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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY CONAL CORBETT FOR JUDICIAL
REVIEW

Corbett's (Conal) Application [2016] NIQB 23

Before: Morgan LCJ, Weatherup LJ and Weir LJ

MORGAN LCJ (giving the judgment of the court)

[1] This is an application for judicial review of a decision by the Police Service of Northern Ireland ("PSNI") whereby, during the applicant's detention in a police station following his arrest, it refused to give the applicant an undertaking that his voice would not be recorded for the purpose of analysis in respect of future investigations. Mr Macdonald QC and Mr Devine appeared for the applicant and Dr McGleenan QC and Mr Egan appeared for the respondent. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] On 1 May 2015, following a coded bomb warning, the PSNI discovered and made safe a bomb hidden at the junction of Brompton Park and Crumlin Road, Belfast. The IRA subsequently claimed it had planted the bomb. On 7 May 2015 the PSNI arrested the applicant under section 41 of the Terrorism Act 2000 ("the 2000 Act") and he was taken to Antrim Serious Crime Suite where his detention was authorised.

[3] During the initial police interviews on 7 May 2015, the applicant failed to answer any questions and did not make any statement either personally or through his solicitor. The following day, prior to the commencement of further interviews, the applicant's solicitor requested that the PSNI give an undertaking that any recording of the applicant's voice in the interviews would not be retained for use in alternative or future investigations. The PSNI refused to give such an undertaking. In the subsequent police interviews the applicant continued to remain silent with his

solicitor indicating that she had advised him to do so given the PSNI's refusal to give the requested undertaking.

[4] On the same date the applicant's legal representatives appeared before Treacy J, sitting in the Queen's Bench Division of the High Court, seeking a declaration that the PSNI's policy to record and/or retain suspects' voices is unlawful. Treacy J granted the applicant leave to apply for judicial review. The applicant was charged on 10 May 2015 with offences under section 57 and section 58(1)(b) of the Terrorism Act 2000. He was brought before a Magistrates' Court which refused him bail. He remains a remand prisoner on foot of these charges.

[5] In an affidavit dated 12 August 2015, Detective Inspector David Lowans of the PSNI avers that other than the recordings of the interviews conducted on 7 and 8 May 2015 the PSNI do not hold voice recordings of the applicant during any other after caution interview. During the course of the present investigation, however, the applicant's computer was seized and files contained on that computer include recordings of the applicant's voice.

Codes of Practice

[6] Schedule 8 of the 2000 Act makes provision for the treatment of persons detained under section 41 of that Act. Paragraph 3(1) of Schedule 8 requires the Secretary of State to issue a Code of Practice about the audio recording of interviews (the audio Code) which was duly issued in 2001. Paragraph 2.2 of the audio Code directs that one tape, the master tape, will be sealed before it leaves the presence of the detained person and a second tape will be used as a working copy. Paragraph 4.27 provides that the detained person shall be handed a notice at the end of the first interview which explains, *inter alia*, the use which will be made of the tape recording, the period of retention of the tape and the arrangements for destruction of the tape.

[7] Section 8 of the audio Code deals with tape destruction:

"i. At the conclusion of criminal proceedings, or in the event of a direction not to prosecute, the contents of a working copy of the tape shall be completely erased. Such tapes shall not be reissued for the purpose of recording interviews.

ii. Unless the provisions of the Criminal Procedure and Investigations Act 1996 code of practice applies or unless civil proceedings have been instigated or it is clear that none will be, master tapes will be destroyed six years after the date of the interview."

[8] The criminal proceedings to which reference is made in the first of the paragraphs are clearly those potentially arising from the matters in respect of which the interview was conducted. The purpose of the paragraph is to ensure that the working copy is only available during the period that such proceedings are ongoing.

That tends to suggest, therefore, that the use to be made of the working copy of the tape is connected to those criminal proceedings.

[9] The provisions in the second paragraph dealing with the master tape are designed first to satisfy the need to retain tapes relevant to the investigation as required by the 1996 Act. The second purpose is to ensure that the master tape will still be available in the event that any civil proceedings are issued in respect of the detention of the interviewee. This provision is clearly designed to secure the exposure of any misconduct during interviews and the protection of police officers against false claims.

[10] The notice to which reference is made at paragraph 6 above has a section entitled "The Use Which Will Be Made of the Audio Recording":

"The interview has been audio recorded using a single twin or triple deck tape recorder. One of the tapes has been sealed in your presence and will be kept securely in case it is needed in court (this tape is known as the "master tape"). The other tape will be a working copy to which the police and you or your solicitor may listen if you wish. Both tapes are protected against tampering."

