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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND KING'S BENCH DIVISION (JUDICIAL REVIEW)

BETWEEN:

THOMAS McWILLIAMS

Appellant:

and

THE DEPARTMENT OF JUSTICE

Respondent:

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Mr Ronan Lavery KC and Mr Mark Bassett (instructed by Brentnall Legal Limited) for the Appellant
Mr Tony McGleenan KC and Mr Philip McAteer (instructed by the Departmental Solicitor's Office) for the Respondent

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Before: McCloskey LJ, Horner LJ and Rooney J

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McCLOSKEY LJ (*delivering the judgment of the court*)

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Nomenclature

DOJ – The Department of Justice
MARA - Multi-Agency Review Arrangements
MARAP – The MARAP Panel
LSO 2001 - The Life Sentences (NI) Order 2001
NISA 1998 – The Northern Ireland (Sentences) Act 1998
CJO 2008 – The Criminal Justice (NI) Order 2008
PBNI – The Probation Board of Northern Ireland
SOSNI – The Secretary of State for Northern Ireland
LCJNI - The Lord Chief Justice for Northern Ireland
TRO – Terrorist Risk Offender

Introduction

[1] By the medium of a letter dated 6 September 2021, the Department of Justice ("DOJ") communicated to Thomas McWilliams (the "appellant"), a convicted person then at liberty pursuant to a licence, its decision to amend the terms of his licence to include a requirement that he be actively monitored by a supervising officer of the division known as "Multi-Agency Review Arrangements" ("MARA"), an internal organ of DOJ. Fundamentally, he complains that one aspect of this amendment of his licence conditions, relating to possible questioning of him about his past by his supervising officer, is intrusive and vitiated by illegality. This is a somewhat lean reduction of the scenario and context examined more fully infra.

[2] By his application for judicial review the appellant challenged this decision on a series of grounds. His application was dismissed in the High Court by Colton J ([2024] NIKB 62). By his appeal to this court, the appellant challenges the dismissal order of the High Court.

The statutory framework

[3] The initial apparent complexity in this appeal is readily attributable to the multiple statutory regimes which have been applicable to the appellant from time to time during a period of approximately 30 years. We shall examine this in appropriate depth and hopefully simplify the correct analysis.

[4] The aforementioned statutory regimes are The Northern Ireland (Sentences) Act 1998 ("NISA 1998"), The Life Sentences (NI) Order 2001 ("LSO 2001"), The Criminal Justice (NI) Order 2008 ("CJO 2008"), The Criminal Justice (Sentencing) (Licence Conditions) (NI) Rules 2009 and The Criminal Justice (Sentencing) (Licence Conditions) (NI) (Amendment) Rules 2021. We shall elaborate infra.

The chronology

[5] The uncontested chronology of material events is the following. On 10 March 1993 Norman Truesdale was murdered. On 31 March 1995 the appellant was convicted of this murder, hijacking, false imprisonment and membership of a proscribed organisation namely PIRA. He was punished by a sentence of life imprisonment.

[6] On 28 July 2000 the appellant was released on licence pursuant to NISA 1998, one of the offshoots of the peace settlement concluded in the same year. We shall describe this as the 'NISA' licence. On 28 August 2013, following the arrest and remand in custody of the appellant some 13 months beforehand, his NISA licence was suspended by the Secretary of State for Northern Ireland ("SOSNI "). On 25 March 2014 the appellant was convicted of possession of a firearm with intent to endanger life or property. He was punished by a determinate custodial sentence of 12 years, equally divided between imprisonment and subsequent licenced release.

[7] On 10 February 2015, the Sentence Review Commissioners (the "Commissioners") revoked the appellant's NISA licence. He remained in sentenced custody thereafter. With effect from 19 October 2018, he became the subject of a new licence. The two key precipitating factors in this respect were the earlier revocation of the appellant's NISA licence (above) and the determination of the minimum term (or "tariff") applicable to the appellant's index offending in 1993. This determination was made by the LCJNI on 10 January 2018. The tariff thus determined was 21 years. The LCJNI was acting under Art 11 LSO 2001. On 13 October 2018, the Parole Commissioners made their determination that while the appellant was considered to present a risk of serious harm to the public, this risk could be managed by an appropriate licence. The appellant was consequently released on licence on 19 October 2018. This is best described as the LSO licence.

[8] There is a third, separate licence in the frame. This is the CJO 2008 licence relating to the further convictions of the appellant on 25 March 2014 (above). This appears to have coexisted with - and, indeed, may have merged with - his LSO licence until its expiry on 18 July 2024. The LSO licence continued thereafter, as will become clear *infra.* No issue turns on the CJO 2008 licence.

[9] At the time of the appellant's licenced release from prison, pursuant to the LSO licence, the following circumstances prevailed. From September 2017, there had been no supervision of released life licence offenders considered to be terrorist offenders by virtue of a verified threat to the Probation Board of Northern Ireland ("PBNI"), which had thitherto been performing this function. This period coincided with the absence of a functioning Executive in Northern Ireland. Following the restoration of government in January 2020 an alternative model was developed upon the request of the Minister of Justice. This resulted in the development of MARA (denoting "Multi Agency Review Arrangements") with a commencement date of 8 September 2020 for an interim period of around one year. Allied to this was the

simultaneous promulgation by the Minister of interim guidance under Article 50 of CJO 2008, accompanied by associated policies.

