Neutral Citation No. [2009] NIQB 91 | *Ref:* **COG7664**

Judgment: approved by the Court for handing down | *Delivered:* **26/11/09**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

____

McIlwaine's (Stephen) Application [2009] NIQB 91

IN THE MATTER OF AN APPLICATION BY STEPHEN McILWAINE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

____

Before Morgan LCJ, Girvan LJ and Coghlin LJ

____

COGHLIN LJ

[1] This is the judgment of the court.

[2] The applicant is currently serving a sentence of imprisonment in Maghaberry Prison. By this application he seeks leave to judicially review a decision taken by the Northern Ireland Prison Service ("NIPS") taken on 20 May 2009 in accordance with which the applicant's Earliest Date of Release ("EDR") under section 26 of the Treatment of Offenders Act (Northern Ireland) 1968 ("1968 Act") and the Prison and Young Offenders Centre Rules (NI) 1995 ("the 1995 Rules") should be 9 March 2010.

[3] This is one of a series of applications relating to the calculation of the periods to be spent in custody by sentenced prisoners that have come before the courts both in this jurisdiction and in England and Wales with particular regard for the credit to which they are entitled in respect of periods of custody on remand.

Background facts

[4] On 18 September 2004 the applicant was arrested on two separate charges ("the first and second charges"). He was remanded in custody on both charges from the 18 September 2004 to 7 January 2005. On 7 January

2005 he was sentenced to 18 months imprisonment on the first charge. After taking into account the remand period from 18 September 2004 to 6 January 2005 his EDR was calculated to be 17 June 2005.

[5] On 17 June 2005 the applicant was released on bail in relation to the second charge. He subsequently became involved in a road traffic accident in the course of which he suffered personal injuries and in respect of which he was charged with dangerous driving (the"third charge"). From the date of the accident, 2 September 2005, to 24 September 2005 he was in hospital in police custody. On 24 September 2005 he was released on bail in respect of the dangerous driving charge. On 10 November the bail that he had been granted in relation to that charge was revoked and he was remanded in custody on the third charge alone from 10 November to 14 December 2005.

[6] On 15 December 2005 he was produced in court and remanded in custody on the second charge. Between 15 December 2005 and 27 January 2006 he was remanded in custody on both the second and third charges. In the meantime, he served 7 days imprisonment on warrants for fines between 20 January and 26 January 2006.

[7] On 27 January 2006 the applicant was sentenced to 15 months imprisonment on the second charge. Upon this occasion the period of remand between the 18 September 2004 and 6 January 2005 was again taken into account together with a further period from 11 November 2005 to 19 January 2006 producing an EDR of 14 March 2006 (the inclusion of the period from 11 November to 15 December 2005 during which he was remanded on the third charge only seems to have been an error – see letter of 4 April 2009).

[8] It is accepted that on 15 March 2006 the applicant's status was changed from that of being a sentenced prisoner to that of remand prisoner in relation to the alleged dangerous driving offence. On 17 November 2006 he received a sentence of imprisonment of 7 ½ years on the dangerous driving charge. At this stage he was informed that his EDR was 2 October 2009. That date was reached by taking into account two periods of adult remand from 15 March 2006 to 31 August 2006 and from 11 November 2005 to 19 January 2006 as well as a period when he was an adult awaiting trial from 1 September 2006 to 16 November 2006.

[9] As a consequence of the coming into operation of new sentence calculation guidelines, consistent with the decision in Re McAfee's Application [2008] NIQB 142, all double counting of remand time was prohibited. The applicant had already received credit for the period between 11 November 2005 and 19 January 2006 against the sentence of 15 months imposed on 27 January 2006. On 20 May 2009 the prison authorities carried out a further calculation when the applicant's EDR in respect of the sentence of 15 months that he had received on 27 January 2006 was amended from 15

March to 7 August 2006. The consequence of that amendment in relation to the sentence imposed on 27 January 2006 was to reduce the period of remand in respect of the dangerous driving charge to the period between 7 August and 16 November 2006. In turn, that meant that the applicant's EDR in respect of the dangerous driving sentence was extended to 9 March 2010.

