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2016 No 16416/01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Murphy's (Gerard) Application [2016] NIQB 30

IN THE MATTER OF AN APPLICATION BY GERARD MURPHY

AND IN THE MATTER OF A DECISION OF THE DEPARTMENT OF JUSTICE FOR NORTHERN IRELAND DATED 6 FEBRUARY 2016

KEEGAN J

[1] The applicant applies for judicial review of a decision of the Department of Justice dated 6 February 2016. This decision was one which revoked the applicant's licence. The applicant was consequently recalled to prison. This hearing was expedited. It was agreed that it would be a rolled up hearing of the judicial review. This took place on 11 March 2016.

[2] Mr Lavery QC and Mr McKeown BL appeared for the applicant and Dr McGleenan QC and Mr Corkey BL appeared for the respondent and notice party. I am grateful to all counsel for their focussed submissions on the issues.

[3] At the outset, Mr Lavery QC stated that relief was sought on specific grounds rather than the wide focus of the Order 53 Statement which is dated 12 February 2016. He confirmed that the relief sought was as follows:

(a) An Order of Certiorari to bring up into this Honourable Court and quash a decision of the Department of Justice for Northern Ireland dated 6 February 2016.

(b) A declaration that the said decision was unlawful, ultra vires and of no force or effect.

[4] The grounds relied upon in this application were stated by Mr Lavery to be as follows:

(a) Probation Board for Northern Ireland (PBNI) have provided to both the Department of Justice and the Offender Recall Unit highly prejudicial information that was patently untrue. This information was then relied upon to substantiate in whole or in part the applicant's recall . Moreover PBNI have acted with *mala fides* by not only providing this information but by also failing to provide relevant information that would have demonstrated that the aforementioned highly prejudicial information was untrue. This has rendered the entire recall procedure irrational, procedurally unfair and in breach of natural justice.

(b) The Department of Justice has erred in law and/or misdirected itself in revoking the applicant's licence and recalling the applicant to prison and in particular has done so by:

(i) failing to satisfy itself that the test for recall has been met;

(ii) relying on information provided by PBNI that was patently untrue in circumstances when the Department of Justice knew or ought reasonably to have known that the said information was untrue;

(iii) relying on a recommendation of the Parole Commissioners for Northern Ireland that relied in whole or in part on the aforementioned untrue information and which in of itself demonstrated a material misunderstanding of the test for recall.

(c) This decision of the Department of Justice is therefore irrational as they have taken into account irrelevant considerations and have failed to take into account relevant considerations when deciding to revoke the appellant's licence and recall him to prison.

(d) The failure by the Department of Justice to provide to the applicant adequate reasons for his recall has denied the applicant an opportunity to effectively challenge the validity of his recall.

[5] The salient history in this case is as follows. The applicant is a sentenced prisoner detained at HMP Maghaberry, having been recalled by the Offender's Recall Unit by decision of the Department of Justice on 6 February 2016.

[6] On 17 December 2013 the applicant was sentenced at Downpatrick Crown Court after conviction for offences of false imprisonment, intentional sexual touching, criminal damage and threats to commit criminal damage. For these offences he received a determinate custodial sentence of 9 months in custody and 24 months on licence. The victim in this case was the applicant's former partner.

[7] The applicant was released on licence on 12 September 2014. On 25 November 2014 the applicant was arrested by the Police Service of Northern Ireland. He was informed that his licence had been revoked and that he had been recalled to custody. The trigger for this event was that the applicant had made certain comments during an appointment with the Probation Service. The applicant by his own admission had at this time vented his frustration with the licence conditions imposed upon him however there is some dispute as to exactly what was said by the applicant. At paragraph 4 of his affidavit in these proceedings the applicant avers as follows:

> "On 19 November 2014 I attended an appointment with Probation, during this appointment I once again vented my frustration with my licence conditions. When asked how I would feel were I to be recalled I informed PBNI that I thought I would struggle to cope, would be angry and would feel like putting a bullet in the head of everyone involved in the recall but that I knew that none of those things would be beneficial. Again at no stage did I intend to threaten or cause alarm or distress by these comments and I prefixed the comments by ensuring those present that I was speaking hypothetically and that I had no intention of being recalled or acting on any thoughts or feelings that would occur were I to be recalled."(sic)