The notice also provides information in respect of the retention of audio tapes which is consistent with the Code's provisions for tape destruction.

[11] Paragraph 3(2) of Schedule 8 of the 2000 Act empowers the Secretary of State to make an order requiring the video recording of interviews of those arrested under section 41. Paragraph 3 (4) provides that where such an order is made the Secretary of State shall issue a Code of Practice about the video recording of interviews (the video and audio Code). The relevant video and audio Code was issued in 2003. This Code provides at paragraph 3.1 that upon arrival at a designated police station the detained person shall be given a written notice by the uniformed officer receiving him. The form of the notice is set out at Annex A and the substance of it is in the following form:

"This note is issued pursuant to paragraph 3.1 of the code of practice governing the video recording of interviews by police officers with persons detained under section 41 of the Terrorism Act 2000. A copy of the code is available in this station for you to consult with should you wish.

This is to inform you that all interviews with police officers which take place in this police station are video recorded. This is done to protect you and to protect the interviewing officers.

The recording may be needed if:

- (a) criminal or civil proceedings are instituted
- (b) you make a complaint of ill-treatment against any of the interviewing officers.

[The recording will not be used for any other purpose.]”

There are no provisions within the body of the audio and video Code expressly dealing with the use to which the tapes may be put. Paragraph 9 deals with the destruction of the master recording and as before seems to be related to (i) the needs of the particular criminal investigation being conducted or (ii) the requirement to have available material to identify wrongdoing at the interview or to protect police officers from false claims.

Consideration

[12] Dealing first with the audio and video Code, it was submitted that the court should be slow to construe the text in square brackets in Annex A at paragraph 11 above, as being part of the Code of Practice itself. We reject that submission. The words are plainly inserted into Annex A. If they were not intended to be part of the Code of Practice they would not have appeared in the Annex. There is no basis for us to proceed as if they were not there. We also note that the Form TACT 47A served upon an interviewee under the audio and video Code contains the same words without the square brackets.

[13] Turning then to the circumstances in which the recording may be needed, it is plain from the reference to (b) in Annex A that the requirement to access the recording could only arise in relation to events occurring in the course of, or related to, the conduct of those actual interviews which were subject to audio and video recording. Secondly, the purpose of the recording is to secure the protection of the applicant and the interviewing officers. That purpose governs the reference to the recording being needed where criminal or civil proceedings are instituted. To suggest, as the respondents have in this case, that there is no limitation on the purposes for which the police can access the tapes is to go far beyond the purpose of protecting the applicant or the interviewing officers. In our view, the purpose of protecting the interviewee and the interviewing officers plainly circumscribes the use which can be made of the tape. The tapes can be used for those purposes either for the institution of criminal or civil proceedings or in connection with a complaint of ill treatment.

[14] It was submitted that it would be anomalous if there was a difference in the use that could be made of the audio material under the audio Code and that which could be made of the material under the audio and video Code. We recognise, however, that the contents of each of the codes differ and that they may serve different purposes. We do not, therefore, consider that the limitations of the audio and video Code read directly across to the audio Code.

[15] We note, however, that there are similarities within the codes. Primary among those is the approach to the retention of tapes. We have set out at paragraph 7 above

those contents of the audio Code which show that the question of destruction is directly related to the investigation in respect of which the interview was conducted. That approach is repeated in the Annex containing the form which is made available to the interviewee at the end of the first interview. That is a strong indicator, therefore, that the use to which the tapes can be put is also related to the progress of the investigation in respect of which the interview was conducted.

[16] Secondly, we consider that the interpretation advanced on behalf of the respondent was that the passage set out at paragraph 10 above meant that the tapes could be used by police for any police purposes. Such a broad entitlement gives rise to the risk of arbitrary use absent any express conditions or protections. The body of the Code of Practice is silent on the extent of the use of the working tape which can be made by police. The context set by the provisions on tape destruction point towards the working copy only being used for matters connected to the investigation in respect of which the interview was conducted. That interpretation also guards against arbitrary use. For those reasons we consider that it is to be preferred.

Conclusion

[17] The interview working tapes retained under the audio Code can only be used in criminal or civil proceedings or an investigation of a complaint of ill treatment related to the interviews conducted with the person detained. In light of this finding we do not consider it necessary to make any declaration.