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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY MARK CAVANAGH FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE POLICE SERVICE OF NORTHERN IRELAND

Mr McLaughlin QC (instructed by Crown Solicitor) for the Appellant
Mr Southey QC with Mr Devine (instructed by KRW Law Solicitors) for the Respondent

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Before: Morgan LCJ, Treacy LJ and Maguire LJ

MORGAN LCJ (delivering the judgment of the court)

[1] The respondent, Mark Cavanagh, challenged the issue, retention and use of a Threat to Life Disruption Notice ("the notice") issued by the PSNI, the appellant, on 25 May 2016. By an Order made on 10 January 2020 Keegan J concluded that the appellant's retention of the notice was incompatible with Article 8 ECHR as it was not in accordance with law or proportionate because retention was for a 100 year period without any stipulated review.

[2] The appellant lodged a Notice of Appeal in respect of retention and the respondent lodged a Respondent's Notice contending that the decision to issue and serve the notice was procedurally unfair, the issue of the notice was in breach of the respondent's reasonable expectation of privacy and the use of the notice in a bail hearing was unfair and unlawful as it was neither accessible nor foreseeable. The appellant has now abandoned the appeal so the issues before this court are those in the Respondent's Notice.

Agreed Facts

[3] On 4 March 2016 the respondent was granted bail by Colton J subject to conditions on charges including incitement to robbery, possession of a firearm and ammunition with intent to endanger life and conspiracy to possess a firearm and ammunition. On 13 May 2016 intelligence was entered onto police intelligence systems relating to the respondent and a number of others. The gist of the intelligence was that they were actively targeting drug dealers in the greater Belfast area for the purposes of extortion. The respondent and the others named were all known to police.

[4] An Occurrence and Enquiry Log was created under the title "Targeting Drug Dealers for Extortion" which recorded the action taken on foot of the intelligence. It records that the intelligence had been disseminated to other divisions within PSNI to whose responsibilities it may have been relevant. It also records that the background profiles of the respondent and the others named were requested.

[5] On 24 May 2016 the intelligence was brought to the attention of the PSNI Commander for the Belfast Area. He made an assessment of the risk posed by the respondent and the other named individuals. He assessed that there was a real risk that the respondent and the other individuals may cause serious harm to a member of the public. He was not able to assess whether the risk was an immediate one but considered that the possibility could not be ruled out. He directed that a disruption notice should be served by police upon the respondent and the other named individuals.

[6] Police attended the respondent's home at approximately 3:30am on 25 May 2016 and read the contents of the notice to him. The respondent was not provided with a copy of the document and refused to sign it. The main portion of the notice reads:

> "Police are in receipt of information which indicates that you intend to take unlawful actions against persons in the Belfast area. You are advised to desist from this activity."

[7] On 24 May 2016 police opened a second Occurrence and Enquiry Log relating to the service of the notice. It records the attendance of police officers at the respondent's home to provide him with the details in the notice and the actions and decisions taken by police following that visit relating to the management of the threat.

[8] The second Occurrence and Enquiry Log entry records the gist of the underlying intelligence in the following terms "the respondent and a number of named associates were actively targeting drug dealers within the Greater Belfast area for the purposes of extortion." The Log Entry further states "No potential victims identified. Nothing to suggest any threats to life of potential victims just robbery." The second Occurrence and Enquiry Log also records that on 2 June 2016

the Duty Officer for the PSNI Division in which the respondent resides carried out a review of the threat and of the steps taken on foot of the threat information. He was content with the actions which had been taken by PSNI until that time and did not consider that any further action was required. It was decided that the matter could be closed.

[9] On 2 June 2016 the respondent's bail conditions were varied administratively by consent. The respondent made a further application to vary his bail conditions which came on for hearing on 10 June 2016 before Horner J. The application involved the respondent having access to a vehicle and was opposed by the Crown following instructions from the PSNI. In advance of the application the Crown gave notice of its intention to rely upon the notice in opposition to the application. A copy of the notice was shown to and photographed by the respondent's legal representatives. During the course of the bail application the notice was produced to the court and relied upon by the Crown in opposition to the application. The bail variation was granted.

