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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 APPLICATION BY 'JR171' (LEAVE STAGE) FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE SECRETARY OF STATE FOR NORTHERN IRELAND AND THE POLICE SERVICE OF NORTHERN IRELAND

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Sean Devine (instructed by KRW Law) for the Applicant
Tony McGleenan QC and Ben Thompson (instructed by the Crown Solicitor's Office) for the First Proposed Respondent, the Secretary of State
Tony McGleenan QC and John Rafferty (instructed by the Crown Solicitor's Office) for the Second Proposed Respondent, the Police Service of Northern Ireland

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SCOFFIELD J

Introduction

[1] This is an application for leave to apply for judicial review of decisions of the Police Service of Northern Ireland (PSNI) and the Secretary of State for Northern Ireland ('the Secretary of State'). The subject matter of the application is the applicant's security. The police have in recent times provided the applicant with information relating to potential threats to him, which prompted him to apply to the Secretary of State for admission to the Home Protection Scheme (HPS) which is run by the Northern Ireland office (NIO). That application has been refused. In short, the applicant contends that either there is a risk to his life which warrants his admission to the HPS or, on the other hand, there is no risk to his life, in which case the police have wrongly (and, he contends, in bad faith) put him in constant fear for his personal safety and that of his family.

[2] The applicant is a practising solicitor. He was granted anonymity by order of McCloskey LJ, who initially considered these proceedings when they were launched during the vacation period with a certificate of urgency. In light of the grant of anonymity, I have endeavoured not to say anything in this judgment which would be of particular value in terms of identifying the applicant. The summary of the factual background is therefore necessarily limited.

[3] McCloskey LJ ordered that a leave hearing should be convened in this case, which was held before me. Mr Devine appeared for the applicant; and Mr McGleenan QC appeared for both proposed respondents, leading Messrs Thompson and Rafferty of counsel respectively. I am grateful to all counsel for their written and oral submissions.

Factual background

[4] As noted above, the applicant is a practising solicitor, part of whose practice involves criminal law and actions against state agencies, including the PSNI and the NIO. The applicant has also had occasion to make a variety of complaints against the PSNI and also has taken civil proceedings against them.

[5] The background to this application arises from the fact that the applicant has been informed by the PSNI on a number of occasions (on his case) that he is under threat. As appears further below, the police take issue with this characterisation and contend that, rather, the applicant has simply been given a "form of words" reflecting information which has been passed to them, without any independent verification by them of any objective threat towards him. In any event, in a number of exchanges, the applicant has been told that there is information suggesting that he is under threat; and he emphasises that references have been made to a possible physical attack upon him, an arson attack on his home or business, and/or that "Republican elements" might attempt to kill him. The applicant also places significant reliance on the fact that, on one occasion after providing him with such information, the police officer concerned asked the applicant whether he wanted to remain in his home. He contends that the clear implication of this was that he may wish to leave his home by reason of the information which had been reported to him.

[6] The applicant's position is that he does wish to remain in his home but wishes to have his home provided with physical security measures at public expense. To this end he applied for inclusion within the NIO's HPS. That application was refused on the basis that the applicant is under "no threat" from Northern Ireland-related terrorism (NIRT), which the HPS is designed to meet.

The Applicant's Case

[7] The primary focus of the applicant's challenge is on the non-admission of him to the HPS. He contends that, even if there is no threat to him from NIRT, there may

still be a threat to his life which warrants protection through participation in the scheme. In any event, he challenges the suggestion that the threat which arises to him is not from NIRT, given that he has been informed (on one occasion in April 2021) that it emanates from "Republican elements"; and in any event challenges the distinction which is made in relation to the scheme's eligibility criteria between terrorist-related threat and non-terrorist related threat. In this regard he relies upon the third report of the Independent Reporting Commission (November 2020) which emphasises the link, and that there is often no clear distinction, between paramilitarism and criminality.

[8] The applicant is critical of the response on behalf of the Secretary of State to the effect that he is under "no threat" from NIRT; and contends that this is utterly inconsistent with the stance of the PSNI in the interactions they have had with him. As a result, he contends that the Secretary of State's decision is irrational, in breach of Article 2 ECHR, unlawfully discriminatory contrary to Article 14 ECHR, and procedurally unfair for absence of reasons. If there is in fact no threat to him, as both respondents now contend, the applicant claims that the PSNI's actions have been irrational, constitute inhumane treatment in breach of Article 3 ECHR, and are motivated by bad faith.

The Respondents' Case

[9] Each respondent comes at this application in a slightly different way, although both claim that the applicant is objectively subject to "no threat" from NIRT for the purposes of the first respondent's case. The PSNI also contend that the applicant is, at most, subject to a low threat (meaning an attack is highly unlikely) more generally.

