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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY STEPHEN JAMES McCLEAN FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE SECRETARY OF STATE FOR NORTHERN IRELAND

COGHLIN J

[1] In this case the applicant seeks, inter alia, a declaration that the Northern Ireland (Sentences) Act 1998 (Amendment of Section 10) Order 2000 was ultra vires the powers of the Secretary of State under the Northern Ireland (Sentences) Act 1998, a declaration that the said order is incompatible with Article 5 of the European Convention on Human Rights and Article 5 read in conjunction with Article 6 and an order of Mandamus compelling the release of the applicant and other associated relief.

The Statutory Framework

[2] The Northern Ireland (Sentences) Act 1998 was passed for the purpose of putting into effect the undertaking included in the agreement between the British and Irish Governments in 1998 to put in place mechanisms to provide for an accelerated programme for the release of prisoners convicted of scheduled offences. The relevant sections of the Northern Ireland (Sentences) Act 1998 ("the 1998 Act") provide as follows:

> "3.-(1) A prisoner may apply to the Commissioners for a declaration that he is eligible for release in accordance with the provisions of this Act.
>
> (2) The Commissioners shall grant the application if (and only if) –

…

(b) the prisoner is serving a sentence of imprisonment for life in Northern Ireland and the following four conditions are satisfied.

(3) The first condition is that the sentence –

(a) was passed in Northern Ireland for a qualifying offence, and

(b) is one of imprisonment for life or for a term of at least five years.

(4) A second condition is that the prisoner is not a supporter of a specified organisation.

(5) The third condition is that, if the prisoner were released immediately, he would not be likely –

(a) to become a supporter of a specified organisation, or

(b) to become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland.

(6) The fourth condition is that, if the prisoner were released immediately he would not be a danger to the public.

(7) A qualifying offence is an offence which –

(a) was committed before 10 April 1998

(b) was when committed a scheduled offence within the meaning of the Northern Ireland (Emergency Provisions) Act 1973, 1978, 1991 or 1996, and

(c) was not the subject of a certificate of the Attorney General for Northern Ireland that it was not to be treated as a scheduled offence in the case concerned.

…

6.-(1) When Commissioners grant a declaration to a life prisoner in relation to a sentence they must specify a day which they believe marks the completion of about two-thirds of the period which the prisoner would have been likely to spend in prison under the sentence.

(2) The prisoner has a right to be released on licence (so far as that sentence is concerned) –

(a) on the day specified under sub-section (1), or

(b) if that day falls on or before the day of the declaration, by the end of the day after the day of the declaration.

(3) But if he would have a right to be released on or by the end of a listed day (within the meaning of Section 4(3)) he has a right to be released on or by the end of the next non-listed day.

7.-(1) The Secretary of State must inform the Commissioners of the length of time served by persons –

(a) sentenced in Northern Ireland to imprisonment for life, and

(b) released on licence after 1982 and before 1999.

(2) In specifying a day under Section 6(1) Commissioners must have regard to –

(a) information given under sub-section (1) above, and

(b) previous decisions of Commissioners.

(3) Before Commissioners specify a day under Section 6(1) the Secretary of State may notify them of cases which he believes are particularly relevant in the prisoner's case; and the Commissioners may take the notification into account.

8.-(1) The Secretary of State shall apply to Commissioners to revoke a declaration under Section 3(1) if, at any time before the prisoner is released under Section 4 or 6, the Secretary of State believes –

(a) that as a result of an order under Section 3(8), or a change in the prisoner's circumstances, an applicable condition in Section 3 is not satisfied, or

(b) that evidence or information which was not available to the Commissioners when they granted the declaration suggests that an applicable condition in Section 3 is not satisfied.

(2) The Commissioners shall grant an application under this Section if (and only if) the prisoner has not been released under section 4 or 6 and they believe –

(a) that as a result of an order under Section 3(8), or a change in the prisoner's circumstances, an applicable condition in Section 3 is not satisfied, or

(b) that evidence or information which was not available to him when they granted the declaration suggested that an applicable condition in Section 3 is not satisfied."

