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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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McConville's (Sean Gerard Patrick) Application

IN THE MATTER OF AN APPLICATION BY SEAN GERARD PATRICK McCONVILLE FOR JUDICIAL REVIEW

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STEPHENS J

Introduction

[1] The applicant, Sean Gerard Patrick McConville, an offender serving a sentence of imprisonment was granted temporary release from Magheraberry Prison between 11.00 a.m. on 21 October 2013 and 11.00 a.m. 23 October 2013 on a number of conditions including that he:-

(a) must have no contact, direct or indirect, to persons linked to paramilitary organisations; and that he

(b) must have no contact, direct or indirect, with persons linked to criminal activity.

Upon his return to prison he faced disciplinary charges for breach of those conditions on the basis that he met with and therefore had direct contact with Colin Duffy, Harry Fitzismons and Brendan Conway at 1.14 p.m. on 22 October 2013. Furthermore that after that meeting he met with and therefore had direct contact with Gary Toman. On 6 December 2013 he was found guilty at adjudication. By these proceedings he seeks to quash that adjudication.

[2] The applicant's grounds of challenge can be summarised as follows:-

(a) that the conditions that he must have no contact, direct or indirect, with persons linked to paramilitary organisations or to criminal activity was not sufficiently precise and clear. That it was impossible

for him for to regulate his actions to ensure compliance with these conditions. Furthermore that the conditions were in breach of Article 8 ECHR in that they were so widely drafted that it was impossible to assess whether they were a necessary and proportionate interference with his private life.

(b) that there was insufficient evidence that the individuals with whom he had contact had links to paramilitary organisations or to criminal activity.

(c) in the alternative, that if there was sufficient evidence that the individuals or any of them were linked to paramilitary organisations or to criminal activity, then there was insufficient evidence that the applicant was aware of those links.

(d) that the procedure at adjudication was in breach of the applicant's common law right to a fair hearing and in breach of Article 6 ECHR in that he was not permitted legal representation.

[3] Mr Barry Macdonald QC, SC and Mr Malachy McGowan appeared on behalf of the applicant and Mr McGleenan QC and Ms Murnaghan appeared on behalf of the respondent. I am grateful to both sets of counsel for their careful preparation of the case and their written and oral submissions.

Factual background

[4] In 2007 the applicant and two others, Damien William McKenna and Gary Toman were arrested in the Lurgan area following a surveillance operation. They were all charged with and pleaded guilty to possession of explosives with intent contrary to Section 3(1) (b) of the Explosives Substances Act 1883. On 17 September 2009 the applicant was sentenced to a 15 year prison sentence, half in custody and half on licence ([2009] NICC 55). His earliest release date on licence is 21 October 2014 having been committed since 19 April 2007.

[5] The applicant is serving his sentence of imprisonment at Maghaberry prison. That prison has a number of separated wings, including one for Dissident Republican prisoners, known as Roe House. Roe House and other separated wings are run in accordance with very different rules than the rest of the prison. Those who are housed in separated wings do not, as a general rule, engage in rehabilitative courses nor do they fully engage with offender managers or the staff of the Probation Board for Northern Ireland. In order to be permitted to reside in a separated wing a prisoner needs to apply to the Governor, though the application is usually made verbally. Mr Macdonald stated that anyone charged with offences of kind committed by the applicant, that is dissident republican terrorist activity, are advised to be in Roe House and that it would be fair to say that most of the inmates

there would be or had been associated in some way with dissident republican activity.

[6] On 23 August 2007 the applicant applied to be transferred to Roe House. In order to process the application and in accordance with the usual practice, he was interviewed by the Governor who explained what being on the separated wing meant. The applicant was then given a "compact" which set out what was expected of him whilst on the wing. The relevant paperwork was then sent to Prison Headquarters and after intelligence and police input, a decision was made that the applicant was sufficiently aligned to Dissident Republicans to render it suitable for him to reside in separated conditions in Roe House. The applicant was transferred to Roe House and has since remained on that separated wing.