[10] The process of issuing and serving disruption notices by PSNI is not the subject of express statutory provisions. PSNI consider it is a form of operational measure with a statutory basis in more generally applicable statutory provisions. It is also the subject of policy provision within the PSNI Threats to Life policy which was in force at the time. Extracts from that policy document are in evidence. The portions that deal with disruption notices were not publicly available at the time of the issue of this notice and are now publicly available and disclosed in these proceedings.

[11] A hard copy of the original notice is currently retained by PSNI in a secure storage facility. An unsigned electronic copy is currently retained on the NICHE system. The investigating officer with carriage of the ongoing criminal proceedings against the respondent accessed the notice on the PSNI NICHE system and used it to provide instructions to Crown Counsel in opposition to the bail variation application.

[12] There are no specific statutory or policy provisions which regulate the possible future use by police of a notice or of the underlying information which gave rise to it. The respondent has expressed concern about its future use such as within an Enhanced Criminal Record Certificate (under Part V Police Act 1997) or as part of a bad character application in criminal proceedings. Any future use of police information of this nature will be subject to any applicable legal obligations, procedures and safeguards.

Retention, Service and Use of the Disruption Notice

[13] The disruption notice was issued as a result of the receipt of underlying intelligence. There is, however, no claim in respect of the retention and use of that intelligence in these proceedings. The purpose of issuing the notice was to satisfy the

positive obligation to protect life imposed under Article 2 ECHR and established by Osman v UK 29 EHRR 245 and developed in Bljakaj v Croatia (2014) 38 BHRC 759.

[14] There was no dispute about the fact that Article 8 ECHR was engaged by the retention of the notice in light of its reflection on reputation. Keegan J was satisfied that the notice was subject to a 100 year review period and that retention without review for that period was not in accordance with law and was disproportionate. The appeal against that finding has been abandoned. This case is concerned, therefore, with the service and use of the notice.

Service

[15] Section 8 of the PSNI's Threat to Life policy provides for the issue of disruption notices as follows:

> "(aa) Schedule 1 to the Human Rights Act 1998 indirectly incorporates many of the rights set out in the European Convention on Human Rights (ECHR) into United Kingdom law. One of these rights is Article 2 of the ECHR which protects the right to life. It is often referred to as the positive obligation of the Osman ruling. One aspect of the right to life is that it requires the State to take feasible operational measures within its power to avert a real and immediate threat to life of which it was or should have been aware.
>
> (ff) A suspect may be issued with a notice when the District Duty Officer (rank of Chief Inspector or above) believes that the existence of a threat posed by them is known. The process is known as the service of a Threat to Life Disruption Notice (see Appendix G). This is not intended to allow a suspect to identify intelligence sources, but remains a tactical option to consider when the identity of the potential victim is unknown or is unclear.
>
> (gg) The use of a disruption notice should be carefully considered and not used as an alternative to arrest. Advice must be sought from the police human rights lawyer as to the wording of a disruption notice."

[16] In this case authority for the issue of the notice was given by Chief Superintendent Roberts. In addition to the intelligence material the authorising officer was also aware of the respondent's criminal record including convictions for conspiracy to commit robbery and serious firearms offences. Chief Supt Roberts did not consider that there were reasonable grounds for the arrest of the respondent or

any of his associates nor was there sufficient information relating to a specific possible victim to enable a Warning Notice to be served. The PSNI human rights adviser agreed that a disruption notice was appropriate in the circumstances of the case and Mr Roberts accordingly directed that it should be issued.

[17] The learned trial judge concluded that service of the notice did not engage Article 8 ECHR. She considered that the gateway to Article 8 protection in respect of private life was a reasonable expectation of privacy. There could be no reasonable expectation of privacy in respect of disclosures by PSNI to the respondent of the information it held in relation to him. Such disclosures enhanced his ability to protect his privacy by both informing him and enabling him to exercise statutory procedures under the Data Protection Act. The applicant's expectation of privacy related to disclosures by PSNI to third parties.