[10] On the part of the Secretary of State, his case is very simple. He says that the applicant simply does not meet the criteria for admission to the HPS on the basis of absence of threat; and that, in any event, the HPS is only one small part of the way in which the State protects those who may be at risk from criminal acts. In the respondents' submission, "admittance to the HPS is not the exclusive means of discharging the State's Article 2 ECHR obligations even in cases, unlike this one, where the Article 2 threshold condition is met."

[11] The case on behalf of the Chief Constable is simply to the effect that there is no threat to the applicant meeting the Article 2 ECHR threshold at which operational measures to protect the applicant's life are required; and that the police have acted reasonably and responsibly in passing on to him information received about possible threats, albeit that the police do not appear to believe that this gives rise to any objectively verified threat in order to engage their Article 2 operational duty.

Discussion

[12] I reject the submission made on the applicant's behalf, in terms that this application *must* succeed against one or other of the proposed respondents. This assertion appears to me to be wrongly grounded in a binary view of the potential level of threat, namely that there is either an Article 2 threat to the applicant's life (requiring admission to the HPS) or there is no threat to the applicant's life (in which case the police had no business providing him with any information at all). This approach is plainly much too simplistic for three reasons. First, there is obviously a spectrum of threat ranging from no threat at all to a very high level of threat, perhaps where an attack is imminent. The applicant's analysis allows little or no room for the possibility that there may be *some* level of threat to his security, warranting some action on the part of the police, but which is not at a level whereby admission to the HPS is necessary. Second, even within that spectrum the evaluation and assessment of threat is not a precise science. That is particularly so where, as here, the agencies involved are, at least to some degree if not wholly, considering threat from different sources (one terrorist related, the other not). Third, even assuming that the Article 2 threshold of 'real and immediate risk to life' was met in this case – which both respondents contend it was not – it does not follow that admission to the HPS, involving substantial public expenditure, is or should be automatic. That is because, in assessing what may reasonably be required of the State, the Strasbourg jurisprudence establishes (and the applicant accepts) that operational choices must be made in terms of priorities and resources in a way which does not impose an impossible or disproportionate burden on the authorities.

[13] I do not consider there is anything unlawful in the NIO maintaining a limited scheme which forms only *part* of the overall State response to the protection of life in respect of those who are at risk from the criminal acts of third parties. It is unsurprising that the scheme maintained by the Secretary of State focuses on terrorist-related threat, since national security remains an excepted matter, whereas criminal justice and policing generally are devolved matters. As the first respondent's submissions record:

> "Since the early 1970s, successive Northern Ireland Secretaries of State have maintained and resourced a limited extra-statutory and discretionary scheme, now known as the HPS. The scheme is aimed at protecting the homes of persons subject to a threat of NIRT which is assessed as SUBSTANTIAL, or higher. In general, it is intended to provide protection for persons in the public service concerned with the effective administration of Government and the criminal justice system, upholding law and order and maintaining the democratic framework.
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> The HPS represents one possible component of the panoply of measures through which the State can discharge its obligations under Article 2 ECHR, where

> engaged. The scheme cannot and does not aim to provide total protection, nor does it seek to protect all persons in Northern Ireland who may be subject to some degree of threat. Admission to the HPS cannot, therefore, be treated as being dispositive of the State's article 2 ECHR obligations, contrary to the inference invited by the Applicant."

[14] The core question in this case is whether there has been any failure to take necessary operational measures which are required to comply with the State's obligation under Article 2 ECHR. It is the Chief Constable who has primary responsibility for the protection of life in this jurisdiction from threats arising from the criminal acts of third parties. That follows from the provisions of section 32(1) and 33(1) of the Police (Northern Ireland) Act 2000. The police are under the direction and control of the Chief Constable and it is part of the general duty of police officers both to protect life and prevent the commission of offences.

[15] In light of this it seems to me that the appropriate target of these proceedings is the Chief Constable of the PSNI and not the Secretary of State. The applicant has placed an undue focus in these proceedings on the limited HPS operated by the Northern Ireland Office. However, the reason for his non-admission to the scheme is not, as he contends, based on his religion or "status as a non-state agent." In fact, the applicant *did* satisfy the occupational criterion for the scheme. The reason for his non-admission to the scheme was simply that there was considered to be no threat to him as a result of NIRT, on the basis of the threat assessment provided by the Security Service and the fact that PSNI District Command had raised no local issues of concern in that regard. The absence of threat plainly falls well short of the requirement that there be a substantial threat (where an attack is likely), which is the normal admission criterion for the scheme, in addition to the occupational criterion. This position has now been explained to the applicant so that, even if there was previously any doubt, his challenge based on the absence of reasons now clearly has no realistic prospect of success. Insofar as the applicant relies on Article 14, I do not consider that there is any realistic prospect of success on this ground given, firstly, the area of discretionary judgment available to the State in the area of national security and, secondly and more importantly, the fact that, in the absence of a substantial threat to him (even from a non-terrorist related source), he is not in an analogous position to the comparators on whom he has relied.