[7] The conditions attached to a prisoner's temporary release are to be found in a document entitled "Temporary absence document." That document contains general conditions, special conditions covering an individual prisoner's particular circumstances, advice to seek guidance if there is any doubt about the meaning of the conditions, a warning as to the consequences of a breach together with a declaration to be signed by the prisoner.

[8] On 21 October 2013 and prior to his temporary release the applicant signed and dated a temporary absence document. This document contained the written conditions with which the applicant was to abide whilst temporarily released from prison. It stated:-

> "6. During your temporary absence you must conduct yourself in a responsible and lawful manner. To do otherwise could result in disciplinary or criminal charges being laid against you.
>
> Special conditions
>
> 2. You must have no contact, direct or indirect, with persons linked to paramilitary organisations.
>
> 4. You must have no contact, direct or indirect, with persons linked to criminal activity."

The document also stated:-

> "You must not engage in any conduct which might bring any of the Prison Service Temporary Release Schemes into disrepute in any way, or which would be likely to cause distress to the victims of crime."
>
> And

> "It is a further condition of your temporary release that, if you have any doubt or uncertainty about the scope or meaning of any of the conditions set out in this undertaking, you will seek guidance from the Governor of the prison or Young Offenders Centre where you are normally held, or from Prison Service Headquarters about the matter, whether before or during the currency of your release."

The document also contained a warning as follows:-

> "You are reminded that any contravention of any of the conditions contained in this undertaking will result in your immediate recall to custody and will render you liable to the preferral of a disciplinary charge under Rule 38(11) of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995."

At the bottom of the document was a declaration in the following terms:-

> "I have read and/or had explained to me the conditions upon which this period of temporary absence has been granted. I accept the conditions and agree to abide by them. I understand that failure to comply with any of these conditions may lead me to being charged under Prison Rules."

[9] The entirety of this document was read aloud to the applicant and he was explicitly warned that any breach of the conditions would result in immediate recall and would render him liable to disciplinary charges. The applicant did not seek any explanation as to the meaning of any of the conditions. He accepted all of those conditions. He signed the declaration. The declaration was then countersigned by a Governor. Having signed the declaration the applicant was temporarily released from prison to stay in Lurgan with his parents. Also on the same day three other prisoners were temporarily released, one of which was Mr Gary Toman.

[10] It is accepted by the applicant that on 22 October 2013 he met and had direct contact with Colin Duffy, Harry Fitzsimons and Brendan Conway and that thereafter he met and had direct contact with Gary Toman. The facts in relation to those contacts were set out in a letter dated 1 November 2013 from a Detective Inspector in the Serious Crime Branch of the Police Service of Northern Ireland ("the PSNI") to the security governor of Maghaberry prison. By that letter the Detective Inspector informed the security governor that at approximately 1.14 p.m. on 22 October 2013 a Mercedes vehicle was observed by police parked in the William Street area of Lurgan and that the police observed four males getting into the vehicle

who were Mr Brendan Conway, Mr Harry Fitzsimons, Mr Colin Duffy and Mr Sean McConville. The letter went on to inform the security governor that the police stopped the vehicle and spoke to the occupants in Victoria Street. That all of them co-operated with the police and gave their details when requested. The detective inspector then stated that:-

> "It causes the PSNI great concern that whilst upon this pre-release period, he has almost immediately re-engaged with senior and prominent Republican figures."

The Detective Inspector went on to describe the individuals with whom the applicant had met as "Senior Dissident Republicans." The Detective Inspector then stated that in addition and after the police stop of the four persons in the car, Mr McConville was then seen at 3.00 p.m., on the same date, in the company of his co-accused and fellow inmate, Gary Toman. The detective inspector's concerns related to the activities of both the applicant and Gary Toman. In his letter he contended that Gary Toman was linked indirectly with those senior dissident Republicans who the applicant had met and that anything spoken about between the applicant and those persons is likely to have been shared with Mr Toman. The detective inspector also stated that the police were of the view that both the applicant and Gary Toman had breached the terms of their pre-release conditions. He requested that in the interests of public safety due consideration be given to revoking any further pre-release visits for both the applicant and Mr Toman.

