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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY TAMMI LEE DIVER
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF AN APPLICATION BY SINEAD CORRIGAN
FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE POLICE SERVICE OF NORTHERN IRELAND AND OF A DISTRICT JUDGE (MAGISTRATES' COURT)

Martin O'Rourke QC and Joseph McCann BL (instructed by Quigley MacManus, Solicitors) for the first applicant, Tammi Lee Diver
Frank O'Donoghue QC (instructed by Oliver Roche, Solicitors) for the second applicant, Sinead Corrigan
Mark Robinson QC and Ben Thompson BL (instructed by the Crown Solicitor's Office) for the Police Service of Northern Ireland (in the Diver case)
Philip Henry BL (instructed by the Departmental Solicitor's Office) for the District Judge (Magistrates' Court), in each case

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SCOFFIELD J

Introduction

[1] This ruling concerns the continually vexed issue of whether an application for judicial review constitutes a criminal cause or matter for the purpose of RCJ Order 53, rule 2 and, relatedly, for the purpose of onward appeal rights under section 41 of the Judicature (Northern Ireland) Act 1978.

[2] There are two, linked cases before the court raising similar, although not identical, issues. Colton J granted leave on the papers in the Diver case (although

that leave has recently lapsed: see [2021] NIQB 83); and I granted leave on the papers in the Corrigan case. In each instance, further submissions were invited from the parties as to whether or not the application for judicial review constituted a criminal cause or matter. Those submissions have now been received and are summarised below. A ruling on whether or not the cases are a criminal cause or matter is required in order to determine the constitution of the court which will hear the substantive application.

[3] I am grateful to all parties for their helpful written submissions. It was agreed that this issue could be considered on the basis of the written submissions only. I pause to note that the initial submissions on this issue in the Corrigan case were prepared by the late Mr Martin McCann of counsel, who was instructed for the applicant in that case before his recent, untimely passing. It was poignant to re-read those submissions, bearing Mr McCann's characteristic verve and discursive style, at this stage. As has been said before, he will be sadly missed by both Bar and Bench in this jurisdiction.

The nature of the challenges

[4] The issue common to both cases before the court is the question of whether and to what extent a grant of bail may impose conditions restricting the applicants' liberty or freedom of action when they are charged with an offence under the Health Protection (Coronavirus, Restrictions) (No 2) Regulations (Northern Ireland) 2020, as amended, ('the Coronavirus Regulations'). Both applicants were alleged to have committed offences involving breach of the restrictions on gatherings in private dwellings in force in January of this year. The issue in relation to the powers of the District Judge (Magistrates' Court) arise principally because the offences in question are triable summarily only and punishable by a fine only, without any potential for a sentence of imprisonment.

[5] Ms Corrigan's case is against the District Judge only. Ms Diver's case also challenges a variety of decisions and actions on the part of the police. She contends that (a) she ought not to have been arrested; (b) she ought to have been released immediately after arrest by police, or at some later point during police detention; and/or (c) she ought not to have been prosecuted by way of charge sheet. In terms of her challenge to the actions of the District Judge, she also contends that, at the very least, she ought to have been released unconditionally when brought before the Magistrates' Court. This case is made on the basis described at para [4] above and also on the basis that the District Judge should simply have found that she had been unlawfully detained by police and have ordered her immediate release.

The parties' positions

[6] In granting leave in the Corrigan case, I expressed the provisional view that the application did not constitute a criminal cause or matter on the basis that the issue under challenge did not have a direct bearing on the bringing or determination

of a criminal charge faced by the applicant and that the question of the bail conditions to which she was subject was collateral to the substantive issues in the criminal proceedings: see *Re McGuinness' Application* [2020] UKSC 6, at paras [68]-[70] and [75]. Nonetheless, submissions from the parties on this issue were directed. Even if the case was (and is) a criminal cause or matter, a single judge is in any event able to grant leave in the case by virtue of RCJ Order 53, rule 3(3) – to which Order 53, rule 2(1) is subject – read together with Order 32, rule 1.

[7] The applicant's submissions in the Corrigan case suggested that the case *was* a criminal matter. The respondent's view – which has also been adopted by the District Judge as the second respondent in the Diver case, at least as far as it concerns a challenge to his actions – was that the case was *not* a criminal matter, although this view was expressed with some diffidence. In the Diver case, both the applicant and the first respondent, the PSNI, took the firm view that the judicial review is a criminal matter.

