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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **27/08/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF APPLICATIONS BY PQ AND RS FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Karen Quinlivan QC and Leona Askin (instructed by McCartney & Casey for the first Applicant and Madden & Finucane for the second Applicant)

Tony McGleenan QC, Laura Curran and Philip Henry (instructed by the Crown Solicitor's Office and the PPS) for the proposed Respondents

Mark Mulholland QC and Ian Turkington (instructed by McCartan Turkington Breen) for the proposed Notice Party

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HUMPHREYS J

Introduction

The Reporting Restrictions Order made by Colton J on 12 March 2021 remains in force.

[1] The applicants for leave to apply for judicial review are, respectively, PQ, a relative of the late TU, and RS, a relative of the late VW. TU was shot dead and VW injured during the events of Bloody Sunday on 30 January 1972.

[2] In September 2020, the Public Prosecution Service ('PPS') announced its decision to prosecute Soldier F, the proposed Notice Party in these applications, for, *inter alia*, the murder of TU and attempted murder of VW.

[3] On 2 July 2021 the PPS made the decision that the test for prosecution in respect of Soldier F was no longer met following the judgment of O'Hara J in *Re Soldier A and Soldier C* [2021] NICC 3. It therefore proposed to discontinue the prosecution. On 8 July leave was granted to seek a judicial review of that decision

and the application is listed for hearing before the Divisional Court in September 2021.

The Committal Proceedings

[4] Committal proceedings against Soldier F commenced at Londonderry Magistrates' Court on 15 March 2021 and these now stand adjourned pending the judicial review challenge to the decision to discontinue the prosecution.

[5] On 9 March 2021, just prior to the commencement of the committal proceedings, members of the PSNI attended with family members of the applicants and informed them that certain information had been disclosed to the legal representatives of Soldier F. In the case of the first applicant, the information in question was:

(i) TU had been a member of Fianna na hÉireann; and

(ii) TU was an active member of the IRA at the time of Bloody Sunday.

[6] In the case of the second applicant, the information imparted was:

(i) VW was a prominent member of the Catholic Ex-Servicemen's Association in Derry in 1973; and

(ii) His car may have been used to transport materials by the IRA in 1980.

[7] Each of these allegations is vehemently denied by the applicants. They make the point that the Bloody Sunday Inquiry sought disclosure of all documents from the PSNI in relation to the deceased and wounded and no such information was forthcoming in relation to either of these two individuals.

[8] The impugned information was furnished by the PSNI to the PPS and thence to the families of the applicants in purported compliance with the disclosure obligations of the PPS in the course of the criminal prosecution. The applicants were particularly concerned that the impugned information would be used by Soldier F's legal representatives during the committal proceedings to damage the reputation of those who were killed or injured on Bloody Sunday, and to undermine the prosecution case.

[9] Judicial review proceedings were commenced on an urgent basis. Each applicant seeks various forms of relief, including an order of certiorari quashing the decisions made by the PSNI and PPS which led to the disclosure of the impugned information, and orders of mandamus requiring these bodies to confirm that the information is inaccurate or to carry out proper enquiries into the provenance and accuracy of the information.

[10] In the event, the legal representatives of Soldier F undertook not to use the impugned information in the committal proceedings and the urgency of the applications thereby dissipated.

Criminal Cause or Matter

[11] At an initial review hearing, the parties appeared to agree, at least provisionally, that these applications did not constitute a 'criminal cause or matter' within the meaning of sections 35 and 41 of the Judicature (Northern Ireland) Act 1978 and Order 53 rule 2 of the Rules of the Court of Judicature (NI) 1980. However, on reflection, the proposed respondents consider that these applications ought properly to be so classified and therefore this question falls to be determined as a preliminary issue.

[12] By virtue of Order 53 rule 2, the jurisdiction of the court on or in connection with an application for judicial review in a criminal cause or matter must be exercised by a Divisional Court. In consequence, such applications are heard by a court constituted of three judges, or two if the Lord Chief Justice directs.