[11] Following receipt of the letter dated 1 November 2013 and on 7 November 2013 the applicant was charged under rule 38(11)(a) of the Prison and Young Offender Centre Rules (Northern Ireland) 1995 ("the prison rules") with a failure to comply with a condition of his temporary release. He was asked as to whether he had any comment and he replied "none." A disciplinary charge was also brought against Mr Toman.

[12] At some stage prior to his adjudication the applicant was provided with a copy of the letter dated 1 November 2013 and was aware of the allegations contained in it. The applicant accepts that he met the individuals named in the letter but it is his case that:

a) "he had no knowledge that the individuals he met were linked with paramilitary organisations or criminal activity" and

b) that there was no evidence on the papers to corroborate the assertion that the individuals he met had such links save for the unsupported description by the PSNI of them as "senior and prominent republican figures" and "senior dissident republicans."

The applicant has set out his understanding of three of the individuals with whom he met which understanding he asserts he gained from reading the papers and speaking to people.

a) In relation to Mr Colin Duffy he states that he has known Mr Colin Duffy in particular from his local area as they had been neighbours and he previously went out with his daughter. He does not think that Mr Duffy has any criminal convictions as he knows that he was found not guilty of the charge that he had been facing while he had been in prison with the applicant. That he had heard that Mr Duffy had been involved with éirígí which he believed was a political movement that did not have links to paramilitary organisations or criminal activity.

b) In relation to Mr Brendan Conway he believed that Mr Conway was previously convicted of kidnapping and that this offence may have occurred in or around 2008 but he had never heard any allegation that this was carried out by a paramilitary organisation.

c) In relation to Mr Harry Fitzsimons he believed that Mr Fitzsimons was previously convicted in relation to a kidnapping that had occurred in 2003 or 2004 but he believed that this was alleged to have been carried out by the Provisional IRA who he believes are no longer in existence.

[13] The adjudication was listed for hearing on 8 November 2013 but at the applicant's request it was adjourned to 15 November 2013 to allow him to consult with his lawyers.

[14] The applicant did consult with his solicitors and they in turn on 11 November 2013 sent two letters to the Prison Service on behalf of the applicant and also on behalf of Mr Toman. The solicitors requested that the applicant and Mr Toman be entitled to legal representation at the adjudications given the complex and technical matters involved.

[15] On 15 November 2013 the applicant's solicitors were informed that the adjudications in relation to both the applicant and Mr Toman had been adjourned. However there was no response from the Prison Service in relation to the request for legal representation for both of their clients. The applicant's solicitors then commenced an application for leave to apply for judicial review in respect of Mr Toman. The leave hearing was adjourned on 21 November 2013 as the Prison Service was giving consideration to dropping the disciplinary charge in respect of Mr Toman.

[16] On 28 November 2013 Mr Toman was informed that he no longer faced a disciplinary charge and that the adjudication in relation to him was no longer proceeding.

[17] On 2 December 2013 a pre-action protocol letter was sent by the applicant's solicitors setting out the request for legal representation in relation to the applicant and challenging the refusal to take a decision. No response was received to that letter or to the earlier letters of 11 November 2013.

[18] On 6 December 2013 a prison officer came to the applicant's cell and informed him that his adjudication was to go ahead that day. The applicant informed the prison officer that he would not attend in the absence of legal representation and he refused to attend. The Governor conducting the adjudication was not aware of the correspondence from the applicant's solicitors seeking legal representation for the applicant at the adjudication. Given that the applicant refused to attend the Governor took the unusual step of personally going to speak to him in Roe House to obtain his response. The applicant asked whether another prisoner could also be present to hear and witness and also to speak on his behalf. The Governor agreed to this request and permitted another prisoner, Mr Paul Duffy, to be present and to make representations on the applicant's behalf.

[19] Mr Paul Duffy made a similar representation to the Governor as was contained in the applicant's solicitor's letters that the case was complex and that the applicant should have legal representation. The Governor did not consider that the issue were complex and declined to permit legal representation. He took into account:-

(a) The passage of time since the receipt of the letter dated 1 November 2013.