[3] Section 9 of the 1998 Act specifies the conditions to be attached to the licence of a released prisoner and provided the Secretary of State with power to suspend a licence and the Commissioners with power, in certain circumstances, to revoke a licence. Section 10 provides as follows:

> "*Release: further provisions*
>
> 10.-(1) This section application if –
>
> *(a)* a prisoner is granted a declaration in relation to a sentence, and
>
> *(b)* the day on which he has a right to be released under Section 4 or 6 (so far as that sentence is concerned) falls after the accelerated release day.
>
> (2) He has a right to be released under the section concerned (so far as that sentence is concerned) on the accelerated release day.
>
> (3) But if the accelerated release day is a listed day (within the meaning of Section 4(3)) he has a right to be released on the next non-listed day.
>
> (4) In the case of a sentence passed before the day on which this Act comes into force, the accelerated release day is the second anniversary of that day.
>
> (5) In the case of a sentence –
>
> *(a)* passed after the day on which this Act comes into force, and
>
> *(b)* treated in accordance with Section 26 of the Treatment of Offenders Act (Northern Ireland) 1968 as reduced by a period of custody beginning before the day on which this Act comes into force, the accelerated release day is the second anniversary of that day.
>
> (6) In the case of any other sentence passed after the day on which this Act comes into force,

> the accelerated release day is the second anniversary of the start of the sentence (or the start of any period of custody by which the sentence is treated as reduced in accordance with Section 26 of the 1968 Act).
>
> (7) Nothing in this Section shall permit the release of a prisoner following a declaration under Section 3(1) before he has served two years of the sentence to which the declaration relates; and for that purpose any period of custody by which the sentence is treated as reduced in accordance with Section 26 of the 1968 Act shall be treated as served as part of the sentence.
>
> (8) The Secretary of State may by order amend sub-sections (4) to (7)."

[4] On 25 July 2000 the Secretary of State for Northern Ireland made the Northern Ireland (Sentences) Act 1998 (Amendment of Section 10) Order 2000 ("the Amendment Order") which came into force on 27 July 2000 and provided as follows:

> "1. This order may be cited as the Northern Ireland (Sentences) Act 1998 (Amendment of Section 10) Order 2000 and shall come into force on 27 July 2000.
>
> 2. For Section 10(7) of the Act there shall be substituted –
>
> > `(7) Nothing in this Section shall permit the release of a prisoner following a declaration under Section 3(1) –
> >
> > *(a)* before he has served two years of the sentence to which the declaration relates; or
> >
> > *(b)* at any time when an application under Section 8(1) for revocation of the declaration has yet to be finally determined;

> and for the purpose of *(a)* any period of custody by which the sentence is treated as reduced in accordance with Section 26 of the 1968 Act shall be treated as served as part of the sentence'."

The Factual Background

[5] On 2 February 2000 the applicant, together with another man, was convicted of murder, attempted murder and possession of firearms arising out of the notorious sectarian attack upon the Railway Bar at Poyntzpass, County Down as a result of which Damien Trainor and Philip Allen were murdered and two other men sustained injuries from gunshot wounds. The applicant subsequently appealed his convictions but his appeal was dismissed on 28 June 2001. The applicant received sentences of life imprisonment in respect of the two counts of murder, 20 years imprisonment in respect of each of two counts of attempted murder and 15 years imprisonment in respect of one count of possession of firearms and ammunition.

[6] The applicant applied to the Sentence Review Commissioners ("the Commissioners") for a declaration that he was eligible for release under the provisions of Section 3 of the 1998 Act and on 2 May 2000 the Commissioners made a substantive determination granting the application and specifying that the 12 November 2008 was the date which would mark the completion of the period specified in Section 6(1) of the 1998 Act.

[7] On 5 July 2000 the applicant was released from prison on pre-release home leave and on 6 July he was arrested and charged with attempted murder and causing grievous bodily harm with intent following a violent disturbance in Banbridge County Down. The applicant was remanded in custody and refused bail on 21 July 2000 although he was ultimately acquitted of these charges on 27 November 2001.

[8] On 10 July 2000 the respondent wrote to the Sentence Review Commissioners applying under Section 8 of the 1998 Act for a revocation of the applicant's release. This application was based upon the assertion by the respondent that, as a consequence of the applicant's involvement in the incident at Banbridge, one of the relevant conditions under Section 3 of the 1998 Act was no longer satisfied, namely, that the applicant would not be a danger to the public. On 19 July 2000 the respondent made an ancillary application to expedite the decision by the Commissioners as to whether to revoke the declaration upon the following grounds:

> "1. Unless this application is granted, the above named will be released on licence (on his life sentence) by the end of 28 July 2000;
>
> 2. If licensed it would be open to him to apply for bail in respect of the charge of attempted murder;
>
> 3. Despite the very serious nature of that charge it is possible that, if he had recently been released on licence by the Secretary of State, a court might grant him bail;
>
> 4. He is a convicted murderer who stands charged with attempted murder and who would pose a serious threat to public safety if at liberty;
>
> 5. If released on licence, it would not be possible for the Secretary of State to suspend that licence unless new information which led him to believe that the above named had breached the conditions of his licence became available;
>
> 6. Failure to grant the application would be unreasonable and would defeat the clear intention of the legislation."