[13] This also impacts directly on the appeal rights of the parties. Section 35(2)(a) of the Judicature Act states:

> *"No appeal to the Court of Appeal shall lie…except as provided by the following provisions of this Part from any judgment of the High Court in any criminal cause or matter."*

[14] By section 41 of the Judicature Act, the only appeal from a decision of the Divisional Court lies to the Supreme Court, which requires leave:

> *"(1) Subject to the provisions of this section, an appeal shall lie to the Supreme Court, at the instance of the defendant or the prosecutor-*
>
> *(a) From any decision of the High Court in a criminal cause or matter;*
>
> *(2) No appeal shall lie under this section except with the leave of the court below or of the Supreme Court; and, subject to section 45(3), such leave shall not be granted unless it is certified by the court below that a point of law of general public importance is involved in the decision and it appears to that court or to the Supreme Court, as the case may be, that the point is one which ought to be considered by the Supreme Court."*

[15] There are therefore significant hurdles to be overcome by a party to a judicial review application who is dissatisfied with a decision of a Divisional Court in a

criminal cause or matter. This extends not only to the requirement of leave, but also the prerequisite that the lower court certify a point of law of general public importance. Without that, the Supreme Court can have no jurisdiction. Furthermore, the appeal rights under section 41 are confined to parties which can properly be described as '*the defendant*' or '*the prosecutor.*' Section 41(6) provides for a somewhat expanded definition of '*the defendant*' in this context:

> "*(a) any reference to the defendant shall be construed –*
>
> *(i) in relation to proceedings for an offence, and in relation to an application for an order of mandamus, prohibition or certiorari in connection with such proceedings, as a reference to the person who was or would have been the defendant in those proceedings;*
>
> *(ii) in relation to any proceedings or order for or in respect of contempt of court, as a reference to the person against whom the proceedings were brought or the order was made;*
>
> *(iii) in relation to a criminal application for habeas corpus, as a reference to the person by or in respect of whom that application was made,*
>
> *and any reference to the prosecutor shall be construed accordingly.*"

[16] It will be apparent therefore that the preliminary issue for determination is one of considerable practical significance to the future of these proceedings since if these are criminal causes or matters, the applicants would have no right of appeal from the decision of the Divisional Court.

Re McGuinness

[17] In *Re McGuinness* [2020] UKSC 6, a unanimous Supreme Court determined that proceedings challenging a decision of the Department of Justice to refer a case of a life sentence prisoner to the Parole Commissioners did not constitute a criminal cause or matter.

[18] Lord Sales delivered the judgment of the court and placed some emphasis on the importance of appeal rights:

> *"68. Accordingly, an overly expansive interpretation of the phrase "a criminal cause or matter" in section 41(1) and section 18(1) would have the effect of reducing to an unacceptable degree parties' access to justice at appellate level, leaving*

pockets of unchallengeable, potentially erroneous first instance decisions.

69. The importance of appeal rights to rectify errors in individual cases, including when no point of law of general public importance is in issue, has long been recognised across the legal system in both the civil sphere and the criminal sphere (in the latter case, in particular since the success of the 1907 Act and the prevalence of worrying errors by first instance courts which the implementation of that Act revealed). The former acceptance that there should be an emphasis on finality of disposal in criminal cases which underlay the position prior to 1873 and was to some degree encapsulated in section 47 of the 1873 Act has, since the early 20th century, been greatly eroded. Therefore, in construing the intended meaning and effect of the "criminal cause or matter" phrase in the context of the operation of the modern statutes which define rights of appeal, namely the 1978 Act and the 1981 Act, it is to be inferred that the intention is that the phrase defines a reasonably tightly drawn category of case focused directly on the process for bringing and determining criminal charges."

[19] As a result, Lord Sales held that 'criminal cause or matter' operated as an exception to the general right of appeal to the Court of Appeal and ought therefore to be construed narrowly and *"in a way which is focused with some precision on an underlying criminal process which is under review in the High Court"* [paragraph 79].

[20] A distinction was drawn between this type of challenge and one which could properly be classified as collateral to the criminal process:

"Various matters can arise for decision in the course of a criminal trial which are collateral to the criminal process and which have stronger affinities with civil cases regarding compliance by a public authority (including a court) with its general obligations under public law. Judicial review proceedings in the High Court in relation to these matters are not categorised as "a criminal cause or matter", so normal rights of appeal to the Court of Appeal apply. This is the type of case discussed in the judgment of Lord Neuberger MR in the Court of Appeal in the Guardian News case. He there discusses in detail many of the authorities bearing on the application of the phrase in relation to review in the High Court of various steps taken or orders made by criminal courts in the course of conducting criminal proceedings. Examples include a decision by a judge in a criminal trial whether to order disclosure to a newspaper of documents relating to that trial (as in Guardian News itself) and a decision in criminal proceedings to make an

> *order estreating a recognisance (R v Southampton Justices, Ex p Green [1976] QB 11).*" [paragraph 75]

