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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

McCafferty's Application (leave stage) [2009] NIQB 59

AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY

TERENCE McCAFFERTY

WEATHERUP J

[1] This is an application for leave to apply for judicial review of a decision of the Secretary of State of 18 December 2008 to revoke the licence of the applicant and to recall him to HMP Maghaberry. Mr O'Donoghue QC appeared for the applicant, Mr Maguire QC for the respondent, the Secretary of State, and Mr Sayers for the Remission of Sentence Commissioner.

[2] The Northern Ireland (Remission of Sentences) Act 1995 provides for the release on licence of persons subject to restricted remission, namely persons who have been sentenced for scheduled offences to which section 79 of the Terrorism Act 2000 applies.

Section 1(3) of the 1995 Act provides that the Secretary of State may revoke a person's licence under the section if it appears to him that the person's continued liberty would represent a risk to the safety of others or that he is likely to commit further offences. A person whose licence is revoked shall be detained in pursuance of his sentence and if at large be deemed to be unlawfully at large.

Section 1(4) provides that if a person's licence is revoked he may make representations in writing to the Secretary of State about the revocation and he shall as soon as practicable be informed of the reasons for the revocation and of his right to make representations.

[3] The Secretary of State introduced 'Additional Safeguards in Relation to the Revocation of Licences under The Northern Ireland (Remission of Sentences) Act 1995'.

Paragraph 1 provides that the Secretary of State will appoint a Commissioner who holds or has held judicial office to consider and advise him on any representations made by the recalled prisoner.

Paragraph 4 provides that, subject to paragraphs 5 and 6, the procedure for dealing with representations shall be determined by the Commissioner.

Paragraph 5 provides that where the Secretary of State certifies any information as 'damaging information' the Commissioner shall not in any circumstances disclose it to the prisoner or his legal representative or any other person, except any special advocate appointed by the Attorney General to safeguard the interests of the prisoner. Further a special advocate shall not disclose the damaging information to anyone.

Paragraph 6 provides that the prisoner, his legal representative and any witness appearing for him shall be excluded from any oral hearing while evidence is being examined or argument heard relating to damaging information.

Paragraph 9 provides that where information has been certified as damaging information the Secretary of State shall within such period as the Commissioner may determine give to the Commissioner and the prisoner a paper setting out the gist of the damaging information insofar as he considers it possible to do so.

[4] The Commissioners issued a statement of procedures under the title 'Remission of Sentences Act 1995 – Case Procedures'.

Paragraph 2 provides that after the prisoner has made representations the Secretary of State shall serve on the Commissioner and the prisoner or his legal representative a copy of his case dossier, including the gist of any damaging information on which he intends to rely, details of the witnesses he intends to call and copies of his statements of evidence.

Paragraph 3 provides that within 21 days of receipt of the dossier the prisoner or his legal representative should serve on the Commissioner and Secretary of State any further representations along with details of any witnesses that are requested and statements of their evidence.

The matter then proceeds to a hearing before the Commissioner.

[5] The applicant relies on four grounds for judicial review relating to the common law and the European Convention.

First, the decision to recall the applicant was arbitrary and oppressive and offends the principle of proportionality in connection with the right to respect for private and family life under Article 8.

Secondly, there has not been a speedy decision in relation to the applicant's recall.

Thirdly the Commissioner is not independent and impartial.

Fourthly the use of closed information or damaging information is unfair.

[6] First of all the applicant contends that the decision to recall was arbitrary and oppressive and disproportionate. The respondent's decision was based first of all on his association with named persons who were said to

be members of a dissident group and secondly on the applicant being involved in planning dissident activity. If the allegations are well founded there would be good grounds for a recall. Whether or not that will be established is a matter for the Commissioner's hearing and it is not a matter for this Court. However the applicant claims that the recall is unlawful as it is based on the applicant's association with the people who have been named and the applicant contends that a condition could have been imposed on his release so as to provide that he would not associate with those persons. However association with others is not the complete picture because it is not his associations in themselves about which the Secretary of State has complained, but that he has these associations and he is planning dissident activity. A licence condition about non-association with specified persons would not have been sufficient to address the issue which concerns his activities. The issue is whether or not he is conducting these activities. The letters issued on behalf of the Secretary of State setting out the reasons for the recall refer both to the association and to the planning and the substance of the concern is the planning of dissident activity with others. There is no arguable basis for judicial review on this ground.

