Neutral Citation No. [2012] NIQB 11 | *Ref:* **TRE8434**

Judgment: approved by the Court for handing down | *Delivered:* **02/03/12**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

McGeough's (Terence) Application [2012] NIQB 11

IN THE MATTER OF TERENCE McGEOUGH FOR JUDICIAL REVIEW

TREACY J

Introduction

[1] The applicant is Terence McGeough presently detained in HMP Maghaberry. He seeks an order of certiorari to quash the Secretary of States refusal to exercise the Royal Prerogative of Mercy ("RPM") to remit the 20 year sentence imposed upon him following his conviction on 6 April 2011 for the attempted murder of a part-time soldier in 1981.

Background

[2] On 13 June 1981 the applicant, as a member of the Provisional IRA ("the IRA"), took part in an ambush near Ballygawley. Mr Brush, a member of the Ulster Defence Regiment, was shot and injured. Mr Brush returned fire and the applicant was also shot and was admitted to hospital on the same day where he was kept under guard. On 27 June 1981 the applicant escaped from hospital and went "on the run." He was not, however, charged with the shooting until 2007.

[3] During the 1980s, while on-the-run, the applicant was involved in purchasing weapons for the IRA. On 30 August 1988 he was arrested as he crossed the Dutch/German border in a motor vehicle. Following a routine vehicle check, two AK47 rifles were found in the applicant's car. He was charged in Germany with involvement in a series of bomb and gun attacks committed on behalf of the IRA. The applicant's trial in Dusseldorf began on 16 August 1990 and according to the applicants chronology he was ultimately acquitted (date unspecified). On 4 September 1991 District Inspector Cowen of the RUC visited the applicant in prison in Germany and told him he was being investigated for the attempted murder of Mr Brush. Between 9 March and 1 May 1992 the Director of Public Prosecution in

Northern Ireland considered applying for the applicant's extradition, but no application was ultimately made.

[4] On 28 May 1992 the applicant was extradited from Germany to the United States on foot of a 1982 warrant for weapons offences and released on bail. The applicant was charged with offences related to the procuring of weapons on behalf of the IRA. The applicant pleaded guilty to moving weapons between states without a licence. According to his chronology 2 years imprisonment was imposed in April 1994 and he was released less than 2 years later in March 1996.

[5] In summary it thus appears that between August 1988 and May 1992 he was in custody in Germany on remand and pending extradition. Between April 1994 and March 1996 he was in custody in America serving his sentence as aforesaid.

[6] Following his release the applicant returned to Ireland. He obtained a degree in History at Trinity College Dublin. He then obtained a higher diploma in Education at University College Dublin qualifying him as a teacher. He began teaching part-time and continued to study in Dublin, He travelled back and forwards to Northern Ireland on many occasions. The applicant married and became a father. He returned to live permanently in Northern Ireland and settled in Bantry in County Tyrone.

[7] During the late 1990s the applicant was involved in politics and rose through the ranks of Sinn Fein. In 2000 he was elected to Sinn Fein's Ruling Executive (Ard Comhairle). In 2001, however, the applicant split with Sinn Fein. While he remained a firm supporter of the peace process he disagreed strongly with Sinn Fein on social issues. He regarded Sinn Fein's policies on matters such as abortion as incompatible with his Roman Catholic faith. The applicant became an increasingly vociferous opponent of Sinn Fein. In May 2006 he became editor of The Hibernian, a Catholic Irish-nationalist newspaper. In elections for the Northern Ireland Assembly held on 7 March 2007, the applicant stood unsuccessfully as an independent Republican against Sinn Fein for the Fermanagh & South Tyrone seat.

[8] On 8 March 2007, as the applicant was leaving the election count, he was arrested. He was charged with the attempted murder of Mr Brush in 1981 and for being a member of the IRA. The applicant's trial commenced on 10 May 2010 in Belfast Crown Court. On 18 February 2011 the applicant was found guilty of both charges.

[9] Under the Good Friday Agreement it was agreed that a scheme be created to allow prisoners to be released early who had been convicted of offences related to the Troubles. The scheme was set out in the Northern Ireland (Sentences) Act 1998 ("the Sentences Act") and permitted the early release of prisoners who had been convicted of "qualifying offences" (scheduled offence within the meaning of the Northern Ireland (Emergency Provisions) Act 1973, 1978, 1991 or 1996).

