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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY AIDAN FERGUSON FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS BY THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

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Jude Bunting KC (instructed by Phoenix Solicitors) for the Applicant
Dr Tony McGleenan KC with Philip McAteer (instructed by the Crown Solicitors Office) for the Respondent

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COLTON J

Introduction

[1] By this application the applicant challenged two decisions of the respondent, namely:

(i) The decision of 26 November 2019 to stop and examine him, pursuant to Schedule 7 of the Terrorism Act 2000 ("the 2000 Act"); and

(ii) The decision of 10 December 2019 not to provide him with the reasons for that stop.

[2] By way of relief the applicant sought:

(a) An order quashing the decisions of 26 November 2019 and 10 December 2019.

(b) A mandatory order requiring the respondent to provide contemporaneous records from and justification for the stop and examination of the applicant on 26 November 2019.

Factual Background

[3] The applicant was stopped and questioned by officers of the Police Service of Northern Ireland at the Belfast International Airport on 26 November 2019. The stop and examination of the applicant was carried out pursuant to the PSNI's powers under Schedule 7 of the Terrorism Act 2000.

[4] The applicant instructed his solicitors to challenge the stop and examination. In his initial correspondence of 27 November 2019, he sought "any contemporaneous materials relating to the PSNI's decision to stop, detain, and question our client including the questions you asked of him and the answers provided by our client …"

[5] The respondent replied to this letter on 10 December 2019. The relevant part of the response was in the following terms:

> "Mr Ferguson was stopped under Schedule 7 Terrorism Act 2000 at Belfast International at 21:47, examined (not detained) and this was completed at 22:07. During this time his rights were explained to him and a Public Information Leaflet was handed to him explaining the process. The leaflet which he took away explains the power to stop, question, search and, if necessary, detain persons under Schedule 7 and states that this power does not require prior authority or suspicion.
>
> If you require a copy of the information leaflet provided to your client, please advise by return."

[6] On 21 December 2019 the applicant sent a detailed pre-action protocol letter to the respondent. The letter indicated that the applicant sought to challenge the decision to stop and examine him and also "in the alternative, he seeks to challenge the refusal of the PSNI to justify the decision of 26 November 2019."

[7] It is clear from the content of the letter that the applicant was challenging the response of 10 December 2019 which in the words of the letter "seems to assert that it is unnecessary to justify the imprisonment of Mr Ferguson …"

[8] The letter further states at para [21]:

> "Further, or in the alternative, the PSNI's refusal (in the email of 10 December 2019) to provide any such justification was also unlawful. There is no lawful basis for withholding the evidence sought by Mr Ferguson in his letter of 27 November 2019, and no such justification is set out in the email. Given the fundamental importance of liberty at common law and under the framework of the

European Convention on Human Rights, any detention (even a short period of time) requires justification."

[9] Under the heading "The details of the action the respondent is expecting to take" he was asked to confirm that:

> "…
>
> (b) He will provide the information sought in Mr Ferguson's letter of 27 November 2019 and in this letter."

[10] Under the heading "The details of any information sought" the respondent was asked to provide at para [26]:

> "[26] (a) Full reasons for the decision to stop and question Mr Ferguson on 26 November 2019.
>
> (b) Full copies of any evidence on which the Chief Constable relies to justify the decision to stop and question Mr Ferguson on 26 November 2019, to include as a minimum, any contemporaneous materials relating to that decision. This should include: any requests to stop and question Mr Ferguson, any evidence as to the officer's state of mind, any national security justification or Port Circulation Sheet. Any evidence as regards the questions asked by the officers during Mr Ferguson's examination, any contemporaneous notes taken of Mr Ferguson's questioning.
>
> (c) Confirmation as regards the apparent PSNI practice of officers not recording the questions asked and the answers received during schedule 7 of the Terrorism Act 2000;
>
> (d) Any guidance issued by the PSNI to officers in respect of schedule 7, the application of that schedule 7, and the rules governing the decision making and evidence gathering by officers of the PSNI."

[11] A reply was sent on behalf of the Crown Solicitor's Office dated 23 January 2020. The respondent asserted that the stop and examination was a "lawful examination which was in compliance with the legislation and code."

[12] In addressing "the adequacy of the information made available in relation to this search" the respondent replied:

> "The Code of Practice also refers to the records of examination at paragraphs 43-44. In particular, at paragraph 44 it states:
>
> > 'Records of the examination and reviews of detention by the review officer must also be kept in accordance with the Management of Police Information Guidance. Records of the examination, including records of review of detention, will not be given to the individual or their solicitor at the time of the examination but will be managed in accordance with Police Information Management and data protection principles."
>
> It is the proposed respondent's position that the applicant's rights were explained to him at the appropriate time and a public information leaflet was handed to him explaining the process.
>
> Records of the examination and reviews of detention by the review officer are kept in accordance with the Management of Police Information Guidance as per the Code of Practice."