[8] In the course of this hearing, the respondent referred me to the source materials in relation to this appointment with the Probation Service on 19 November 2014. This states as follows:

> "Discussion re custody and again Gerard stated that he had acquired knowledge in custody to get a gun. He was reminded of his personal responsibility not to misuse this information. I advised him I had contact with Maghaberry re: accessing his work completed during education and they are to get back to me. Again Gerard used derogatory language towards female PO and Sentence Manager Maghaberry. He advised if he was recalled to custody he would put a bullet in all of us that had contributed to this. When challenged about this, he referred to his statement as hypothetical."(sic)

[9] It was accepted that the applicant had made the comments ascribed to him. However, it was asserted that the comments about acquiring a gun and using a gun had been made on different dates and were entirely unrelated. The case was made that the two comments had effectively been conflated into one. It was also asserted that the comments were not meant as a threat. Mr Lavery asserted that this latter

point was confirmed by a Probation Officer in the Parole Commissioners of Northern Ireland (PCNI) hearing which took place on 18 March 2015.

[10] As a result of these matters the applicant was recalled to prison. This led to a consideration of his case by the PCNI and by a decision of 18 March 2015 the PCNI determined that the applicant should be released. The PCNI decision stated that the statutory test for recall had not been met. However paragraph 36 of the PCNI decision also makes comment as follows:

> "36. However the defective reasons letter in the present case is compounded by other issues. In the recommendation of the Commissioner regarding recall dated 24 November 2014 the Commissioner states at paragraph 10, `I have credible evidence before me that Mr Murphy's risk to the public has increased significantly since his release from custody especially as he had stated that he has access to a weapon that he would put a bullet in PBNI staff'. But is this correct? At paragraph 9, he recorded that `he (Mr Murphy) stated that whilst in custody he acquired the knowledge as to how to procure a weapon and if he was to be recalled to prison he would put a bullet in any PBNI staff involved in that process'."

[11] It appears that in response to the panel at the oral hearing, the Senior Probation Officer agreed that the reference to the knowledge to procure a weapon was made on the 3 November 2014 meeting and the threat to put a bullet in the PBNI staff was made at the meeting on 19 November 2014. It seems that the alleged conflation of the two remarks may have influenced the Parole Commissioner who recommended recall. The conclusion at paragraph 36 of the Parole Commissioners decision states that "the information before the Commissioner was not only limited, but was in the view of the panel somewhat misleading and factually inaccurate in the above respect."

[12] I was informed that this decision of the Parole Commissioners was itself subject to a judicial review by the Department of Justice. That case was resolved after a letter was received from the Parole Commissioners wherein it was accepted that the Parole Commissioners had exceeded their jurisdiction by also commenting upon the lawfulness of the detention.

[13] The applicant was released from custody on 18 March 2015. Thereafter it is common case that the applicant received a written warning on 28 August 2015 due to issues of noncompliance with the integrated domestic abuse programme (IDAP). On 25 November 2015 the applicant was charged with a number of offences namely two breaches of a Harassment Order and breach of SOPO. On 21 January 2016 the applicant was given a final written warning due to his attitude displayed on 15 January 2016 when attending with the Probation Service.

[14] These issues are set out in the report from the Probation Service dated 5 February 2016. In Section 4 entitled "circumstances and details of breach" the case is made that the applicant has breached his licence conditions. This section is clear in stating that the applicant is aware of the condition of his licence in particular that he had to present himself in accordance with the instructions given by his Probation Officer to participate actively in the IDAP programme during the licence period and to comply with the instructions given by or under the authority of the person in charge.