[10] Pursuant to the Sentences Act, prisoners could apply to Sentence Review Commissioners for early release provided that various conditions were satisfied. The legislative provisions were given extensive consideration by Lord Bingham in *McLean* [2005] UKHL 46, inter alia, at paras [1] – [4] As the court observed an important feature of the Sentences Act was Section 10. Thus where, as here, a sentence was passed after the Act came into force (28 July 1998) the accelerated release day is two years post conviction.

[11] Certain prisoners did not fit within the strict terms of the Sentences Act but the assessment made at the time was that they came within the spirit of the GFA early-release scheme. In order to remove these perceived anomalies the then Secretary of State used the RPM to remit part of the sentences and permit release in the same way as would occur pursuant to the early release scheme in the Sentences Act.

[12] On 18 February 2011 the applicant's solicitors wrote to the NIO and asked that the RPM be used in the applicant's case to remit his sentence once that sentence was handed down. While he had not served 2 years in prison in Northern Ireland, he had been in prison on remand and pending extradition for a little under 4 years in Germany followed by a little under 2 years in the USA. His imprisonment in Germany and the US was for offences related to the Troubles and which would have been "qualifying offences" within the meaning of the Sentences Act if tried in Northern Ireland. The applicant also met the other criteria for early release as he did not support any organisation that opposed the ceasefire and he was not likely to become involved in terrorism if released. The NIO was requested (but refused) to use the RPM to remit the applicant's sentence for the 1981 attempted murder of Mr Brush and the membership of the IRA.

[13] The Applicant's solicitors in correspondence and before this court contended that he was in an analogous position to various identified individuals who had been released via the RPM and he was therefore entitled to equal/consistent treatment.

Statutory Framework

[14] The exercise of prerogative powers is addressed in section 23 of The Northern Ireland Act 1998.This provision was amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010. It introduced a new section 23(2A) which provides:

> **"(2A) So far as the Royal prerogative of mercy is exercisable on Her Majesty's behalf under subsection (2), it is exercisable only by the Minister in charge of the Department of Justice."**

[15] However, the exercise of prerogative powers in respect of matters relating to terrorism, as in this case, remains a reserved matter exercisable by the Secretary of

State rather than the Minister of Justice. (See Paragraph 9(1)(d) of Schedule 3 of the Northern Ireland Act 1998 as amended by Article 3 of the Northern Ireland Act 1998 (Amendment of Schedule 3) Order 2010 (SI 2010/977).

Justiciability

[16] The background to the grant of such a discretionary pardon was considered by the Administrative Court in ***Shields [*2008] EWHC 3102**. Maddison J stated:

> **" [19] A pardon is a common law extra-judicial power exercised by the Crown under the Royal Prerogative of Mercy. It is exercised by the Secretary of State for Justice as the Minister responsible for those in detention. In modern times, the Prerogative has been exercised in at least three situations, and Mr Weatherby, for Mr Shields, submits that it is a flexible constitutional safeguard which can be adapted to particular situations. First, there is special remission, as where the prison authorities miscalculate a release date or release a prisoner early by mistake. Second, there is conditional pardon, of which commutation of a death sentence was an example – see *R v Home Secretary, ex parte Bentley* [1994] QB 349, where the penalty was posthumously recognised not to have been commensurate with the offending. Third, there is free pardon, which may relate to miscarriages of justice. It has rarely been exercised since the Criminal Appeal Act 1907. Furthermore, the establishment of the Criminal Cases Review Commission under the Criminal Appeal Act 1995 means that miscarriages of justice within the United Kingdom are almost always dealt with through the Commission's power to refer the safety of a conviction to the Court of Appeal Criminal Division. However, the prerogative to grant a free pardon undoubtedly remains, as was made plain in *Bentley* – and see also section 16 of the 1995 Act, which provides for the Commission to give assistance to the Secretary of State in connection with the Prerogative of Mercy."**

[17] Is the decision refusing to exercise the RPM justiciable?

