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**Ref: MOR10956**

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

**Delivered: 07/05/2019**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN’S BENCH DIVISION (JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION  
FOR JUDICIAL REVIEW BY ANTHONY JOHN MCDONNELL**

**AND IN THE MATTER OF DECISIONS OF THE DEPARTMENT OF JUSTICE,  
THE POLICE SERVICE OF NORTHERN IRELAND AND THE SECRETARY OF  
STATE FOR THE HOME OFFICE PURSUANT TO PART 4 OF THE COUNTER  
TERRORISM ACT 2008 AND THE COUNTER TERRORISM ACT 2008  
(FOREIGN TRAVEL NOTIFICATION REQUIREMENTS) REGULATIONS 2009**

**Before: Morgan LCJ, Deeny LJ and Burgess J**

**MORGAN LCJ (delivering the judgment of the court)**

[1] The applicant was born in Northern Ireland and resides there. He holds an Irish passport and asserts that he is an Irish citizen. On 4 December 2013 he was convicted of five counts of possession of information that would be likely to be of use to terrorists in contravention of section 58(1)(b) of the Terrorism Act 2000 (“the 2000 Act”) at Belfast Crown Court. The information consisted of the car registration numbers of police officers. He was sentenced to a determinate custodial sentence of three years and six months. He was released from prison on 2 October 2014 and his licence period expired on 3 July 2016.

[2] By virtue of Part 4 of the Counter Terrorism Act 2008 (“the 2008 Act”) notification requirements are imposed as a result of a conviction of certain offences under the 2000 Act. In the applicant’s case it is common case that these requirements apply to him because:

- (i) the offence in respect of which he was convicted falls within section 41 (1) of the 2008 Act,

- (ii) he was over 16 at the time he was dealt with (section 44 (a)), and
- (iii) he was sentenced to a period of imprisonment for a term of 12 months or more (section 45 (3) (a) (ii))

[3] The notification requirements include the provision of information about his address and premises in the United Kingdom at which he regularly stays but this application is concerned with section 52 of the 2008 Act which provides that the Secretary of State may by regulations make provision requiring a person to whom the notification requirements apply who leaves the United Kingdom to notify the police of their departure before they leave and to notify the police of their return if they subsequently return to the United Kingdom. By virtue of section 53 of the 2008 Act the period in respect of which the notification requirements apply to this applicant is 10 years because the term of imprisonment imposed was less than five years.

[4] The relevant regulations are the Counter Terrorism Act 2008 (Foreign Travel Notification Requirements) Regulations 2009 ("the 2009 Regulations"). By virtue of regulation 3 where a person intends to leave the United Kingdom for a period of three days or more the required information to be notified to the police includes:

- “(b) so much of the following information as the person holds –
  - (i) where the person intends to travel to more than one country outside the United Kingdom, the person’s point of arrival in each such country (other than the point of arrival specified in section 52(2)(c)),
  - (ii) the name of the carrier the person intends to use to leave the United Kingdom and to return to the United Kingdom,
  - (iii) the name of any carrier the person intends to use to travel between countries while outside the United Kingdom,
  - (iv) the address or other place at which the person intends to stay for their first night outside the United Kingdom,
  - (v) where the person intends to return to the United Kingdom on a particular date, that date, and
  - (vi) where the person intends to return to the United Kingdom at a particular point of arrival, that point of arrival. ”

[5] By Regulation 4 where a person knows any of the required information more than seven days before the date of their intended departure they must notify such of the required information as they hold not less than seven days before that date or if there is a reasonable excuse as soon as practicable but in any event not less than 24 hours before that date. Where the person does not know any of the required information more than seven days before the date of their intended departure the

notification must be made not less than 24 hours before the date of their intended departure. Regulation 5 provides for notification on return where the period outside the United Kingdom has been for three days or more within a period of three days beginning with the day on which the person returned. Regulation 6 provides that notification is made by attending at the police station in the person's local police area and making oral notification to a police officer. Section 54 of the 2008 Act makes it an offence to fail without reasonable excuse to comply with the notification requirements and a person guilty of an offence is liable on summary conviction to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both and on indictment to imprisonment for a term not exceeding five years or a fine or both.

[6] The applicant has two children now aged 12 and 14. They spend approximately half their time with him and the other half with his ex-wife. His sister owns a caravan located in Omeath, County Louth in the Republic of Ireland. The applicant and his two children travel regularly to stay there for one or two nights a week. He would also go there during the summer and on Easter and Christmas holidays. He submits that notifying the police of each and every occasion on which it is possible that he would stay more than three nights is a burden. When in Omeath he visits his cousins and buys goods and services there. The use of the caravan is a huge benefit to one of his sons who suffers from ADHD and autism.

[7] The applicant claims that the automatic imposition of foreign travel notification requirements on him is unlawful as it is contrary to directly effective EU law, namely articles 20/21 TFEU, Article 4 of Directive 2004/38/EC, Article 56 TFEU and/or Directive 2006/123/EC. Mr Lavery QC and Mr Bassett appeared for the applicant and Ms Murnaghan QC and Mr Kennedy for the Department. We are grateful to all counsel for their helpful oral and written submissions.

#### **Article 20/21 TFEU and Article 4 of Directive 2004/38/EC**

[8] Articles 20 and 21 of the Treaty on the Functioning of the European Union ("TFEU") provide that every citizen of the Union shall have the right to move and reside freely within the territory of the Member States subject to the limitations and conditions laid down in the Treaties and the measures adopted to give them effect. Directive 2004/38/EC is the principal measure designed to give effect to the Treaty obligation. Article 4 (1) of the Directive provides that Union citizens with a valid identity card or passport shall have the right to leave the territory of a Member State to travel to another Member State. Article 4(2) states that no exit visas or equivalent formality may be imposed on Union citizens such as the applicant.

