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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 DAVID BROWN FOR JUDICIAL REVIEW

STEPHENS J

Introduction

[1] This is an application by David Brown, a life sentence prisoner, for judicial review challenging a decision made by the Secretary of State for Northern Ireland ("the Secretary of State") to consult Sir Michael Nicholson, a retired Lord Justice of Appeal, before issuing a certificate under Article 11(1) of the Life Sentences (NI) Order 2001 which will fix the tariff element of the applicant's life sentence.

The facts

[2] At about midnight on 27 May 1994 the applicant came across Mrs Roberta St Clair Gunn, a stranger to him. Having knocked her to the ground he battered her skull in with a brick striking numerous blows. On 10 October 1995 the applicant pleaded guilty at Belfast Crown Court to the murder of Mrs Gunn. Nicholson L.J., the trial judge, sentenced the applicant to the mandatory punishment of life imprisonment. The applicant remains in prison. In January 2007 Lord Justice Nicholson retired from judicial office. A process is presently being undertaken, pursuant to Article 11(1) of the Life Sentences (NI) Order 2001, to fix the tariff element of the applicant's life sentence.

The legislative background

[3] Historically decisions regarding the release of prisoners sentenced to life imprisonment were a matter for the executive. Under *Section 23 of the Prison Act (Northern Ireland) 1953* the Minister of Home Affairs could at any time, if he thought fit, release on licence a person serving a term of

imprisonment for life. There was no statutory obligation on the Minister to consult with any judicial figure. It was his decision and his alone. The functions of the minister were transferred to the Secretary of State by *SI 1973 No 2163*. The statutory obligation upon the Secretary of State to consult with the Lord Chief Justice "together with the trial judge, if available" was introduced in Northern Ireland by *Section 1(3) of the Northern Ireland (Emergency Provisions Act 1973*. Accordingly at the time that the applicant was sentenced by Nicholson LJ any decision regarding the release of the applicant was a decision for the Secretary of State after consultation with the Lord Chief Justice and the trial judge, if available.

[4] *Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms* requires that in "the determination of any criminal charge against him everyone is entitled to a fair and public hearing … by an independent and impartial tribunal established by law." The determination of sentence by the executive does not comply with Article 6 of the Convention. Article 5 of the *Life Sentences (Northern Ireland) Order 2001* made fundamental changes in respect of the manner in which tariffs were set for all defendants sentenced to life imprisonment after 8 October 2001, the date upon which the order came into operation. Under Article 5 the tariff, representing the elements for retribution and deterrence, is to be fixed as a part of the sentencing process by the trial judge. There are appeal procedures for the defendant and the Attorney General can refer a tariff to the Court of Appeal. The Secretary of State and the executive play no part in this sentencing exercise. Article 5 of the 2001 Order applies to those sentenced after 8 October 2001 but for existing life prisoners, who had been sentenced prior to that date and in respect of whom no tariff had been set, Article 11 of the 2001 Order provided the process whereby a tariff could be set. The process involves a certificate of opinion from the Secretary of State as to, inter alia, the tariff which would have been fixed by the court by which the prisoner was sentenced if the 2001 Order had been in operation at the time when he was sentenced.

[5] The present equivalent provisions in England & Wales are contained in the Criminal Justice Act 2003. The process for existing life prisoners is different from that provided by Article 11 (1) of the 2001 Order. In England and Wales the process does not involve a certificate from the executive but rather the tariff is set by the High Court with provisions for an appeal to the Court of Appeal by the defendant and the availability of an Attorney General's reference. There is no role for the executive in England and Wales in respect of existing life prisoners.

<u>The issue between the parties to this judicial review application.</u>

[6] Article 11(1) of the Life Sentences (NI) Order 2001 provides:-

> "This Article applies where, in the case of an existing life prisoner, the Secretary of State, *after consultation with* the Lord Chief Justice and *the trial judge if available*, certifies his opinion that, if this Order had been in operation at the time when he was sentenced, the court by which he was sentenced would have ordered that the release provisions should apply to him as soon as he had served a part of his sentence specified in the certificate." (emphasis added)

