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Judgment: approved by the Court for handing down | *Delivered:* **26/11/2015**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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McMullan's (June) Application [2015] NIQB 98

IN THE MATTER OF AN APPLICATION BY JUNE McMULLAN FOR JUDICIAL REVIEW

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MAGUIRE J

[1] The court has before it an application by June McMullan (hereinafter the applicant) for leave to apply for judicial review.

[2] The applicant is the widow of Constable John Proctor. Constable Proctor was murdered by the IRA on 14 September 1981 minutes after he had visited the applicant who at that time was in hospital giving birth to their son.

[3] Later, a man called Kearney was convicted of Constable Proctor's murder. The conviction took place on 28 November 2013. He was given a life sentence with a tariff of 20 years.

[4] On 6 January 2015 the Sentence Review Commissioners determined that Mr Kearney should be released after serving a period of imprisonment of 2 years. This was because his case fell under the Good Friday Agreement and attracted the early release provisions of the Northern Ireland (Sentences) Act 1998. The court has been told that Mr Kearney will be released in approximately three weeks' time – at or about the end of November 2015.

[5] The judicial review arises out of the issue of victim input into periods of temporary release which Mr Kearney had applied for.

[6] It is clear that Mr Kearney has enjoyed periods of temporary release on 9 March and 17 March 2015. On neither occasion was the applicant contacted in advance of his release and asked to provide her views about it. This was surprising as the applicant had been informed about a Prisoner Release Victim Information Scheme ("PRVIS") made under the Justice (Northern Ireland) Act 2000 which she

was eligible to participate in. In fact, she had agreed in early 2014 to participate in this scheme and accordingly she should have been given advance notice of the potential temporary releases of Mr Kearney. Under the scheme it had been intended that participants would have the opportunity to make representations to the authorities about an issue such as pre-release home leave.

[7] On or about 22 July 2015 the applicant filed proceedings for judicial review. In those proceedings she seeks to have the court:

- Quash the Northern Ireland Prison Service's temporary release plan in respect of Mr Kearney.

- She also seeks various declarations about the compatibility of Mr Kearney's temporary release plan with Articles 2 and 8 of the European Convention on Human Rights. There was also a claim that periods of temporary release granted to Mr Kearney were such as to give rise to a breach of the applicant's human rights under Articles 2 and 14 of the Convention read together.

[8] The section of the Order 53 statement dealing with grounds of judicial review records a large number of grounds of challenge. As one would expect they relate closely to the facts of the applicant's experience in terms of her participation in the PRVIS scheme. There was also reference to the Prison Service's Pre-Release Home Leave Scheme not being correctly administered in that it is alleged that Mr Kearney obtained pre-release home leave without any or adequate risk assessment being carried out and without consideration of the potential impact his home leave may have upon victims. In respect of the latter matter, it appears that Mr Kearney has been a denier while in prison and has not co-operated with any assessment which ordinarily would be undertaken.

[9] The applicant has expressed the suspicion that Mr Kearney was being treated more leniently than other prisoners due to him being a Good Friday Agreement prisoner. This, she indicates, undermined the significance of Mr Kearney's criminal conviction and life sentence. Moreover, in her affidavit, she also expressed the view that Mr Kearney should not be entitled to the same level of temporary release as a life sentence prisoner who has served a long period of imprisonment, as against the two years which Mr Kearney is required to serve.

[10] The applicant has also referred to more recent history concerning Mr Kearney's home leave in a second affidavit filed just before the leave application took place. In that affidavit she indicates that Mr Kearney was suspended from home leave for three months on his return to prison on 17 March 2015. This was because he had breached the rules of home leave by consuming alcohol.

[11] There is also reference to the applicant receiving a letter in June 2015 from the Prison Service about Mr Kearney. This letter seems to have been in the form of advice that he was again seeking home leave. In respect of it, the applicant avers:

> "I do not believe that this letter invited me to make representations about this."

[12] There is also reference in the affidavit to the applicant seeing Mr Kearney when she was coming from church on 4 October 2015. The inference is that the applicant had again not been asked to provide her views in advance of Mr Kearney acquiring a further period of home leave.

[13] In her latest affidavit under the heading "Importance for Victims Generally" the applicant acknowledges that Mr Kearney's release from prison is imminent at the end of November 2015. She asserts nonetheless that it is important that the application for judicial review be heard. This was because she believed that other victims should not be treated in the way that she has been treated: that is to say that they would be given proper notice of periods of temporary release sought by offenders responsible for the suffering of loved ones. She also indicated that she wanted to ensure that those benefiting from early release due to the terms of the Good Friday Agreement "do not receive greater benefit in completing their sentence than they are strictly entitled to".

[14] The intended respondent to this application is Northern Ireland Prison Service. It has resisted the grant of leave on two grounds:

(i) The applicant's delay in applying for judicial review.

(ii) On the basis that the proceedings are on the cusp of being overtaken by events (that is the release of Mr Kearney). In view of his imminent release the intended respondent is of the view that the proceedings lack utility. This view is reinforced by the fact that in the intended respondent's response to the applicant's pre-action protocol it apologised for the failure to give to the applicant notice of Mr Kearney's application for home leaves in March of this year.

