**Neutral Citation No. [2010] NIQB 56** | *Ref:* **TRE7846**

*Judgment: approved by the Court for handing down* | *Delivered:* **10/05/2010**

*(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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**Reilly's (James Clyde) Application [2010] NIQB 56**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY JAMES CLYDE REILLY**

**AND IN THE MATTER OF A DECISION TAKEN BY THE PAROLE BOARD ON 20 JULY 2009 REFUSING AN ORAL HEARING ON THE ISSUE OF PRISONER RELEASE**

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**TREACY J**

**Introduction**

[1] By written judgment delivered on 13 April 2010[1] the Court found that the decision of the Parole Board dated 20 July 2009 denying the applicant an oral hearing violated Art 5(4) ECHR and common law and indicated that it would hear the parties on the question of relief.

[2] It was agreed between the parties that the decision of the Parole Board of 20 July 2009 should be quashed and the issues which remain between the parties are whether there should be an order of mandamus or certiorari and whether damages should be awarded for the breach of Art5(4). Both parties agreed that the question of relief could be decided on the basis of the papers and the written submissions and that there was no requirement for a further hearing in that respect.

[1] [2010] NIQB 46

**Mandamus or Certiorari**

[3] The respondent accepts that it follows from the Court's Judgment that certiorari must issue to quash the impugned decision and that the Board would then take a further decision on the applicant's case which would be to *refer his case to an oral hearing panel*. As a result of a "serious backlog" of oral hearing cases the respondent asserts that the applicant's case would not yet have been heard *even if* the decision of 20 July 2009 had been to grant him an oral hearing. In undertaking to grant the applicant an oral hearing the Parole Board also undertook to give the applicant's case the same listing priority as it would have had if an oral hearing had been granted by the decision in July 2009 and that this would therefore ensure that he didn't suffer any disadvantage as a result of the Parole Board's original erroneous decision in July 2009. In light of those undertakings the respondent submitted that mandamus is unnecessary.

[4] The applicant submitted that on a principled basis mandamus should issue, inter alia, contending that the need for such an order is underlined by the Parole Board's further reasons for suggesting that no mandamus was required and specifically the evidence regarding a serious backlog. The applicant submitted that the respondent's description of the backlog itself represents a putative violation of Art 5(4) due to the failure of the State which it was submitted appeared to be due to a lack of Judges related to the failure of the State to organise its legal system so as to comply with the Convention's requirements. In those circumstances the applicant submitted that the undertaking suggested by the Parole Board is insufficient to protect the applicant's rights under Art 5(4) ECHR and the Court should not accept the undertaking in preference for its powers of mandamus since to do so would, they submitted, be akin to condoning a putative ongoing violation.

[5] In light of the undertakings provided and the serious backlog referred to I consider that certiorari is the most appropriate remedy. As a result of these undertakings I am satisfied that the applicant will not suffer any disadvantage. An order of mandamus which would or might have the effect of placing the applicant in a better position than other prisoners also seeking an oral hearing would be undesirable in terms of prison administration and discipline and may also be incompatible with the rights of those prisoners.

**Damages**

[6] It was common case that the applicant could not establish that he has been held in detention for any longer than he would have been if he had been granted an oral hearing. This is because the outcome of the hearing is, at best, uncertain.

[7] The applicant submitted that the court should award him damages in respect of the refusal of the oral hearing, subsequent delay, and the inferred frustration and distress.

[8] Section 8 of the Human Rights Act, so far as material, provides:

> **"Judicial remedies**
>
> **8(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.**
> **(2) …**
> **(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including –**
>
> > **(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and**
> > **(b) the consequences of any decision (of that or any other court) in respect of that act,**
> > **the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.**
>
> **(4) In determining –**
>
> > **(a) whether to award damages, or**
> > **(b) the amount of an award,**
> > **the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention."**

[9] With respect to Section 8(3) of the HRA the respondent submitted that the "other relief or remedy granted" and "consequence of [the Court's] decision" will have the result of putting the applicant in exactly the same position as he would have been in if his Art 5(4) rights had not been violated and he had been granted an oral hearing by the decision in July 2009. It was submitted therefore

that he would achieve "just satisfaction" and that no award of damages is necessary[2].

