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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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

John Larkin KC with Joseph O'Keeffe (instructed by Phoenix Law) for the Applicant
Phillip Henry (instructed by the PPS) for the Respondent
Mark Robinson KC with Tara Maguire (instructed by the Department of Justice) for
the Notice Party

Before: Keegan LCJ and Treacy LJ

TREACY LJ (*delivering the judgment of the court*)

Introduction

[1] This is an application for leave to apply for judicial review of a decision by the Public Prosecution Service ("PPS") to appeal a grant of compassionate bail made by a Magistrates' Court.

Factual Background

[2] The applicant was arrested on 18 August 2020. He was charged with offences for which, if convicted, he could receive sentences of imprisonment. He was remanded in custody while awaiting trial for these offences.

[3] On 10 December 2020 the applicant's sister died tragically and unexpectedly after a fall. On 11 December he applied to Strabane Magistrates' Court for compassionate bail to attend his sister's funeral the following day, 12 December. In his careful and detailed ruling, District Judge McGarrity weighed the risks of granting bail to a person reasonably suspected of serious crimes against his interest in attending the funeral of a very close relative. He noted that he made his decision bearing in

mind that, as a remand prisoner, the applicant is presumed innocent of the charges he faces and that his article 5 and article 8 ECHR rights were engaged. He decided to grant compassionate bail for 4½ hours commencing at 11:00am the following morning (12 December). He attached detailed conditions to this grant of bail that were intended to manage any risks to the public that might arise from the temporary release of a person reasonably suspected of serious crime.

[4] At the end of the hearing the PPS notified the court orally that it intended to appeal the grant of compassionate bail using its statutory right of appeal under section 10 of the Justice (Northern Ireland) Act 2004 (“the 2004 Act”). It filed a written notice of appeal within two hours of the grant of bail as it is required to do under the section, and it pursued its appeal in the High Court.

[5] In view of the urgency of the matter the then Lord Chief Justice sat on the evening of 11 December 2020 to hear the appeal. All sides were represented by their counsel and all the arguments that had been made before the District Judge were re-visited and reconsidered by the appeal judge. He weighed the competing interests differently from the District Judge and decided that compassionate bail should not be granted in this case. That is the nature of appeals, a fresh set of eyes can review the same facts and hear the same arguments and still reasonably reach a different conclusion. That is what happened in this case.

[6] After this hearing an order was issued revoking the grant of compassionate bail. This happened on the evening of 11 December after the appeal hearing and before the compassionate bail order could come into effect. At all relevant times therefore, this applicant continued to be remanded in custody on foot of the order of an article 6 compliant court lawfully seized of the matter under the applicable legislation.

[7] The question for this court is whether the decision by the PPS to exercise its statutory right of appeal against the initial grant of compassionate bail is arguably unlawful.

The Relevant Law

[8] The main legal provisions in play in this case are section 10 of the 2004 Act and section 41 of the Judicature (Northern Ireland) Act 1978 (“the 1978 Act”). The relevant provisions are set out below.

[9] Section 10 of the 2004 Act provides:

“10. Prosecution right of appeal against grant of bail by magistrates' court

- (1) Where a magistrates' court grants bail to a person who is charged with, or convicted of, an offence

punishable by imprisonment, the prosecution may appeal to the High Court against the granting of bail.

- (2) Subsection (1) applies only where the prosecution is conducted –
 - (a) by or on behalf of the Director of Public Prosecutions, or
 - (b) on behalf of the Police Service of Northern Ireland ...
- ...
- (4) the prosecution wishes to exercise the right of appeal under subsection (1) oral notice of appeal shall be given to the court which has granted bail at the conclusion of the proceedings in which bail has been granted and before the release from custody of the person concerned.
- (5) Written notice of appeal shall thereafter be served on the court which has granted bail and the person concerned within two hours of the conclusion of such proceedings.
- (6) On receipt from the prosecution of oral notice of appeal from its decision to grant bail, the court which has granted bail shall remand in custody the person concerned, until the appeal is determined or otherwise disposed of ...
- ...
- (8) The hearing of an appeal under subsection (1) ... against a decision of the court to grant bail shall be commenced within 48 hours, excluding weekends, Christmas Day, Good Friday and a bank holiday, from the time when oral notice of appeal is given.
- (9) An appeal by the prosecution under this section shall be by way of re-hearing, and on such an appeal the High Court may –
 - (a) remand the person concerned in custody, or

