

An Chartlann Náisiúnta
National Archives

Reference Code:	2022/84/13
Creator(s):	Department of the Taoiseach
Accession Conditions:	Open
Copyright:	National Archives, Ireland. May only be reproduced with the written permission of the Director of the National Archives.

ARC3080

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISON (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY ED MOLONEY FOR JUDICIAL REVIEW

CARSWELL LCJ

Introduction

In this application the applicant Mr Ed Moloney, the Northern Editor of the Sunday Tribune newspaper, seeks judicial review of an order made by His Honour Judge Hart QC on 2 September 1999 under paragraph 3 of Schedule 7 to the Prevention of Terrorism (Temporary Provisions) Act 1989 (the 1989 Act), whereby he ordered the applicant to produce to a constable within seven days certain documents. The documents in question were any notes made by him in an interview which the applicant had with one William Stobie in or about 1990, in which Stobie gave an account to him of his connection with the events leading up to and following the murder of Patrick Finucane, the Belfast solicitor who was murdered in February 1989. The police sought this order on the ground that there were reasonable grounds to believe that this material would be of substantial value to their investigation, and the judge accepted this view. His conclusion is challenged by the applicant, who also put forward a number of other grounds for setting aside the judge's order.

The Statutory Provisions and Jurisdiction

The material provisions for present purposes are portions of paragraphs 3 and 4 of Schedule 7 to the 1989 Act (as amended):

©TSCH/2022/84/13

27 OCT '99 15:33 FRANCIS KEENAN 01232 439252

"3.-(1) A constable may, for the purposes of a terrorist investigation, apply to a Circuit Judge for an order under sub-paragraph (2) below in relation to particular material, or material of a particular description, being material consisting of or including excluded material or special procedure material.

(2) If on such an application the judge is satisfied that the material consists of or includes such material as is mentioned in sub-paragraph (1) above, that it does not include items subject to legal privilege and that the conditions in sub-paragraph (3) below are fulfilled he may order a person who appears to him to have in his possession, custody or power any of the material to which the application relates, to -

(a) produce it to a constable for him to take away, or

(b) give a constable access to it,

within such period as the order may specify and if the material is not in that person's possession, custody or power (and will not come into his possession, custody or power within that period) to state to the best of his knowledge and belief where it is.

.....

(5) The conditions referred to in sub-paragraph (2) above are-

(a) that a terrorist investigation is being carried out and that there are reasonable grounds for believing that the material is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purposes of which the application is made; and

(b) that there are reasonable grounds for believing that it is in the public interest, having regard-

(i) to the benefit likely to accrue to the investigation if the material is obtained; and

(ii) to the circumstances under which the person has the material in his possession, custody or power.

©TSCH/2022/84/13

27 OCT '99 15:33 FRANCIS KEENAN 01232 439252

that the material should be produced or that access to it should be given.

....

(7) In Northern Ireland the power to make an order under this paragraph shall be exercised by a county court judge.

4-(1) Provision may be made by Crown Court Rules as to-

(a) the discharge and variation of orders under paragraph 3 above; and

(b) proceedings relating to such orders.

(2) The following provisions shall have effect pending the coming into force of Crown Court Rules under sub-paragraph (1) above-

(a) an order under paragraph 3 above may be discharged or varied by a Circuit judge on a written application made to the appropriate officer of the Crown Court by any person subject to the order;

(b) unless a Circuit judge otherwise directs on grounds of urgency, the applicant shall, not less than forty-eight hours before making the application, send a copy of it and a notice in writing of the time and place where the application is to be made to the constable on whose application the order to be discharged or varied was made or on any other constable serving in the same police station.

(3) An order of a Circuit judge under paragraph 3 above shall have effect as if it were an order of the Crown Court.

...

(7) In the application of this paragraph to Northern Ireland for references to a Circuit judge there shall be substituted references to a county court judge and for references to a government department or authorised government department there shall be substituted references to a Northern Ireland department or authorised Northern Ireland department."