The relevant statutory provisions

[10] The sentence pronounced by a court may be subject to adjustment to take account of two factors:-

> (1) remission of sentence as provided for in Rule 30 of the Prison and Young Offenders Centre (Northern Ireland) Rules 1995 (the "1995 Rules");
>
> (2) any period spent by the prisoner in custody on remand while awaiting trial.

[11] Rule 30 of the 1995 Rules is as follows:-

> "(1) A prisoner serving a sentence of imprisonment for an actual term of more than 5 days may, on ground of his good conduct, be granted remission in accordance with the provisions of this Rule but this Rule shall not permit the reduction of the actual term to less than 5 days.
>
> (2) The remission shall not exceed half the total of the actual term and any period spent in custody which is taken into account under Section 26(2) of the Treatment of Offenders Act (Northern Ireland) 1968 (which relates to the duration of sentences)…..
>
> (7) In this Rule 'actual term' means 'the term of a sentence of imprisonment as reduced by Section 26(2) of the Treatment of Offenders Act (Northern Ireland) 1968 . . .'"

[12] Section 26(2) of the 1968 Act deals with credit for periods spent on remand in custody and provides as follows:-

> "(2) The length of any sentence of imprisonment . . . imposed . . . by a court shall be treated as reduced by any relevant period . . .
>
> 2(A) In sub section (2) 'relevant period' means:

> *(a)* any period during which the offender was in police detention in connection with the offence for which the sentence was passed; or
>
> *(b)* any period during which he was in custody –
>
> > *(i)* by reason only of having been committed to custody by an order of a court made in connection with any proceedings relating to that sentence or the offence for which it was passed or any proceedings from which those proceedings arose, or
> >
> > *(ii)* by reason of his having been so committed and having been concurrently detained otherwise than by order of a court."

The relevant authorities

[13] The statutory scheme for computation of sentences of imprisonment has been the subject of decisions both in this jurisdiction and in that of England and Wales. The Divisional Court decisions in England and Wales of R v. Governor of Brockhill Prison, ex parte Evans [2001] [1997] QB 443 and R v. Governor of Onley Young Offender Institution, Rugby ex parte Reid [1997] QB 443 have been recently considered in this jurisdiction by this court in Re Montgomery's application [2008] NIQB 130 and Re McAfee's application [2008] NIQB 142. In McAfee the court also took into account two authorities that were not considered in Montgomery, namely, R v. Secretary of State for the Home Department ex parte Kitaya (The Times 30 January 1998) and R v. Governor of Haverigg Prison, ex parte McMahon (1997 unreported).

[14] In McAfee, after a careful consideration of the relevant authorities, this court reached the conclusion that the rule against double counting, which it considered to be soundly based in commonsense and logic, should inform the interpretation of Section 26 of the 1968 Act. In delivering the judgment of the court Kerr LCJ observed, at paragraph 20:-

> "The purpose of the legislation is to ensure that offenders do not spend longer in prison than is warranted by the pronounced sentences. It is not designed to allow a prisoner convicted of multiple offences to be the undeserving beneficiary of a

reduction in a series of sentences because of a single period of detention on remand."

The case made on behalf of the applicant

[15] In the course of a detailed and admirably comprehensive submission Mr Lavery QC attacked the decision of the prison authorities upon a number of grounds arguing that:-

(i) The decision was contrary to the legitimate expectation of the applicant who would not have pleaded guilty to the relevant charge if he had been aware that the period of remand from 15 March 2006 was not to be deducted from his sentence in accordance with Section 26(2) of the 1968 Act. The applicant had acted in reliance upon the procedure adopted by the prison authorities which was well known and, in respect of which, no change had been publicised. Mr Lavery QC submitted that the fact that subsequent to the 15 March 2006 the applicant had been treated as a remand prisoner should have brought him within the provisions of Section 26. He argued that the respondent should not be entitled to recalculate a sentence once that sentence had been recognised as having been served either by formal release or by reaching the date of the prisoner's EDR. The decision of the respondent to recalculate the second sentence in reaching an EDR for the third sentence had the effect of preventing the applicant from being credited for actual remand time and therefore frustrated the purpose of the legislation.