- (b) grant bail subject to such conditions (if any) as it thinks fit.
- (10) No appeal lies against the decision of the High Court on an appeal under this section.
- ..."

[10] Section 41 of the 1978 Act provides:

"41 Appeals to the Supreme Court in other criminal matters

- (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 ...
- ...
- (4) For the purpose of disposing of an appeal under this section the Supreme Court may exercise any powers of the court below or may remit the case to that court.
- (5) Schedule 1 shall have effect in relation to appeals under this section.
- (6) In this section, sections 44 and 45 and Schedule 1 –
 - (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;

- (b) “application for habeas corpus” means an application for a writ of habeas corpus ad subjiciendum and references to a criminal application or civil application shall be construed accordingly as the application does or does not constitute a criminal cause or matter;
- (c) “leave to appeal” means leave to appeal to the Supreme Court under this section.

The Parties' Arguments

The Applicant

[11] In the first skeleton argument lodged on behalf of the applicant, counsel assert that he was unable to attend his sister’s funeral:

“only because of a PPS decision’ and ‘without judicial interposition.”

Both limbs of this assertion are surprising given the factual matrix set out above.

[12] The crux of the applicant’s argument is expressed as follows in his first skeleton argument:

“7. By reason of the prosecution using section 10 of the Justice (NI) Act 2004 to appeal to the High Court against the grant of compassionate bail, the applicant had no right of appeal on a point of law to the Supreme Court. Section 10(10) of the 2004 Act expressly prohibits an appeal against the decision of the High Court on an appeal brought by the prosecution. Conversely, *if the High Court had refused to grant compassionate bail following a refusal of bail by a District Judge, then there would have been a right of appeal for both parties to the Supreme Court under section 41 of the Judicature (NI) Act 1978.*

8. In this particular case, a point of law of general public importance had been identified as arising from the judgment given by the High Court ... However, *by reason of section 10 of the 2004 Act, there could be no appeal to the Supreme Court on this point of law*” [emphasis added].

[13] The key proposition underlying this argument is that the decision of the PPS to use section 10 of the 2004 Act had the effect of depriving the applicant of a right of appeal to the Supreme Court in relation to his application for compassionate bail. It is claimed that the applicant was deprived of this appeal right in circumstances where other applicants for compassionate bail would not have been so deprived. It is claimed that section 10 of the 2004 act is inherently unlawful because it selectively removes the appeal rights of bail applicants who appear in the High Court on foot of a PPS appeal under section 10, but that appellants against refusals of bail who reach the High Court by any other route are not subject to this loss of appeal rights. This consequence of the decision to use section 10 is said to distort the bail system to such a degree that the system has denied this applicant his rights under articles 6, 8 and 14 of the ECHR. For these reasons the applicant claims that the PPS decision to use section 10 must be reviewed by the High Court in a judicial review hearing.

Argument of the PPS

[14] The main arguments advanced by the PPS may be summarised as follows:

- Insofar as it is said to have made an error by using a legislative provision which the applicant claims is inherently unlawful, these proceedings target the wrong defendant. The PPS is not responsible for the lawfulness or otherwise of statutory provisions: that is the responsibility of the Department of Justice (“the Department”) the Notice Party in this case.
- In any event the PPS is entitled to rely on the ‘presumption of regularity’- ie to assume that enacted legislation *is* lawful and *can be* relied upon, and that any act done prior to any future declaration of unlawfulness will still remain a lawful act.