[18] There is considerable authority for the proposition that the touchstone of private life is whether the person in question had a reasonable expectation of privacy in the particular circumstances. Lord Toulson set out the position in JR38 [2015] 3 WLR 155 at paragraph [88]:

> "88. In Campbell's case Lord Nicholls said at para 21 that "Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy". He also warned that courts need to be on guard against using as a touchstone a test which brings into account considerations which should more properly be considered at the later stage of proportionality. Applying Campbell's case, Sir Anthony Clarke MR said in Murray's case at para 35 that "The first question is whether there is a reasonable expectation of privacy." He said at para 36 that the question is a broad one which takes account of all the circumstances of the case, including the attributes of the claimant, the nature of the activity in which the claimant was involved, the place at which it was happening, and the nature and purpose of the intrusion. The principled reason for the "touchstone" is that it focuses on the sensibilities of a reasonable person in the position of the person who is the subject of the conduct complained about in considering whether the conduct falls within the sphere of article 8. If there could be no reasonable expectation of privacy, or legitimate expectation of protection, it is hard to see how there could nevertheless be a lack of respect for their article 8 rights."

[19] Mr Southey contended for a broader test and relied upon the observations of Lord Sumption in R (Catt) v ACPO [2015] AC 1065 at paragraph [4] where he said that a reasonable expectation about the privacy of home or personal communications

must extend to every occasion on which a person has a reasonable expectation that there will be no interference with the broader right of personal autonomy recognised in the case law of the Strasbourg court.

[20] Catt also dealt with the case of T. In that case a prevention of harassment letter had been issued by the Metropolitan Police in respect of words spoken during a neighbour dispute. The argument that service of the notice engaged Article 8 had been rejected by the Court of Appeal. The court considered that "although the receipt of the letter no doubt caused her a degree of annoyance and distress its effect was not of a serious nature and in any event it was and could have remained essentially a private matter between her and the police" ([2013] EWCA Civ 192 at [55]). Leave to appeal that issue to the Supreme Court was refused.

[21] The affidavit from the respondent in this case indicates no complaint of annoyance or distress as a result of the service of the notice. It is not suggested that any neighbour or other person was alerted to the content of the notice as a result of its service. His complaint has been focused on the use of the notice in connection with an application to vary his bail.

[22] The notice does not alter his status in any way. It advises him of the nature of the information which has been received and that it is assessed as being credible in the sense that it may be true. Although in his affidavit the respondent says that he was denied the opportunity to make representations he does not indicate what those representations might have been. He is at liberty to make such representations at any time.

[23] The purpose of the notice is to deter anyone who may be considering the commission of a serious criminal offence. That is apparent from the context which is threats to life. As in this case the material giving rise to the notice is often intelligence material and there may be difficulties in the amount of information that could be safely communicated to the subject of the notice. In order to be effective the decision maker will need to take into account the imminence of a possible attack.

[24] The requirements of procedural fairness are dependent on the context of the decision (Doody [1994] 1 AC 531 at 560). The context here is that of operational police decisions in a situation of urgency. In light of that background, particularly the factors set out at [22]-[23] above, we do not consider that the assessment of the information and its communication to the respondent by way of the disruption notice gave rise to any obligation at common law of prior consultation. That is consistent with the approach of the Court Of Appeal in Catt and leave to appeal that approach was refused.

Use

[25] The publication of a disruption notice plainly engages the Article 8 rights of the subject primarily because of the impact upon reputation (Pfeifer v Austria (2007) 48 EHRR 175). By virtue of section 32 of the Police (Northern Ireland) Act 2000 police officers have a general duty to protect life and to prevent the commission of offences. In respect of threats to life the PSNI also has a positive duty under Article 2 ECHR to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual. Any publication for the purpose of satisfying those obligations plainly serves a legitimate aim and is rationally connected to the aim.

[26] The concern in this case relates to whether the use of the disruption notice is "sufficiently constrained by some legal rule governing the principles on which the decision is to be made" (Re Gallagher [2020] AC 185 at [12]). The use of the notice constitutes processing for the purposes of the Data Protection Act 2018. The 2018 Act specifically deals with processing for law enforcement purposes which are defined in section 31 as the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security.