[9] The applicant submits that the travel notification requirements contained in the 2008 Act and 2009 Regulations are capable of discouraging, dissuading and/or making the exercise of a fundamental freedom less attractive. The possibility of imprisonment for exiting the jurisdiction is a clear interference with the effective

enjoyment of those rights. It is submitted that there is an obvious and significant limitation on the ability to travel and temporarily reside in another Member State and that this amounts to a restriction on the free movement rights of the applicant.

[10] The proportionality of the notification requirements were considered in the context of the European Convention on Human Rights ("the Convention") in R(Irfan) v Secretary Of State for the Home Department [2013] QB 885. In that case the claimant who had been convicted of an offence of engaging in conduct with the intention of assisting in the commission of acts of terrorism contended that the imposition of notification requirements for a period of 10 years after release was a disproportionate interference with his rights under the Convention and that the 2008 Act was incompatible with Article 8 of the Convention by reason of the absence of a review mechanism.

[11] The challenge was dismissed. The court considered that terrorism offences fell into a special category which called for a precautionary but not disproportionate approach. Considerable weight had to be accorded to Parliament's view. It was accepted that there was an intrusion into the claimant's private life for the purposes of Article 8 but that it was a moderate intrusion with the legitimate aim of preventing the grave disorder and crime inherent in terrorism and its application was not disproportionate. The scheme was compatible with Article 8 of the Convention.

[12] The 2008 Act and 2009 Regulations have not been the subject of consideration in terms of European Law but identical notification requirements under the Sexual Offences Act 2003 and Sexual Offences Act 2003 (Travel Notification Requirements) Regulations 2004 were considered in R (F a child) v Secretary of State for Justice [2010] 1 WLR 76. The claimant had been convicted of two offences of rape and other serious sexual offences committed when aged 11 and sentenced to a period of 30 months detention for those offences. One of the issues in the case was a claim by him that the travel notification requirements constituted a formality equivalent to an exit visa proscribed by Article 4 (2) of Directive 2004/38/EC. It was further submitted that Article 4 (1) of the 2004 Directive was engaged as the notification requirements would inevitably prevent some people from travelling who wished to travel at short notice. It was contended that Article 4 (1) should be interpreted as meaning that a person was required to do no more than show a passport before departure and that a notification requirement was an additional requirement which conflicted with Article 4 (1).

[13] The Court of Appeal in England and Wales rejected those submissions. A notification requirement was not a formality equivalent to an exit visa. An exit visa was a document which authorised a person to leave the country so that he or she merely needed to show it on departure to establish the right to leave. A notification

requirement was not a process whereby permission was sought or granted to leave the United Kingdom.

[14] The court also rejected the submission that the notification requirements offended Article 4 (1) of the Directive. The notification requirements did not prohibit travel and did not prohibit a person from leaving the country. At most they might inhibit departure in the relatively few cases where it was not possible to give 24 hours' notice because the traveller might be concerned that he would face prosecution on return and be unable to satisfy the reasonable excuse defence.

[15] This case then proceeded to the Supreme Court ([2011] 1 AC 331) on the issue of whether there should be some mechanism for review of the notification requirements in those cases where they were imposed indefinitely. For the purposes of this appeal the interesting part of the discussion centred on the extent to which the notification requirements interfered with Article 8 rights under the Convention. Lord Phillips noted that although the information was on the face of it innocuous the offender would have to explain the purpose of the notification. That linked the offender to the recorded particulars of the conviction. One of the objects of the notification requirements was that information should be conveyed to third parties in circumstances where this was necessary for the prevention of further offending. He noted that for regular travellers there was an obvious risk inherent in making repeated visits to a police station to give notification of travel plans so that third parties would become aware of the reason for doing so.

[16] What these cases demonstrate, therefore, is that there are two issues at play in the consideration of notification requirements. The first is that the right to move and reside freely is not directly interfered with by the imposition of the requirements. The imposition of the notification requirements does, however, directly impinge upon the private life of the offender. The interference with private life has a number of components including the need to physically carry out the notification process and perhaps more importantly the possible disclosure of the offender's background to third parties.

[17] We do not accept that the applicant can construct any indirect effect as a result of the notification requirements for the purpose of demonstrating an interference with the Treaty right to free movement. As a matter of Treaty law the right to move freely has to be effective. There is in our view no proper basis for concluding otherwise in this case. Any inhibiting effect must not be disproportionate. The factors in play in this case are the important Treaty right to freedom of movement and the important public right to be protected from acts of terrorism. That arises directly in cases of sentences of imprisonment while what is at issue here is a very modest intrusion by comparison. As the Court of Appeal in England and Wales said in R (F a child) terrorism offences are in a special category. When balancing the need for public protection which is the legitimate aim of the

notification requirements against any inhibiting factor in having to go through the physical procedures associated with those requirements we are entirely satisfied that the balance comes down firmly in favour of protection. We do not consider, therefore, that any indirect effect of the notification requirements breaches the Treaty rights contained in Articles 20 and 21 of TFEU.

#### **Article 56 TFEU and Directive 2006/123/EC**

[18] We do not consider that the submissions based on free movement of services give rise to any additional basis of challenge. Article 56 TFEU protects the freedom to provide services within the Union and there is a corresponding right for a recipient of services to exit a Member State for the purpose of obtaining those services elsewhere. For the reasons we have given, however, we consider that the free movement rights of the applicant have been properly secured so that he is in a position to avail of services outside the United Kingdom in accordance with his Treaty rights.

#### **Conclusion**

[19] For the reasons given we conclude that the notification requirements under the 2008 Act and the 2009 Regulations do not offend European Law and the application is accordingly dismissed.