©TSCH/2022/84/13

27 OCT '99 15:33 FRANCIS KEENAN 01232 439252

It was not in dispute that the documents in question constituted excluded material. Crown Court rules have not been made under paragraph 4(1) and accordingly the procedure set out in paragraph 4(2) was followed. None of the parties to the application sought to argue that the court did not have jurisdiction to grant judicial review of the judge's decision, but we felt it necessary to satisfy ourselves on the point. The Northern Ireland High Court does not have power to grant judicial review of the proceedings of the Crown Court, unlike the position in England under section 29(3) of the Supreme Court Act 1981, and we were exercised by the provision in paragraph 4(3) that an order made by a county court judge under paragraph 3 is to have effect as if it were an order of the Crown Court. We were in the end satisfied, with the help of a cogent argument from Mr McCloskey, that the jurisdiction is conferred upon the judge as a judge of the county court, and that the object of paragraph 4(3) is to confer powers upon him for such purposes as enforcement of his order. The High Court accordingly can exercise its supervisory jurisdiction over the county court by way of judicial review and grant remedies in appropriate cases.

The Factual Background

The following account of the murder of Patrick Finucane and its aftermath is taken from the statement of facts submitted by the RUC in support of the application to the judge for production of Mr Moloney's documents:

> "On Sunday, 12 February, 1989 at about 7.30 pm at 11 Fortwilliam Drive, Belfast, several masked gunmen forced their way into the home of Patrick Finucane, a Belfast Solicitor. At the time Patrick Finucane was eating a meal with his wife and three children. On entering the kitchen the gunmen opened fire and he was shot at close range fourteen times by two separate firearms, namely a 9mm Browning Automatic Pistol and a .357 Magnum Revolver. He was fatally wounded and was dead on arrival of the Emergency Services.
>
> The masked gunmen made good their escape and an immediate murder investigation was undertaken by the RUC. Some days

©TSCH/2022/84/13

27 OCT. '99 15:34 FRANCIS KEENAN 01232 439252

later the UFF claimed responsibility for the murder of Patrick Finucane. Throughout the course of the investigation by the RUC a number of people were arrested for the murder but at the time nobody was charged.

In June 1990, a journalist by the name of Neil Mulholland who was working at the time for the Sunday Life met and interviewed a person named William Stobie. At this meeting Mulholland made detailed notes and kept them in a secure location. Some months later Mulholland heard an appeal by the police for any information as to help with the investigation into the murder of Patrick Finucane. As a result, Mulholland contacted the police and was interviewed on 7 September 1990 about interviews he had with William Stobie, however at the time he did not wish to make a statement and substantiate these allegations.

As a result, Stobie was arrested and interviewed over a period between 13 September 1990 and 20 September 1990. During these interviews Stobie denied any involvement in the murder and was subsequently released without charge.

On 19 April 1999, at the request of Sir Ronnie Flanagan, Chief Constable of the RUC, John Stevens, Deputy Commissioner of the Metropolitan Police was asked to re-investigate the murder of Patrick Finucane.

One line of enquiry was to re-interview Neil Mulholland. As a result, on 3 June 1999 Mulholland made a lengthy statement and produced his original notes of meetings with Stobie in 1990. As a result of this and other evidence Stobie was arrested, interviewed and on 23 June 1999 was charged with the murder of Patrick Finucane."

One of the matters upon which the appellant relied before us was that the statement that "Stobie denied any involvement in the murder" was misleading. Detective Chief Inspector Turner said in the course of his evidence to the judge:

"... it is right that he denied his involvement in the murder. However, he admitted that certain things, such as certain facts, such as he was the quartermaster at the particular time that he was asked to supply certain weapons at the particular time and that he recovered certain firearms after the murder. He denied that he knew that the target was in fact specifically Patrick Finucane, but that in fact it was to be a top Provo."

©TSCH/2022/84/13

27 OCT '99 15:34 FRANCIS KEENAN 01232 439252

DCI Turner also accepted that these admissions were the "bones" or core of the case made by Stobie in his police interviews, which was in substance an admission that he had played an ancillary role in the murder.

In 1990 the applicant had interviewed Stobie and obtained a full and detailed account from him of the part which he had played. His reason for doing so, according to the article by the applicant which was published on 27 June 1999, was that if he ever feared that his life was in danger his story could be made public - the implication being that if he told it to the applicant the knowledge that he had done so and that it would all be published would deter the police from revealing to the UFF that he had been an informer. The applicant did not publish the story until Stobie was arrested and charged with the murder. Stobie has now denied any involvement in this crime.