Discussion

[8] *Re McGuinness' Application* (*supra*) is of obvious assistance in ascertaining whether a judicial review application constitutes a criminal cause or matter. It is a recent, and authoritative, decision of the Supreme Court on this topic. The broad thrust of the decision is that the category of criminal matters ought not to be construed too generously, as it had been in the *McGuinness* case itself (which essentially involved question of sentence calculation), and that a renewed focus was required on the true nature of the proceedings underlying the judicial review rather than reaching decisions as a matter of impression. However, the *McGuinness* decision could not, nor does it purport to, give a ready-made answer to this question in every case. On the contrary, Lord Sales expressly noted that difficulties would still arise in marginal cases (see para [65]). The core approach to these questions is now set out in the judgment of Lord Sales at paras [45] and [70]-[77].

[9] The applicants' submission that the challenge to the way in which the District Judge (Magistrates' Court) dealt with bail constitutes a criminal matter is based on the following analysis:

(a) In *McGuinness*, the Supreme Court did not purport to overturn *Amand v Secretary of State* [1942] 2 All ER 381 and, indeed, considered it still to remain the leading decision. It directs focus to the underlying proceedings. Here, the proceedings in the Magistrates' Court are undoubtedly criminal in nature; and the grant of bail in the course of those proceedings is not so collateral to the proceedings as to fall outwith the presumption that a challenge to it too is a criminal matter. In particular, the grant of bail does not (unlike an application to lift a reporting restriction) involve any third party.

(b) Moreover, in *R v Blandford Justices, ex parte Pamment* [1990] 1 WLR 1490 – a case referred to, without disapproval, by Morgan LCJ at para [45] of his

judgment in *Re JR27's Application* [2010] NIQB 12 – a matter relating to the grant of bail by the justices was treated as a criminal cause or matter.

(c) In addition, in *Re Donaldson's Application for Bail* [2003] NI 93, it appears to have been accepted by all parties that the bail application before the High Court was a criminal cause or matter, such that no appeal lay to the Court of Appeal in Northern Ireland.

(d) In the Diver case, the applicant also emphasises that the judge's decision on bail is inextricably linked to the police charging decision which preceded it which is also subject to challenge.

[10] The District Judge submits that, although the underlying proceedings in this case (the proceedings in the Magistrates' Court) are clearly criminal in nature, involving jeopardy of conviction and punishment, the precise decision under challenge (relating to bail conditions) is one of those matters referred to by Lord Sales at para [75] of his judgment in *McGuinness*, namely matters which arise for decision in the course of criminal proceedings "which are collateral to the criminal process and which have stronger affinities with civil cases." Mr Henry makes the point that, whatever the outcome of Ms Corrigan's application for judicial review, she will still face the same charges. He supplemented this submission by observing that the focus of this application is Ms Corrigan's bail conditions; and there is no offence of breaching bail conditions in this jurisdiction.

[11] In the Diver case, the first respondent (the PSNI) submitted that the challenge to its actions were a criminal cause or matter. Mr Robinson QC drew attention to the Divisional Court's analysis in *Re Alexander and Others' Application* [2009] NIQB 20. That case was also a challenge to police actions involving arrest and detention of suspects and, having reviewed the relevant authorities, the court considered that determination by a Divisional Court as a criminal cause or matter was appropriate. In particular, at para [36] Kerr LCJ stated that, "The underlying arrest and investigatory process is a criminal cause or matter…"

[12] The challenge to the actions of the police in the Diver case may be the easiest aspect to resolve. Although a case could be made that the PSNI actions (particularly those relating to the arrest and pre-charge detention of the applicant) *precede* the criminal proceedings and do not have a direct bearing on the bringing or resolution of the criminal charge against the applicant, at least part of the applicant's case is directed towards the police's charging decision. The applicant asserts that she should have been released without charge. Mr O'Rourke's submissions relied heavily on this aspect of the case as demonstrating that these proceedings are a criminal matter. A contrary argument is possible, namely that the challenge is not, in fact, to the commencement of the prosecution itself (*i.e.* the fact that the applicant should be tried summarily on an allegation of breach of the criminal law) but, rather, simply to the *means* of commencement of the prosecution (by way of charge and production before the Magistrates' Court rather than by way of release, complaint

and summons), which is an ancillary issue. Ultimately, however, I have been persuaded that this aspect of the case should be considered to be a criminal matter. I reach no conclusion on the question of whether a challenge to the arrest alone would be a criminal cause or matter. *Re Alexander* certainly supports that view; but its reasoning may not survive the import of the Supreme Court's decision in *McGuinness* (particularly the observation at para [71] that the process for bringing a criminal charge against a person under domestic law begins with a decision to prosecute).