[16] The issue here is that the applicant does not accept the reasoning that no risk to him from NIRT has been established, in light of the different message which he feels he has received from the police: but there is no necessary inconsistency in that regard for the reasons expressed in paragraph [12] above. The second respondent's explanation of the occasions where the applicant has been given information about his personal security by police officers is as follows:

> "In each of the relevant occasions, the PSNI received information which identified the Applicant. This information was assessed by the PSNI, both on an individual basis and taken together with the previous information, as applicable to the Applicant. At its height, the PSNI assessed the threat in respect of the applicant as LOW risk this being distinct from the separate NIRT threat assessment conducted by MI5).
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> The PSNI proceeded to take operational measures proportionate to the assessed threat(s), as indicated by the policies and procedures reflected in Service Instruction SI2317…, which included the five interactions of which the Applicant now complains. On each occasion, officers attended with the Applicant and orally conveyed to him a "form of words" in respect of the information received."

[17] The second respondent also contends that a number of other measures proportionate to the assessed threats have been actioned, including that the District Neighbourhood policing team was notified of the applicant's address and the information received (for the purposes of their patrolling patterns); the applicant was provided with advice about his personal security; and the applicant was offered a referral to meet with a Crime Prevention Officer (which he declined). The applicant contends that these measures amount to very little and give him no faith that any risk to his life or safety has been materially mitigated.

[18] As to the communications from police, the applicant has emphasised that, when the information was communicated to him by police, he was *not* told that the information was considered to be without foundation. He says that the information would not have been communicated to him at all (and the police officer concerned would certainly not have asked him if he was intending to move home and whether he needed assistance with that) if the information was nothing to be concerned about.

[19] I have considered the terms of the PSNI Service Instruction referred to and relied upon by the second respondent in its pre-action response and skeleton argument. I was not able to see a clear provision in that document which appeared to cater for the present scenario, namely where a "form of words" was provided to a member of the public in circumstances where the police did not consider there was any material threat to them. The policy does indicate that in many cases the issue of a Form TM1 and the 'Protect Yourself' booklet will be sufficient – but that appears to be in a case where a real and immediate threat has been found to exist in terms of considering what feasible operational steps are required in response (unlike in the present case, in which the PSNI contends that the Article 2 threshold is not met).

[20] Although I have some misgivings about doing so, it seems to me that this is a case in which leave to apply for judicial review ought to be granted. This is because, in light of the fact that a potential threat to life is involved, the court ought to exercise anxious scrutiny. It may be that the court is ultimately satisfied that the Chief Constable's position as articulated at the leave stage, namely that there is no threat meeting the Article 2 threshold, has been made out. However, for the moment, the applicant's case that there is an actual or potential discrepancy between what police officers have conveyed to him on the ground and the PSNI's corporate position in these proceedings appears to me to be worthy of further investigation. That is particularly so given that there have now been several instances where the police have felt it appropriate to provide information to the applicant about potential threats. How and why this came about, and the extent (if any) of the threat to the applicant which it was designed to address, ought to be explained on affidavit.

[21] Notwithstanding the above, I do not consider that any of the grounds pleaded against the second respondent should proceed. The PSNI's provision of information to the applicant was clearly not irrational, in my view. I do not consider it even arguably crosses the Article 3 threshold for inhuman treatment. Nor do I consider that the applicant has surmounted the evidential threshold necessary to raise a case of improper motive or bad faith, which is a bare assertion at this stage. However, I do consider, on the basis discussed above, that leave should be granted in relation to the question of whether the information provided to police, and passed on by them, gave rise to a threat meeting the *Osman* threshold where reasonable operational measures were required to mitigate that risk and, if so, whether the State (for this purpose represented by the Chief Constable) has adequately discharged that obligation.

Conclusion

[22] By reason of the foregoing, I propose to grant leave to apply for judicial review against the second respondent only. I refuse leave on the applicant's pleaded grounds against the second respondent but direct, pursuant to RCJ Order 53, rule 3(4), that the applicant's Order 53 statement be amended to reflect the single ground set out at paragraph [21] above.

[23] In the course of the second respondent's submissions, it was highlighted that the applicant has also declined to assist police in ascertaining further information, in that he had asserted to police that he was aware of the identity of those who have made some of the threats towards him but declined to provide any further information in this regard. When asked about this in the course of the leave hearing, I did not find Mr Devine's response on behalf of the applicant particularly compelling. If the applicant is genuinely concerned about potential threats to him which have been communicated by the police, as he says he is, I would expect him to give all reasonable assistance to the police in investigating those matters. This was not pressed upon me by the respondent as a free-standing ground on which

leave should be refused; but I do consider it a matter which should be left open for further consideration at the substantive hearing, as may be appropriate, and which should be explained by the applicant on affidavit.

[24] I refuse leave to apply for judicial review against the first respondent on each of the grounds relating to the applicant's non-admission to the NIO's HPS. Although it perhaps presently appears unlikely, should the evidence in the case develop in such a way that the Secretary of State's involvement in the proceedings requires to be reconsidered, that can be addressed at a later stage.