The article published over the applicant's name in the issue of the Sunday Tribune for 27 June 1999 contained a detailed account of his interviews with Stobie and of the information which Stobie gave him. The first interview in 1990 lasted for some two and a half hours, and according to the article the applicant and Stobie had met several times since then, most recently in May 1998. Reference is made in the course of the article to notes made by the applicant after the first interview. The article purports to quote these notes verbatim in setting out the account given by Stobie of his part in obtaining the guns used in Finucane's murder and handing them over to other men in a drinking club. Initials are also used to describe several persons who are stated to have been closely concerned with planning or executing the murder.

The Application for Production

On 8 July 1999 Detective Inspector Clements of the RUC made an ex parte application to the judge under paragraph 3 of Schedule 7 to the 1989 Act for production of the applicant's

©TSCH/2022/84/13

27 OCT '99 15:34 FRANCIS KEENAN 01232 439252

original notes of his interviews with Stobie, together with any background material which came into existence in connection with the applicant's research preceding the publication of his article. The application was grounded on the statement, prepared by DCI Turner, to which we have referred. The judge also asked to see certain other documents in order to satisfy himself that the application was properly founded:

a) the witness statement made by Neil Mulholland on 3 June 1999;

b) a summary of the questions put to Stobie during interview and the answers which he gave;

c) Stobie's written statement given by him to the police at interview on 23 June 1999.

The judge granted the application and made the order sought, but limited it to the interview notes and did not include the background material.

The applicant moved to set the order aside, as provided for in paragraph 4(2)(a) of Schedule 7 to the 1989 Act. The matter first came before the judge on 27 July 1999, when the applicant's counsel applied to the court for disclosure of all four documents which had been before the judge when he granted the ex parte application. The judge directed that the statement of facts be handed over, but declined to order production of the other three documents, on the ground that their production might hinder the continuing police investigations.

At the resumed hearing on 23 August 1999 Mr C M Lavery QC on behalf of Mr Moloney renewed the application for production of these documents, and asked the court, if it would not so order, to stay the application, or alternatively to transfer it for hearing before another judge. Counsel for the RUC was willing to furnish a copy of Stobie's statement, but the judge declined to order production of the remaining documents and refused the other applications. In so ruling he bore in mind that, as appears from the observations of Stuart-Smith LJ in *R v Crown Court at Middlesex Guildhall, ex parte Salinger* [1993] 2 All

©TSCH/2022/84/13

27 OCT '99 15:35 FRANCIS KEENAN 01232 439252

ER 310 at 320, information may have to be withheld from the recipient of the order if it would be inconsistent with the security of the operation to disclose it. The judge spelt out his reasons at page 6 of his written decision given on 2 September 1999:

> "In deciding whether it was proper to order the disclosure of this material I had to balance the security of the continuing inquiries by the police against the ability of the respondent to deal with the case being made against him. In any police investigation there are matters which the police properly may wish to withhold from public scrutiny during an inquiry lest those who may be made subject to further questioning or arrest are alerted to the nature of the case against them. In view of the contents of Mr Moloney's article there is, as I shall later refer to in this judgment in a different context, substantial evidence to indicate that there are obvious lines of inquiry to be pursued against people who have not yet been arrested. I also took into account that the extremely detailed nature of Mr Moloney's article, and the fact that the applicant would call witnesses who would be available for cross examination, would enable Mr Moloney to present his case fully and forcefully. I further ruled that if an issue should arise during the questioning of an officer as to whether a specific question ought to be answered then the court would have to decide whether that question should be answered.
>
> It is also clear from Salinger's case that the court may have been made aware of information at the ex parte stage which cannot be disclosed to the respondent at an application of this sort. If the court takes the view that that sensitive information was decisive then the court should tell the respondent that that is the case. In the present case I was satisfied that the documents shown to the Court on 8 July were not decisive and that it is possible for me to consider the present application entirely upon the basis of the evidence which was to be placed before the court on 23 August. In those circumstances I did not consider it necessary to discharge myself in order that the matter be heard before another judge."

The judge then went on to hear evidence and argument on the substantive application before him. Oral evidence was given by Detective Inspector Clements and Detective Chief Inspector Turner in support of the application. The applicant did not give evidence or call any witnesses on his behalf. Following submissions from counsel the judge reserved his decision and gave a written judgment on 2 September 1999.

