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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY NOEL MCCREADY AND IN THE MATTER DECISIONS TAKEN BY THE SENTENCE REVIEW COMMISSIONERS

MORGAN J

[1] On 2 February 2000 the applicant was convicted of two counts of murder, two counts of attempted murder and one count of possession of a firearm with intent. He was sentenced to life imprisonment in respect of the murders, 20 years imprisonment on the attempted murders and 15 years imprisonment on the firearms charge. These crimes were committed prior to 10 April 1998 and accordingly the applicant was entitled to apply for early release under the provisions of the Northern Ireland (Sentences) Act 1998.

[2] In this application for leave to apply for judicial review the applicant seeks to challenge three decisions of the Sentence Review Commissioners. The first is a decision of 26 July 2000 when the Commissioners issued their preliminary indication that the Secretary of State's application for revocation of the declaration that the applicant was eligible for release should be granted. The second is the decision of 29th of March 2002 when the Commissioners issued their substantive determination finding that the application for revocation should be granted. The third decision under challenge is that of 7 June 2006 whereby the Commissioners refused to accept a fresh application for release by the applicant.

[3] The Northern Ireland (Sentences) Act 1998 was an Act passed to make provision for the release on licence of certain persons serving sentences of imprisonment in Northern Ireland. The relevant provisions governing eligibility for release are found in section 3: -

> **"3.** - (1) A prisoner may apply to 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)-

(a) the prisoner is serving a sentence of imprisonment for a fixed term in Northern Ireland and the first three of the following four conditions are satisfied, or

(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) The 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 10th 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."

[4] The procedure under which the Commissioners act is set out in the Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998. Rules 7 and 8 provide for the receipt of application papers by the Commissioners and the service of response papers. Rule 9 deals with further applications:-

> **"9.** - (1) Subject to paragraph (2), any successive application made under section 3(1) or 8(1) of the Act shall be referred to as a further application.
>
> (2) The Commissioners may only determine a further application if in their view:
>
> (a) circumstances have changed since the most recent substantive determination was made in respect of the person concerned; or
>
> (b) reliance is placed in support of the further application on any material information, document or evidence which was not placed before the Commissioners when the most recent substantive determination was made in respect of the person concerned.
>
> (3) For the purposes of these Rules, an application is successive where it is not the first application to have been made under the section of the Act in question by or in respect of the person concerned."

[5] The procedure for consideration and determination of applications is found in Part IV of the Rules. Rule 11 provides that the Commissioners may take any ancillary decision they consider appropriate and rule 12 makes provision for ancillary applications which are dealt with by the single commissioner without a hearing. Rule 13 dealers with ancillary appeals and provides that a party may appeal against an ancillary decision taken by a single commissioner by serving on the Commissioners and on the other party, within seven days of receiving written notice of the ancillary decision, a notice of ancillary appeal in an appropriate form. Rule 14 deals with the preliminary indication:-

> **"14.** - (1) Following receipt of the response papers, the single Commissioner shall take any ancillary

decisions he considers appropriate and when satisfied that it is appropriate to do so he shall then give a direction that the case is ready to be made the subject of a preliminary indication.

(2) After the expiry of seven days from service on the parties of written notice of the direction given pursuant to paragraph (1), the panel shall give the preliminary indication in accordance with the Provisions of this rule.

(3) The preliminary indication shall be given without a hearing and shall only be given if the following conditions are satisfied in relation to the case:

(a) any irregularities have been cured or waived in accordance with rule 27;

(b) there are no outstanding ancillary applications or ancillary appeals to be determined; and

(c) the time for bringing an ancillary appeal against any ancillary decision has expired.

(4) The preliminary indication shall indicate the substantive determination that the panel are minded to make and shall be given by being recorded in a written decision notice, signed and dated by or on behalf of the members of the panel.

