

Neutral Citation: [2020] NIQB 59

<i>Ref:</i> MOR11323

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

<i>Delivered:</i> 30/09/2020

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF APPLICATIONS FOR JUDICIAL REVIEW BY

RISTEARD O'MURCHÚ and ARLENE SHANNON

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

Before: Morgan LCJ, Treacy LJ and Huddleston J

MORGAN LCJ (delivering the judgment of the court)

[1] Each of the applicants was arrested in connection with criminal offences. In each case, the investigating officer indicated that it was proposed that there should be downstreaming of their interview as a result of which persons who were not in the interview room would both see and hear what was occurring. No additional recording of the interview was involved in this process. In each case, their solicitor contended that downstreaming was not in accordance with law. As a result of that objection, these judicial review proceedings were lodged although the PSNI decided to proceed with the interviews without downstreaming. Mr Lavery QC and Mr Mullan appeared for the applicants and Dr McGleenan QC and Mr Thompson for the respondent. We are grateful to all counsel for their helpful oral and written submissions.

[2] Ms Shannon was arrested on 4 March 2019 in connection with an allegation of benefit fraud. She was taken to Musgrave Street PSNI station for questioning and was informed by her solicitor that the Major Inquiry Team was going to deal with her. Her solicitor informed her that this was unusual for standard benefit fraud investigations. During the preamble to her interview, she was advised that there would be downstream monitoring. She was concerned that other people that she could not see were viewing or listening and felt that something else was going on behind the scenes. She said that she had previously been the subject of what she

believed to have been an approach by PSNI or MI5 officers when she had money placed in her bank account and a text message followed up to confirm that it had been done and requesting help in return. She had reported this to her solicitor and the Investigatory Powers Tribunal.

[3] Chief Superintendent Walls stated that the only persons intending to downstream monitor her interview were her assigned PSNI Tier 3 Interview Coordinator and two assigned DFC Fraud Investigators. All of those individuals had direct professional involvement in the applicant's investigation. The background was that, while investigating other matters, the Terrorism Investigation Unit ("TIU") of the PSNI identified a number of cases of suspected social security fraud involving the applicant and her partner. It was determined that it was neither safe nor appropriate for the DFC to take that investigation forward on an independent basis. Accordingly, a joint working investigation was established between the PSNI and the DFC. The factors relevant to that decision included the specialist nature of social security fraud investigation, the suspected context of the TIU original investigation, the individuals to whom it related and the safety of relevant DFC staff within the community.

[4] Mr O'Murchú was arrested on 15 May 2019 under section 41 of the Terrorism Act 2000 in connection with allegations of possession of an AK-47 assault rifle and possession of information likely to be of use to terrorists. He stated that it was explained to him by his advisers that downstream monitoring would involve remote monitoring of his interview by other persons in a different location and that he would not know how many persons would be monitoring their interview, who they were or where they worked. He had a particular cause for concern because on 6 December 2016 he was subject to an approach by two members of the PSNI as he was on his way from hospital with a view to him becoming an informer.

Codes of Practice relevant to interviews

[5] Articles 60 and 60A of the Police and Criminal Evidence Order 1989 ("PACE") impose a duty on the Department of Justice to issue a code of practice in connection with the tape-recording and visual recording with sound of interviews of persons suspected of the commission of criminal offences which are held by police officers at police stations. Article 65 of PACE requires the Department to issue codes of practice in respect of the arrest, detention and questioning of persons by police officers. The codes deal with some aspects of what happens in the interview room and the arrangements for the retention of the recordings.

[6] It is common case that the codes of practice do not touch upon downstreaming. The relevant codes under PACE and the Terrorism Act 2000 provide that before the interview commences each interviewer shall identify themselves and any other persons present to the interviewee. Code E provides that access to interview recordings must be strictly controlled and monitored to ensure that access is restricted to those who have been given specific permission to access materials for specified purposes when this is necessary. That includes police officers

and prosecution lawyers as well as persons interviewed if they have been charged or informed they may be prosecuted.

