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*Judgment: approved by the court for handing down
(subject to editorial corrections)**

ICOS No: 23/2592/01

Delivered: 09/05/2024

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
KING'S BENCH DIVISION (JUDICIAL REVIEW)

BEFORE A DIVISIONAL COURT

IN THE MATTER OF AN APPLICATION BY AMANDA McCABE AND
KEVIN BARRY MURPHY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE PUBLIC PROSECUTION
SERVICE AND DUNGANNON MAGISTRATES' COURT

Mr John Larkin KC with Mr Joseph O'Keefe KC (instructed by Phoenix Law Solicitors)
for the Applicants

Mr Tony McGleenan KC with Mr Philip Henry KC (instructed by the PPS) for the PPS,
first Respondent

Mr Joseph Kennedy (instructed by the Departmental Solicitor's Office) for the District
Judge, second Respondent

Before: Keegan LCJ and Treacy LJ

KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] The applicants apply for leave to bring judicial review of various decisions pertaining to criminal proceedings brought against them which have been before the magistrates' court and are now before the Crown Court. These cases were stayed pending the decision of this court in relation to a co-defendant *Re Bassalat's Application* [2023] NIKB 8. Since that decision the applicants have been returned for trial. We are told that a No Bill application has been listed but not heard as yet.

[2] At the review of this matter on 9 April 2024 the court directed that the parties should file submissions on whether this application should proceed having regard to the judgment of the Court in *Bassalat's Application*. All parties agreed that the matter would be dealt with by written submissions and that a written decision would

simply issue. This is the decision of the court having considered all of the written submissions filed.

[3] The applicants contend that the central issue in this application for judicial review is the approach adopted by the PPS to the review for disclosure of materials held by the Security Service which relates to criminal proceedings in which the Security Service is a principal investigator. The PPS contends that the Security Service is a third party to criminal proceedings and it, therefore, has no duty to obtain all material held by the Security Service for disclosure relating to the underlying criminal proceedings.

The competing arguments

[4] The applicants want this case to proceed notwithstanding the *Bassalat* decision. That is because the applicants maintain that *Bassalat* was concerned with the approach adopted by the PPS at the committal stage only. It is accepted that the court referred to the treatment of the Security Service as a third party and the relationship between PPS and the Security Service in respect of disclosure. However, the applicants maintain that the focus of the court's judgment was not on this relationship, rather it was on the disclosure process in the committal proceedings. Therefore, the applicants submit that the lawfulness of the treatment of the Security Service as a third party where it is a principal investigator remains a significant issue which should be determined by this court. Further, they contend that whilst the accused in the underlying criminal proceedings can make a section 8 application to the Crown Court to make an order for disclosure, that court is not the appropriate forum to determine whether the policy of the PPS with respect to material held by the Security Service is lawful. in a public law capacity.

[5] In response to the above the PPS states that none of the applicants' attempts to distinguish this case from *Bassalat* withstand scrutiny. This is for the reasons the PPS sets out namely that this court has already determined these issues in *Bassalat*; the PPS explained the disclosure test it was applying and which this court confirmed was correct; this court has already ruled that the PPS was correct to treat MI5 as a third party for disclosure purposes (see paras [56] to [59]); this court observed that the PPS has been provided with unrestricted access to the MI5's materials for the purposes of dealing with disclosure (para [56]). In any event, the PPS states that any debate on disclosure should take place within the criminal proceedings, not by way of impermissible satellite litigation in this court.

[6] The District Judge as second respondent adopted the *Re Darley* [1997] NI 384 position in this challenge. Counsel also submitted in writing that having reviewed the applicants' updated position paper, and with the matter having moved to the Crown Court, the District Judge intends to take no further part in these proceedings, unless requested or required to do so.

Conclusion

[7] This court has already dealt with the MI5 argument on which the applicant seeks to distinguish this case from *Bassalat*. Any further or refined argument about this issue can be made in the Crown Court. Applying the well-established authority of *R v DPP ex parte Kebeline* [2000] AC 326 that we referenced at paras [50] to [52] of our decision in *Bassalat* issues of disclosure are for the specialist criminal court namely the Crown Court, not for satellite litigation:

“[50] There is also an effective alternative remedy in the specialist criminal court. The Crown Court has the facility to deal with this type of issue and has done so in the past in this jurisdiction. Judicial review is a measure of last resort and should only be exercised where alternative remedies are exhausted. That means that whilst there is a residual jurisdiction it should only need to be utilised in cases after alternative remedies are tried or unavailable. In addition to avoidance of delay in criminal cases and the duplication of judicial effort this has the significant advantage of saving the public funds expended on judicial reviews of this nature.”

[8] To our mind the above applies with even more force now that these applicants have been returned for trial to the Crown Court. There is nothing within the written submissions that alters our view. We find no convincing basis upon which these cases are distinguishable from *Bassalat*. Accordingly, there is no utility in a judicial review proceeding, the points having already been examined and determined in a linked case. In any event as we have said, the Crown Court can hear further arguments on this issue if needs be.

[9] It would also offend the overriding objective to rerun the case in the judicial review court with all of the judicial time and costs involved. This is particularly so when in parallel the specialist criminal court is seised of the matter.

[10] Accordingly, we refuse leave to apply for judicial review in each case on the same basis as we did in *Bassalat* in that the applicants have an alternative remedy in the Crown Court where they have both now been returned for trial.