[13] I have also been persuaded, contrary to my initial instincts, that the challenge to the imposition of bail conditions should also be held to be a criminal matter. The District Judge was undoubtedly exercising his powers in the course of underlying proceedings which were criminal in nature; and the bail decision should take its colour from the nature of those proceedings unless it is so collateral to the subject matter of those proceedings to warrant being treated differently. In light of the submissions received, I no longer think it appropriate to do so – particularly in view of the fact that a number of previous decisions appear to have treated matters relating to the grant of bail as criminal matter and *McGuinness* does not appear to overrule those authorities either expressly or impliedly.

[14] The circumstances of the Diver case do, however, highlight the potential complications which might arise if part of the case only is considered to be a criminal cause or matter. For instance, if the challenge to the police's actions in the Diver case was a criminal matter but the challenge to the District Judge's determination of her bail conditions was not, how then ought the case to be heard and appealed? Or if only part of the actions on the part of the police (those at, and following, charge) are to be viewed as part of the underlying criminal proceedings? It would seem inappropriate to require a case raising a number of issues which could and should properly be dealt with together to be separated out into a number of proceedings for determination by different constitutions of the High Court. Similarly, it is undesirable for there to be the prospect of differing appeal routes on separate issues in the one case. Lord Sales also touched upon this issue in his judgment in *McGuinness*. At paras [87] and [89] he recognised that there could be "overlap between civil and criminal matters in some cases" and that, in some such cases, it may be that the association of the civil issues with underlying criminal proceedings is so strong that "they are to be taken together" as a criminal cause or matter in the High Court. This would address the need to avoid bifurcation of the rights of appeal in relation to closely related dimensions of the same proceedings. As always, context is important.

[15] In this case, therefore, I intend to rule that both cases should in their entirety be treated as a criminal cause or matter for the purpose of Order 53, rule 2.

Conclusion

[16] For the reasons given above – although still not without some element of doubt in each instance – I conclude that the Corrigan case is a criminal cause or matter; and that the Diver case, in both its facets, is also a criminal cause or matter. These cases therefore (subject to a further grant of leave in the Diver case) should be heard and determined before a Divisional Court.

[17] In many judicial review cases, the distinction between what is and is not a 'criminal cause or matter' remains difficult to apply. In my experience, parties generally do not much care (at least at first instance) whether their case is, or is not, dealt with by a Divisional Court. The distinction is of much more practical significance when it comes to rights of appeal, particularly given the requirement of certification of a point of law of general public importance for an appeal from the Divisional Court, coupled with the requirement for leave to appeal from that court or the Supreme Court. In general, however, parties – and the court – simply wish to have clarity as to which procedural regime applies in their case. The time and cost spent arguing and resolving this issue in many, if not most, cases in which it arises now appears to me to be contrary to the overriding objective of dealing with cases justly, including by saving expense and ensuring that the matter is dealt with expeditiously. This concern is exacerbated by the fact that an error in relation to the issue may well be jurisdictional. Indeed, the course of the *McGuinness* litigation itself – in which the Supreme Court decided, having granted permission to appeal, that it had no jurisdiction to entertain the appeal and that, therefore, the appellants' remedy, if any, lay in an out-of-time appeal to the Court of Appeal in Northern Ireland, the decision of which might then be appealed further (back) to the Supreme Court – is a helpful illustration of the additional time and cost which can be generated where the parties and/or the court are tripped up by this issue.

[18] Moreover, as the judgment of Lord Sales helpfully explains (see, for instance, para [64] of his judgment) the initial justification for the distinction, at least as far as rights of appeal are concerned, is very far removed from the realities of modern practice in the field of public law. I would add my voice to those before me who have expressed the view that the distinction is now anachronistic and serves no useful purpose – or at least no purpose outweighing the disadvantages of the distinction being maintained.