©TSCH/2022/84/13

22 OCT '99 15:35 FRANCIS KEENAN 01232 439252

He held that there were reasonable grounds for believing that the material would be of substantial value to the investigation. He reached that conclusion, however, not on the ground of benefit to the prosecution of Stobie, for he considered that there was sufficient information in the applicant's article for the prosecution to decide whether Mr Mulholland's evidence appeared to be credible. The police had submitted that it would be of substantial value to see the notes as well as the article to assess that matter, but the judge did not accept that. He held, however, that there were reasonable grounds for believing that the notes would be of substantial value to the investigation into the identity of other persons concerned in the murder, who were referred to only by initials in the article.

The judge went on to consider whether there were reasonable grounds for believing that the production of the notes was in the public interest, having regard to the factors specified in paragraph 3(5)(b) of Schedule 7. He weighed in the balance the competing public interests of the freedom of the Press and the prosecution of perpetrators of serious crimes. He pointed to the fact that in this case, unlike the large majority of cases where journalists seek to withhold information about their sources, the informant Scobie actively wished to have his name known rather than to remain anonymous. He concluded:

> "I am satisfied that there are reasonable grounds for believing that it is likely that if the police inspect the original notes they may be materially assisted in their investigations, and therefore disclosure of the notes is *necessary* for that investigation. This necessity is so strong that it outweighs the competing high public interest in preserving journalistic sources *in the circumstances of the present case*, not least because the nature and content of that material has been placed in the public domain at the behest of a self-confessed participant in the events surrounding the death of Mr Finucane. By doing so Stobie cannot be legitimately considered to have been, nor can anyone in a similar position in the future be deterred from imparting such information by the fear of his identify, or the details, becoming public. In such circumstances Stobie has effectively abandoned any protection for his information which the law might otherwise consider, and the

©TSCH/2022/84/13

27 OCT '99 15:35 FRANCIS KEENAN 01232 439252 P.10

balance of the competing public interests is in favour of the order sought by the applicant being granted."

The Issues on Appeal

Mr Lavery relied on three main grounds of attack upon the judge's order, as contained in his amended statement:

1. The police had failed to show the requisite good faith in making the *ex parte* application to the judge, and therefore the order for production should be set aside.

2. The procedure adopted by the judge was unfair, in that

   a) relevant material was withheld from the applicant and his advisers;

   b) the judge proceeded to decide the application to set aside his order, although he had himself seen the material withheld;

   c) the judge permitted the police to alter the basis on which they sought production of the applicant's notes, although his advisers had not received notice of that alteration.

3. The judge had (a) misdirected himself in a material respect; (b) taken factors into account in an incorrect manner; (c) reached a conclusion which was unreasonable in the *Wednesbury* sense.

Good Faith in the ex parte Application

It is a well established principle applicable to ex parte applications for relief of certain kinds that the applicant is under a duty to make full and fair disclosure of all material facts known to him or of which he should obtain knowledge on making proper inquiries. It was first applied to ex parte applications for injunctions, then to applications such as those for a rule nisi for a writ of prohibition (*R v Kensington Income Tax Commissioners, ex parte Princess Edmond de Polignac* [1917] 1 KB 486). Its most common application in modern conditions is in applications for Mareva injunctions and Anton Piller orders.

©TSCH/2022/84/13

22 OCT '99 15:36 FRANCIS KEENAN 01232 439252 P.11

In *Dalglish v Jarvis* (1850) 2 Mac & G 231 the phrase *uberrima fides* was imported from the law of insurance, although one might question the necessity for the adjective. Although many of the cases concern deliberate withholding of material in order to mislead and deceive the court, it is quite apparent from the judgments in *Brink's-MAT Ltd v Elcombe* [1988] 3 All ER 188 that innocent non-disclosure, in the sense that the importance of the material was not perceived by the applicant, may be sufficient to cause the court to discharge the ex parte order. The court has a discretion whether to discharge the order, and, depending on the facts, may decide not to do so or may grant a new order: *ibid* at 193d, per Ralph Gibson LJ. Where the police apply for an order for production of documents, it is not unlike the case where a plaintiff applies for an interim injunction: the court has to weigh up a number of factors and place them in the balance in reaching a decision whether to grant the relief sought. The order of the court will be immediately effective and may have serious consequences for the defendant. In such a case it is of importance that the court should be furnished with full and frank information, so that it will not make an order on incorrect or inadequate material.