[10] It is common case that the applicant has not established that the breach of Art 5(4) will have extended the period he had to spend in custody. Furthermore there is no evidence before the Court that he has suffered any distress or frustration. His otherwise detailed affidavit is completely silent on this point. I agree with the respondent that there is a low likelihood of such distress having been suffered in circumstances where he has not been detained for any longer than he would have been detained if an oral hearing had been granted.

[11] In ***R (Degainis) v Secretary of State for Justice*** **[2010] EWHC 137 (Admin)** Saunders J held that damages should not be awarded to a prisoner in a case of breach of Article 5(4) caused by delay in the holding of a scheduled Parole Board hearing for six months beyond its scheduled date. In that case, there was "a possible inference that the delay did cause some increased anxiety in the Claimant [but] .. no specific evidence as to the extent of that anxiety or any effect on the Claimant of it" – para.11. Saunders J stated:

> **"15. I have to decide whether in this case I should award damages for frustration and distress. Of course, every decision in cases of this kind will be fact specific but in order that practitioners can act on the exhortations of Collins J. in *R(on the application of Betteridge) -v- the Parole Board* [2009] EWHC 1638 not to pursue actions which are 'not likely to achieve any sensible redress', it is important that Judges apply the same principles consistently as to the appropriate circumstances in which to award damages.**

[2] It is always open to the ECHR to hold that the finding of a violation is sufficient just satisfaction. This in fact has been the approach which has been followed in a series of cases which have emanated from Northern Ireland. See for example ***Brogan v UK, McCann v UK, Murray v UK, Magee v UK*** and ***Averill v UK***. This approach has come in for robust criticism by some of the Judges. Judge Bonello in ***Nikolova v Bulgaria*** **31 EHRR 64 GC** stated:
**"I do not share the Court's view. I consider it wholly inadequate and unacceptable that a Court of Justice should 'satisfy' the victim of a breach of fundamental rights with a mere handout of legal idiom. The first time the Court appears to have resorted to this hapless formula was in the Golder case of 1975 ... Disregarding its own practice that full reasoning should be given for all decisions, the Court failed to suggest one single reason why the findings should also double up as the remedy. Since then, propelled by the irresistible force of inertia, that formula has resurfaced regularly. In view of the many judgments which relied on it did the Court seem eager to upset the rule that it has to give neither reasons nor explanations".**

**16. The most extensive review of when to award damages was by Stanley Burnton J. in *R(on the application of KB and others) -v- South London and South and West Region Mental Health Review Tribunal* [2004] 1 QB 936. In that case he said that to attract an award in damages, the frustration and distress must be 'of such intensity that it would itself justify an award of compensation for non-pecuniary damage'.**

**17. By virtue of Section 8 of the Human Rights Act, the Court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention. Article 41 gives the European Court the power to afford just satisfaction to the injured party if the State has only made partial reparation. Stanley Burnton J reviewed the European cases and demonstrated that there were no consistent principles applied by the European Court as to when to award damages. In some cases it has been prepared to infer that the injured party must have suffered frustration and distress from the breach of Article 5(4) and has awarded a sum in damages without any evidence as to the actual distress suffered. In other cases it has ruled that an apology and admission have provided just satisfaction. That situation remains substantially the same now.**

**18. I would not be prepared to infer, in the absence of specific evidence, that the injured party suffered from a sufficient level of frustration of distress to warrant an award of damages and, as most of our domestic courts are likely to follow the guidance of Stanley Burnton J., that is likely to be the result in all cases where there is no specific evidence of frustration and distress.**

**19…**

**20….**

> **21. I am not satisfied on the balance of probabilities that the breach of Article 5(4) will have extended the period that the Claimant has to spend in custody. I am not satisfied that the Claimant has suffered the sort of frustration or anxiety that merits an award of damages and accordingly the claim for damages fails."**

**Conclusion**

[12] I propose to follow the approach of Stanley Burnton J in ***KB*** and Saunders J in ***Degainis.*** Such frustration and distress, if any, suffered by this applicant is not "of such intensity that it would itself justify an award of compensation." I am not satisfied that an award of damages is necessary to afford just satisfaction to the applicant and I therefore decline to make such an award.