(b) The seriousness of the charge and the seriousness of any potential penalty. In particular he noted that any potential penalty was likely to be quite light as regards any adverse impact that it might have on the applicant because the separated prisoners have a system of pooling all of their resources. The range of penalties that could be imposed was in reality unlikely to particularly inconvenience the applicant.

(c) The complexity of the issues. He considered that the applicant's solicitors were inappropriately concentrating on why and how it was that the PSNI had observed the applicant rather than on the fact that he had associated with the named individuals.

(d) The ability of the applicant to present his own case. He considered that the applicant was fully competent.

[20] The evidence against the applicant was contained in the letter dated 1 November 2013. The Governor reflected on whether there was any need for him to call the detective inspector to the adjudication in order to answer questions but in the circumstances he could see no benefit in having the police officer attend. He considered that the facts contained in the letter dated 1 November 2013 were

reliable, that the applicant's identity and the identity of those with whom he had associated were confirmed. The Governor found that the charges had been proved.

[21] The Governor gave the applicant an opportunity to say anything in mitigation. The applicant refused the offer. The Governor then proceeded to fix the penalty and awarded the applicant 14 days loss of newspapers and periodicals, 14 days loss of earnings, tuck shop, gym and sports and library.

[22] There is a distinction between the penalty that was imposed and other consequences or potential consequences of the charges having been proved. As a consequence of the charge being proved the applicant was not granted temporary release over the 2013 Christmas period. There could have been, but have not been, consequences for the applicant in relation to further temporary releases. The date upon which the applicant is released on licence is fixed by law and there can be no adverse consequence in that regard. However it is conceivable that if subsequent to his release on licence there is an application to return the applicant to prison for a breach of his licence condition then on a consideration of that application one of the factors that might be taken into account was the finding that these charges had been proved.

Whether special conditions two and four were sufficiently clear and precise

[23] Article 8 of the ECHR requires, amongst other matters, that any interference with the right to respect for private and family life be "in accordance with the law." The expression "in accordance with the law" which appears in paragraph 2 of Article 8 or the expression "prescribed by law" which appears in paragraph 2 of Articles 9, 10 and 11 requires sufficient precision to be brought to the interference. At paragraph 49 of its judgment in *Sunday Times v United Kingdom* (1979) 2 EHRR 245, the ECtHR stated that in relation to the requirement of sufficient precision there is not a requirement of certainty but rather that many laws are inevitably couched in terms which, to a greater and lesser extent are vague and whose interpretation and application are questions of practice. The Court expressly recognised that sufficient precision may require the citizen to obtain appropriate advice in order to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. I consider that absolute certainty is not required and I also consider that absolute foresight of the consequences by the citizen is not required. The citizen has to be able to foresee to a degree that is reasonable in the circumstances. Other decisions that are relevant to the degree of precision are *Müller v Switzerland* (1988) 13 EHRR 212, *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241, *Marper v United Kingdom* ECHR 2008 at paragraphs 95 – 96, *Gillan v United Kingdom* [2010] 50 EHRR 45 at paragraph 77 and *Silver v United Kingdom* (1983) 5 EHRR 347 at paragraph 88.

[24] There are important functions to be performed by the conditions attached to temporary release, including protecting the public and informing the applicant. There are numerous ways in which conditions can be drafted to perform their

function. However the function to be performed by conditions attached to temporary release are also performed by conditions attaching to, for instance, probation orders, the grant of bail, the release of offenders by the Parole Commissioners, the release of offenders under the Northern Ireland (Sentences) Act 1998 and the grant of the Royal Prerogative of Mercy, see paragraphs [9] (h) and [17] – [18] of the judgment in *Rodger's (Robert James Shaw) Application* [2014] NIQB 79. There is scope for improving consistency as between the conditions imposed by the various responsible agencies. There are numerous individuals who have committed terrorist offences and who have been released on licence. There should be a well drafted consistent set of standard conditions. The conditions in this case might have been informed or improved by a consideration by the Prison Service of the conditions imposed by other bodies such as, in particular, the Parole Commissioners and there might as a consequence of such consideration, or even regardless of liaison between the agencies dealing with the release of offenders back into the community, be better ways in which the particular conditions under consideration could be drafted. For instance there could be a prohibition on having any contact, direct or indirect, with particular individuals whose names are listed out together with a capacity for the list of names to be amended by the prison authorities. There could be a prohibition on being a member of or associating with any member of a particular political organisation. However the question in this case is not whether the conditions could be drafted in clearer terms or whether they are drafted in different terms by the Parole Commissioners, but whether they are sufficiently precise and clear.