The passage in the statement grounding the ex parte application brought before the judge to which exception is taken is the phrase "During those interviews Stobie denied any involvement in the murder". It became apparent from DCI Turner's evidence on the inter partes hearing that Stobie had admitted a considerable degree of involvement in the preparations for and aftermath of the murder, while denying that he knew the identity of the intended victim. No application was made at the inter partes hearing for the discharge of the ex parte order on the ground of non-disclosure, nor was any submission directed towards the discrepancy between the statement and the evidence given. The evidence was received by the judge and he then went on to decide the matter on the facts before him.

©TSCH/2022/84/13

27 OCT '99 15:36 FRANCIS KEENAN 01232 439252 P.12

It was submitted on behalf of the applicant that the adoption of the phrase in the statement was a deliberate *suppressio veri* designed to mislead and deceive the court. We are of the view that it was a somewhat inadequate description of the admissions made by Stobie, but we do not consider that the applicant has established that it was deliberately inadequate. We take into account the fact that evidence was given at the inter partes hearing without objection which contained a full and proper disclosure of the material facts. The judge when making his decision on the issues in that hearing was fully apprised of the facts material to that decision.

It seems to us questionable whether the applicant can properly ask this court at the present stage of the matter to set aside the judge's order on the ground of non-disclosure at the ex parte stage when he did not ask the trial judge to discharge his original order. If we assume that we could properly set it aside now, however, we are satisfied that it is not an appropriate case for it. The degree of misstatement was not in our judgment gross or such as to attract serious censure. Once the evidence was before the judge which showed the true state of the facts he had the proper information on which to decide the substantive issue. In those circumstances we have no doubt that if he had been asked to discharge the order he would have been right to refuse. We therefore do not consider that the applicant can succeed on this ground.

Unfairness of Procedure

The old principle of natural justice, *audi alteram partem*, is a far-reaching principle which can embrace almost every question of fair procedure: Wade & Forsyth, *Administrative Law*, 7th ed, p 494. The content of the principle is not prescribed in immutable terms, and much will depend upon the facts and circumstances of the instant case: *ibid*, p 521 and authorities cited there. The applicant's advisers were furnished with the grounding

©TSCH/2022/84/13

P.13 FRANCIS KEENAN 01232 439252 27 OCT '99 15:37

statement and with Stobie's statement given to the police on 23 June 1999. Their complaint is that they and their client were not permitted to see Neil Mulholland's witness statement made on 3 June 1999 and a summary of the questions and answers at Stobie's interviews. The gravamen of their case was that the information contained in Mr Moloney's notes was already well known to the police, so that its production could not be of substantial value to the investigation. It was of importance to see the documents withheld in order to confirm the amount which the police knew.

One might readily agree that it would be desirable that the applicant and his advisers should be able to see these documents, in order to ascertain if they might help their case in setting aside the order for production. It is envisaged, however, that some information may have to be withheld from the person to whom the order is directed, although he should be told of its existence: see *Ex parte Salinger* [1993] 2 All ER 310 at 320, per Stuart-Smith LJ. The withholding is therefore not a sufficient ground of itself for setting aside the order. Much may depend on the circumstances and the effect on the fairness of the proceedings of the withholding. As Stuart-Smith LJ recognised, the withheld information may well be decisive, but the fact that it is withheld will not without more invalidate the proceedings.

In the present case the judge recognised the difficulty which faced the applicant and was clearly familiar with the principles expressed in *Ex parte Salinger*. He stated that the withheld information was not decisive and that he would decide the inter partes application entirely upon the basis of the evidence which was to be placed before him at the hearing on 23 August 1999. Mr Lavery contended that he should not have put himself in this position, but should have asked another judge to hear the inter partes application. While there may be cases in which such a course is desirable, we do not consider that it has been established that it was unfair for the judge himself to hear that application. It not infrequently is necessary

©TSCH/2022/84/13

27 OCT '99 15:37 FRANCIS KEENAN 01232 439252 P.14

for a judge to put out of his mind a matter which he has heard in court and leave it out of account when reaching his decision, for example when prejudicial evidence is given in a non-jury criminal trial. We consider that a conscientious judge is capable of doing so properly in a case of the present nature. We would observe that in *Ex parte Salinger* the same judge heard both the ex parte and the inter partes applications without objection. We therefore do not consider that this ground has been established.

