Neutral Citation No. [2010] NIQB 63 | *Ref:* **COG7844**

Judgment: approved by the Court for handing down | *Delivered:* **12/05/10**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

DIVISIONAL COURT

Rea's (Ian) Application [2010] NIQB 63

IN THE MATTER OF AN APPLICATION BY IAN REA FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE PRISON SERVICE OF NORTHERN IRELAND

Before: MORGAN LCJ, HIGGINS LJ and COGHLIN LJ

COGHLIN LJ (delivering the judgment of the court)

[1] The applicant, currently a prisoner at HMP Maghaberry, has applied for judicial review of a decision by the Governor of that prison who has calculated the applicant's earliest date of release ("EDR") as 17 February 2011. In arriving at that date the Governor has refused to give the applicant credit for a period spent on remand in custody between 19 June 2003 and 1 March 2004. Mr O'Donoghue QC and Dr McGleenan appeared on behalf of the appellant while the respondent was represented by Mr Maguire QC and Mr Schofield. The court is grateful to both sets of counsel for their carefully prepared and succinctly delivered written and oral submissions.

Background History

[2] The relevant series of background events may be summarised as follows:

(i) On 2 January 2003 Robert William Green was shot dead at 6.40pm outside the Kimberley Bar, Kimberley Street, Belfast.

(ii) During the month of January 2003 the applicant was questioned by the police about the murder of Mr Green. He was released without charge.

(iii) On 12 January 2003 a police search was carried out at a lock-up garage at Drumart Drive, Belvoir Estate, Belfast and, during the course of that search, a cache of arms and ammunition together with a small amount of explosives were found. That cache included the weapon used to murder Mr Green, a Smith & Wesson .37 magnum revolver together with a number of other firearms and a quantity of ammunition.

(iv) On 17/18 June 2003 the applicant's home was searched and, during the course of that search, a handwritten list of guns and ammunition was discovered. That list included references to some of the weapons and ammunition that had been found at the garage at Drumart Drive. The list was composed in the handwriting of the applicant but, during interview, he denied any knowledge of the garage or its contents and refused to answer any questions about the list.

(v) On 28 January 2003 the applicant was charged with possession and possession with intent to supply controlled drugs. Both the applicant and the respondent agree that those charges are not relevant to the present application.

(vi) On 19 June 2003 the applicant was remanded in custody on a charge alleging possession of an article in circumstances giving rise to a reasonable suspicion that possession of the said article was for a purpose in connection with the commission, preparation or instigation of an act of terrorism contrary to Section 57 of the Terrorism Act 2000, namely, the notepaper list of firearms and ammunition. The applicant was refused bail and remanded in custody until bail was granted on 1 March 2004. On 22 March 2004 the applicant was recharged with the possession of drugs offences and the PPS withdrew the charge contrary to Section 57 of the Terrorism Act 2000.

[vii] On 20 May 2005 a Mr Steven Paul McFerran was charged with the murder of Robert William Green and, subsequently, the applicant was also charged with the murder of Mr Green together with 5 counts relating to possession of firearms and explosives. The firearms and explosives that were the subject of these charges were those that had been found during the course of the search of the garage on 14 January 2003 and included a number of the articles described in the handwritten note.

[viii] At the commencement of the trial Mr McFerran pleaded guilty to the manslaughter of Mr Green and the applicant pleaded guilty to 3 counts

relating to possession of firearms and ammunition contrary to Article 17 of the Firearms (Northern Ireland) Order 1981, possession of explosives contrary to Section 3(1)(b) of the Explosive Substances Act 1883 and possession of an imitation firearm contrary to Article 17A of the Firearms (Northern Ireland) Order 1981. The PPS accepted Mr McFerran's plea of guilty to manslaughter and withdrew the murder charge against the applicant. He then pleaded guilty to the firearms offences. In the course of sentencing him to 8 years imprisonment the learned trial Judge recorded that the applicant's fingerprints had been found upon numerous items in the garage and that the list of firearms and ammunition had been recorded on the notepaper in the applicant's handwriting.

[3] The applicant was committed for trial in custody on the charges of murder and possession of firearms and ammunition on 25 January 2006 but he was granted bail on the following day, 26 January 2006. He was recommitted to custody on 20 February 2007 on an Awaiting Trial Warrant and on 26 February 2007 he received the sentence of 8 years imprisonment. In calculating the applicant's EDR the Governor of Maghaberry Prison gave him credit for the 8 days that he spent remanded in custody after being charged with the murder and firearms offences. It is the applicant's case that he should also be entitled to credit for the period from 19 June 2003 to 1 March 2004 during which he was remanded in custody charged with the offence contrary to Section 57 of the Terrorism Act 2000 – some 10½ months.

The Legal Framework

[4] Section 26(2) of the Treatment of Offenders Act (Northern Ireland) 1968 provides that:

> "The length of any sentence of imprisonment … imposed on or ordered in relation to an offender by a court shall be treated as reduced by any relevant period …"

Section 26(2A) provides that:

> "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 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 an order of a court."