[13] The Code of Practice to which the letter refers is that issued by the Home Office dated March 2015 entitled "Examining officers and review officers under Schedule 7 to the Terrorism Act 2000." This document is publicly available. The applicant's solicitor sent a response on 3 February 2020, again, raising the purported failure of the respondent to provide any material relating to the stop and examination under Schedule 7.

[14] The letter says at paragraph 3:

> "… at best, your letter states that:
>
> > 'Records of the examination reviews and detention by the review officer are kept in accordance with the Management Police Information Guidance.'
>
> Please provide the relevant documentation forthwith."

[15] The respondent replied on 10 February 2020 indicating that it was relying on its pre-action protocol response.

History of Proceedings

[16] Proceedings were issued seeking leave for judicial review on 26 February 2020. The application was reviewed at a hearing on 22 February 2021 and directions were made for a hearing on 17 September 2021. On 9 September 2021, the respondent sought the adjournment of the hearing, given difficulties in providing an affidavit in time for the hearing. The applicant consented to that adjournment. The application was relisted for hearing on 12 November 2021.

[17] The respondent conceded leave which was formally granted and the case was set down for a substantive hearing on 12 November 2021.

[18] On 4 October 2021, the respondent provided an affidavit from Detective Constable B.

[19] In his affidavit Detective Constable B set out the basis for stopping the applicant at the airport on the day in question. He confirmed that it was carried out further to a request for the applicant to be examined under Schedule 7 to the Terrorism Act 2000 contained within a Port Circulation Sheet ("PCS") dated 21 November 2019.

[20] In the affidavit he explains that a PCS is a method of "flagging" a subject of interest. It assists Ports Officers in determining whether they should utilise their powers under the Terrorism Act.

[21] The PCS request confirmed that the stop was to occur inbound and the purpose of the examination was "to assist in making a determination about whether the person appears to be someone who is or has been concerned in the Commission, Preparation or Instigation of acts of terrorism ("CPI")." Officers were asked to consider using their Schedule 7 powers to elicit this information and to explore topics which were set out in the PCS.

[22] Having received notification of the PCS Detective Constable B decided that it was appropriate to stop and examine the applicant under Schedule 7. In his affidavit he sets out the conduct of the examination.

[23] A number of exhibits were attached to the affidavit as follows:

(i) Port Circulation Sheet dated 21 November 2019.

(ii) Public Information Leaflet.

(iii) Notebook entry dated 26 November 2019.

(iv) Transcript of stop on 26 November 2019 prepared by Detective Constable B.

(v) Entry from book 500–EO.

(vi) Handwritten document entitled "Ferguson Stop – 26/11/19."

(vii) Record entitled "Landing Card."

[24] Mr Bunting on behalf of the applicant highlights some of the material contained in the affidavit and exhibits. In particular, he points to the following matters:

(i) The stop was carried out further to a request for the applicant to be examined (affidavit of Detective Constable B).

(ii) The request came from MI5 (Exhibit).

(iii) The MI5 request had been set out in a contemporaneous Port Circulation Sheet, which was disclosed (Exhibit).

(iv) Further contemporaneous records were made in a notebook entry in advance of the stop, in the transcript of the stop prepared at the time by Detective Constable B, in a Book 500-EO Entry, in a further handwritten document and in a Landing Card (all Exhibits).

(v) The reason for the stop was to fulfil the statutory purpose of assisting in whether the applicant appeared to be someone who is or has been concerned in terrorism (affidavit of Detective Constable B).

(vi) The basis for this suspicion was the intelligence and further information provided by MI5 in the Port Circulation Sheet (Exhibit).

[25] It is argued on behalf of the applicant that in disclosing this material, the respondent finally provided him with the contemporaneous material and justification that he first sought in his pre-action correspondence. On receipt of the affidavit from Detective Constable B and the exhibits thereto the applicant decided not to pursue the challenge to the decision of 26 November 2019. Given that the absence of contemporaneous justification was the basis for the illegality pleaded and given that the applicant sought a mandatory order requiring the respondent to provide this material, the parties agreed that it was no longer necessary for there to be a substantive hearing. The hearing date was then vacated to allow the parties to seek to agree a final order. The parties agree that the application for judicial review can be dismissed. However, they disagree in relation to costs. The applicant invites the court to order that the respondent pay the applicant's costs of these proceedings. This application is resisted by the respondent.