The allegations of unfairness in the judge's conduct of the hearing are another facet of the same complaint. The applicant's counsel made the case that the judge uncritically accepted the police case concerning the withheld documents without probing the assertions made about their importance and did not take a sufficiently pro-active role to test DCI Turner's answers or require him to give proper replies to questions in cross-examination. It was contended that he did not subject the evidence and the police case to a critical analysis and that this bears out the suggestion that his approach to the case was not even-handed. We have examined the transcript of the proceedings with care in order to assess the validity of these complaints, but we do not regard them as made out. We would respectfully adopt the remark of Lord Bingham of Cornhill CJ in *R v Hereford Crown Court, ex parte Rowlands* [1998] QB 110 at 125 that immaterial and minor deviations from best practice would not have the effect of vitiating proceedings.

Misdirection and Unreasonableness

Mr Lavery submitted that the judge had misdirected himself in failing to have regard to Stobie's own admissions made in interview and in his misapprehension of the content of DCI Turner's evidence concerning the identity of the persons referred to by initials in the applicant's article. He also suggested that the judge had not given sufficient weight to the freedom of the Press.

©TSCH/2022/84/13

27 OCT '99 15:37 FRANCIS KEENAN 01232 439252 P.15

The suggestion that the judge was in error in failing to give sufficient weight to the freedom of the Press is in our view misplaced. It is entirely clear from the terms of his judgment, particularly the discussion at pages 10-11 and his reference to the importance of Press freedom at page 16, that the factor was in the forefront of his mind. Counsel's real complaint was that the judge did not give it as much weight as the applicant and his advisers thought it deserved. This approach is erroneous in the same way as that which Lord Hoffmann rejected in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 2 All ER 636 at 657, where he said:

> "The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fits or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.
>
> This distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State".

The reasoning of this passage and a similar expression of opinion in Lord Keith of Kinkel's speech in the same case at page 642 is in our opinion directly applicable, *mutatis mutandis*, to the contention advanced in the present case.

Mr Lavery submitted that the judge had misdirected himself in failing to have regard to Stobie's own admissions made in interview and in his misapprehension of the content of

©TSCH/2022/84/13

22 OCT '99 15:38 FRANCIS KEENAN 01232 439252 P.16

DCI Turner's evidence concerning the identity of the persons referred to by initials in the applicant's article. In respect of Stobie's admissions, the judge ruled that he would decide the inter partes hearing without reference to them because they were not released to the applicant. The basis of the applicant's complaint was that the admissions might be helpful to his case. They may on the other hand tend to support the police case for production, a matter which we cannot tell when we have not seen the documents in question. The judge did state his opinion, however, at page 7 of his judgment that the documents withheld were not decisive and that he could reach a conclusion on the application before him entirely upon the basis of the evidence placed before the court. In these circumstances, when he disregarded the withheld documents, in an effort to avoid or minimise prejudice to the applicant, we do not think that it can be said that he misdirected himself by declining to consider a relevant factor.

The judge held at page 13 of his judgment that the material contained in the appellant's notes would not in his judgment be of sufficiently substantial value to justify his ordering their production:

> "In the present case the prosecution already have evidence from Mr Mulholland against Stobie, and whilst Mr Moloney's notes would be of value to supporting the credibility of Mr Mulholland's evidence I am not persuaded that the benefit to the prosecution of Stobie would be sufficiently substantial to justify the notes being produced to the police. One consequence of such an order would be that the prosecution would have advance notice of admissions by Stobie to someone else who is not willing to give evidence for the prosecution when they rely on alleged admissions by him to a person who is willing to give evidence on their behalf. There may be good reasons for making such an order where the person against whom it is sought is not a journalist. However, that does not have to be decided in this case as there is sufficient information in Mr Moloney's article for the prosecution to decide whether Mr Mulholland's evidence appears to be credible or not."

©TSCH/2022/84/13

27 OCT '99 15:38 FRANCIS KEENAN 01232 439252

The learned judge then proceeded to consider the submission that the notes would be of substantial value in assisting the police in following other lines of inquiry in relation to Mr Finucane's murder. He stated at pages 14-15 of his judgment:

> "D/C/I Turner advanced another reason why the order should be made, namely that there are further lines of enquiry that the police wish to follow into Mr Finucane's murder. This was advanced by him in his oral evidence in the ex parte application of 8 July and again on 23 August. His evidence is that there are facts referred to in the article that were not contained in Mr Mulholland's statement and notes. D/C/I Turner was very guarded in his evidence, and understandably so. As I have already stated, the police may properly wish to withhold matters from public scrutiny during an enquiry lest those who may be made subject to further questioning or arrest are alerted to the nature of the case against them. Whilst such reticence is, in general, entirely understandable, nevertheless the police have to point to the existence of sufficient material which enables the Court to decide for itself whether there are reasonable grounds for believing that the material sought will be of substantial value to the investigation."

