Michaelmas Term
[2015] UKSC 62
On appeal from: [2013] NICA 22

JUDGMENT

R *v* McGeough (Appellant) (Northern Ireland)

before

Lord Neuberger, President
Lord Kerr
Lord Hughes
Lord Toulson
Lord Hodge

JUDGMENT GIVEN ON

21 October 2015

Heard on 9 July 2015

Appellant	*Respondent*
Orlando Pownall QC Sean Devine (Instructed by Carlin Solicitors)	David McDowell QC Robin Steer BL (Instructed by Public Prosecution Service)

LORD KERR: (with whom Lord Neuberger, Lord Hughes, Lord Toulson and Lord Hodge agree)

Introduction

1. In 1981 Samuel Brush worked as a postman. He was also a member of the Ulster Defence Regiment. Members of that regiment were frequently targeted by paramilitary groups then operating in Northern Ireland. Because of that Mr Brush was wearing light body armour and carrying a personal protection weapon when he was ambushed by two gunmen on 13 June 1981. The ambush took place in a remote area of County Tyrone, some four and a half miles from the village of Aughnacloy.

2. Although suffering bullet wounds from the attack on him, Mr Brush managed to fire his gun at one of his assailants. One of the bullets which he fired struck one of the gunmen. Some time later that person was admitted to hospital in Monaghan which, despite the fact that it is in the Republic of Ireland, is not far from Aughnacloy. On his trial for the attempted murder of Mr Brush, it was held that the appellant was the man who had been admitted to that hospital and that he had been engaged in the attack and was guilty of attempted murder. Those findings and the appellant's conviction of the attempted murder of Mr Brush are not under challenge in this appeal.

3. The injuries that the appellant had sustained were serious. He was airlifted to a hospital in Dublin. There he underwent significant surgery. A bullet was removed from his body. This was handed to police and was later subjected to ballistic tests. Inevitably, as a result of the operation, there was substantial scarring of the patient's torso. The results of the ballistic tests and the appearance of scarring on the appellant's body were significant items of evidence on his trial.

4. After a relatively short period of convalescence in Dublin, the appellant was returned to Monaghan General Hospital on 22 June 1981. Although he was thereafter under police guard, he managed to escape on 27 June and some time after that, he left the country.

5. On 22 August 1983, a man calling himself Terence Gerard McGeough made an application for asylum in Sweden. The name, the date of birth, the place of birth and the next of kin that were given on the asylum application all matched those of the appellant. His Irish passport was submitted with the application. An expert gave

evidence on his trial that the handwriting on the application form was that of the appellant. The trial judge expressed himself as satisfied that it was the appellant who had made the asylum application.

6. Although it was not formally accepted by the appellant that he had made that application, this has not been disputed throughout the various hearings which have taken place. Nor has it been disputed that the form in which the application for asylum was made contained information to the effect that the appellant had become an operational member of the Irish Republican Army in early 1976 and that thereafter he was given increasing levels of responsibility. These led to his being assigned to take part in the attack on Mr Brush. He carried out that attack as a member of the Irish Republican Army. That group was a proscribed organisation throughout the time of the appellant's admitted membership of it.

7. The appellant was charged with offences of attempted murder and possession of a firearm. He was convicted of both. Neither of these charges is the subject of this appeal. On the basis of the material contained in the asylum application form, he was further charged with being a member between 1 January 1975 and 1 June 1978 of the Irish Republican Army contrary to section 19(1) of the Northern Ireland (Emergency Provisions) Act 1973. He was also charged with the same offence in relation to the period between 31 May 1978 and 14 June 1981, contrary to section 21(1) of the Northern Ireland (Emergency Provisions) Act 1978. He was convicted of those charges also.

The proceedings

8. The appellant's trial on all four charges took place at Belfast Crown Court in November 2010 before Stephens J, sitting without a jury. The appellant did not give evidence. On 18 February 2011, the judge delivered judgment, convicting the appellant of all the offences with which he had been charged. The convictions on the first two counts, those of the attempted murder of Mr Brush and possession of a firearm, were based on the identification of the appellant as the man whom Mr Brush had shot. This is turn depended on a number of factors, including the name and age given by the person admitted to Monaghan hospital, the presence of a tattoo on the patient's arm which matched that found on the appellant after his arrest, operation scars on the appellant's body which were precisely where one would expect to find them in light of the surgery which had been carried out and the fact that ballistic tests carried out on Mr Brush's personal protection weapon had rifling marks which matched the bullet removed from the patient during the operation in Dublin. The judge also drew an adverse inference against the appellant because of his failure to give evidence or to account for the scarring on his body.

9. An application had been made during Mr McGeough's trial that the information that had been supplied when he sought asylum in Sweden should not be admitted in evidence. The application was made on two bases. Firstly, it was contended that the evidence should be excluded under article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE) because it would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. Secondly, it was suggested that the admission of the evidence would offend the rule against self-incrimination.