[26] The parties agreed that the court could determine the question of costs based on written submissions submitted by the parties. Those submissions have been received and the court is obliged to counsel for their helpful and focussed submissions.

The applicable legal principles on costs

[27] In general terms the court has a broad discretion in relation to the award of costs in applications for judicial review.

[28] The powers of the High Court to deal with costs of and incidental to proceedings are set out in the Rules of the Supreme Court and, primarily, in Order 62. The general rule is that the unsuccessful party should normally pay the costs of the successful party. Order 62 rule 3(3) provides:

> "(3) If the court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the court shall order the costs to follow the event, except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

[29] In *Re YPK & Ors' Applications* [2018] NIQB 1 McCloskey J carried out a detailed review of the authorities on costs in judicial review proceedings and set out the relevant principles in detail at para [5] of his judgment as follows:

> "(1) The court has discretion as to –
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs -
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order.
>
> ….

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including -

(a) the conduct of all the parties;

(b) whether a party has succeeded in part of his case, even if he has not been wholly successful; and …

(5) The conduct of the parties includes -

(a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended his case or a particular allegation or issue;

(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim."

[30] There are no particular principles applicable to costs in judicial review proceedings. In *YPK* McCloskey J noted with approval the guidance provided by the English Court of Appeal in *M v London Borough of Croydon* [2012] EWCA Civ 595 as to how the general costs principles are to be applied in the context of judicial review. In that judgment the following guiding principles were set out:

"(i) Where a claimant has been wholly successful whether following a contested hearing or via settlement `… it is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary': see [61].

(ii) In a case where the claimant succeeds in part only following a contested hearing or via settlement, the court will normally evaluate the factors of '… how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim and

how much the costs were increased as a result of the claimant pursuing the unsuccessful claim.' (see [62])

The court's evaluation of such questions will be greatly facilitated where the case has proceeded to the stage of substantive judicial adjudication. But the judicial task will be altogether more difficult in cases where the claimant's partial success arises through the mechanism of consensual resolution. In the latter type of case '… there is often much to be said for concluding that there is no order for costs.' (see [62])

(iii) In cases where a compromise which does not 'actually reflect the claimant's claims' is struck, the court '… is often unable to gauge whether there is a successful party in any respect … Therefore, there is an even more powerful argument that the default position should be no order for costs. However, in some cases it may well be sensible to look at the underlying claims and enquire whether it was tolerably clear who would have won if the matter had not settled.' See [63]"

[31] In the context of a case where a judicial review has been dismissed the principles established in the case of *R(Boxall) v London Borough of Waltham Forest* [2002] All ER(D) are relevant. Indeed, much of the principles set out in *Re YPK* were derived from the *Boxall* case.

[32] The principles in *Boxall* were referred to by this court in *JR186's Application* [2002] NIQB 20 as follows:

"[28] When faced with determining the issue of costs where a judicial review has been dismissed the courts in this jurisdiction tend to adopt the principles set out in the case of *R(Boxall) v London Borough of Waltham Forest* [2000] All ER(D). In the *Boxall* case Scott-Baker J set out the relevant principles as follows:

'(i) The court has power to make a costs order when the substantive proceedings have been resolved without a trial where the parties have not agreed about costs.

(ii) It will ordinarily be irrelevant that the application is legally aided.

(iii) The overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional costs.

(iv) At each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between the position will, in differing degrees, be less clear.

(v) How far the court was prepared to look into the previously unresolved substantive issues will depend on the circumstances of a particular case, not least the amount of costs at stake and the conduct of the parties.

(vi) In the absence of a good reason to make any other order the fall-back is to make no order as to costs.

(vii) The court should take care to ensure that it does not discourage parties from settling the judicial review proceedings, for example, by a local authority making a concession at an early stage.'"

The parties' submissions on costs

[33] The applicant says he is entitled to a full order for costs against the respondent essentially for two reasons.

[34] First, it is argued that the applicant succeeded in obtaining what he describes as the "primary relief he sought"; namely the contemporaneous reasons for a stop under Schedule 7. It is argued this was the primary focus of his pre-action correspondence and his Order 53 Statement. The applicant recognises that he has not obtained each and every aspect of the relief sought but this should not obscure the reality of the case, namely that he has succeeded in getting what he asked for in his pre-action protocol letter.