(ii) In any event, the respondent had a discretion whether or not to apply the new policy to the applicant and continue his detention. Mr Lavery submitted that it was not mandatory for a prisoner to be detained for the full term imposed by the court and that the prison authorities at all times had a discretion as to whether or not to release him at any time. He referred to section 13 of the Prison Act (Northern Ireland) 1953 ("the 1953 Act") Act which provides for the making of rules permitting the authority to grant temporary release (rule 27) and to the power to grant remission of up to half the sentence under rule 30 referred to above. He also drew the attention of the court to End of Custody Licence introduced in England and Wales in order to reduce overcrowding. According to this argument the sentence of the court is the warrant of authority for the detention rather than a mandatory command and the prison authority retains at all times the discretion whether or not to exercise the power of detention afforded to him or her by the sentence. In support of this submission Mr Lavery referred to the language used in section 15(1) and section 15A of the 1953 Act and the fact that the prison authorities have not regarded themselves as being obliged to recall any prisoners who have been released as a consequence of the application of the previous policy. i.e. prisoners who had been released

in accordance with an EDR calculated as a consequence of double counting.

(iii) Mr Lavery further submitted that the prison authorities had failed to recognise that they had such a discretion and, as a consequence, they had not complied with any of the duties accepted as being essential for the fair and reasonable exercise of such a discretion including, for example, the duty of sufficient enquiry, the duty to take into account all relevant considerations and treat like cases alike, the duty to act consistently with the purpose of the legislation and the duty to act fairly and reasonably in the circumstances.

[iv] Mr Lavery also argued that the applicant had been the victim of discrimination contrary to Article 14 of the European Convention on Human Rights ("ECHR") in so far as his case came within the ambit of Articles 5, 7 and 8.

[v] In addition to the discretionary power on the part of the prison authorities for which he contended, Mr Lavery also drew the attention of the court to the prerogative power exercisable by the Secretary of State to remit any sentence. He referred to the case of Lewis v. Attorney General of Jamaica and Another [2001] 1 AC 50 in support of the proposition that the prerogative of mercy should be exercised fairly. In that context he again referred to the contrast between those who had been released with the benefit of the double counting policy and the applicant who had not been released but who had been afforded the formal status of remand prison with effect from 15 March 2006.

Legitimate expectation

[16] The basis of the applicant's claim under this heading is that he enjoyed a substantive legitimate expectation that, as a consequence of the calculation carried out by the prison authorities in January 2006, the EDR in respect of the second sentence had been fixed at the 15 March 2006. Thereafter he enjoyed the status of a remand prisoner remanded in custody in respect of the dangerous driving charges. However, it is now apparent that the calculation that produced the EDR of 15 March 2006 was carried out contrary to the rule against double counting which this court considered to be soundly based in commonsense and logic in McAfee. In that case this court decided that "double counting" was wrong and did not reflect the intention of the legislature.

[17] Fundamental to the concept of legitimate expectation is the proposition that the expectation contended for is "legitimate" and not unlawful or otherwise outside the powers of the decision making authority. In R v.

Ministry of Agriculture, Fisheries and Food ex parte Hamble (Offshore) Fisheries Limited [1995] 2 All England reports 714 Sedley J recognised that legitimate expectation might be substantive as well as procedural but accepted that the concept fell short of estoppel observing, at page 731, that:-

> ". . . estoppel against government would mean that the donee of a statutory power could be bound by an ultra vires representation with the dual effect of unlawfully extending the statutory power and destroying the ultra vires doctrine by permitting public bodies arbitrarily to extend their powers."

More recently the rule that a representation by a public authority, which that authority had no power to make, is not binding and cannot sustain a legitimate expectation or an estoppel has been the subject of some academic and judicial criticism – see for example the article by Professor Paul Craig in Administrative Law 4th edition page 635 to 650, together with an appendix dealing with the decision in R v. North and East Devon Health Authority ex parte Coughlan [2001] QB 213. The views expressed by Professor Craig in that article were quoted with approval by the Court of Appeal in England and Wales in Rowland v. the Environment Agency [2005] Ch 1. However, in that case, both May LJ and Mance LJ conceded that a person would not be permitted to enjoy the benefit of a substantive legitimate expectation to the extent that doing so would involve forcing the relevant public body to act beyond the scope of its lawful powers. At paragraph 105 May LJ observed:

> "I accept that a modification in Mrs Rowland's favour of the strength of her legitimate expectation does not achieve for her a more favourable outcome to this appeal under the law which we are obliged to apply. However strong the legitimate expectation, it comes against the buffers that it is beyond the power of the respondents to extinguish public rights of navigation over Hedsor water."