[15] The Prison Service has also made the point that the applicant will have known for some time that Mr Kearney enjoyed the benefit of an early release date granted to him by the Sentence Review Commissioners as far back as February of this year.

[16] The intended respondent has contended to the court that the relevant chronology for the purpose of its delay objection to the granting of leave to apply for judicial review is as follows:

(i) The applicant was aware of the basis for her challenge from in or about 14 March 2015.

(ii) She had also known from in or about that time that it was unlikely that she would be eligible for legal aid.

(iii) It was also known at that time that Mr Kearney had a release date of November 2015. In the light of the above the Prison Service argued that if she had wished to take proceedings she will have known that she needed to act promptly. In fact, the proceedings were not issued until 22 July 2015 (over four months after the date of knowledge).

Court's assessment

[17] In the court's view it is impossible to avoid the conclusion that these proceedings were not initiated promptly. It is also clear that the proceedings were not initiated within the outer limit for the taking of judicial review proceedings of three months from the date of knowledge.

[18] These difficulties in the applicant's case are compounded by the fact that in this case speed was of the essence as the applicant will have been aware of the time frame linked to the release of Mr Kearney at the end of this month.

[19] The court has considered whether this is a case in which it can adopt the view that the delay in initiating this application can be set to one side or excused. Having carefully considered the applicant's explanations for the delay in this case, the court is unpersuaded that these sufficiently explain the failure to act with the requisite speed. In particular, the court does not consider that the delay in this case can be excused by reason of funding difficulties as it had been known for a substantial period that the applicant was unlikely to qualify for legal aid. In fact when she initiated the proceedings on 22 July 2015 the applicant was in no different position to that which she was in when she first acquired knowledge of the issues which arise in this case.

[20] The court has considered whether in this case it should exercise its discretion to extend time under the terms of Order 53 Rule 4(1). It sometimes is the case that a court will extend time particularly if it concludes that there is a good public interest or other reason for so doing. The court, having considered this issue, for reasons which will be given later, has concluded that there is no good public interest reason for extending time in this case.

[21] The second issue before the court is whether or not the proceedings lack utility. On this issue it has been realistically accepted by Mr Doherty QC who appeared with Mr McGowan on behalf of the applicant, that it would not be possible to have these proceedings dealt with, if leave was granted, prior to the release of Mr Kearney from prison later this month. In other words, it was accepted that the hearing of this case could not itself bring any benefit to the applicant.

[22] As a general rule the Judicial Review Court does not hear proceedings which have become academic. This is the well-established position in public law. That

position was set out by Lord Slynn in the case of Regina v Home Secretary ex parte Salem [1991] 1 AC 450 at 457. Lord Slynn said:

> "The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

[23] Applying this test it appears to the court that in the present case:

(a) There is no discrete point of statutory construction.

(b) This is a case which would involve the consideration of detailed facts which at least to some extent appear to be dispute as between the parties.

(c) This is not a case where there are a large number of similar cases.

[24] In fact the position in this case is that Mr Kearney currently is in a class of his own in that he is the only life sentence prisoner within the prison establishment in Northern Ireland awaiting early release having obtained a determination in his favour from the Sentence Review Commissioners. While it is possible that in due course there could be others who could be convicted at a later date and fall into this category, whether in fact such will occur is speculative.

[25] In the course of her submissions to the court Ms Doherty QC pointed out that apart from the early release element in this case there were some interesting issues about how the PRVIS Scheme operates. In particular she raised questions about whether the scheme had been published; who makes decisions under the scheme; and what are the operational arrangements for administering the scheme. The court reminds itself that the scheme is based ultimately on the statutory framework set up under the Justice Act. It applies generally to all prisoners who are required to serve a term of imprisonment greater than six months. It can therefore be seen that the scheme is not itself about the particular position of Good Friday Agreement life sentence prisoners who have an early release date.

[26] The court has stood back and asked itself the question where or not it should exercise the discretion to which Lord Slynn referred in Salem. It has concluded that it should not do so. It seems to the court that the particular circumstances of this

case while involving the operation of PRVIS are intimately interlinked to the particular facts and circumstances of Mr Kearney's incarceration. It is these facts and circumstances, which on any view are atypical, which underlie this case. In the light of this, the court is unconvinced that this case is a suitable vehicle for a general challenge to the PRVIS arrangements under the Justice Act. Those arrangements, it seems to the court, would best be considered in another case which does not carry with it the connotations of the issues which underlie this case. The court also reminds itself that the judicial review court is not the sole means available by which information about the operation of the scheme can be obtained.

[27] Accordingly the court concludes that this is not a case which should be heard for public interest reasons given that it is otherwise effectively academic.

Conclusion

[28] The court therefore concludes:

(i) That the proceedings run foul of the requirements of the Order 53 Rule 4.

(ii) That it should not grant an extension of time in relation to the delay in apply for relief.

(iii) That the proceedings are effectively academic as regards the applicant given Mr Kearney's date of release.

(iv) That this is not a case in which the court should exercise discretion to hear the application because of a good reason in the public interest for doing so.