Accordingly Article 11(1) requires the Secretary of State to consult with the Lord Chief Justice and the trial judge, if available. *In an application by Colin King for judicial review* [2002] NICA 48 the consultation process has been interpreted as a recommendation as to tariff by the Lord Chief Justice and by the trial judge, if available, to the Secretary of State. In each individual case and as part of the procedure whereby the Lord Chief Justice makes a recommendation to the Secretary of State an oral hearing is convened, if the prisoner requests one. In this case the applicant requested such a hearing which took place on 10 March 2008. Prior to that hearing an issue had arisen as to whether Sir Michael Nicholson, who had been the trial judge, should be consulted in view of the fact that he had retired from judicial office in January 2007. The oral hearing proceeded on that date in front of the Lord Chief Justice but Sir Michael Nicholson played no part in it. Subsequently the Secretary of State by letter dated 28 March 2008 conveyed to the applicant his decision to consult with Sir Michael Nicholson despite his retirement. The applicant contends that Sir Michael Nicholson should not be consulted and these proceedings were commenced.

[7] The point at issue in these proceedings is whether Sir Michael Nicholson should be involved in the Article 11(1) consultation despite his retirement from judicial office. Mr McDonald Q.C., who appeared with Mr Hutton on behalf of the applicant, put the applicant's case on two distinct grounds, as follows:

(a) That Sir Michael Nicholson is no longer "available" within the meaning of Article 11 (1) by virtue of his retirement. That the word "available" should be given the meaning that he is able to be used as a judge rather than as a citizen who previously occupied judicial office. That he is not able to be used as a judge if he is no longer in office. Fixing the tariff is a judicial sentencing exercise. It should be performed by a judge not a retired judge.

(b) Alternatively that if "available" in Article 11(1) on ordinary principles of construction is to be construed

> as meaning whether Sir Michael Nicholson is willing and able to perform the function, then applying the interpretative obligation under Article 3 of the Human Rights Act 1998, it should be read and given effect in a way which is compatible with the Convention rights. The applicant's case is that if it was construed in accordance with the ordinary principles of construction it would not be compatible with the Convention rights because, it is asserted, a retired judge does not have the necessary independence, for instance, it is asserted, that the oath of office no longer applies.

The preliminary issue

[8] Prior to the listing of this judicial review application the parties had raised the issue as to whether the application was in a criminal cause or matter. This preliminary point is of significance because it effects the composition of the court hearing the application and the court to which any appeal lies. Order 53 Rule 2(1) of the Rules of the Supreme Court (Northern Ireland) 1980 provides that in a criminal cause or matter the jurisdiction of the court on or in connection with an application for judicial review shall be exercised by three judges sitting together. That is subject to the qualification in Rule 2(2) that the jurisdiction may be exercised by two judges if the Lord Chief Justice so directs and also the qualification in Rule 2(6) that the jurisdiction on consent may be exercised by a single judge in accordance with section 16(5) of the Judicature (Northern Ireland) Act 1978. A court of two or more judges exercising jurisdiction pursuant to Rule 2 shall be called a Divisional Court. As far as an appeal is concerned section 35(2) (a) of the Judicature (Northern Ireland) Act 1978 provides that –

> "no appeal to the Court of Appeal shall lie … from any judgment of the High Court in any criminal cause or matter."

Section 41 of the Judicature (Northern Ireland) Act 1978 provides in certain circumstances for an appeal to the House of Lords from the High Court in a criminal cause or matter. In England and Wales a similar provision applies in relation to the court to which any potential appeal lies, see section 18 (1) (a) of the Supreme Court Act 1981, section 1 of the Administration of Justice Act 1960 and paragraph 53/14/22 of the Supreme Court Practice 1999. A Divisional Court can also hear civil matters. For the position in that regard in England and Wales see 4th Edition of Halsbury's Laws of England volume 1(1) at note 1 paragraph 175. For the position in Northern Ireland see In Re Coleman's Application [1988] NI 205 at page 209 B – H.

[9] Skeleton arguments were made available to the listing judge in relation to the preliminary issue as to whether this judicial review application was a civil matter or in a criminal cause or matter. In effect both the applicant and the respondent agreed that it was not in a criminal cause or matter. On the basis of that agreement and without any oral argument, the listing judge directed that the case be listed on the basis that it was a civil matter. The case was not listed before a divisional court. Subsequently I was assigned to hear the substantive application. At the start of the hearing I raised the issue as to whether the judicial review application was in a criminal cause or matter despite the parties' agreement to the contrary. Both parties contended that it was a civil application and furthermore that this issue had been disposed of by the listing judge. I proceeded to hear the substantive application but it became apparent during the course of the hearing that the basis upon which the respondent had contended that it was not in a criminal cause or matter was no longer sustainable.