At paragraph 140 Mance LJ said:-

> "No challenge was made before us to the first three principles, including therefore the proposition that the agency could not, even bearing in mind any contrary legitimate expectation, be expected to perform acts exceeding its actual powers, although it would be entitled to alleviate any injustice by benevolent exercise of its powers."

At paragraph 67 of his judgment in the same case Peter Gibson LJ quoted with approval the summary by the trial judge of the general principles of English law relating to legitimate expectation which included the following remarks:-

> "But under English domestic law there can be no legitimate expectation that a public body will confer a substantive benefit or extinguish an obligation when it has no power to do so. This rule of law has been the subject of sustained academic criticism as conducive to injustice: see Craig, Administrative Law 4th edition (1999), page 642 and Morgan and Hogan Administrative Law in Ireland, 2nd edition (1991), page 863. But it remains the law."

[18] The applicant seeks to found his claim for legitimate expectation upon an interpretation of Section 26(2) that has been held to be unlawful and outside the powers of the prison authorities by this court in the case of McAfee. In such circumstances, this aspect of his claim must be rejected.

Discretion of the prison authorities

[19] As indicated earlier, Mr Lavery's primary submission was that, once committed to prison under the authority of sentence by the court, the prison authorities were entitled to release a prisoner at will in accordance with a free standing general discretionary power. In such circumstances, given the accepted basis upon which such powers should be exercised, it was both unfair and unreasonable for the prison authorities to afford the benefit of double counting to prisoners who were released from prison but not to the applicant once he had been formally afforded remand prisoner status.

[20] In R v. Governor of Brockhill Prison (No 2) [2001] 2 A.C. 19 the House of Lords considered the application of Section 67 of the Criminal Justice Act 1967 (the equivalent of Section 26(2) of the 1968 Act). In the course of giving the leading judgment of the House, Lord Hope explained how Section 67 sought to give effect to the broad principle that periods spent in custody before trial or sentence which were attributable only to the offence for which the offender was being sentenced should be taken into account in calculating the length of the period which the offender must spend in custody after he has been sentenced. Any such discount was to be applied by the governor of the institution responsible for detaining the person during his sentence. The governor required to be supplied with the information necessary to make the computation and he had to inform himself as to the legal requirements with which he had to comply in order to do so. However, at page 23 Lord Hope went on to observe:-

> "Under the system laid down by Section 67(1) of the 1967 Act there is no room for the exercise of a discretion by the governor, or for the application by him of value judgments as to the extent to which the person's liberty was restricted during the periods which he is required to take into account. He is required to apply a set of rules, and the offender is entitled to insist that these rules are applied correctly in accordance with the requirements of the statute."

As Lord Hope went to point out such a system has the merit of ensuring that each offender is dealt with strictly in accordance with rules that have been prescribed by law. We respectfully agree with and accept that analysis. The terms in which Parliament has sought to express its intention in Section 26(2) are clearly mandatory and this court decided in McAfee that the correct and lawful way in which to apply this section was to avoid double counting. The prison authority must comply with the rules set out by Parliament applied in accordance with the decision of this court and there is no room for a residual discretion on the part of the governor to adopt an approach found to have been unlawful.