10. Before ruling on the application to exclude the evidence, Stephens J heard the testimony of Mrs Helene Hedebris, a legal expert from the migration board in Sweden. She explained that an application for asylum is made to the police department. It is then transferred to the migration board. The board takes the decision on the application. There is a right of appeal from the board's decision. Mr McGeough's application for asylum was rejected by the board. He exercised his right to appeal. His appeal was dismissed.

11. Mrs Hedebris gave evidence that Sweden had a centuries-old tradition of openness in relation to public documents. The only exception to this related to documents whose disclosure was forbidden by a specific secrecy code made under a Secrecy Act. While this code applied to files for asylum applications generally, it did not prohibit the disclosure of information from those files which was required for a criminal investigation unless the asylum application had been successful. In that event, material obtained in the course of an asylum application was not disclosed. This is not relevant in Mr McGeough's case, however, because, as already noted, his application was refused and his appeal against the refusal was dismissed. There was therefore no reason under Swedish law to withhold the material from the prosecuting authorities in the United Kingdom.

12. Mrs Hedebris said that the position about disclosure of such material was widely-known in Sweden. The appellant had had the benefit of two lawyers' advice, the first at the time of his application for asylum and the second when he appealed against the decision to dismiss his application. It was inconceivable that he had not been advised of the position. He could not have been in doubt when he made the application, that in the event of its not succeeding, the material that it generated would enter the public domain.

13. In the course of the application by Mr McGeough to have the information contained in the application form excluded from evidence, it was drawn to the judge's attention that if, in 2009, an individual applied in the United Kingdom for asylum, an immigration officer would give him, on what is described as "a statement of evidence form numbered ASL 1123", the following explanation as to how his application would be treated:

> "The information you give us will be treated in confidence and the details of your claim for asylum will not be disclosed to the authorities of your own country. However, information may be disclosed to other government departments, agencies, local authorities, international organisations and other bodies where necessary for immigration and nationality purposes, or to enable them to carry out their functions. Information may also be disclosed in confidence to the asylum authorities of other countries which may have a responsibility for considering your claim. If your asylum application is unsuccessful and you are removed from the United Kingdom, it may be necessary for us to provide information about your identity to the authorities in your own country in order to obtain travel documentation."

14. Stephens J was also asked to consider paragraph 339IA of the Immigration Rules 1994. This provides that information supplied in support of an application (and the fact that an application had been made), would not be disclosed to the alleged actors of persecution of the applicant.

15. The judge held that the undertaking contained in form ASL 1123 went further than was required by Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in member states for granting and withdrawing refugee status (the Procedures Directive). He found that the relevant obligation (in article 22 of the Procedures Directive) was restricted to the disclosure of information for the purposes of examining individual cases. It did not restrict the disclosure of information for the purposes of undertaking criminal prosecutions.

16. Since, in order to make the application for asylum, the appellant was not under compulsion to reveal the information that he did (and there was therefore no question of a breach of the rule against self-incrimination); since the appellant must have been aware that the information that he disclosed would enter the public domain if the application was unsuccessful; and since there was nothing in Swedish law, the Procedures Directive or general public policy considerations which contraindicated the disclosure of the information to prosecuting authorities in the United Kingdom, the judge decided that the conditions necessary for the exercise of his power under section 76 of PACE were not present and he directed that the material produced by the appellant in making his asylum application should be admitted in evidence. It was on this material that the appellant was convicted on the third and fourth counts of membership of a proscribed organisation.

17. On appeal to the Court of Appeal, the basis of the objection to the admission of the evidence was described in para 10 of the judgment of the Lord Chief Justice, Sir Declan Morgan:

> "… the appellant submitted that the learned trial judge should not have admitted the Swedish asylum materials. It was argued that assertions in such an application were inherently unreliable since applicants for asylum were liable to exaggerate the basis for their claims. Secondly, it was contended that these were admissions made without caution and the approach to their admission should correspond with the admission of statements made to police in similar circumstances. Thirdly, it was submitted that since it was necessary to set out the background to the appellant's asylum claim in this documentation these statements ought to be treated as statements made under compulsion. Lastly, the appellant argued that reliance on such statements would undermine the purpose of the Refugee Convention by creating a chill factor which would prevent deserving claimants disclosing valid circumstances for fear of subsequent victimisation in their home territory if the application failed. …"

18. As well as article 22 of the Procedures Directive, the appellant relied on article 41 which stipulates that state authorities responsible for implementing the Directive "are bound by the confidentiality principle as defined in national law, in relation to any information they obtain in the course of their work".

19. The Court of Appeal dismissed the appeal. In rejecting the arguments in relation to the admission of the Swedish material, the Lord Chief Justice observed that the evidence was lawfully obtained in Sweden and in the United Kingdom in accordance with the international conventions applicable at the time. The appellant was not under compulsion. There was no question, therefore, of the rule against self-incrimination being engaged. The appellant had had legal advice in Sweden as to the effect of Swedish law. Under that law the asylum documents could properly be revealed to the authorities in another jurisdiction if the asylum application was unsuccessful.