[10] The respondent originally submitted that under Article 11(1) of the 2001 Order the trial judge is not the decision making agency.

> "Rather, his function is to express his opinion about the appropriate tariff. Properly analysed, his status is that of *a consultee.* He is a *persona designata.* In the modern era, the importance of consultation and the requirements and standards which it embodies needs little emphasis."

In short the respondent was contending that the decision maker was the Secretary of State and that Sir Michael Nicholson, and by extension the Lord Chief Justice, were purely consultees. That if Sir Michael Nicholson was consulted he would be

> "performing his statutory function of consultee in the present case."

This characterisation of the process by the respondent then lead to the submission that the secretary of state in making the impugned decision, that is the decision to consult with Sir Michael Nicholson, was acting in a self contained statutory context

> "performing a statutory function."

Accordingly the judicial review application was not in a criminal cause or matter. The applicant agreed and contended that "the underlying proceedings remained administrative in form in domestic law". The applicant also referred to a number of cases in England & Wales in which there had been appeals to the Court of Appeal from decisions of Divisional

Courts in relation to the equivalent statutory provisions. Such appeals should have been direct to the House of Lords if the judicial review applications were in a criminal cause or matter. For instance in *R v Secretary of State for the Home Department, ex parte Doody and other appeals* [193] 1 All ER 151 Glidewell LJ said:

> "This court does not have jurisdiction to determine these appeals if they are appeals in a "criminal cause or matter" within s 18 (1) of the Supreme Court Act 1981. Counsel for all the appellants and for the respondent were unanimous in their view that the appeals are not in a criminal cause or matter, and on a brief consideration of the relevant authorities I agree."

Accordingly it was contended that there was a significant and steady acceptance of jurisdiction on the civil side.

The test as to whether a criminal cause or matter

[11] In *Cuoghi v Governor of Brixton Prison and another* [1997] 1 WLR 1346, Lord Bingham CJ said that if the main substantive proceedings in question are criminal, proceedings ancillary or incidental thereto are similarly to be treated as criminal. Weatherup J in *an application by JR14 for Judicial Review* [2007] NIQB 102 reviewed the authorities in relation to the test to be applied and suggested that three steps were appropriate -

a) Firstly, a distinction must be made between the judicial review application before the court and "*the underlying substantive process in which the Applicant has become involved*" see paragraph [10] of his judgment.

b) Secondly, "……*it is necessary to determine whether the underlying substantive process may lead directly to a charge or punishment before a court*" see paragraph [11] of his judgment.

c) Thirdly, "…….*it is necessary to establish whether the particular application which has been made to the court is ancillary or incidental to that substantive process*" see paragraph [11] of his judgment.

Conclusion in relation to the preliminary issue

[12] There were a number of difficulties with the respondent's initial contentions as to the character of the process under Article 11(1) of the 2001 Order and the subsequent characterisation of these proceedings being civil.

[13] The first difficulty is that the respondent sought to draw a distinction between the impugned decision, namely the decision to consult Sir Michael Nicholson which is termed administrative and the actual consultation which will thereafter take place which the respondent accepted during argument was judicial. It was suggested that as the decision to consult Sir Michael was administrative then the judicial review application was civil. The distinction sought to be drawn is a distinction without a difference. The decision to consult and the actual consultation is all part of the one process.

[14] The second difficulty is highlighted by the respondent's reference to Section 27 of the Judicial Pensions and Retirement Act 1993. The respondent's primary contention was that Sir Michael Nicholson's response to the request for consultation was authorised by Article 11 (1) of the 2001 Order. In the alternative the respondent relied on *section 27 of the Judicial Pensions and Retirement Act 1993* for the proposition that Sir Michael Nicholson could continue to act "for the purpose of continuing to deal with, giving judgment in, or dealing with any ancillary matter relating to, any case begun before him before he ceased to hold that office." The full terms of Section 27 are as follows:-

> "(1) Notwithstanding that a person has vacated or otherwise ceased to hold an office to which this Section applies –
>
> (a) he may act as if he had not ceased to hold the office for the purpose of continuing to deal with, giving judgment in, or dealing with any ancillary matter relating to, any case begun before him before he ceased to hold that office; and
>
> (b) for that purpose, and for the purpose of any proceedings arising out of any such case or matter, he shall be treated as being or, as the case may be, as having been a holder of that office;
>
> but nothing in this subsection shall authorise him to do anything if he ceased to hold the office by virtue of his removal from it".

