of refusing to submit to an “intelligence led drugs test”. This arose out of his arrest for suspected possession of cannabis resin. On the eve of the misconduct hearing, the applicant sought leave to apply for judicial review on the basis that if the misconduct hearing were to proceed it could prejudice the fairness of any future prosecution against him. The High Court rejected his submissions and the application for leave to apply for judicial review was dismissed.

The applicant asked the High Court to anonymise the judicial review proceedings. He informed the Court that he had resigned from the PSNI on the morning of the misconduct hearing with the result that, on a consensual basis, it did not proceed. He claimed that he had previously received threats from both loyalist and republican terrorists and was concerned that his safety would be compromised if he was identified in the proceedings.

Mr Justice McCloskey said that case law establishes a strong general rule that court proceedings should be conducted in public. The departure from the principle of open justice is only justified to the extent that the court reasonably believes it to be necessary in order to serve the ends of justice. He referred to the obligations on the court where an application is based on the need to protect fundamental human rights. In such cases it is incumbent on the court to act in accordance with its duty under section 6 of the Human Rights Act 1998. The judge referred to two types of application:

- Where a litigant invokes Article 2 of the ECHR (right to life). In this case court should ask whether there exists an objectively verified, present and continuing risk to the life of the litigant concerned. If it considers there is, the court will then have to consider whether, in the particular circumstances, this gives rise to a positive obligation on the part of the court as a public authority under s.6 of the Human Rights Act 1998. This exercise will involve consideration of whether there is any connection between the existence or possible escalation of the risk to the life of the litigant and his pursuit of the proceedings without the protection of anonymity.
- Where a litigant invokes Article 8 of the ECHR (right to respect for private and family life). If this right is engaged, the court will have to conduct a balancing exercise on the facts, weighing the extent of the interference with the individual's

Judicial Communications Office

privacy on the one hand against the general interest at issue on the other hand. In cases involving the media, the competing general interest will normally be the right of freedom of expression under Article 10 of the ECHR. In other cases the competing interest is the general imperative for justice to be done in public, as confirmed by Article 6(1) of the ECHR.

Mr Justice McCloskey referred to the guidance handed down by the English Court of Appeal in the case of JIH v News Group Newspapers. This was a case involving the right to privacy of an individual against the freedom of expression rights of a newspaper organisation. The judge said that whilst decisions of the English Court of Appeal are not binding on the courts in Northern Ireland, they are, by well-established principle, accorded appropriate deference and there was no apparent reason why the guidance promulgated in this case should not be observed here.

Mr Justice McCloskey also set out the procedure by which the court expected litigants to seek anonymity in this type of proceedings (this guidance does not extend to children's proceedings or certain types of criminal proceedings in which special and particular issues arise). The judge said that in cases of this kind, the permission of the court must be sought from the outset of the proceedings or, if later, at the earliest moment when grounds for seeking anonymity have arisen. Such applications should be founded on an affidavit sworn by the litigant or witness concerned. Affidavits in support of such applications should be proactive, timely and fully compliant with the requirements of openness. The judge said that where the application is delayed or where there is a perceived lack of openness, the prospects of a successful outcome may be diminished in consequence. Applications of this kind should normally proceed on notice to other parties.

The judge said, in his opinion, that the advent of Convention rights in domestic law through the Human Rights Act 1998 has served to place a sharper focus on issues relating to hearings in camera, hearings in chambers, protection of the identities of litigants and witnesses and the promulgation of judgments. He considered that if the court adopts as its starting point the principle of open justice and, having done so, then explores rigorously the question of whether sufficient justification for any encroachment on this principle has been demonstrated and, if so, in what manner and to what extent, the court is unlikely to fall into error. The judge added that adherence to this approach has the additional merit of minimising the risk of misuse of the court's process.

Turning to the present case, Mr Justice McCloskey said that the affidavit sworn belatedly by the applicant included scant particulars about the previous terrorist threat. The connection between fully open proceedings and any existing threat asserted by him was far from clear. The judge said that the evidential picture painted by the applicant was "unsatisfactory and incomplete". He found that on the basis of the evidence before the court, he could not be satisfied of the existence of "an objectively verified, present and continuing risk to the applicant's life". Mr Justice McCloskey commented, however, that the possibility of prolonging the proceedings in circumstances where the applicant has resigned from the PSNI and the fact that he has not brought an appeal against the court's substantive ruling to refuse the application for judicial review, meant that it would be ill-disposed of the court to invest further time and resources in continuing the proceedings in pursuit of this discrete matter and for no other purpose.

Judicial Communications Office

Mr Justice McCloskey said that, accordingly and “with some misgivings”, he acceded to the applicant’s quest for anonymisation.

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 Court Service website (www.courtsni.gov.uk).

ENDS

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