[18] In ***Defreitas* v *Benny* [1976] AC 234** Lord Diplock stated:

> **"Mercy is not the subject of legal rights. It begins where the legal rights end. A convicted person has no legal right even to have his case considered by the Home Secretary in connection with the exercise of the prerogative of mercy. In tendering his advice to the sovereign the Home Secretary is doing something that is often cited as the exemplar of a purely discretionary act as contrasted with the exercise of a quasi-judicial function."**

[19] However the House of Lords departed from the previous approach in its landmark decision in ***CCSU v Minister for Civil Service* [1985] AC 374**. Lord Roskill stated:

> **"If the Executive instead of acting under a statutory power acts under a prerogative power…so as to affect the rights of the citizen, I am unable to see, subject to what I shall say later, that there is any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. …**
>
> **But I do not think that the right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review."**

[20] Lord Diplock accepted that the exercise of a prerogative power might be challenged on grounds of illegality or procedural impropriety but in respect of an irrationality challenge such as the present case said [p411]:

> **"While I see no *a priori* reason to rule out "irrationality" as a ground for judicial review of a ministerial decision taken in the exercise of prerogative powers, I find it difficult to envisage in any of the various fields in which the prerogative remains the only source of the relevant decision making power, a decision of the kind that would be open to attack through the judicial process on this ground. Such decisions will generally involve the**

> **application of government policy. The reasons for the decision maker taking one course rather than another do not normally involve questions which, if disputed, the judicial process is adapted to provide the right answer."**

[21] Following *CCSU* Watkins LJ in ***Bentley*** **[1993] EWHC** stated:

> **"The question is simply whether the nature and subject matter of the decision is amenable to the judicial process. Are the courts qualified to deal with the matter or does the decision involve such questions of policy that they should not intrude because they are ill-equipped to do so? Looked at in this way there must be cases in which the exercise of the Royal prerogative is reviewable in our judgment. If, for example, it was clear that the Home Secretary had refused to pardon someone solely on the grounds of their sex, race or religion, the courts would be expected to interfere and in our judgment would be entitled to do so. We conclude therefore that some aspects of the Royal Prerogative are amenable to the judicial process."**

[22] On the basis of those authorities the respondent submits that this case falls on the wrong side of the line because:

(i) the question of the release of prisoners in the context of this case involved consideration of questions of policy;
(ii) the challenge is to the exercise of a pure discretion – not the application of broad statutory criteria;
(iii) the applicant has failed to identify any specific error of law on the part of the proposed respondent;
(iv) the applicant's case is based on irrationality;
(v) the proposed respondent has provided a reasoned basis for the decision – no prisoner who had served less than two years in the United Kingdom or the Republic of Ireland received a remission pardon.

[23] However in *Re Martin Corden* (unreported decision of Kerr J. 22/6/01) the applicant also challenged the SOS's refusal to recommend the exercise of the RPM. The challenge was brought in part on the basis of alleged inconsistency between his case and that of James McArdle in which the RPM was exercised. (This is the same comparator on which the applicant in the present proceedings principally founds his case). Mr Maguire who appeared for the Respondent in *Corden* did not raise any issue of justiciability nor did Kerr J. Moreover the modern and more flexible approach to the issue of justiciability in the context of reviewing prerogative powers is helpfully summarised in De Smiths Judicial Review, 6th ed, at paras 3-032 – 3-037.

[24] I am prepared to assume that, as in *Corden,* the non-exercise of the RPM is, in principle, reviewable on the ground of unequal treatment. This type of irrationality challenge and its jurisprudential basis was considered in some detail by Girvan J in *Re Colgan* [1996] NI 24,43g-44c.See also De Smiths Judicial Review, 6th ed., at 11-062 – 11-069.

[25] If reviewable the respondent's secondary submission is that the Court must afford a wide margin of deference to the decision-maker in this particular context. The respondent contended that the decision to grant a remission pardon is a matter of pure discretionary power and absent any alleged abuse of power, error of law, fraud, mistake or improper purpose (which is not alleged or pleaded) it should not be subjected to the Court's supervisory jurisdiction save in an exceptional case.

[26] The respondent further argues that since the sole ground of contention advanced by the applicant is alleged inconsistency of treatment his case does not fall within any exception to the general approach of deference to the use of prerogative powers.

Abuse of Process Proceedings

[27] The respondent submits that the factual material relied upon by the Applicant in these proceedings is, essentially, material that was presented in an abuse of process application before Coghlin LJ during the course of the attempted murder trial. Two affidavits were filed in the course of that application by Simon Case on behalf of the Northern Ireland Office upon which the Respondent also relies in resisting this application.

