Judicial Communications Office

1 April 2019

COURT DISMISSES APPEAL AGAINST OFFENDER'S RECALL

Summary of Judgment

The Court of Appeal[1], sitting today in Belfast, dismissed an appeal by an offender whose licence was revoked and who was recalled to prison.

Background

Neil Christopher Hegarty ("the appellant") was sentenced in 2014 to a determinate custodial sentence of ten years (five years in custody and five years on licence) after being convicted for the possession of explosives with intent to endanger life or cause serious injury to property and another count of possession of articles for use in terrorism. He and two co-offenders had been stopped by police in the Creggan Estate, Londonderry on 6 December 2012. An improvised explosive device (IED) was found in a holdall on the floor behind the driver's seat. The IED was a projectile device which was capable of penetrating a considerable thickness of steel armour plate.

The custodial element of the offenders' sentences was to expire on 5 December 2017 and they were then to remain on licence until 6 December 2022. In anticipation of their release it was agreed at a meeting between the Head of Licensing within the NI Prison Service ("NIPS") and the Head of the Offender Recall Unit ("ORU") of the Department of Justice that a curfew and electronic monitoring would be necessary and proportionate additional licencing conditions in relation to all three offenders.

The appellant and his co-offenders were to provide an address prior to release. On the afternoon of 1 December 2017 the Head of the ORU received an email from NIPS Licencing Unit advising that the appellant and his co-offenders had refused to provide an address. However, during the course of these proceedings it was accepted that the appellant had not been asked to provide an address on this date but rather the request was made on 4 December and the appellant provided his address on the following day. There was therefore no attempt by the appellant to disrupt his release on licence by failing to provide an address.

On 5 December 2017 the Head of the ORU contacted G4S to advise that the appellant had provided an address and that they should liaise with the PSNI about installing the electronic monitoring equipment that evening. Prior to his release on that date, the appellant was provided with a copy of his licence which contained details of his curfew and monitoring conditions. The appellant was surprised by these and at one stage it was believed that he said he would not be consenting or co-operating with these conditions. The appellant asserted, and the Court accepted, that this did not occur. The appellant told the Court that he was given little detail by the prison officers about the process of "tagging" and was not told to expect anyone at his home to fit the tag that particular night. He was, however, given a booklet about the process which he asserted he did not read. The Court commented that even if the appellant did not read the booklet he knew he was to be subject to a curfew at his home on the evening of 5 December and that it was likely that an electronic tag was

[1] The panel was Lord Justice Stephens (delivering the judgment of the Court), Lord Justice Treacy and Sir Richard McLaughlin

to be fitted at his home that night. The Court also considered that the appellant had ample opportunity to read the booklet and that no acceptable explanation had been provided as to why he did not read it.

At approximately 23:20 on 5 December 2017 two G4S staff attended the appellant's address in order to install the home monitoring equipment and the electronic tag. They could see through the window that there were a number of people in the living room but no-one answered the door. They then knocked on the window and a person, later described as matching the description of the appellant, mimicked them knocking on the door and then went on to ignore them. They left the property as they had serious concerns about their safety given the reported dissident republican threat to G4S employees around this time.

The PSNI submitted a Recall Report to the Parole Commissioners the following day which contained an account of the events at the appellant's home and stating: "The fact that Mr Hegarty was aware staff would be attending last night to fit the equipment and refused them entry shows he took a conscious decision not to co-operate. When we consider his wilful disengagement with prison authorities during the licence process and his affirmation before leaving prison that he would not be consenting to the fitting of such equipment we have good reason to believe that a second attempt would be met with similar response".

The Single Commissioner compiled a written report in which she said she had relied upon the documentary evidence submitted to her on the "assumption that the information therein is accurate". She said she was satisfied that there was evidence that proved that "the risk of the offender causing harm to the public has increased significantly since the date of release on licence and that this risk cannot be safely managed in the community". She commented that this evidence was the refusal by the appellant "to consent to the fitting of his electronic tag and monitoring equipment both immediately before and after his release and by behaving in a manner which undermines the purposes of his release". The Single Commissioner concluded that the appellant had removed himself from the requirements of his licence within one day of his release and recommended to the Department the revocation of his licence. On 6 December 2017 the Department acceded to this recommendation and its decision was immediately notified to the PSNI giving rise to the appellant's arrest and return to custody.

The Application

The appellant sought leave to bring judicial review proceedings contending that the decisions by the Single Commissioner and the Head of the ORU were unlawful as they were based on an inaccurate and un-particularised assertion that he had stated before leaving prison that he would not be consenting to the fitting of electronic monitoring equipment in respect of his curfew. It was submitted that this assertion could and should have led to further enquiries by the decision makers prior to making their respective decisions.

The High Court Judge dealing with the judicial review application accepted that every licence revocation decision pursues the purpose of protecting the public and that the discretion which the Department exercises in making such decisions is a broad one, an element of which is that the decision maker's assessment of what facts and factors are relevant and irrelevant is open to challenge only on an irrationality basis and the weight he or she gives to such factors will ordinarily be a matter for the judgement of the decision maker. He relied upon a passage in case law which states that "the decision to recommend a recall should not be regarded as one that requires the deployment

of the full adjudicative panoply". The judge held that the Single Commissioner and the Department had relied on inaccurate material but dismissed the application for judicial review on the basis that the recall determination "plainly lay within the range of reasonable decisions available to the [Head of the ORU].

The Appeal

The Court of Appeal applied the leading and binding authorities in this jurisdiction and the provisions of the Criminal Justice (Northern Ireland) Order 2008 which governs the recall of offenders while on licence (see paragraph [55] of the judgment). It considered that the intensity of review in respect of decisions under the 2008 Order in relation to an offender who is still subject to a determinate custodial sentence of imprisonment, even though on licence, lies at the lower end of the scale given the public interests involved and the nature of the legislative scheme. It said that in considering where this case fell on the scale of intensity of review, the judge relied not only on the appellant's loss of liberty but also on a factual determination as to the duration of that loss finding that a decision under the 2008 Order necessarily involves a loss of liberty.

The Court of Appeal said it was apparent that the Single Commissioner's decision was based on incorrect information in that the appellant had not refused to consent to the fitting of his electronic tag and monitoring equipment immediately before his release. It concluded that the Single Commissioner should not have proceeded on the basis of an assumption that the information within the police report was accurate but added that the information as to what occurred at the appellant's home would necessarily have led the Single Commissioner to make the same decision. The Court said there was no evidence that the Single Commissioner considered making any enquiries of the police officer. It said she ought to have considered doing so given the vagueness of what was being alleged as to the appellant's attitude in prison and the simplicity of the enquiry:

> "However if she had done so and if she had discovered that the information as to what occurred in prison was inaccurate we consider that given the appellant was a convicted terrorist, given the facts [set out above] and what occurred at the appellant's home … her decision would necessarily have been the same. On that basis the decision of the Single Commissioner was not unlawful."

The Court noted that the trial judge had previously found as a fact that the Department did not take into account the inaccurate information given the close contact between the Head of the ORU and NIPS. On the basis of that factual finding, the Court considered that there was no need for any further enquiries to be made by the Department and held that the information available as to what had taken place at the appellant's home was more than sufficient to justify his recall.

Conclusion

The Court dismissed the appeal.

ENDS

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