Accordingly the respondent was contending that under section 27 of the Judicial Pensions and Retirement Act 1993 Sir Michael Nicholson would have jurisdiction to act as if he had not ceased to hold judicial office because he was dealing with *a matter ancillary to the criminal case* against the applicant. If the respondent needs to rely on Section 27 of the Judicial Pensions and Retirement Act 1993 to establish Sir Michael Nicholson's jurisdiction to act then this emphasises that the substantive proceedings are criminal. It would then be an express part of the respondent's case that Sir Michael Nicholson would be dealing with a matter ancillary to the criminal case against the applicant. The ancillary process in question results in a tariff being set representing the element of deterrence or retribution. In the alternative if the respondent does not have to rely on the Section 27 of the Judicial Pensions and Retirement Act 1993 to establish Sir Michael Nicholson's jurisdiction to act, but rather can rely on Article 11(1) of the 2001 Order, then he would still have been responding purely because he was the trial judge in a criminal case. That is he would have been responding in respect of the applicant's criminal case. This is emphasised by the respondent's articulation of the contribution of the trial judge to the Article 11 process. The respondent stated –

> "… the unique contribution which the trial judge can bring to a tariff fixing exercise under Article 11 cannot be gainsaid. It is probably correct that in a majority of cases the insights and assessments of the trial judge will be deeper and more fully informed than those of the Lord Chief Justice. Their may be nuances and subtleties which only the trial judge can fully grasp. Moreover, the trial judge is likely to be better versed than the Lord Chief Justice in matters pertaining to the course and conduct of the criminal proceedings, such as the timing of a guilty plea."

That articulation of the contribution of the trial judge demonstrates that the consultation purely relates to a criminal cause or matter.

[15] The third and fundamental difficulty is that Sir Michael Nicholson and the Lord Chief Justice are not consultees. They are performing a judicial function which is a sentencing exercise in relation to the applicant, see paragraph [31] of the judgment of the Court of Appeal in *an application by Colin King for Judicial Review* [2002] NICA 48. In that case the Court of Appeal considered whether Article 11(1) of the 2001 Order was compatible with Article 6(1) of the European Convention. It concluded that Article 11 was on ordinary principles of construction incompatible with Article 6 (1) by virtue of the Secretary of States involvement. However applying Section 3 of the Human Rights Act 1998 the Court of Appeal was prepared to read into Article 11 a restriction on the opinion of the Secretary of State which required him to accept the minimum term set by the judiciary and the lower of the two minimum

terms, if faced with a choice. Thus the Court of Appeal construed Article 11 (1) as meaning in effect:-

> 'This Article applies, where in the case of an existing life prisoner, the Secretary of State, after consultation with the Lord Chief Justice and the trial judge if available, certifies his opinion *in accordance with their recommendation or the lower of the two recommendations,* that if this Order had been in operation when he was sentenced, the court by which he was sentenced would have ordered that the release provisions should apply to him as soon as he had served a part of his sentence specified in the certificate'.

Far from being a pure consultee, as originally submitted on behalf of the Secretary of State, Sir Michael Nicholson would be exercising a judicial sentencing function in respect of the applicant and if Sir Michael Nicholson's recommendation as to tariff was lower than that of the Lord Chief Justice, then the Secretary of State would be bound to certify his opinion in accordance with Sir Michael Nicholson's recommendation. The issue in this judicial review application is as to whether Sir Michael Nicholson should be involved in that judicial sentencing exercise in respect of the applicant.

[16] In conclusion, applying the steps set out by Weatherup J:

> (a) the substantive exercise in which the applicant has become involved is a judicial sentencing exercise.
> (b) The substantive process will lead directly to a punishment being imposed, namely the fixing of a tariff.
> (c) The judicial review application is ancillary or incidental to that substantive process in that it relates to the question as to who should be involved in the substantive process.

[17] Accordingly, it is my conclusion that this application for judicial review involves a criminal cause or matter and should be dealt with by a Divisional Court.