The exercise of prerogative power

[21] Mr Lavery submitted that the Northern Ireland Prison Service as an executive branch of the Northern Ireland Office could only exercise its powers with the authority of the Secretary of State. He further argued that the power to pardon as part of the Royal Prerogative of mercy could operate by remitting the sentence of a person whose early release had been the result of a mistake. He relied upon the decision of the Privy Council in Lewis and Others v. Attorney General of Jamaica and Another [2001] 2 AC 50 as authority for the proposition that the exercise of the prerogative of mercy was subject to judicial review for the purpose of ensuring that the prerogative was exercised by procedures which were fair and proper and accorded with the norms of natural justice. Mr Lavery further submitted that fair and reasonable exercise of the prerogative required that the applicant, who had been initially granted formal remand status, should be treated in the same way as those prisoners who had been actually released as a consequence of the same, albeit mistaken, double counting approach.

[22] In a further affidavit, Mr Robin Maysfield, Director of NIPS, explained that consideration had been given to the category of prisoners released early as a consequence of the mistaken double counting policy, that legal advice had been obtained and the matter referred to the Minister of State. He confirmed that the instructions to prison governors issued in relation to sentence calculation in February and July 2008 had been expressly limited to prisoners in custody at that time. It was the view of NIPS that, taking into account the legal

advice, the finite nature of resources and competing pressures upon such resources, recalculation of sentences should be so limited. According to Mr Maysfield, recalculation of the sentences of all time served prisoners released from the commencement of the Treatment of Offenders Act (Northern Ireland) 1968 until the date of the judgment of the court in McAfee would present enormous practical difficulties. There would be many thousands of such cases and, where they existed, original files would require to be examined by one of the few staff who work in full or part time as sentence calculators.

[23] Initially, Mr McGleenan, on behalf of the respondent, had submitted that prisoners released early as a consequence of the original incorrect double counting policy should be regarded as "unlawfully at large" and that they would be subject to completing their sentence, properly calculated, if they were returned to prison,. Mr McGleenan subsequently modified this approach in the context of the decision of the Court of Appeal in England and Wales in Re Jonathan Lunn v. the Governor of Her Majesty's Prison Mooreland [2006] EWCA Civ 700. We consider that he was right to do so. At paragraph 23 of the judgment in Lunn's case Moore-Bick LJ said:-

> "In our view Section 49 of the Prison Act 1952 (the equivalent of Section 38 of the 1953 Act in N.I.) has to be understood in this context. It is the duty of the prison governor to carry out the order of the court in accordance with its terms and the relevant statutory provisions. He is under a duty to detain the prisoner for the required period, neither more nor less, and must calculate the earliest date on which the prisoner can be considered for parole and the date on which he is entitled to be released on licence. Both of these have to be calculated by reference to the period of imprisonment specified in the court order. Once a date for early release is reached the governor has neither the right nor the duty to detain the prisoner any longer and would be acting unlawfully if he were to do so."

Once released in accordance with the earlier mistaken policy, there would have been no sentence or order authorising the continued detention of such a prisoner as required by section 38 of the 1953 Act and he could not have been unlawfully at large.

[24] The applicant, at all material times, remained in custody despite being afforded formal remand status. In such circumstances, upon receiving the instruction to recalculate in accordance with the McAfee decision, the governor was bound to comply with the requirements of Section 26(2) as interpreted in that decision. That legislation occupied the space in which any exercise of the Royal Prerogative might operate – see AG v. De Keyser's Royal Hotel [1920] AC 508 – and no residual discretion remained.

The Convention rights

[25] Mr Lavery relied upon alleged breaches of Article 5, Article 7, Article 8 and Article 14 of the ECHR. Article 5 is concerned with deprivation of liberty and Article 7 protects individuals from being convicted of any criminal offence which did not constitute a criminal offence under national or international law at the time when it was committed or being subject to a heavier penalty than the one that was applicable at the time that the offence was committed. However, at all material times, the applicant was deprived of his liberty by virtue of a sentence passed by a competent court by which he had been properly convicted in accordance with law. Legitimacy of that sentence was unaffected by a mistaken approach on the part of the governor as to how to correctly calculate the EDR in accordance with Section 26(2). While the applicant's Article 8 rights to respect for his private and family life were undoubtedly adversely affected by the sentence of imprisonment any interference therewith was clearly justified for the prevention of disorder or crime. Since we do not consider that Articles 5, 7 or 8 are engaged we do not propose to give further consideration to Article 14.

[26] Accordingly, for the reasons set out above, we grant leave but dismiss the application.