[7] The second ground concerns the issue of a speedy decision. Article 5(4) of the European Convention does require that the lawfulness of any detention should be decided speedily by a court. In this case the applicant's dossier was provided to the applicant on 18 February 2009 and under the procedures the applicant had 21 days to respond. The applicant has not responded, but rather has sought a series of extensions, all of which have been granted by the Commissioner. It is apparent that such delay as has occurred is that of the applicant in not responding. The applicant has not invited the Commissioner to make a decision without the response. On the contrary the applicant has asked for extensions for the purpose of making a response. The Commissioner awaits the response. There is no arguable basis for complaint about the absence of a speedy decision and I do not grant leave on this ground.

[8] The next ground is that the Commissioner is not independent and impartial. Article 5(4) involves a determination by an independent and impartial tribunal. No particulars of the applicants ground are stated as to the basis on which it is alleged that the Commissioner is not independent and impartial but Counsel contended that the two Commissioners who are in post have been appointed by the Secretary of State and it is the Secretary of State who also exercises the power of recall of prisoners.

[9] The issue of the independence of the Remission Commissioners was raised in Adair's Application (18 February 2003). Carswell LCJ stated at paragraph 15, in considering the issue as a right to a fair trial in the event that Article 6 of the Convention applied, that one had to look at the whole process, including the role of the Commissioner and the availability of judicial review.

The view was expressed that the Commissioners "…. are manifestly independent and impartial".

[10] A similar issue arose in relation to the Sentence Commissioners in Sheridan's Application [2004] NIQB 4. In an application for early release under the Northern Ireland (Sentences) Act 1998 the applicant challenged the independence of the Sentence Commissioners on the ground that they were required to decide issues between the applicant and the Secretary of State, and it was the Secretary of State who paid their remuneration and who could pay them compensation if they ceased to be Commissioners prior to the expiry of their terms of office. In the present case there is no evidence concerning the terms of office of the Remission Commissioners but they may be similar in that they are presumably paid out of public funds although we do not know the circumstances in which they might cease to be Commissioners. In Sheridan it is worthy of note that the Commissioners were appointed by the Secretary of State under the statutory scheme which provided for their appointment under section 1 of the 1998 Act. The present appointments are not made under a statutory scheme but are provided for under the 'Additional Safeguards' introduced by the Secretary of State. Mr O'Donoghue draws attention to the fact that the Secretary of State stated in Parliament that he would make the additional safeguards statutory and that has not occurred. Nevertheless it appears that these additional safeguards are being applied to the recall of prisoners. Girvan J stated in Sheridan in relation to the Sentence Commissioners that under the common law principle set out in Porter v Magill [2002] 1 All ER 465 that it could not be argued that a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Commissioners were biased.

[11] A third case referred to by the applicant is R(Brooke) v Parole Board [2008] 1 WLR 1950. A much more detailed examination of the circumstances relating to the members of the English Parole Board was undertaken. It was held that they did not demonstrate objective independence. By directions and by the use of his control over the appointment of members of the Board the Secretary of State has sought to influence the manner in which the Board carried out its risk assessment; the Department's use of its funding powers aimed at ensuring that the Board refrained from or reduced an aspect of its procedure, which the Department did not consider warranted the expense involved, was interference which exceeded that which could properly be justified by the role of sponsor; the Secretary of State's general power to terminate a member's appointment, if satisfied that he had failed satisfactory performance of duties, was not compatible with the independence of members of the Board. There is no such evidence in the present case, either in relation to directions issued about the way to carry out risk assessments or whether funding is affected by the way in which they carry out their functions. I have not been satisfied that there is an arguable case that the Commissioners are other than independent and impartial.

[12] The fourth ground is at the heart of this application, namely the use of closed or damaging information. The applicant relies on Article 6 of the Convention but the reference should be to Article 5(4) and generally to common law procedural fairness. The essence of the complaint is that the material on which the respondent concluded that the applicant was planning dissident activity has not been disclosed. The Secretary of State contends that he cannot disclose that information because of the risk to the sources of the information and to the means by which it was gathered. This is not an unfamiliar problem concerning the right of a party to know and to respond to an adverse case and the extent of disclosure that requires to be made in order to satisfy that right and the rights of others.