[27] The first data protection principle in section 35 of the 2018 Act requires that in order to be lawful and fair the processing must be necessary for the performance of the task carried out for law enforcement purposes by a competent authority. The third data protection principle requires that any personal data processed for any of the law enforcement purposes must be adequate, relevant and not excessive in relation to the purpose for which it is processed. The fourth data protection principle is that personal data processed for any of the law enforcement processes must be accurate and where necessary kept up-to-date and every reasonable step must be taken to ensure that personal data that is inaccurate is erased or rectified without delay. Each of these principles operates, therefore, as a constraint on the lawful use of personal data held by the PSNI.

[28] There were three areas in respect of which it was contended that the use of the notice would constitute a breach of the respondent's Article 8 rights. The first was in relation to its use in the bail application on 10 June 2016. The use of intelligence material in bail applications was the subject of consideration by the High Court in Re Donaldson's Application [2003] NI 93. That case established that where the Crown intended to rely upon intelligence material in a bail application and the defence sought disclosure thereof the applicant for bail was entitled to disclosure of such material as would enable equality of arms between the parties to be established (Garcia Alva v Germany [2001] ECHR 23541/94).

[29] Although the disruption notice would not of itself contain the intelligence material its introduction would alert the court to the fact that the notice was based upon intelligence material as a result of which the bail applicant would be entitled to disclosure of the material or a sufficient gist thereof to ensure equality of arms. The

purpose of that exercise plainly would be to enable the bail applicant to make effective representations in order to refute the substance of any adverse material.

[30] In most cases it is the intelligence material that is likely to be relevant to the issues arising in the bail application. A disruption notice may have some relevance in circumstances were there was evidence that some actions had arisen as a result of service of the notice relevant to the issues arising in the bail application. The important point, however, is that the procedure is subject to careful judicial scrutiny to ensure that inappropriate use of the disruption notice is excluded from the determination of the bail application. In some cases that may even lead to the application being recommenced in front of a different judge. Given the full judicial supervision of bail applications no issue of procedural unfairness arises.

[31] The second area was in respect of bad character applications in criminal cases. Bad character evidence is only admissible if it satisfies the gateways in Articles 5 and 6 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004. The Crown Court Rules require advance notice of the introduction of such material and there is full judicial control of whether or not the material satisfies the requirements of the gateways. There are likely to be very limited circumstances in which a disruption notice would satisfy the statutory criteria but there is no procedural unfairness in the statutory regime and no basis upon which to contend that the introduction of evidence of a disruption notice in an appropriate case would constitute a breach of Article 8 ECHR.

[32] The final area of concern arose in respect of the issue of an Enhanced Criminal Record Certificate ("ECRC") pursuant to Section 113B of the Police Act 1997. A request for such a certificate can be made by a registered person and essentially is sought in respect of employment or engagement in activities with children or vulnerable adults or licensing as a taxi driver. Section 113B(4) requires the Chief Constable of the PSNI to provide any information which –

> "(a) the chief officer reasonably believes to be relevant for the purpose described in the statement under subsection (2), and
>
> (b) in the chief officer's opinion, ought to be included in the certificate.".

The purpose described in subsection (2) is the proposed employment, engagement or licensing.

[33] The obligations under the 1997 Act were considered by this court in KC's Application [2021] NICA 11. Where it is intended to make disclosure the Chief Constable is under an obligation to consider whether the individual should be offered the opportunity to make representations before the disclosure is made. When dealing with a disruption notice based upon intelligence material suggesting

an allegation of a sensitive kind such as this we consider that the respondent would have to be offered the opportunity to comment upon disclosure before it was made. We accept that Article 8 would be engaged by any disclosure but are satisfied that the respondent would have substantial procedural protections.

Conclusion

[34] For the reasons given in agreement with the learned trial judge we do not consider that the service or suggested use of the disruption notice gave rise to any specific breach of Article 8 ECHR and we consider that there are considerable procedural protections if it was intended to use the notice in a bad character application or an ECRC.