[7] In England and Wales, the Home Office updated its codes of practice following a statutory consultation process in 2018. Code E 2018 relates to the audio recording of interviews and contains the following provisions relating to the use of remote monitoring:

“If the interview room or other location where the interview takes place is equipped with facilities that enable audio recorded interviews to be remotely monitored as they take place, the interviewer must ensure that suspects, their legal representatives and any appropriate adults are fully aware of what this means and that there is no possibility of privileged conversations being listened to. With this in mind, the following safeguards should be applied:

- (a) The remote monitoring system should only be able to operate when the audio recording device has been turned on.
- (b) The equipment should incorporate a light, clearly visible to all in the interview room, which is automatically illuminated as soon as remote monitoring is activated.
- (c) Interview rooms and other locations fitted with remote monitoring equipment must contain a notice, prominently displayed, referring to the capacity for remote monitoring and to the fact that the warning light will illuminate whenever monitoring is taking place.
- (d) At the beginning of the interview, the interviewer must explain the contents of the notice to the suspect and if present, to the solicitor and appropriate adult and that explanation should itself be audio recorded.
- (e) The fact that an interview, or part of an interview, was remotely monitored should be recorded in the suspect's custody record or, if the suspect is not in detention, the interviewer's pocket book. That record should include the names of the officers doing the monitoring and the purpose of the monitoring (e.g. for training, to assist with the investigation, etc.)”

Policy and Guidance

[8] Chief Supt Walls indicated that downstream monitoring has been used by police forces in the United Kingdom since the 1990s. The first policy document regulating its use was Home Office Circular 50/1995 entitled “Guidelines for Remote Monitoring of Tape-Recorded Interviews with Suspects” issued in September 1995 providing as follows:

“It is becoming increasingly common for tape-recorded interviews with suspects at police stations to be remotely monitored as they take place. This can be useful in the context of an investigation and also for training purposes. However, it is important to ensure both that suspects and their legal representatives are fully aware of what is happening and that there is no possibility of privileged conversations being listened to. With that in mind, the following procedural safeguards should be applied.

1. The remote monitoring system should only be able to operate when the tape recorder has been turned on.
2. Equipment should incorporate a light, clearly visible to all in the interview room, which is automatically illuminated as soon as the remote monitoring capacity is activated.
3. All interview rooms with remote monitoring equipment should contain a notice, prominently displayed, referring to the capacity for remote monitoring and to the fact that the warning light will illuminate whenever monitoring is taking place.
4. The contents of that notice must be explained to the suspect by the interviewing officer at the beginning of the interview and that explanation should itself be recorded on the tape.
5. The fact that an interview, or part of an interview, was remotely monitored should be recorded in the suspect’s custody record. That record should include the names of the officers doing the monitoring and the purpose of the monitoring (e.g. for training, to assist with the investigation, etc.)”

[9] Subsequently the Association of Chief Police Officers of England and Wales and Northern Ireland (“ACPO”), now known as the National Police Chiefs’ Council, issued a position statement entitled “The remote monitoring of suspect interviews” setting out guidance on remote monitoring of interviews. Reference was made to Home Office Circular 50/1995 describing the procedural requirements involved in remotely monitoring interviews with suspects and it was noted to be relevant today regardless of the increased use of digital technology. It was noted that remote monitoring can improve the quality of an investigative interview and should be viewed as essential when investigating major crime and an integral component part of any suspect interview strategy.

[10] The decision to remotely monitor an interview should be made by a senior investigating officer. The fact that an interview or part of an interview was to be remotely monitored should be recorded in the suspect’s custody record and the record should cover the purpose of monitoring the interview and the names of everybody monitoring it. Guidance on the equipment was given as follows:

“Fixed Equipment

Wherever possible any private consultations between the suspect and their legal advisers should take place in a separate room. Remote monitoring equipment must only operate when recording equipment in the interview room is switched on and the interview has commenced. This ensures that any privileged conversations between the suspect and their legal representative in the interview room remain confidential.

A warning light should automatically illuminate when the remote monitor is activated. The light must be clearly visible to everybody in the interview room.

A notice must be displayed in a prominent position in all interview rooms where remote monitoring equipment is fitted. The notice must cover the following points:

that the room has capacity for remote monitoring;

that a warning light will be illuminated when the remote monitoring equipment is switched on;

that the details of those monitoring the interview will be recorded on the suspects custody record.

Portable Equipment

Portable equipment may be used to monitor interviews with suspects. If it is fitted with a warning

light that illuminates when the remote monitor is activated a notice containing the same information referred to above should be displayed in the interview room. If it is not fitted with a warning light it is important that a separate room that is not fitted with recording equipment is set aside for privilege consultations between the suspect and their legal advisers; in these circumstances a modified notice should be displayed omitting any reference to a warning light.”