[13] The House of Lords decided Secretary of State for the Home Department v AF [2009] UKHL 28 last Wednesday in relation to the imposition of Control Orders in England and the disclosure of information to those who had been subject to such Orders. Lord Phillips noted that on 19 February 2009 the Grand Chamber of the European Court in Strasbourg gave judgment in A v The United Kingdom and addressed the extent to which the admission of closed material was compatible with the requirements of Article 5(4). The House of Lords quoted extensively from the Strasbourg Court but I rely on one sentence at the end of paragraph 220 of the judgment in A v UK -

> "Where, however, the open material consists purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5(4) would not be satisfied."

The applicant in the present case relies on the open material consisting purely of general assertions about the applicant's associations and activities and the decision to recall him to prison being based solely or to a decisive degree on damaging information.

[14] Lord Phillips at paragraph 65 states that examples were cited by the Grand Chamber in A v UK covering the withholding of material evidence and the concealing of the identity of witnesses. The Grand Chamber has now made clear that non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him, at least where he is at risk of consequences as severe as those normally imposed under a Control Order. At paragraph 68 Lord Phillips concluded by stating that the Judge adjudicating on the Control Orders would have to consider, not merely the allegations that had to be disclosed in order to place in the open sufficient to satisfy the

requirements laid down by the Grand Chamber, but whether there was any other matter whose disclosure was essential to the fairness of the trial.

[15] Thus the ECtHR recognised that some information could be withheld and the identity of witnesses could be concealed but the permitted non-disclosure could not deny the party concerned knowledge of the essence of the case against him. The extent of the information that has to be given in order to satisfy the requirements of procedural fairness will depend on the context and the circumstances of the particular case. The House of Lords in AF referred the matter back to the Judge to make a determination as to the proper disclosure in order to satisfy the requirements of Article 5(4) and procedural fairness.

[16] The respondent in the present case seeks a reference back to the Commissioner, who has been appointed by the Secretary of State, to determine the appropriate extent of disclosure to the applicant. The applicant seeks leave to judicially review the extent of the disclosure to the applicant, limited as it is by the existence of 'damaging information'. The respondent on the other hand claims that the applicant's complaint is premature in that initially it is for the Commissioner to determine whether the extent of disclosure to the applicant satisfies the requirements of procedural fairness. When that has been decided, and if the applicant is dissatisfied, he may then challenge the Commissioner's determination by way of Judicial Review. The applicant responds that the 'Additional Safeguards' and the Commissioners 'Case Procedures' do not permit disclosure of damaging information by the Commissioner. That is so but that limitation does not expressly prevent the Commissioner from ruling that fairness requires additional information to be disclosed by the Secretary of State and indeed the respondent's Counsel contends that that is what the Commissioner might do. It is not that the Commissioner would disclose the information, which he is not permitted to do, but that he might rule that the disclosure that has been made is insufficient and it would then be for the Secretary of State to determine whether he would furnish more information. If he did so the applicant would have the opportunity to make representations on the information disclosed. If the Secretary of State did not disclose any further information, presumably that would be a matter that would impact on the decision made by the Commissioner.

[17] There is a dispute between the applicant and the respondent as to the role of the Commissioner when the issue is whether the extent of the disclosure made by the Secretary of State is sufficient to satisfy the requirements of procedural fairness. Initially this is a matter for the Commissioner. Until the Commissioner determines whether he has power to consider the issue and if he has, whether the disclosure is sufficient in the interests of procedural fairness, and the applicant and the Secretary of State have reacted as they each see fit to whatever that ruling might be, it seems to

me that it cannot be said to be arguable that the procedure is unfair. At the present state of the proceedings before the Commissioner the outworking of the procedures on the disclosure of information is not known. I accept the respondent's contention that this ground is premature.

[18] Accordingly, I refuse leave on the first three grounds, namely the arguments about the imposition of a condition to the licence, the speedy decision and an independent and impartial Commissioner. On the fourth ground on closed or damaging information I propose to adjourn this application for leave pending a decision by the Commissioner on the nature of his powers and how they might be exercised in relation to the damaging information. When that decision has been made by the Commissioner the matter might proceed to a substantive hearing before the Commissioner or return to the Court on the issue of the grant of leave to apply for judicial review on the fourth ground.