[15] It is noted in this report that on 15 January 2016 the applicant read the information leaflet and signed the consent form to participate in the Building Better Relationships (BBR) programme that now replaces the IDAP. In this report there is an indication that on 3 February 2016 the applicant attended a pre-group meeting with the facilitators of the BBR programme as an introduction to taking up his place on the programme on 18 February 2016. It is noted that "programme staff advised that this meeting was characterised by foul and abusive language directed at programme staff and with reference to the victim in this case." The applicant makes some concessions in his affidavit about this meeting. He agrees that he vented his frustration and he states that he referred to PBNI staff as "ball-bags."

[16] With regard to the incident on 15 January 2016 which led to the final formal warning being issued, the report is quite clear that the applicant was disruptive at the meeting and used foul language. In his affidavits the applicant himself accepts his frustration with the licence conditions and the applicant does accept some use of inappropriate language towards probation. In particular he accepts that he had compared probation staff to "Nazi minions." The conclusion of this report is set out as follows;

> "Mr Murphy has demonstrated a complete lack of meaningful engagement with PBNI. His attitude towards the supervision process, PBNI staff and other professionals in his life such as Social Services and PSNI has remained hostile and abusive. He continues to refer to his ex-partner and the victim of his offences in the most derogatory manner."

[17] As a result of the above, this report recommended the recall of the applicant under Article 28(2) (a) of the Criminal Justice (Northern Ireland) Order 2008.

[18] By letter of 6 February 2016 the applicant was informed of the revocation of his licence. He was recalled to prison on 7 February 2016. The decision letter of 6 February 2016 is accompanied by what has been described as a "suite of documents." This is not disputed. The documents are the Probation Report of 5 February 2016 which I have referred to above and the Parole Commissioner recommendation of 5 February 2016.

[19] The recommendation of the Commissioner is informed by the Probation Report to which I have referred. At paragraph 10 of the recommendation of the Commissioner, reference is also made to the meeting on 19 November 2014 with two female members of staff whereby it is stated that the applicant indicated that he knew how to get hold of a weapon and that if he was recalled to prison he would "put a bullet in any PBNI staff involved in this process". The Commissioner notes that he later said that he had been speaking hypothetically but nonetheless the recall proceedings were initiated.

[20] The Commissioner at paragraph 15 of her report sets out the facts of the applicant's case since his release on 19 March 2015. She states that in her view he has again proved to be offensive, hostile and combative in his dealings with the PBNI and she continues as follows:

> "As a consequence of his behaviour, he has been judged as not programme ready and he will not be offered a place on the BBR programme at the moment."

[21] In the conclusion section the Commissioner sets out her findings. Firstly she sets out the test for whether or not a determinate custodial sentence licence should be recalled. At paragraph 17 the Commissioner sets out her reasons for recommending recall. These are:

> "The anger, hostility and intemperate behaviour that Mr Murphy has frequently displayed since his release on licence are matters of great concern and I am satisfied, on the balance of probabilities that the risk of his causing harm to the public has increased more than minimally since his release from custody".

[22] In terms of sequence, it appears that the Probation Report informs the Parole Commissioner who then issues a recommendation. The recommendation is transmitted to the respondent who ultimately makes a decision on the basis of the legislation. It is important at this stage to set out the relevant statutory provision in relation to this issue. This is the Criminal Justice (Northern Ireland) Order 2008 and in particular Article 28 which reads as follows:

> "Recall of prisoners while on licence
>
> 28(1) In this article "P" means a prisoner who has been released on licence under Article 17, 18 or 20.
>
> (2) The Department of Justice or the Secretary of State may revoke P's licence and recall P to prison –

(a) if recommended to do so by the Parole Commissioners; or

(b) without such a recommendation if it appears to the Department of Justice or (as the case may be) the Secretary of State that it is expedient in the public interest to recall P before such a recommendation is practicable.

(3) P-

(a) shall, on returning to prison, be informed of the reasons for the recall and of the right conferred by sub-paragraph (b); and

(b) may make representations in writing with respect to the recall.

(4) The Department of Justice or (as the case may be) the Secretary of State shall refer P's recall under paragraph (2) to the Parole Commissioners.

(5) Where on a reference under paragraph (4) the Parole Commissioners direct P's immediate release on licence under this Chapter, the Department of Justice shall give effect to the direction.