- This case is now academic in that it relates to events that happened in 2020 and the outcome of the proposed judicial review can have no impact on those past events. The supervisory jurisdiction of the High Court should not be used to rule on academic points.
- In any event the applicant’s argument must fail because there is no right of appeal to the Supreme Court under section 41 of the 1978 Act arising from a bail application. Bail applications are not a ‘criminal cause or matter’ for the purposes of s 41(1)(a).

Arguments of the Department of Justice (“the Department”)

[15] The Department also opposes the grant of leave, principally on the ground that bail decisions by the High Court are not a ‘criminal cause or matter’ giving rise to any rights of appeal to the Supreme Court under section 41 of the 1978 Act.

Consideration

[16] In view of the recurrence of the ‘criminal cause or matter’ argument and its centrality to this case, this court will consider that argument first.

[17] Section 41(1)(a) of the 1978 Act provides:

“(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; ...”

The Case Law

[18] The Supreme Court itself considered the meaning of ‘criminal cause or matter’ in 2020 in the leading case of *In Re McGuinness* [2021] AC 392. That was an application for judicial review of the method used by the Department to calculate the earliest date upon which a convicted prisoner could become eligible for parole. The applicant was a sister of a person murdered by the convicted prisoner whose parole eligibility was under consideration. The High Court dealing with the judicial review assumed it was a ‘criminal cause or matter’ and sat as a Divisional Court. It found in favour of the applicant, and the Department and the prisoner were both allowed to appeal.

[19] Because this was assumed to be a criminal a criminal cause or matter, there was no right of appeal to the NI Court of Appeal. The only right of appeal was to the Supreme Court upon a certified point of law of public importance. The Supreme Court accepted jurisdiction to deal with the point and, in a landmark judgment, Lord Sales

gave comprehensive guidance about the meaning of the phrase ‘criminal cause or matter,’ and described how practitioners can identify a case in that category. He also reviewed the policy behind the various Acts of Parliament which use that phrase, both in Northern Ireland and in other UK jurisdictions. We extract below those parts of the Supreme Court’s guidance which are most relevant to the present case.

[20] Lord Sales at para [45] of *McGuinness* began by reminding himself of the guidance in the earlier leading case of *Amand* [1943] AC 147 in which Lord Wright noted:

“... the word ‘matter’ does not refer to the subject matter of the proceeding, but to the proceeding itself.’

[21] Also, in *Amand*, Viscount Cave noted two conditions which must be satisfied for a matter to qualify as ‘criminal’ namely that:

“... the applicant is put in jeopardy of criminal punishment *by the proceeding*; and such jeopardy has to be ‘*the direct outcome*’ of the proceeding ...” [emphasis added].

[22] Lord Sales noted that these two conditions remain relevant today. He concluded:

“Although the House of Lords in *Amand* was not giving an exhaustive definition of the phrase, it identified the paradigm type of case which is covered by it. *Any extension beyond that type of case would require to be clearly justified* [para 45] [emphasis added].

[23] Lord Sales also considered the policy underlying the legislation which restricts appeal rights to the Supreme Court both in Northern Ireland and elsewhere in the UK. He notes that the legislation brought in to govern access to the then House of Lords reflected:

“Parliament’s concern that the time of the House of Lords, as the highest court within the legal system should not be unduly taken up with routine appeals in criminal matters ...” [para 47]

[24] Nevertheless, Parliament is aware that systemically important points of law can arise in the context of the criminal process, and Lord Sales inferred that it did intend that such points should be captured. The intention of Parliament then, was to create a system that allowed access to the Supreme Court for the rare criminal cases that do require review by the highest court in the land, while also excluding routine appeals in criminal matters that were well within the competence and experience of lower tier

courts. It sought to achieve that balance in the way it defined 'criminal cause or matter':

"The phrase a 'criminal cause or matter'... defines a legal category of cases before the High Court for which there is only a highly circumscribed possibility of appeal to the Supreme Court, involving specified procedural hurdles; ..." [Para 63]

[25] What is the salient feature of the criminal cases that Parliament intended to let pass?