[11] The College of Policing first published guidance on investigative interviewing on 23 October 2013 and has continued to modify the guidance up to 18 March 2019. This noted that downstream monitoring needed to be taken into account when structuring an interview and provided as follows:

“Downstream monitoring

Suspects and their legal representatives must be made fully aware if remote monitoring of the interview is to take place. The following minimum standards apply, in accordance with Home Office Circular 50/1995 Remote Monitoring of Interviews with Suspects (as agreed between ACPO and the Law Society):

- the remote monitoring system should only be able to be operational when the tape recorder has been turned on
- a light, which automatically illuminates upon activation of remote monitoring, should be visible to all in the interview room
- all interview rooms with remote monitoring equipment should prominently display a notice referring to the capacity for remote monitoring and to bring attention to the fact that the warning light will illuminate to signify that remote monitoring is taking place
- at the beginning of the interview, the contents of the notice must be explained to the suspect by the interviewing officer (the explanation itself should be recorded on the tape)
- the suspect’s custody record should include reference to the fact that an interview, or part of an interview, was remotely monitored. It should include the names of the officers

monitoring the interview and the purpose of the monitoring, i.e., for training or to assist with the investigation.”

Reasonable expectation of privacy

[12] It was argued by the applicants that each had a reasonable expectation of privacy in respect of the conduct of the interviews. It was further submitted that the downstreaming and monitoring of their interviews was not in accordance with law. There was a distinction between this jurisdiction and England and Wales where the Home Office had updated Code E to provide the necessary legal basis.

[13] The respondent argued that the applicants could not establish a reasonable expectation of privacy relating to the use or intended use of downstream monitoring because each was already held in a custodial environment where CCTV monitoring and recording applied throughout the periods of detention. No challenge was made to that CCTV monitoring and recording and the only persons to use downstream monitoring or intending to do so did so with the intention of monitoring the respective interviews. All had direct professional involvement in the investigations and would in any event have been lawfully entitled to examine the content of those interviews.

[14] The reasonable expectation of privacy test was adopted by the House of Lords in Campbell v MGN Ltd [2004] UKHL 22. That case concerned the publication in a national newspaper of information that the respondent had a drug addiction, that she was receiving treatment, that her treatment was at a particular place, the details of that treatment and a visual portrayal of her leaving a specific meeting with other addicts. The respondent had previously publicly indicated untruthfully that unlike others in her profession she did not take drugs.

[15] The House was united on the principled approach to the case. The first task was to establish whether there was a reasonable expectation of privacy in relation to the publication and if so it was then necessary to move to the proportionality assessment taking into account the newspaper’s right to freedom of expression under Article 10 of the Convention.

[16] It is, however, possible to detect some divergence of views about the factors to be taken into account in determining whether a reasonable expectation of privacy was established. A concession was made by the respondent’s counsel that the publication of the private information that she had a drug addiction and was receiving treatment was justifiable on the basis of her previous statements that she had not been a drug user. Lady Hale explicitly stated that this information was and remained private information apparently accepting the concession. Lord Nicholls and Lord Carswell, however, appear to have considered that the justification for the publication was relevant to the issue of whether it was private information. All accepted, however, that it was important to recognise that the issue of what constituted a reasonable expectation of privacy should be separate from the question of whether the interference was proportionate.

[17] The next important case in this territory was the Court of Appeal decision in Murray a minor v Big Pictures (UK) Ltd [2008] EWCA Civ 446. This case concerned the publication of a photograph of the child of a famous author. The court considered the judgments in Campbell and concluded that the first question was whether there was a reasonable expectation of privacy as a result of which Article 8 was in principle engaged. If so, the second question was whether the publication was proportionate.

[18] This decision is important because at [36] Sir Anthony Clarke MR set out the approach to determining whether a reasonable expectation of privacy was established:

“As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.”

[19] The next relevant case is the Supreme Court decision in Re JR 38 [2015] UKSC 42. In that case, a child who had just passed his 14th birthday was photographed by police engaging in public disorder associated with sectarian rioting in Derry. In order to identify those involved the PSNI arranged for the publication of photographs including that of the appellant in local newspapers. A majority of the Court of Appeal in Northern Ireland concluded that since the child would be entitled to anonymity in the criminal justice system, he had a reasonable expectation of privacy in respect of the publication of a photograph suggesting that he had committed a criminal offence. The court went on to conclude that the publication by the newspapers pursued a legitimate aim and was proportionate having regard to the public interest in detecting children who were engaging in public disorder.

[20] A majority of the Supreme Court disagreed. Lord Toulson said at [88] that the principal 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.

[21] Lord Clarke agreed with Lord Toulson that, on the facts, the criminal nature of what the appellant was doing was not an aspect of his private life that he was entitled to keep private. He could not have had an objectively reasonable expectation

that such photographs, taken for the limited purpose of identifying who he was, would not be published. The dilemma demonstrated in these cases is that the justification provided by Lord Clarke for the engagement question is precisely the material relied upon by the Court of Appeal in carrying out its proportionality assessment.