(6) The Parole Commissioners shall not give a direction under paragraph (5) with respect to P unless they are satisfied that –

(a) where P is serving an indeterminate custodial sentence or an extended custodial sentence, it is no longer necessary for the protection of the public from serious harm that P should be confined;

(b) in any other case it is no longer necessary for the protection of the public that P should be confined."

[23] Mr Lavery QC based his case upon the affidavits of the applicant which are dated 12 February 2016 and 8 March 2016. Mr Lavery also filed a comprehensive skeleton argument. I can summarise his arguments as follows. Mr Lavery asserted that the decision made on 6 February 2016 should be quashed. He made this case on

the basis that material was used in the decision making process that was highly prejudicial and inaccurate regarding the applicant. Specifically, he referred to the fact that the comments ascribed to the applicant which were the basis of the previous recall were referred to in the Probation Report. However, no reference was made to the fact that the Parole Commissioner's decision of 18 March 2015 made some findings that the words attributed to the applicant may have been misleading and factually incorrect and also that no specific threat was made to the Probation Officer.

[24] Mr Lavery stated that if these matters were contained within the material sent to the decision-maker they must have been within his contemplation. Mr Lavery argued that if the decision-maker did not take this material into account that should have been stated. Mr Lavery also made a case that the reasons given in the decision-making letter were not clear.

[25] Mr Lavery said that he was not strongly advancing the argument that there had been *mala fides* on the part of the respondent. He accepted that such a case would inevitably involve a factual inquiry. He said that the issue was simply relevant to context. He said that whilst a remedy in the form of a hearing before the Parole Commissioners was available, it was distant in time, and there was a different legal test. Mr Lavery asserted that the legal test was a higher one for the applicant to satisfy and so that potential alternative remedy should not be a bar to relief in this case.

[26] Dr McGleenan QC argued that leave in this case was not arguable and so should be refused. He referred to the statutory test for recall which he said was clearly made out on the basis of the breaches of licence since release of the applicant on 18 March 2015. Dr McGleenan argued that the decision of 6 February 2016 could not be impugned because the decision-maker had considered the position of the applicant since release on licence. He said that there was ample evidence of breach of licence conditions since the release. He said that the other material was background. Dr McGleenan referred to the affidavit of the decision-maker. He accepted that there was an *ex post facto* reasoning to this whereby the decision-maker says that he did not take into account the prejudicial material in the Probation Report.

[27] Dr McGleenan referred to the fact that the respondent has in fact triggered a procedure whereby the applicant's case will be referred under Article 28(2) of the Criminal Justice (Northern Ireland) Order 2008 for an expedited hearing before the Parole Commissioners. He referred to a timetable in relation to that process whereby papers will be prepared by 25 March 2016, representations will be invited by 22 April 2016 and there will be consideration of the case on 6 May 2016. Dr McGleenan argued that this was a much more suitable remedy to dealing with factual disputes including the claims of *mala fides.* In relation to the exercise of discretion, if the applicant were to succeed on any of his grounds, Dr McGleenan said that no relief should be granted on the basis of the alternative remedy. In making his case Dr McGleenan also referred to his skeleton argument which was

helpfully filed in this case. He referred to the affidavits prepared by the respondents and notice party in this case namely four affidavits of 3 March 2016, 4 March 2016, 7 March 2016 and 7 March 2016.

[28] In this application I must determine the following;

(i) Should I grant leave?

(ii) If I grant leave does the applicant succeed on the merits?

(iii) If the applicant does succeed on the merits should relief be granted in the context of a potential alternative remedy?

[29] In order to determine the above, I have to decide whether the decision of 6 February 2016 is irrational on the ground that it was based upon the material from the Probation Report which is described by the applicant as prejudicial and inaccurate in relation to the first release on licence. This argument is essentially that the decision was reached upon an error of fact. The second part of the applicant's case is the argument that the reasons given are not adequate.