"... it is to be inferred that the phrase defined a reasonably tightly drawn category of case focused directly on *the process for bringing and determining criminal charges*; ... Parliament obviously intended that *cases with a direct bearing on that process should be captured* by the phrase, without drawing subtle and ultimately unsustainable distinctions depending on the precise nature of the procedure by which the matter concerning the process for bringing and determining criminal charges might be brought before the High Court;" [para 69 and 70] [Emphasis added]

[26] Lord Sales summarised his guidance as follows:

"The question whether a decision constituted a 'decision of the High Court in a criminal cause or matter' within section 41(1)(a) of the 1978 Act was to be determined by asking whether the direct outcome of the proceedings which underlay the proceedings in the High Court was that a person was placed in jeopardy of criminal trial and punishment or an alleged offence."

[27] Applying this distillation to the case before him he concluded that:

"In the present case the issue raised by the applicant in the judicial review proceedings did not relate to the commencement or conduct of any underlying criminal process concerning the prisoner ... therefore the Divisional Court's decision was not a 'decision of the High Court in a criminal cause or matter' within section 41(1)(a); and that accordingly the Supreme Court did not have jurisdiction to hear the appeals ..."

[28] To apply this guidance to the present case we must consider the question: what kind of 'cause or matter' is a compassionate bail application and where does it fit in the justice system?

Discussion: What is "bail?"

[29] The question of whether a suspect gets substantive bail or not first arises when the person has been lawfully arrested or detained for the purpose of bringing him before the court on reasonable suspicion of having committed an offence. A person so detained must be promptly brought before a judge and is entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial (see article 5(1)(c) and 5(3) of the ECHR). The second limb of article 5(3) entitles the accused person "to trial within a reasonable time or to release pending trial." These are not alternatives. A person charged with an offence must always be released pending trial unless the state can show that there are "relevant and sufficient reasons" to justify continued detention. Continued detention can only be justified if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweigh the rule of respect for individual liberty (see Lester & Pannick, *Human Rights Law and Practice*, 3rd Ed. at para 4.5.50). In domestic practice those arrested, charged, and detained on charges founded on reasonable suspicion of having committed the offence must be promptly before a magistrate so that decisions about the evidence and the charges it supports can be reviewed by a judge.

[30] If the judge is satisfied that the suspect has a case to answer he must also decide whether to remand the accused in custody or to release him pending trial. In the absence of relevant and sufficient reasons to justify continued detention he must be released. Such reasons may include flight risk, interference with the course of justice, prevention of further offences and the preservation of public order. This remand is justified by the need to protect the public from the potential risks posed by people suspected of serious crimes.

[31] This first remand decision about the grant or refusal of bail is intrinsically linked to the criminal process. It arises at a time close to the beginning of a criminal proceeding against the suspect. It generally arises when the person is appearing as a 'defendant' in a criminal court. He is defending himself against allegations laid by a 'prosecutor', someone who makes charges against him and sets out the evidence about his alleged crimes. The initial bail decision has the colour and feel of 'a criminal cause or matter.' Indeed, this first remand decision defines the content of what 'criminal jeopardy' will mean for this suspect. Will it mean immediate detention in custody or not? The first remand decision answers that question.

[32] From the perspective of the suspect a refusal of substantive bail at this stage means that he acquires a new status: he becomes a 'remand prisoner.' Remand prisoners are presumptively innocent people about whom reasonable suspicions exist but against whom nothing has been proved. They are detained in custody because

they are waiting for a trial to happen, and a judge has decided that the state has established relevant and sufficient reasons to justify continued detention.