(5) The Commissioners shall serve a copy of the written decision notice on the parties as soon as is practicable after giving the preliminary indication and this shall contain, subject to rule 22, the following:

(a) where the preliminary indication is that the panel is minded to refuse an application made under section 3(1) of the Act, a statement of the reasons for this;

(b) where the preliminary indication is that the panel is minded to grant an application made under section 3(1) of the Act, a declaration specifying:

(i) the sentences in respect of which the person concerned would be eligible to be released in

accordance with the provisions of the Act if the preliminary indication were to become the substantive determination; and

(ii) in relation to each life sentence in respect of which the person concerned would be eligible to be released if the preliminary indication were to become the substantive determination, the day which the Commissioners are minded to believe would mark the completion of the period specified in section 6(1) of the Act;

(c) where the preliminary indication is that the panel is minded to grant an application made under section 8(1) of the Act, a statement of the reasons for this and a statement that any declaration previously granted to the person concerned under section 4 or 6 of the Act would be revoked if the preliminary indication were to become the substantive determination; and

(d) where the person concerned is a recalled prisoner, a statement as to whether the panel is minded to confirm or revoke the recalled prisoner's licence, and a statement of the reasons for this.

(6) Within 14 days of receiving a copy of the written decision notice, each party shall serve on the Commissioners and on the other party a written notice, signed by him or by his representative, stating whether or not he wishes to challenge the preliminary indication."

Rule 15 deals with the substantive determination: --

"**15.** - (1) After the preliminary indication has been given, the panel shall make the substantive determination in accordance with the provisions of this rule.

(2) Where both parties have indicated, in accordance with rule 14(6), that they do not wish to challenge the preliminary indication, the panel shall make the substantive determination that it was minded to make when it gave the preliminary indication.

(3) Where either party indicates, in accordance with rule 14(6), that he wishes to challenge the preliminary

> indication, the panel shall disregard the preliminary indication and shall make the substantive determination pursuant to a substantive hearing.
>
> (4) The substantive determination shall be made by being recorded in a written decision notice, signed and dated by or on behalf of the members of the panel."

[6] Subsequent to his conviction the applicant applied to be released under the provisions of the 1998 Act. On 14 April 2000 he received a preliminary indication that he was eligible for release. In the absence of any challenge the substantive determination issued on 2 May 2000. On 5 July 2000 the applicant was granted pre-release home leave in anticipation of his proposed release. As a result of an incident which occurred in Banbridge on that day the Secretary of State made a revocation application on 10 July 2000 contending that the applicant's declaration should be revoked on the ground of public safety.

[7] On 19 July 2000 the Secretary of State made an ancillary application to vary the time appointed under the rules for the determination of ancillary applications and secondly to vary the time appointed under the rules for determining the application to revoke the declaration of early release. By letter dated 21 July 2000 the single commissioner rejected the first application. By letter dated 25 July 2000 the single commissioner waived the period of seven days between the declaration of readiness and the issue of the preliminary indication provided for in rule 14(2). The single commissioner rejected the application to vary the period of 14 days for indicating whether or not a party wishes to challenge the preliminary indication.

[8] In a further letter of the same day the single commissioner indicated that the preliminary indication would be given by the panel "on this day, immediately following their meeting. This is notwithstanding the fact that the time for bringing an ancillary appeal against the ancillary decisions of the 21st July and 25 July 2000 has not expired (see rule 14(3) (c))…. In the absence of objections to the contrary being received in this office by 4 p.m. today from either party, the preliminary indication will accordingly be issued by close of business this evening."

[9] No objection was received and on 26 July 2000 the Commissioners gave a preliminary indication under rule 14 that the application to revoke should be granted. On 4 August 2000 the applicant indicated that he wished to challenge the preliminary indication and on 29th of March 2002 the panel made a substantive determination under rule 15 granting the Secretary of State's application to revoke.

[10] On 24 January 2006 the applicant applied again for early release. On 7 June 2006 the Commissioners wrote to the applicant stating that the single commissioner had determined that the application did not satisfy the requirements of Rule 9(2) (a) or (b).