[35] Secondly, it is argued that the entire application could and would have been avoided had the respondent provided the disclosure sent to the applicant on 4 October 2021 at the pre-action stage. The purpose of the pre-action protocol is to avoid unnecessary litigation. Had this material been provided pursuant to the applicant's request this judicial review application would have been unnecessary.

[36] Dr McGleenan on behalf of the respondent points out that the Order 53 Statement challenges the lawfulness of the stop on 26 November 2019 and sought a quashing of that decision.

[37] Having challenged that decision and seeking a remedy including a quashing of that decision, a declaration that it was unlawful and damages, on receipt of the respondent's affidavit evidence the applicant accepted the lawfulness of the stop and decided not to pursue the proceedings any further.

[38] By doing so it is argued that the applicant accepted he would not have succeeded in the challenge in relation to the first decision.

[39] It is argued that the key information with respect to the lawfulness of the stop was already known to the applicant when he brought the proceedings. At the time of the stop, as is apparent from Detective Constable B's affidavit, the applicant was told of the reason why he was stopped, namely that he had been selected for examination under Schedule 7 to the 2000 Act. He was given an information leaflet, was told the examination could be carried out in private but refused, the questions he was asked, his denial of having a mobile phone and the finding of two mobile phones inside a shoe in his property. The central plank of the respondent's argument in relation to costs is, in effect, that the applicant was aware of the relevant information upon which the stop was based. Materials provided in the respondent's affidavit merely provided an objective account of what was already known to the applicant. It is therefore argued that this does not amount to a "success" in the proceedings.

Consideration

[40] In this case it is clear that from the outset the applicant was focused on seeking a justification for what, in his view, was an unlawful stop. This was made clear in the pre-proceedings correspondence. When the information was not provided the applicant raised the matter again and by 10 February 2020 it was clear that the respondent was refusing to provide any of the contemporaneous materials being sought.

[41] It was only when the affidavit was filed that contemporaneous documentation in relation to the stop was provided. The court makes no criticism of the affidavit of Detective Constable B and, indeed, takes the view that it is an exemplary response to a challenge of this type.

[42] It is correct that much of the evidence contained in the affidavit and the material exhibited to it was information which was available to the applicant. However, that is not true for all of the material. Of particular relevance is the disclosure for the first time of the basis upon which the stop was requested and the decision was made to carry it out. Had this material been provided at the outset then the applicant would have had to make a decision as to whether or not to proceed with a challenge to the decision to stop. The fact that he chose not to pursue the matter when the material was provided suggests that no judicial review proceedings would have arisen in those circumstances.

[43] When a challenge is made to the lawfulness of such a stop, given that it represents a loss of liberty, prima facie, the person stopped is entitled to know the basis upon which the stop was justified. It may be that there are circumstances in which sensitive material cannot be disclosed. In those circumstances the proper response would be to indicate that this is the case.

[44] In this case the respondent chose not to engage with the issue of disclosure of material relating to the reason for the stop. This is not a case where the applicant rushed to court seeking judicial review. At the outset it was made clear that he was seeking material relating to justification for the stop. It became a central part of the application. On receipt of that information, he properly agreed to the dismissal of the proceedings.

[45] I agree with Mr Bunting's submissions that a member of the public should not be put to the expense of issuing a judicial review claim, obtaining leave (in this case by consent), and waiting almost two years in order to be told why his liberty was restricted. He properly raised the issue via the pre-action protocol procedure. The purpose of the procedure is to avoid unnecessary judicial review claims by requiring public authorities to set out their case before litigation is brought.

[46] I make it clear that it may not always be possible for a respondent in this position to provide the information sought. When faced with such a request a proposed respondent may well ask for further time to investigate the matter, or in particular circumstances, may say that it is not possible to disclose information for various reasons. In this case the respondent simply did not engage adequately with this aspect of the applicant's claim.

[47] It seems to the court that had the proceedings gone to a full hearing in the absence of the material provided in Detective Constable B's affidavit the applicant would have succeeded, absent a particular reason for not disclosing the material. No such reason has been, or could be, put forward in this case.

[48] The conduct of the applicant in firstly raising the point properly in pre-litigation correspondence and then agreeing to a dismissal of the claim when the information initially sought was provided, strongly supports his application for costs.

[49] In the circumstances of this case the court concludes that had the information sought been provided pre-challenge these proceedings would have been unnecessary.

[50] Exercising its broad discretion the court therefore concludes that the applicant is entitled to an order for costs against the respondent.

[51] The court therefore directs that the application for judicial review be dismissed but that the respondent pays the applicant's costs with those costs to be taxed in default of agreement.