[5] In calculating the EDR of a prisoner the prison authorities also have regard to Rule 30 of the Prison and Young Offenders Centre (Northern Ireland) Rules 1995 ("the 1995 Rules") which provides 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 …'"

The Calculation

[6] In the course of his affidavit Governor Jeanes, a Governor at HMP Maghaberry, has explained that the calculation of the applicant's EDR took into account the 2 days he spent on remand in custody on 25 and 26 January 2006 together with the 6 days from 20 February to 25 February 2007, a total of 8 days. After taking into account that period the applicant's EDR was calculated as 17 February 2011. Governor Jeanes confirmed that the calculation did not give any credit to the applicant for the period of remand from 19 June 2003 to 1 March 2004. According to Governor Jeanes that period

was not taken into account because the 2006 charges were different from the 2003 charges. At paragraph 12 of his affidavit he stated that:

> "The 2003 charges consisted of a charge of possession of drugs and of possession of notepaper for terrorist purposes. Neither of these charges was replicated in the 2006 charges. Rather, the 2006 charges on which the applicant was sentenced consisted of the possession of firearms with intent; the possession of explosives with intent; and the possession of an imitation firearm. The 2006 charges were in respect of different dates from 2003 charges and were under different legislation."

In such circumstances the remand period in respect of the 2003 charges was not considered to be a "relevant period" for the purposes of Section 26(2) of the 1968 Act.

[7] The equivalent legislation in England and Wales, Section 67 of the Criminal Justice Act 1967, was considered by the House of Lords in R v Secretary of State for the Home Department ex parte A [2000] 2 WLR 293 which was a case in which a youth had been refused bail on a charge of handling stolen goods and was committed to non secure local authority accommodation. Ultimately, on being sentenced to 4 months detention in a Youth Offenders Centre, the Governor refused to give credit for the time spent on remand in local authority accommodation. The House of Lords held that for a period on remand to count as a relevant period under the legislation the youth would have to have been committed to secure accommodation and therefore the Governor was correct to refuse credit for time spent on remand in local authority accommodation. After referring to Section 67 of the Criminal Justice Act 1967 as amended by Section 49(2) of the Police and Criminal Evidence Act 1984 and Section 130 of the Criminal Justice Act 1988 Lord Hope said, at page 279:

> "The broad principle to which it seeks to give effect is that periods spent in custody before trial or sentence which are attributable only to the offence for which the offender is being sentenced are to be taken into account in calculating the length of the period which the offender must spend in custody after he has been sentenced."

At page 287 in the same case Lord Clyde said:

> "From the history the policy behind Section 67 becomes clear, namely that periods of sentences to custody should be automatically discounted in respect of periods which the offender has spent in custody or in conditions equivalent to custody pending trial or sentence in the case."

He later emphasised the importance of the test being one that was at once "clear and certain."

[8] In the A case Lord Hope also expressed concern about the system under which the relevant information would be provided to the prison authorities and the task that they faced in putting the policy into practice. At page 283 he said:

> "Mr Levy accepted that the computation laid down by Section 67(1) of the Act of 1967, which provides for an automatic discount from the length of the sentence of the relevant period defined in Section 67(A)(c), made it necessary for the institution which was responsible for detaining the person during his sentence to be provided with the information which it needed to make the computation. But in my opinion the nature of the discount, and the fact that its application has been left to the governor of the institution and not a judge, suggest that value judgments as to whether the person's liberty was or was not restricted are inappropriate. …
>
> Mr Levy said that a workable system was in place which enabled local authorities to provide the necessary information to the prison authorities. I have no doubt that this is so, having regard to what had to be done to give effect to R v Collins. But the fact that there is a workable system does not mean that it is a reliable or an appropriate system. Fairness as between one offender and another suggest that it is inappropriate for the governor who has to do the computation to have to form judgments on information provided by others on matters as to which there is no precise criterion."

The Submissions of the Parties

[9] The applicant and the respondent are agreed that, of the 2003 charges, the drugs charges are irrelevant and it is only the possession of the notepaper list of firearms and ammunition charges that is relevant for the purposes of this appeal.

[10] The applicant's original grounds of challenge as set out in his Order 53 statement and skeleton argument were:

(i) The failure to take into account the period spent on remand in relation to the 2003 charge constitutes an extension of the applicant's custodial sentence by administrative act and thereby contravenes Article 5 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR");

(ii) The calculation of the applicant's EDR as 17 February 2011 is procedurally improper as a consequence of the Governor's failure to take into account the congruent nature of the 2003 and 2006 charges;

(iii) The Governor's decision to calculate the EDR in this fashion was irrational in that a reasonable Governor scrutinising the available information on the 2003 and 2006 charges would not have concluded that the time spent on remand was not a "relevant period" for the purposes of Section 26(2) of the 1968 Act.