[28] The Respondent invites the Court to compare the contents of paras13-16 of the judgment of Coghlin LJ ([2010] NICC 33) with the applicants averments at paras16-19 of his grounding affidavit that he was given assurances by a senior member of Sinn Fein, Mr Gerry Kelly, in or about 2001, that he would not be arrested or charged if he returned to Northern Ireland.

[29] The applicant had made that case before Coghlin LJ but was confronted in cross-examination with a letter dated 22 January 2003 from the Northern Ireland Office to Mr Kelly where it was clearly stated that the applicant would **not** be immune from charge or arrest if he returned to Northern Ireland.

[30] The respondent complains of the applicant's lack of candour in making no reference in his affidavit to this correspondence or the manner in which it featured in the abuse of process application. The alleged lack of candour the respondent says is fatal to the challenge. I disagree. Whilst it might have been preferable for the applicant to have expressly engaged in his affidavit with this matter the fact remains that the judgment was exhibited to the affidavit of his solicitor Mr Corrigan .In any event this judicial review is concerned with a different issue namely the alleged unequal treatment and irrational inconsistency in the exercise of remission pardons.

The Parties Submissions

[31] The central contention advanced by the Applicant in these proceeding is that he has been subjected to inconsistent treatment as compared with other former prisoners, in particular, Anthony Sloan, Angelo Fusco, Paul Magee, Robert Campbell and James McArdle.

[32] Sloan, Campbell, Magee and Fusco were convicted in their absence on 12 June 1981 of murder, attempted murder and possession of firearms and ammunition with intent to endanger life. Two days before their conviction they escaped from custody and were sentenced to life terms of imprisonment for murder and attempted murder and a determinate term of 20 years imprisonment for the firearms offences. All four had served fourteen months on remand in Northern Ireland prior to the escape and various terms of imprisonment in the Republic of Ireland for offences arising from the escape.

[33] Because these individuals had served less than two years for the offences committed in Northern Ireland they were not eligible to apply for early release under the Northern Ireland (Sentences) Act 1998. In order to resolve this position section 23 of the Prison Act (Northern Ireland) 1953 was used to release them under licence for the life sentences and the RPM was used to remit the unexpired portion of the determinate sentences. [see first affidavit of Simon Case filed in the abuse of process application, paras 18, 22.27 and 31]

[34] By letter dated 1 March 2011 the applicant contended that Sloan's period of imprisonment in the Republic of Ireland was unrelated to the offence of murder and attempted murder for which his original sentences were imposed. On 7 March 2011 the Crown Solicitor's Office responded on behalf of Secretary of State:

> **"My client does not consider Mr McGeough to be eligible for the exercise of the Royal Prerogative of Mercy in this case nor does he regard Anthony Gerard Sloan as a direct comparator to that of your client.**
>
> **The sentence Mr Sloan served in the Republic of Ireland was linked to the index offence of possession of firearms with intent to endanger life and unlawful imprisonment, given that it was imposed for the offence of escape while on remand for those same offences. The sentence served overseas by your client, by contrast, related to entirely separate offences in another jurisdiction and at a separate time. These were not linked to the offences of which he has now been convicted."**

[35] The case of James McArdle, upon which the applicant placed particular reliance and regarded as his best comparator, arose from a different factual scenario. McArdle was convicted in England in June 1998 in relation to the Canary Wharf bombing. He was sentenced to 25 years imprisonment. He transferred to Northern Ireland in September 1998 and was then convicted of separate offences committed in Northern Ireland. He was sentenced to two terms of 20 years and one term of seven years. He was eligible to apply for early release for the Canary Wharf offences but the Northern Ireland (Sentences) Act 1998 required that he serve two years for the offences committed in Northern Ireland. RPM was used to remit the unexpired portion of the Northern Ireland sentences. [See Case, first affidavit, para 32].

[36] McArdle had been in custody since April 1997 and would have served well over two years imprisonment by the cut-off date of 28 July 2000. The anomaly that arose in his case was the fact that he was convicted of two separate sets of offences in two jurisdictions. He had however served a period in custody which would have satisfied the requirements of Section 10(7) of the Northern Ireland (Sentences) Act 1998 but for that anomaly.

[37] The Respondent submits, and I accept, that the circumstance of the comparators relied upon are plainly different from those in his case and the Secretary of State assessment to that effect is one that he is rationally entitled to make. In marked contrast this Applicant served **no** time in custody in relation to the attempted murder prior to his escape from hospital two weeks after the shooting; he was arrested seven years later in August 1988 in Germany for offences unrelated to the attempted murder; he served a period on remand for those unrelated offences in Germany until being extradited to the United States on 28 May 1992.