This application was considered by the Single Commissioner who acceded to some aspects but declined to vary the 14 day maximum period between issue of the preliminary indication and substantive determination. On 26 July 2000 the Commissioners issued a preliminary indication that they were minded to grant the Secretary of State's application to revoke the declaration of eligibility for release in the following terms:

> "The Commissioners believe that the information now available suggests that the qualifying condition in Section 3(6) is not satisfied for the following reasons:
>
> (1) The respondent has been charged with an offence of grave violence.
>
> (2) The alleged offence occurred very shortly after the respondent was released on pre-release home leave.

(3) While noting the respondent's claim that the incident leading to the charge involved self-defence the Commissioners also note that a High Court application for bail was refused on 21 July 2000.

The declaration previously granted to Mr McLean under Section 6 of the Act, in the substantive determination of 2 May 2000 would therefore be revoked if this preliminary indication were to become the substantive determination."

[9] On the same day as the Commissioners issued the preliminary indication, 26 July 2000, the respondent laid before Parliament the 2000 Order.

The Submissions of the Parties

[10] Mr Treacy QC, on behalf of the applicant, advanced his case by way of two submissions:

(1) Mr Treacy's primary submission was that while the Amendment Order of 2000 purported to have been made by the respondent in accordance with the powers conferred upon him by Section 10(8) of the 1998 Act it was in fact ultra vires since Section 10(8) only empowered the Secretary of State to make orders amending sub-sections (4) to (7) of Section 10. Sections (4) to (7) of Section 10 of the Act of 1998 related to the manner in which a prisoner's accelerated release day was to be calculated and these sub-sections were quite separate from and unrelated to Section 8 of the 1978 Act which dealt with revocation. In acting as he had, Mr Treacy QC argued the Secretary of State was using his power to amend in accordance with Section 10(8) for a purpose quite different from that for which it had been given by Parliament, namely, to amend the Section 8 procedure.

(2) Mr Treacy QC's secondary submission was that the Northern Ireland (Sentences) Act 1998 was intended by Parliament to confer upon a prisoner successfully applying for an accelerated release date a "statutory right" to be released which was quite independent of the sentence passed upon the prisoner when originally convicted. He further argued that the right of the applicant to be released on the accelerated release date, 28 July 2000, in accordance with the determination made on 2 May 2000 could not be removed as a result of the Amendment Order unless the Secretary of State complied with Article 5(1) and Article 5(4) of the European Convention on Human Rights. Mr Treacy QC submitted that the applicant's detention subsequent to the passage of the Amendment Order could not be brought with any of the grounds specifically set out in Article 5(1) and, even if one of the specified grounds did apply, the applicant had been denied access to a

procedure whereby the lawfulness of his detention could be reviewed by a competent tribunal at reasonable intervals in accordance with Article 5(4) in accordance with a procedure which was compliant with Article 6.

Conclusions

[11] As Mr Treacy QC reminded the court the Northern Ireland (Sentences) Act 1998 was passed as a consequence of the agreement reached between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland concluded at Belfast on 10 April 1998, an agreement which the participants in the multi-party negotiations by which it was preceded strongly commended to the people "North and South". In the aftermath of this agreement both Governments undertook to put in place mechanisms to provide for an accelerated programme for the release of prisoners convicted of scheduled offences in Northern Ireland or, in the case of those sentenced outside Northern Ireland, similar offences.

[12] Since the main effect of the Act of 1998 was the accelerated release into the community of a substantial number of prisoners who had been lawfully convicted of the most serious terrorist crimes, it is not surprising that the legislation also sought to establish certain safeguards in the interests of that community. For example, Section 3 included, among the conditions to be satisfied, that the prisoner was not a supporter of a specified organisation, that if released immediately, he would not be likely to become a supporter of such an organisation, that he would not become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland and that prisoners serving a sentence of life imprisonment should not become a danger to the public if immediately released.

[13] Sections 8 and 9 of the 1998 Act provided further procedures by means of which the Secretary of State and/or the Commissioners could review the risk to the public consequent upon a declaration that a prisoner was entitled to release with Section 8 enabling the Secretary of State to apply to the Commissioners for a revocation of such a declaration prior to the prisoner's release while Section 9 dealt with the conditions under which a prisoner could continue to enjoy his freedom on licence after he had been released.