[25] The purpose of temporary release is to assist in a prisoner's rehabilitation by facilitating his resettlement into the community. It is not to facilitate a return to criminal activity. Association with persons linked to paramilitary organisations or to criminal activity is contrary to the appropriate purpose. Mr Macdonald recognised the legitimate aim of special conditions two and four in a democratic society. He asserted that the aims of special conditions two and four were that there should be no question of the applicant re engaging with paramilitary or criminal activity given his conviction for precisely those activities and to protect the public from further activity of that type. The purpose of temporary release is enforced by the imposition of the conditions. They are to be construed purposively. A purposeful construction would not prevent contact with persons "linked to" criminal activity at the level of minor road traffic offences. The ability to obtain advice provides sufficient certainty in relation to the division between minor and significant criminal activity.

[26] The conditions prohibit the applicant from having contact, direct or indirect, with persons "*linked to*" paramilitary organisations or criminal activity. Special condition two does not require that the prohibited persons have to be "*members of*" a paramilitary organisation or "*convicted of*" paramilitary activity. Also the conditions do not require that the prohibited persons have been "*convicted of*" membership of a paramilitary organisation or "*convicted of*" criminal activity or that the paramilitary or criminal activity is current. The purpose of temporary release is to enable individuals to return to the community not to have contact with persons linked to

paramilitary organisations or to criminal activity either previously or currently. For instance a peer group of those who have *previously* have been convicted of criminal offences is contrary to the purpose of rehabilitation. Seen in the context of the purpose of temporary release and rehabilitation a link to a paramilitary organisation or to criminal activity does not require current criminal activity or an existing paramilitary organisation. The correct construction of the words "*linked to*" is that a person is "*linked to*" paramilitary organisations or "*linked to*" criminal activity if his name is "*associated with*" a paramilitary organisation or "*associated with*" criminal activity. An association can arise in many ways and at any time. A method, by which an association can arise, is for instance, as in this case on the evidence of the detective inspector, by reputation. It can arise, as in this case, by being charged with, though not convicted of, paramilitary or criminal activity. It can also arise, again as in this case, by being convicted of paramilitary or criminal activity. Furthermore it can arise, again as in this case, by the presence of the prohibited individuals on the separated wing of Maghaberry prison. To be in Roe House an inmate has to be "associated with" or "linked to" dissident republican activity.

[27] Regardless as to the other conditions and warnings contained in the temporary absence document I consider that special conditions two and four are sufficiently clear and precise. However if I am incorrect in that assessment then I consider that those conditions are sufficiently clear and precise when seen in the context of the opportunity given to the applicant to seek guidance and in the context of the other terms and conditions. Throughout his sentence the applicant has been provided with the opportunity to engage with an offender manager and with the staff of the Probation Board for Northern Ireland. Those services were available to him in order to provide guidance. Specifically in relation to his temporary release the terms and conditions were read aloud to the applicant and he was provided with an opportunity to seek guidance prior to commencing temporary release. The temporary absence document specifically stated that if there was any doubt or uncertainty then that the applicant should seek guidance from the Governor of the prison. He agreed to that term and signed that document. There was a structure in place under which he could have obtained guidance whilst on temporary release. He could simply have asked whether contact with a particular individual was or was not in breach of special conditions two and four, though as will become apparent I do not consider that the applicant had any need for such guidance in relation to the individuals with whom he met.

[28] I reject the ground of challenge that special conditions two and four were not sufficiently clear and precise.