DCI Turner dealt with the importance of these initials in a couple of passages of his evidence. In his examination in chief he said:

> "One of the differences in the article written by Mr Moloney are initials of persons who played a role or a suspected role in the murder of Patrick Finucane and whilst it may be, as was said earlier, that the defence contention that the police must know what those initials stand for, it is very important that we actually examine those notes to see those initials as an original note, contemporaneous note or, in fact, to see whether they are expanded upon at all in the notes and they've been abbreviated for the article, for example, your Honour."

When he was pressed in cross-examination on what he could expect to obtain from the notes he stated that the initials of people referred to in the article as associates of Stobie might be in full in the notes, although he could not say until he saw the notes whether any names or further information might be found there. He was not prepared to say what knowledge the police had already of the identity of those people. As the judge observed in his judgment, Mr

©TSCH/2022/84/13

27 OCT '99 15:38 FRANCIS KEENAN 01232 439252 P.18

Turner had necessarily to be guarded in what he said about the police investigations, but although he denied he was speculating he was compelled to accept on this issue that he would not know what help might be derived from the notes until he saw them.

The judge set out his conclusion on this issue at pages 14-15 of his judgment:

> "D/C/I Turner pointed to the references in the article by their initials to those who actually took part in Mr Finucane's murder. He said that it was very important for the police to examine Mr Moloney's notes to see whether the initials were expanded and, if they were, so ascertain the identity of those involved. Mr Lavery said that this was a spurious point and that the police knew who were referred to, but D/C/I Turner said some of the initials appeared to refer to names not mentioned by Mr Mulholland.
>
> If that is the case, then that material alone is potentially of very great value indeed to the investigation, as it would enable the police to positively identify some of those involved in Mr Finucane's murder. I see no reason to disbelieve D/C/I Turner's evidence and this alone is sufficient to satisfy me that the material sought is likely to be of substantial value to the investigation. It must also be remembered that the majority of the references to Stobie's admissions are in the third person, and so it is important that the original notes be inspected to see whether they contain additional material evidence unknown to the police and which may lead to those still at large being brought to justice for this very grave crime. Naturally, there is a degree of speculation involved at this stage in accessing how significant such material may prove to be, but that is inherent in any application of this kind where the police have not seen the original material and are relying on a description of it by a third party, in this case by Mr Moloney."

In this conclusion the learned judge has in our opinion either misapprehended the purport of DCI Turner's evidence or has misdirected himself in respect of the matters which he had to consider. In that evidence Mr Turner did not or could not say that the notes made by Mr Moloney would be likely to contain any material which would advance the investigation. He could not produce any ground for his expressed hope that there would be any more enlightening reference in the notes to the persons whose initials were contained in

©TSCH/2022/84/13

27 OCT '99 15:39 FRANCIS KEENAN 01232 439252 P.19

the article. It is understandable that he wanted to compare them with the text of the article, in the hope that they might throw up something which would assist him. But he was quite unable to point to anything which might indicate that he was likely to gain anything from them. Naturally a conscientious investigator will want to follow up every possible avenue by which he might be able to obtain information or indications which could take forward his task of finding and producing evidence against those who committed or were committed a serious crime. But in order to satisfy the condition laid down by paragraph 3(3)(a) of Schedule 7 to the 1989 Act the police have in our view to show something more than a possibility that the material will be of some use. They must establish that there are reasonable grounds for believing that the material is likely to be of *substantial* value to the investigation. DCI Turner's evidence does not in our judgment start to meet that criterion. We consider that the judge has either misapprehended that evidence or has adopted an incorrect test in reaching his conclusion, which the evidence cannot support.

We therefore are impelled to quash the judge's decision given on 2 September 1999 whereby he ordered the appellant to produce the documents specified in his order of that date.

©TSCH/2022/84/13

27 OCT. '99 15:39 FRANCIS KEENAN 01232 439252 P.20