[22] We agree that the question of engagement is different from the issue of justification and the authorities remind the court not to confuse these separate issues. We consider, however, that the reasonable expectation of privacy question and the issue of justification are not distinct silos in that matters related to the factual and legal background may be relevant to both.

[23] This is an example of such a situation. Although the parties approached the case on the basis that the engagement question was distinct from the quality of law issue with the latter arising only at the justification stage, we consider that Murray, as approved by JR 38, leads to the conclusion that in this case the quality of law issue is material to the engagement question and should be considered at that stage. That is because the respondent's essential submission is that the safeguards provided by the guidance documents are part of the background to be taken into account in determining the applicant's reasonable expectation of privacy has been engaged.

Quality of law

[24] There was no dispute about the relevant principles applying to the "in accordance with the law" test. In R (P) v Secretary of State for Justice [2019] UKSC 3 the Supreme Court approved the test set out in Huvig v France (1990) 12 EHRR 528. The impugned measure should have some basis in domestic law requiring that it should be accessible to the person concerned who must be able to foresee its consequences for him and the measure must be compatible with the rule of law.

[25] The applicants pointed to the contents of the amended Code E in England and Wales, set out at [7] above, describing the range of safeguards which should be applied in respect of downstreaming. Those safeguards arise in many different circumstances but the provisions satisfy the tests of accessibility and foreseeability and can only be used for proper police purposes as set out in section 32 of the Police Act (Northern Ireland) 2000. It is difficult to see that a failure to comply with the safeguards would of itself render the contents of any interview inadmissible but such a failure could be material in determining whether or not there had been a breach of Article 8 since any interviewee would have a reasonable expectation that the protections in respect of the conduct of each interview would be observed.

[26] The promulgation of guidance in respect of remote monitoring of recorded interviews was first published by circular from the Home Office in September 1995. The issue of such circulars was, during that period, a common mechanism for the setting of legal standards. The purpose of the circular was to make sure that suspects and their legal representatives were fully aware of what was happening and that there was no possibility of privileged conversations being listened to. The procedural safeguards were then set out. It is striking how little has changed since then. Those procedural safeguards are replicated in the ACPO Position Statement,

the Guidance from the College of Policing on remote monitoring and the amended Code E in England and Wales.

[27] The 1995 Home Office Circular did not expressly apply to Northern Ireland and there was no indication that downstream monitoring was a feature of investigations in this jurisdiction at that time. The PSNI is, however, a member of ACPO. That organisation was established as a not-for-profit private limited company to lead the development of policing practices in England, Wales and Northern Ireland. It provided a forum for chief police officers to share ideas and coordinate their strategic operational responses and to give leadership and guidance on the conduct of all aspects of policing.

[28] The ACPO Position Statement on the remote monitoring of suspect interviews was issued through work done by the National Investigative Interviewing Strategic Steering Group. The purpose of the Position Statement was to set out guidance on the remote monitoring of interviews with suspects. The 1995 Home Office Circular was expressly incorporated into the Position Statement and each of the protections contained in the Circular are expressly repeated.

[29] This was not a discussion document or a recommended course of action. It was a commitment made by the relevant professional bodies tasked with the conduct of the interviews of suspects in their jurisdictions as to how downstream monitoring would be carried out. The Position Statement was plainly challengeable by way of judicial review and its promulgation gives rise to legal consequences in that it created a legitimate expectation that downstream monitoring would be carried out in accordance with the Statement. We are satisfied, therefore, that the ACPO Position Statement had the necessary quality of law to give rise to foreseeability in respect of downstream monitoring.

Conclusion

[30] The interview of suspects under caution after arrest gives rise to an obvious interference with the ability to engage in one's everyday activity but also involves a considerable adverse reflection on character. That is particularly so in these cases where the background of the allegation is connection to terrorism. The publication of such interviews would prima facie constitute a clear breach of Article 8. JR 38 requires the court to take into account the protections offered by the codes of practice concerning the conduct and recording of interviews and the controls on access to those recordings. To that must be added the ACPO Position Statement.

[31] The circumstances of the detention and interview of each applicant arose from the proper interest of police in the investigation of crime but at the time of each interview neither applicant had been charged with any offence. Each was subject to state detention which would give rise to anxiety in any reasonable person. This case is plainly distinguishable from JR 38. The issue of the engagement of Article 8 should not be confined to the narrow issue of the downstreaming of the interview. It is not necessary for us to determine whether in those circumstances Article 8 is engaged but if it is engaged we are satisfied that the ACPO Position Statement has the necessary quality of law.

[32] For those reasons the application is dismissed.