[30] The first step in this exercise must be to look at how the decision-maker approached the decision. It was accepted that the decision-maker exercised its own discretion in this matter. The decision-making letter is clear in terms of the statutory test that was applied. In my estimation the operative part of the letter is as follows:

> "From the evidence provided the Department of Justice is satisfied that the risk of harm you pose to the public, as articulated in the Parole Commissioner's recommendation has increased more than minimally since you were released on licence. The Department concludes that this risk can no longer be safely managed in the community".

[31] The decision draws from the Parole Commissioner's recommendation. It also follows that the decision-maker has applied the test as to whether or not the risk of the applicant has increased more than minimally since he was released on licence. As such it seems to me that the decision-maker has applied the proper legal test and has considered the matter of how the applicant has behaved since he was released on licence.

[32] I accept that the Parole Commissioner in reaching her recommendation was provided with the Probation Report. That Report in Section 4 sets out the alleged breaches on licence. The applicant does not specifically agree with all of the allegations made against him but on the basis of his affidavits it is clear that some concessions are made. However, the Probation Report also refers to the previous

recall in a way that the applicant says is prejudicial to him and amounts to an error of fact.

[33] As such the issue really is whether or not the Probation Report's recount of the first release on licence has polluted or infected the process in some way. I accept that background should be stated in a report as it would be invidious to exclude it. I also accept the proposition that it is better that the background is stated in full. The fact that the Parole Commissioner's reasoning of 18 March 2015 is not reflected in the background section is at the heart of this challenge. The assertion is made that only the part favourable to the respondent is included and that the apparent criticisms are taken out.

[34] In my view, it would have been better to include the complete history in the Probation Report. However, I do not see this as a reason to strike down the decision of 6 February 2016. This is because of the nature of the decision made and the materiality of the information about the applicant's first recall to it. The decision of 6 February 2016 must be seen for what it is. It was a decision based on a consideration of whether or not there had been breach of licence since release which was more than minimal. As such I do not consider that the decision was based upon any error of fact as to the circumstances of the applicant's first recall. I do not consider that to have been material to the matter to be determined.

[35] I have also considered the case made by the applicant that there has been a failure to record adequate reasons which has effectively denied the applicant an opportunity to challenge the validity of his recall. I consider that this case is not made out. The letter that was sent to the applicant setting out the decision does not give the full substance of the reasoning. However, it was accepted that the relevant accompanying documents were also sent to the applicant with the decision letter. These do explain the reasons for the decision in a clear and unambiguous way. In particular the Parole Commissioner's recommendation is clear in terms of the reasoning for recall which is based upon breach of licence.

[36] I consider that the reasoning does not raise any doubt that the decision maker erred in law. The reasoning is also clear in highlighting that the decision maker reached a rational decision on relevant grounds. As such there is no prejudice to the applicant.

[37] I do not make any finding in relation to *mala fides* as it was correctly conceded by Mr Lavery that this is a matter which is not well suited to judicial review and would require oral evidence. I refer to the difficulties with establishing *mala fides* in the text 'Judicial Review in Northern Ireland 2nd Edition Gordon Anthony' paragraphs 5.51-5.52. In any event, Mr Lavery realistically accepted that he could not strongly advance this proposition.

[38] I do consider that there is an alternative remedy in this case in any event. The applicant's case has been referred to the Parole Commissioners. This is a body that

can hear oral evidence. It seems to me that this is a more appropriate body to hear this type of case. I note that the applicant himself has not requested an expedited hearing but it is accepted that the respondent has requested that the Parole Commissioners to hear this case in a relatively short period of time. I am not persuaded that this is an ineffective remedy due to the legal test applied.

[39] In all of the circumstances I do not consider that there is any merit in the arguments raised by the applicant. I do not consider that the Department of Justice has erred in law and/or misdirected itself when recalling the applicant to prison. I cannot accept that the decision of the Department of Justice is irrational as the decision has in my estimation taken into account all relevant matters and is reasoned.

[40] I consider that the applicant has satisfied the test for leave as this is a modest hurdle for him to overcome. I consider that an arguable case was made and so leave should be granted. However having heard the arguments I refuse the application on the merits on all of the grounds.

[41] Accordingly the application is dismissed.