[38] The periods of imprisonment served in Germany and the United States do not bear any relationship with the index offence for which the Applicant is presently serving a 20 year sentence. They are, as Mr McGleenan contended in his written argument, factually dissimilar and are remote in time and place from the shooting of Mr Brush in June 1981. The Applicant's case is not characterised by the type of anomaly relevant to the comparators he has identified. He had not served *any* period of imprisonment in Northern Ireland that would have engaged the mechanisms of the Northern Ireland (Sentences) Act 1998.

[39] Moreover, the Respondent submits that in the exercise of what was asserted to be a pure unbounded discretion for the purpose of correcting a small number of anomalies in the interests of securing a broader political resolution the Secretary of State is entitled to make fine judgments about the issuing of an RPM. The political background to those judgments underscores the fact that this exercise of executive power should, generally, be insulated from the supervisory scrutiny of the Court.

Discussion

[40] The exercise of the RPM by the Secretary of State in the comparator cases relied upon by the applicant was made at a different time and context. Through correspondence from the CSO the current Secretary of State has asserted his view that the applicant is not eligible for the RPM. Nor, in any event ,does he regard the comparators as being in a relevantly analogous position.

[41] The release of prisoners by an earlier Secretary of State over a decade ago in the context of that time inevitably will have involved considerations of policy. The refusal by the current Secretary of State in 2011 to exercise the RPM to remit the applicants lawfully imposed sentence is a separate exercise.

[42] Lord Bingham in *McLean* [2005] UKHL at para5 described the accelerated release provisions of the 1998 Act "as an important and ,in a literal sense, extraordinary scheme". Having been convicted of attempted murder and sentenced to 20 years this applicant will in fact only have to serve 2 years as a result of these provisions. Following his conviction the applicant sought the exercise of the Royal Prerogative of *Mercy* to remit his sentence so that he would be spared incarceration even for a single day. When the Secretary of State refused to do so the applicant brought these proceedings. Mr Brush, whom the applicant attempted to murder, had not been served with papers or notified of the application by either of the parties. Given his obvious interest in the outcome of these proceedings I directed that he be served and made a Notice Party. Although he did not intervene or make submissions he was present for the hearing.

[43] It is striking to observe that if the accelerated release provisions are as Lord Bingham characterised them, "extraordinary" what epithet would be left to describe the invocation of the Royal Prerogative of *Mercy* by the Secretary of State to ensure that the applicant serve no part of the sentence lawfully imposed upon him by a competent court?

[44] Exercising the RPM in this way would be inconsistent with the express provisions of the Act which lay down the requirement that persons in the position of the applicant convicted after the Act must serve 2 years of their sentence before obtaining accelerated release.

[45] Moreover the effective removal of any penalty upon conviction resulting from the exercise of the RPM in the way sought may well be incompatible with or repugnant to the positive obligations imposed upon the state by Art 2 of the ECHR. See, for example, Lester & Pannick, Human Rights Law and Practice, at para 4.2.7 discussing the states positive Art 2 obligation to put in place effective criminal law provisions to deter the commission of offences, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.

[46] The SOS's contention that the applicant is not eligible for the RPM is hardly surprising. The applicant's contention of unequal treatment is in my view untenable. First, it overlooks the consideration that the exercise of the pure discretionary power was by another SOS a decade earlier and in a different context. It is noteworthy that in *Corden* Kerr J acknowledged that it was open to the SOS to allow political considerations to play a part. In any event the respondent has provided a reasoned basis as to why the so called comparators are not relevantly analogous. The applicant relied in particular on the McArdle comparison but for the reasons advanced by the respondent there are obvious distinctions between the applicant and his case. As Kerr J observed in *Corden's* case, (where that applicant also unsuccessfully relied on the McArdle example to try and make an unequal treatment case) McArdle only fell outside the literal scope of the Sentences Act because of the fortuitous operation and timing of the prosecutorial process. The applicant has failed to establish that any of the comparators are relevantly analogous. Put simply he is not comparing like with like and he has accordingly failed to demonstrate any unequal treatment .No ground of challenge is made out and the judicial review must be dismissed.