[33] The proceedings underlying the present application is not the refusal of substantive bail as discussed above. On the contrary it was a different category of bail familiar to the courts and practitioners. It is an application made by the prisoner to respond to a pressing need that has arisen in his life. This category, the 'compassionate bail application', generally arises in response to important family events such as the birth of a child or the death of a close relative which happens while the person is in prison. Often, as in the present case, such applications have to be dealt with on an emergency and expedited basis. Substantive bail applications engage article 5. Compassionate characteristically engage article 8. The context for compassionate applications is that substantive bail will have already been refused by a judge following a full consideration of all the relevant and material factors that bear on the issue.

Can a right of appeal to the Supreme Court arise from a compassionate bail application?

[34] Applying Lord Sales' guidance to the facts of the present case we must consider whether a compassionate bail application carries a right of appeal to the Supreme Court as the applicant claims. The applicant's challenge in this judicial review is premised on the basis that the decision of the PPS to use section 10 of the 2004 Act had the effect of depriving the applicant of a pre-existing right to appeal to the Supreme Court. If no such right of appeal exists the challenge is unarguable and must fail.

[35] This case arises out of the exercise by the PPS of their statutory right to appeal the decision of the District Judge to grant bail and the decision of Morgan LCJ reversing that decision. Neither the appeal nor the bail application that gave rise to it involved any challenge to the original decision to remand the applicant in custody pending his trial. Nothing about this 'matter' puts the applicant in criminal jeopardy. He was already in criminal jeopardy months before the application was made. The specific meaning of 'criminal jeopardy' in the circumstances of his case had already been clarified at the first remand - in his case it would include immediate detention in custody pending trial. His compassionate bail application did not challenge that: it simply sought a compassionate variation to it because of the sad event that had occurred in his family. It proceeded on the basis that, if compassionate bail was granted, the applicant would return to prison voluntarily as soon as the bail period expired.

[36] Any extension of the meaning of criminal cause or matter beyond the paradigm type of case identified in *Armand* would require to be clearly justified. Such a novel extension has not been clearly justified. If compassionate bail applications were captured by the phrase "criminal cause or matter" Parliament's concern (that the highest court should not be unduly taken up with routine appeals in criminal matters) is likely to greatly exacerbated. Routine compassionate bail applications, usually arise

on an urgent basis, involve a fact specific balancing exercise and are well within the competence of the lower tier courts who deal with such applications on a regular basis. Further, compassionate bail applications are not a category of case focussing directly on the process for bringing and determining criminal charges. Thus, one can infer with the assistance of the Supreme Court judgment that Parliament never intended to capture such routine matters.

[37] This appeal against the grant of compassionate bail was not immediately and closely related to the criminal case at which the remand in custody pending trial was imposed. When he was pursuing bail in court he appeared as an 'applicant' for bail - not as a 'defendant.' The other sides' representatives appeared as 'respondents' to his application - not as 'prosecutors.'

Conclusion

[38] Everything about this application has the colour and flavour of a risk management exercise not dissimilar to many types of civil proceedings. Nothing about this compassionate bail application or the appeal put this applicant in criminal jeopardy. As in *McGuinness*, these proceedings 'did not relate to the commencement or conduct of any underlying criminal process concerning the prisoner...' They do not partake of the criminal character of the trial he faces and would not change his status as a remand prisoner. They do not qualify as a 'criminal cause or matter' under the Supreme Court guidance in *McGuinness* and they do not give rise to any right of appeal to that court.

[39] Since an application for compassionate bail is not a criminal cause or matter it follows that no applicant for compassionate bail before the High Court on similar facts could qualify for a right of appeal to the Supreme Court under section 41 of the 1978 Act because that right is only available in criminal causes of which this compassionate bail application is simply not one. There is therefore no differential treatment of this application in relation to his appeal rights and the arguments advanced about articles 8 and 14 ECHR do not need to be addressed.

[40] Further, we agree with the PPS and the Department that this appeal is now academic in that it relates to events that happened in 2020 and the outcome of this the application can have no impact on those past events.

[41] For all these reasons we refuse leave and dismiss this application.