[21] As a result, the Supreme Court held that the case of *Re JR27* [2010] NIQB 12 was wrongly decided. That challenge concerned the retention by the PSNI of certain data relating to the applicant collected under PACE powers in a case where no prosecution resulted. The majority (McCloskey and Weatherup, JJ) held that the 'jeopardy principle', derived from *Amand v Home Secretary* [1943] AC 147, meant that the judicial review proceedings were properly considered a criminal cause or matter since the step taken may have placed the applicant in jeopardy of a criminal charge. Lord Sales preferred the dissenting analysis of Morgan LCJ and stated:

> "*The jeopardy principle as adumbrated in Amand is much more tightly focused on court proceedings in relation to a specific criminal charge than the majority thought. Issues regarding the holding and use by public authorities of information relating to an individual are firmly in the sphere of civil public law, and there was no close connection with the bringing of a criminal charge in this case to change that position.*" [paragraph 93]

Consideration

[22] The proposed respondents contend that the key point of distinction in the cases described by Lord Neuberger MR in *R (Guardian News and Media) v City of Westminster Magistrates' Court* [2011] EWCA Civ 1188 as 'collateral' was whether the outcome had any bearing on the underlying criminal proceedings.

[23] Thus, the proposed respondents argue, the court ought to examine the impact of the issue on the underlying criminal proceedings. They point to the examples given by Lord Sales at paragraph 75 of his judgment and stress that, whilst this was not intended to be an exhaustive list, a common theme is that none of the examples entailed any impact on the outcome of the criminal proceedings. Disclosure of documents to a newspaper, which was the subject matter of the *Guardian* case, could not affect whether the accused was guilty or not guilty. Similarly, an application to estreat a recognisance could not sound on verdict or sentence.

[24] The proposed respondents say that the disclosure of the impugned information could have an impact on the outcome of the criminal proceedings in that it could be used by Soldier F to undermine the prosecution case. The use of the material would require an application pursuant to the Criminal Evidence (Northern Ireland) Order 2004 to admit bad character evidence in relation to a non-defendant and also, potentially, an application to admit hearsay evidence. It is not possible, at this stage, to ascertain the likelihood of success of such applications but it suffices, for these purposes, that the evidence may have an impact on the ultimate issue of guilt or innocence. If the court were to grant any of the relief

sought by the applicants, this ability to deploy the information would be adversely affected.

[25] The riposte to this contention from the applicants is that the bearing on the outcome of criminal proceedings is only one factor be taken into account in assessing whether the challenge is properly regarded as collateral to the criminal proceedings. In the *Guardian* case Lord Neuberger commented:

> *"GNML's application was wholly collateral to the extradition proceedings themselves, as is highlighted by the fact that the original application was made by someone who was not a party to those proceedings, and the order made by the district judge refusing GNML's application did not involve the court invoking its criminal jurisdiction or making an order which would have any bearing on the extradition proceedings"* [paragraph 36]

[26] It is self-evident that these proceedings were not commenced by any party to the underlying criminal proceedings. Furthermore, the decisions under challenge do not concern the invocation of any criminal jurisdiction by the courts but rather come about as a result of the disclosure requirements under statute and common law.

[27] The management, retention and disclosure of data relating to individuals by public bodies are classically matters of civil law. They give rise to rights and obligations pursuant to the Data Protection Act 2018 and the General Data Protection Regulation, as well as matters which can affect individuals' rights under Articles 2 and 8 of the ECHR. There are parallels between these cases and, for instance, *McConway v Northern Ireland Prison Service* [2004] NICA 44 in relation to the retention and use of allegedly inaccurate information.

[28] It is instructive to consider what the position would be had the retention of this information by the PSNI come to light in a different context. Had the applicants become aware by some other means, similar judicial review proceedings could have been commenced which would never have come within the classification of 'criminal cause or matter.' The fact is that the underlying criminal proceedings here only provide the reason why the impugned information has come to light. As Lord Sales observed in *McGuinness:*

> *"Issues regarding the holding and use by public authorities of information relating to an individual are firmly in the sphere of civil public law."*

[29] I have therefore determined that these applications are wholly collateral to the criminal proceedings against Soldier F and do not therefore fall within the exception contained in section 35 of the Judicature Act in relation to 'criminal cause or matter.'

[30] Whilst by no means determinative of the matter, I am fortified in this conclusion by the fact that no appeal at all may lie from the first instance decision in this regard in the event that it was classified as a criminal cause or matter. That would be an unsatisfactory outcome, and reinforces Lord Sales' view that a restrictive interpretation should be placed on the exception.

Conclusion

[31] These applications for judicial review do not fall within the exception of 'criminal cause or matter' and will therefore be heard by a single judge.

[32] I reserve the issue of costs and hear the parties as to a timetable for determination of the leave application.