The arguments

20. On the hearing of the appeal before this court, the appellant accepted that there was nothing in the Procedures Directive or the Immigration Rules which explicitly forbade the disclosure of information concerning applications for asylum. It was contended, however, that the "clear purpose" of the Directive was to encourage applicants for asylum to make full disclosure to the relevant authorities. In order that this be achieved, applicants should feel secure that the information that they supplied would not be revealed to state authorities in the country from which they had fled. It was acknowledged that the relevant instruments referred to the

withholding of information from the actors of persecution but it was suggested that this reflected a broader public policy that all applicants for asylum should be encouraged to be candid and open in their applications. Candour depended on assurance that the information revealed would not be disclosed.

21. Quite apart from the need to inspire applicants with confidence that the material would not be disclosed, there was, it was argued, a distinct public policy imperative which dictated that such material would not be used in criminal proceedings against the asylum-seeker. Two principal grounds were advanced in support of this contention. First, it was pointed out that undertakings given to asylum seekers in the United Kingdom would preclude the disclosure of that material. Secondly, by analogy with provisions in the Children Act 1989, the appellant argued that where an applicant for asylum was effectively compelled to give information which exposed him to the possibility of criminal sanction, that disclosure should not be used in subsequent criminal proceedings.

Discussion

22. The need for candour in the completion of an application for asylum is self-evident. But this should not be regarded as giving rise to an inevitable requirement that all information thereby disclosed must be preserved in confidence in every circumstance. Obviously, such information should not be disclosed to those who have persecuted the applicant and this consideration underlies article 22 of the Procedures Directive. It provides:

> "Collection of information on individual cases
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> For the purposes of examining individual cases, member states shall not: (a) directly disclose information regarding individual applications for asylum, or the fact that an application has been made, to the alleged actor(s) of persecution of the applicant for asylum; (b) obtain any information from the alleged actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that an application has been made by the applicant in question, and would jeopardise the physical integrity of the applicant and his/her dependants, or the liberty and security of his/her family members still living in the country of origin."

23. As the appellant has properly accepted, there is no explicit requirement in this provision that material disclosed by an applicant for asylum should be preserved

in confidence for all time and from all agencies. On the contrary, the stipulation is that it should not be disclosed to alleged actors of persecution and the injunction against its disclosure is specifically related to the process of examination of individual cases. The appellant's case had been examined and his application had been refused. The trigger for such confidentiality as article 22 provides for was simply not present.

24. The appellant is therefore obliged to argue that the need for continuing confidentiality in his case arises by implication from the overall purpose of the Directive. But neither article 22 nor article 41 provides support for that claim. Article 22 is framed for a specific purpose and in a deliberately precise way. To imply into its provisions a general duty to keep confidential all material supplied in support of an asylum application would unwarrantably enlarge its scope beyond its obvious intended purpose.

25. Article 41 provides:

> "Member states shall ensure that authorities implementing this Directive are bound by the confidentiality principle as defined in national law, in relation to any information they obtain in the course of their work."

26. It is not disputed that Swedish national law does not define "the confidentiality principle" as extending to the non-disclosure of information supplied in support of an asylum application, where that application has been unsuccessful. On the contrary, the tradition of the law in that country is that information generated by such applications should enter the public domain. Article 41 cannot assist the appellant, therefore.

27. Neither of the specific provisions of the Directive that the appellant has prayed in aid supports the proposition that its overall purpose was to encourage candour by ensuring general confidentiality for information supplied in support of an application for asylum. The Directive in fact makes precise provision for the circumstances in which confidentiality should be maintained. It would therefore be clearly inconsistent with the framework of the Directive to imply a general charter of confidentiality for such material.

28. The fact, if indeed it be the fact, that material which an applicant for asylum in the United Kingdom supplied, in circumstances such as those which confronted the appellant when making his application in Sweden, would not be disclosed here, likewise cannot assist his case. The information which the Swedish authorities

provided was properly and legally supplied. When the authorities in this country obtained that material, they had a legal obligation to make appropriate use of it, if, as it did, it revealed criminal activity on the appellant's part.

29. Neither the terms of the Directive nor the circumstances in which material would have been dealt with, if obtained in the United Kingdom, impinged on the manner in which the trial judge was required to approach his decision under article 76 of PACE. There was nothing that was intrinsic to that material nor in the circumstances in which it was provided that would support the conclusion that its admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. The judge was plainly right to refuse the application.

30. The purported analogy with the provisions of the Children Act 1989 is inapt. That Act imposed an obligation on all persons giving evidence in proceedings concerning the care, supervision and protection of children to answer any relevant question irrespective of whether the answer might incriminate him or his spouse or civil partner – section 98(1). In light of that compulsive provision, it is unsurprising that section 98(2) should provide that statements or admissions "shall not be admissible in evidence against the person making it or his spouse or civil partner in proceedings for an offence other than perjury". There is no correlative situation of compulsion in the case of an application for asylum and, consequently, no occasion for a prohibition on the use of evidence obtained through that procedure. In any event, the need for a specific provision forbidding the use of such material in the Children Act and the absence of any corresponding provision in the law relating to asylum applications underscores the inaptness of the claimed comparison.

Conclusion

31. The appeal must be dismissed.