[11] For the applicant Mr Hutton B. L. submitted that the preliminary indication given on 26 July 2000 was issued ultra-vires and without jurisdiction since it was issued at a time when the period for bringing ancillary appeals in respect of ancillary decisions taken in the applicant's case had not expired. He contended that Rule 14 (3) (c) of the 1998 Rules was an absolute bar on the issue of any preliminary indication during that period. He further contended that the issue of a preliminary indication was essential to the jurisdiction to issue a substantive determination and that accordingly the substantive determination of 29 March 2002 was issued without jurisdiction. He further contended that the decision of 7 June 2006 was unreasonable in that the Commissioners failed to accept or investigate the issue of jurisdiction raised by the applicant in connection with his previous preliminary indication and substantive determination.

[12] For the Commissioners Mr Larkin QC submitted that where there had been a failure to comply with a legislative provision it was necessary to establish what consequence would follow from that. In this case the preliminary indication was no more than an administrative step prior to the determination of the substantive issue. Under rule 15 the panel was required to disregard the preliminary indication when making the substantive determination. There was no reason to suppose that any criticism of the preliminary indication in this case could undermine the lawfulness of the substantive determination.

I am grateful to both counsel for their helpful submissions.

[13] The first two decisions under challenge are clearly of some vintage. Mr Hutton BL indicated that the point pursued by him was one which apparently had not occurred to those previously representing this applicant. If the point was a good one it bore at least indirectly on the applicant's entitlement to liberty. In those circumstances I consider that the starting point is to examine whether the applicant has demonstrated an arguable case with a reasonable prospect of success in relation to the issues.

[14] For the purpose of this application I proceed on the basis that the applicant can demonstrate non-compliance with the requirements of rule 14(3). Where such non-compliance has been established it is necessary to examine the legislative intent as to what consequence should flow (see ex p Jeyeanthan [2001] 1 WLR 354). In seeking to establish that intent it is necessary to have regard to the use of mandatory or directory language within the provision, to establish the purpose for the use of such language

and to determine from the context of the provision and other aids to interpretation what consequence should flow from any breach.

[15] The relevant provision in rule 14(3) (c) of the 1998 Rules is designed to ensure that any ancillary appeals which may have a bearing on the preliminary indication should be determined before that indication is given. The purpose is to prevent the issue of an indication on an inaccurate or incomplete basis.

[16] The first indication which was open to challenge was that issued on 21 July 2000. It rejected the Secretary of State's application to abridge the time for ancillary applications. It was a decision in the applicant's favour. There is no material to suggest that the applicant was at any disadvantage as a result of this decision.

[17] The second decision is that contained in the first letter on 25 July 2000. It abridged the time prescribed by rule 14(2) for the issue of the preliminary indication. The purpose of the written notice under rule 14(2) is to ensure that each party can draw to the Commissioner's attention any relevant matter before the preliminary indication issues. There is nothing in the papers to suggest that the applicant would have drawn any such matter to the Commissioner's attention. It is further clear from the terms of the correspondence on 25 July 2000 that the applicant was invited to respond to the Commissioner if he objected to the abridgement of the time prescribed by rule 14(2). He did not do so and indeed did not seek to challenge the delivery of the preliminary indication for approximately 6 years. Accordingly there is no basis for any contention that either of these decisions impinged on the merits of the preliminary indication which was issued.

[18] In those circumstances I consider that any breach of rule 14(3) (c) can properly be described as technical and that non-compliance, therefore, should not affect the validity of the preliminary indication or the substantive determination. In those circumstances the application for leave must fail. In my view, for the reasons given, the challenges to the preliminary indication and the substantive determination could never succeed. The challenge to the decision on 7 June 2006 is based on the premise that the decision maker failed to take into account flaws in the earlier decisions. I do not consider that there is an arguable case with a reasonable prospect of success supporting the proposition that any flaws detected were material to the decision that was made on 7 June 2006.

[19] There was some debate before me as to whether the decision of 7 June 2006 was an ancillary decision within the meaning of the Rules. It has not been necessary for me to determine that issue and accordingly I express no view on it.