[14] The amendment effected by Article 2 of the 2000 Order simply specified a further circumstance according to which the accelerated release date of a prisoner following a declaration under Section 3(1) was to be calculated and did not specifically alter the circumstances or conditions under which the Secretary of State could apply to the Commissioners to revoke a declaration in accordance with Section 8. By amending Section 10(7) of the Act as it did the Amendment Order of 2000 simply ensured that the accelerated date of release was fixed in such a way so as to enable any revocation application properly instituted by the Secretary of State under

Article 8 of the 1998 Act to be effectively completed prior to release. Accordingly, I reject the first of Mr Treacy QC's submissions.

[15] I turn now to consider Mr Treacy QC's submissions based upon the applicant's Convention rights.

[16] I do not accept his primary submission that the purpose or effect of the 1998 Act was to establish a statutory right of release for qualifying prisoners irrespective of and unrelated to the sentence of the original court of conviction. The title to the 1998 Act describes the legislation as:

> "An Act to make provision about the release on licence of certain persons serving sentences of imprisonment in Northern Ireland."

As I have already indicated while the Act established a system under which persons convicted of serious terrorist crimes against the community in Northern Ireland could apply for accelerated release from their sentences, this system also put in position safeguards for the public in so far as qualifying prisoners were required to satisfy certain conditions and the right to be released was "… a right to be released on licence (so far as that sentence is concerned)" … - see Sections 4 and 6 of the 1998 Act. The prisoner's licence under Section 4 or 6 was also made subject to conditions by Section 9 and the same section also provided the Secretary of State with a power to suspend and the Commissioners with a power to revoke the licence. As I have already indicated, Section 8 instituted a power to revoke the declaration in appropriate circumstances.

[17] I consider that the passage of the Amendment Order 2000 simply amended the basis upon which accelerated release under the 1998 Act was to be calculated thereby ensuring that prisoners should not be released into the community on licence until the Commissioners had an opportunity to fully and properly determine an application by the Secretary of State to revoke a Section 3(1) declaration in accordance with Section 8 of the 1998 Act. In practical terms, it is perhaps difficult to think of a clearer example of the need for such a provision in the public interest than the pending release of a person convicted of two sectarian murders who had been arrested on a charge of attempted murder and grievous bodily harm on the day after he was released on pre-release home leave. The need to ensure the effective completion of all enquiries into risk is self evidently designed to protect the public and, as far as possible, prevent re-offending. Indeed the duty placed upon the Secretary of State by Section 8(1) of the 1998 Act is mandatory. It has been observed many times that the search for a fair balance between the general interest of the community and the personal rights of the individual is inherent in the whole of the Convention and in Brown v Stott [2001] 2 All ER 97 Lord Steyn speaking of the framers of the Convention said:

> "They also realised only too well that a single-minded concentration on the pursuit of fundamental rights of individuals to the exclusion of the interests of the wider public might be subversive of the idea of tolerant European liberal democracies. The fundamental rights of individuals are of supreme importance but those rights are not unlimited: we live in communities of individuals who also have rights."

In my view, the passage of the 2000 Order was an entirely proportionate response to the factual situation with which the Secretary of State was faced.

[18] It follows from the preceding paragraphs that I do not consider that a breach of Article 5(1) has been established since, in my view, at all material times the applicant was legitimately deprived of his liberty as a result of the original conviction by a court of competent jurisdiction which took place less than 6 months before his pre-release home leave. If I am wrong about this conclusion and Article 5(1) was engaged by the passage of the 2000 amendment, I am satisfied that the passage of this amending order was neither arbitrary nor irrational and that if the applicant was deprived of his liberty such deprivation was a reasonable and lawful response to circumstances disclosing a risk of danger to the public with a sufficient connection with the circumstances of his original offence to justify his detention – see Weeks v United Kingdom [1987] 10 EHRR 293: Waite v United Kingdom [2002] ECHR 53236/99.

[19] Mr Treacy QC also argued that the detention of the applicant after the original accelerated release date of 28 July 2000 was in breach of Article 5(4) of the Convention since his detention thereafter was justified on the basis of individual characteristics such as dangerousness to the public and that, in such circumstances, in order to comply with Article 5(4) the order should have enabled the applicant to have access to a procedure whereby the lawfulness of his detention on foot of the Secretary of State's application for revocation could be determined speedily. However, having had an opportunity to carefully consider the timetable of events, taking into account the applicant's appeal from his original conviction and his subsequent criminal trial before Girvan J subsequent to which the applicant was acquitted on 27 November 2001, I am not persuaded that the time which elapsed before the Commissioners' final determination of the Secretary of State's application to revoke the declaration was such as to give rise to a breach of Article 5(4).

[20] Accordingly, I also refuse the application for a declaration of incompatibility. The application will be dismissed.