Whether there was sufficient evidence that the persons with whom the applicant met were prohibited persons within the terms of special conditions two and four and if so whether the applicant was aware that they were.

[29] There was clear evidence that the individuals with whom the applicant met were prohibited persons within the meaning of special conditions two and four to the knowledge of the applicant. The evidence can be broken down as follows:-

a) All four individuals had been imprisoned on the separated wing for dissident republican prisoners. The applicant knew that Roe House was a separated wing for dissident republican prisoners, he viewed himself as a dissident republican prisoner, he knew that all the other prisoners in Roe House also viewed themselves as dissident republican prisoners and were accepted by the other prisoners as such. On the correct construction of the words "linked to" meaning "associated with" paramilitary activity and "linked to" meaning "associated with" criminal activity all the prisoners in Roe House were linked to dissident republican paramilitary and criminal activity and upon his temporary release it was clear to the applicant that he should not have contact, direct or indirect with anyone who had been in Roe House.
b) Mr Fitzsimmons, Mr Conway and Mr Toman have all been convicted of criminal offences to the knowledge of the applicant.
c) Mr Duffy had been charged with but acquitted of criminal offences to the knowledge of the applicant.
d) The detective inspector stated that Mr Duffy, Mr Fitzsimmons and Mr Conway were all "Senior Dissident Republicans" and the applicant knew that was the opinion held by the PSNI given that absent such an opinion none of the individuals could have been transferred to Roe House.

[30] I reject the ground of challenge that there was insufficient evidence that the individuals with whom the applicant had contact, had links to paramilitary organisations or to criminal activity. I also reject the ground of challenge that there was insufficient evidence that the applicant was aware that the individuals were linked to paramilitary organisations or to criminal activity.

Legal representation

[31] The legal principles as to what is required to ensure procedural fairness in prison adjudications which I seek to apply are set out in *R v Secretary of State for the Home Department ex parte Tarrant* [1985] 1 QB 251, *Al Hasan* [2001] EWCA Civ 1224, *Re White* [2004] NIQB 15 and *Re Beattie's Application for Judicial Review* [2007] NIQB 51.

[32] The respondent had not determined the request by the applicant for legal representation in advance of the adjudication and accordingly the applicant was not informed of the outcome of his request for legal representation prior to the adjudication. It has been suggested that this is in breach of rule 35(3) of the Prison Rules (NI) 1965. Assuming, without deciding, that the failure to inform the

applicant in advance of the adjudication was in breach of that rule I consider that this made no substantive difference to the way in which the applicant approached the adjudication. A decision was made at the adjudication that he was not entitled to legal representation. The applicant's position is that he did not wish to participate in the adjudication absent such representation. There is no averment from him that if he had been told in advance that he was not entitled to legal representation that he would have participated in the adjudication.

[33] The next question in relation to legal representation is whether the decision not to afford him legal representation complies with the obligation of procedural fairness. That involves a consideration of the *Tarrant* principles. The issues before the adjudicator were simple and well within the capacity of the applicant to present his own case. The applicant accepts that he knew that Mr Fitzsimons, Mr Conway and Mr Toman had all been convicted of serious criminal offences and accordingly he knew that they were all "linked to" criminal activity. The applicant believed that offences committed by Mr Fitzsimons were carried out by a paramilitary organisation so again the applicant knew that Mr Fitzsimons was "linked to" a paramilitary organisation. The applicant also knew that Mr Duffy, Mr Fitzsimons, Mr Conway and Mr Toman had all been detained either on remand or as sentenced prisoners in Roe House and accordingly he knew that they were all "linked to" or "associated with" dissident republican paramilitary activity. The applicant accepted that he had direct contact with all of those individuals. The issues were not complex. The potential penalty was modest. The consequences of a finding that the charge was proven were no more or less than the consequences that one could anticipate from any adverse adjudication. I do not consider that there was any requirement for legal representation.

[34] I reject the ground of challenge that the procedure at adjudication was in breach of the applicant's common law right to a fair hearing or in breach of Article 6 ECHR in that he was not permitted legal representation.

Conclusion

[35] I dismiss the application for judicial review.