[11] In a professional and attractively presented argument Mr O'Donoghue focussed his attention upon Section 26 (2A)(b)(i) of the 1968 Act. He argued that the fact that the firearms and ammunition that were the subject of the notepaper list were some of the same firearms and ammunition in respect of which the applicant was ultimately sentenced provided the common factor that constituted the offence contrary to Section 57 of the Terrorism Act 2000 an offence that was "related" to the those offences. In support of this submission Mr O'Donoghue drew the attention of the court to the fact that the notepaper which had formed the basis of the original Section 57 charge had been incorporated as an exhibit into the papers used for the purpose of returning the applicant on the murder and possession charges. Mr O'Donoghue argued that, in the interests of fairness and justice, Section 26(2A) should be given a purposive construction that took into account time spent on remand for offences alleged to have arisen from the same facts that served to support the charges in respect of which the prisoner was ultimately sentenced, even if the original custody was justified in respect of a different offence. In his supplemental skeleton he gave as an example a case in which an accused was remanded in custody charged with murder but subsequently re-charged/returned for trial and convicted of manslaughter upon precisely the same factual evidence. He suggested that cases of attempted murder and

wounding with intent or theft and handling stolen goods based upon the same evidence would also qualify. He did not advance any argument based on Article 5 of the European Convention of Human Rights and Fundamental Freedoms (ECHR).

[12] While he accepted that the applicant has spent some 9-10 months in custody in relation to the Section 57 charge, Mr Maguire emphasised that, after it had been withdrawn, such a charge had never been reinstated and no further proceedings had been instituted against the applicant for a period of almost 2 years. He submitted that, in the circumstances of this particular case, the period to be taken into account in accordance with Section 26(2A)(b) was either:

(i) Any period of custody imposed in connection with proceedings that were related to the sentence passed on the applicant or

(ii) any period in custody imposed in connection with proceedings related to the offence for which the applicant was ultimately sentenced.

According to Mr Maguire, in either case, the phrase "in connection with" was the vital bridge. The onus was on the applicant to establish a direct and substantial connection between the period in custody sought to be taken into account and the offence in respect of which the relevant sentence was ultimately passed. It would not be sufficient to establish a connection that was tenuous, insubstantial or tangential. He argued that incorporation of the notepaper as an exhibit in the committal papers relating to murder, firearms and ammunition was quite incapable of amounting to the necessary substantial direct connection. If it were otherwise, the Governor of the prison, whose responsibility it was to ensure that the calculation was correct, would be faced by having to make a difficult value judgment.

Discussion

[13] In the circumstances of this particular case the fundamental question to be determined for the purpose of implementing Section 26(2A)(b)(i) of the 1968 Act was whether the order of the court remanding the applicant in custody in June 2003 was made in connection with proceedings relating to the offences for which he was sentenced in February 2007. While there may be some degree of common factual background we must reject the submission advanced on behalf of the applicant that the offence with which he was charged in 2003 arose out of precisely the same circumstances as those for which he was ultimately sentenced in 2007.

[14] As Governor Jeanes recorded in this case the 2003 charge contrary to Section 57 of the Terrorism Act 2000 differed from the offences of which the applicant was ultimately convicted by being brought under different

legislation and being related to different subject matter, namely, a piece of notepaper that was found at a different location upon a different date. The presence of the notepaper list in the applicant's home on 17/18 June 2003 formed the basis of a sui generis and quite separate charge contrary to Section 57 of the 2000 Act that did not depend upon the applicant himself having any direct physical involvement with the arms/ammunition recorded therein or any of the other articles found in the garage. By contrast, the fingerprint evidence produced by the prosecution in support of the offences in respect of which he was ultimately sentenced established just such a direct personal and physical involvement with the arms and ammunition. In such circumstances, we are not persuaded that the applicant has established the necessary direct connection between the order remanding him in custody between 19 June 2003 and 1 March 2004 and any of the offences in respect of which he was eventually sentenced by Gillen J. It is clear that the governor did take into account the earlier period of remand in custody but, having done so, determined that it did not constitute a "relevant period" within the meaning of section 26(2) as defined in section 26(2A). In our view that was a conclusion that he was entitled to reach in the circumstances and not one that could be condemned as irrational. Accordingly, the application must be dismissed.

[15] The equivalent legislation in England and Wales was eventually amended and the relevant provision is now Section 240 of the Criminal Justice Act 2003. In accordance with the 2003 amendment the calculation of the period of credit for earlier periods in custody was transferred from the governor of the prison to the judge responsible for the ultimate sentence. Secondly, Section 240 permits credit to be given not only for remands in custody "in connection with" the offence for which an offender is sentenced but also for "a related offence" where the charge is founded on same facts or evidence.

[16] Consideration might be given to amendment of the legislation currently applicable in this jurisdiction to bring it into line with that applicable in England and Wales. However, whilst appreciating the purpose of the transfer if the provision is to be widened, we would simply note that, in such circumstances, it would become essential to promulgate appropriate guidance/rules for the judiciary and for the sentencing judge to have available all the materials relating to any previous periods of custody claimed to be relevant if a significant increase in appeals to the court of appeal is to be avoided.