[10] The MARA arrangements were applied to the appellant with effect from 16 September 2020. The trigger for this was a DOJ assessment that the appellant satisfied the definition of "terrorist risk offender" ("TRO"). This assessment was made under the MARA arrangements. This prompted an application by DOJ to the Parole Commissioners for the incorporation of additional conditions in the appellant's LSO licence to reflect the foregoing assessment. The essential effect of the proposed variation was to require applications for any change of address or any proposed departure from Northern Ireland to be submitted to MARA. The Parole Commissioners acceded to this application, with a resultant variation of the appellant's LSO licence effective from 16 September 2020, duly communicated to the appellant. A revised licence was issued. There was no legal challenge by the appellant at this stage.

[11] Around one year later, certain new arrangements took effect, from 6 September 2021. These had two central elements. First, the 2009 Rules were amended by the introduction of the following definition:

> "'Supervising Officer' means a probation officer or such other person or organisation for the time being responsible for supervising specific offenders on licence in accordance with the arrangements made by the Department of Justice."

In addition, and consequentially, in the standard conditions of licence the term "probation officer" was replaced by "supervising officer." The second central component was the introduction of new Ministerial guidance under Article 50 of the 2008 Order. This, inter alia, at para 3.2, defines a "terrorist risk offender" ('TRO') as:

> "An individual on licence, with the exception of anyone released on licence under the terms of the [1998 Agreement] who has not been convicted and currently serving a sentence (listed above) since their release under the [1998] Agreement."

[12] Foreshadowing the new arrangements (supra), on 4 August 2021, acting under the MARA arrangements, DOJ made a further application to the Parole Commissioners for additional amendments of the appellant's LSO licence in the following terms:

> "Under the variation notice the applicant must:
>
> (a) Keep in touch with the supervising officer as instructed by the supervising officer.

(b) Receive visits from the supervising officer as instructed by the supervising officer.

(c) Reside permanently at an address approved by the supervising officer and obtain the prior permission of the supervising officer of any change of address.

(d) Undertake such work, including voluntary work, as approved by the supervising officer, and obtain the prior permission of the supervising officer for any proposed change."

By their ensuing decision, the Parole Commissioners acceded to this application. This gave rise to the impugned act on the part of DOJ: see infra. None of these new licence conditions are challenged by the appellant.

The impugned measure

[13] DOJ, by its letter of 6 September 2021 to the appellant, accompanied by a Variation Notice, informed him of certain new licence arrangements:

> "The purpose of this letter is to advise you that Multi-Agency Review Arrangements (MARA) have been deployed by the Department of Justice to support the management of individuals classified as Terrorist Risk Offenders.
>
> Following assessment by the Multi-Agency Review Assessment Panel (MARAP) it has been agreed you meet the definitional criteria to be classified as a terrorist risk offender. Accordingly, with effect from today's date, your licenced supervision will be managed through new arrangements.
>
> Your period on licence is an integral component of the sentence you received at court following your conviction. Following a review, MARAP has agreed your revised licence conditions to support the purpose of a licence, namely to protect the public, prevent reoffending and support rehabilitation. A copy of your revised licence, which comes into immediate effect, is attached."

The four new licence conditions (above) were then rehearsed. The "supervising officer" is a DOJ official acting under the aegis of MARA.

[14] The Variation Notice, revised LSO licence and accompanying DOJ letter fall to be read and considered together. The letter (above) informed the appellant that in accordance with the MARA criteria he was classified a "terrorist risk offender" ("TRO"). The functions of the supervising officer were explained to him in these terms:

> "For the remainder of the licence you will be under the supervision of an assigned officer.
>
> An appointment has been made to meet (**XX).**
>
> **Within supervision sessions your supervising officer will be asking you questions about many areas of your life - topics will be broad but may include your history of offending behaviour,** your general life history, your experience of relationships, employment, education, alcohol use or drug use. Your supervising officer will also want to understand what support you have around you. You are encouraged to engage in these discussions with your supervising officer in line with the expectation of your licence.
>
> The supervising officer will use this information, as well as a selection of background court paperwork or previous reports completed about you, to complete an assessment of the risk posed by you and the specific issues that are related to the likelihood of you committing further offences.
>
> This assessment will be reviewed to assess any progress made on licence and will also inform aspects of decision making during your time on licence. You are entitled to see a copy of the assessment when completed and also to contribute your views."

The passage challenged by the appellant in these proceedings is highlighted. Nothing else is under challenge.

[15] These proceedings followed, initiated on 29 October 2021, the principal remedy pursued by the appellant being an order quashing the Variation Notice dated 6 September 2021 to the limited extent highlighted above.

This appeal

[16] The appellant's more wide-ranging challenge at first instance has been considerably refined at the appeal stage. The court's direction that his case at this stage be formulated with precision in writing has elicited the following argument on

the part of Mr Lavery KC and Mr Bassett, of counsel. It is submitted that the appellant could not be the subject of MARA supervision because his case did not fall within the definition of "terrorist risk offender." The kernel of the appellant's case is when the impugned Notice was made he had (and continues to have) the status of a person released on licence pursuant to the 1998 Agreement who has not been convicted and is currently serving a sentence since his release thereunder.

[17] Per the appellant's further written submissions:

(a) Pursuant to this new life licence, issued under the Life Sentences (Northern Ireland) Order 2001, the appellant was released from prison on 19 October 2018. The appellant was then, as he always was and always will be, a former prisoner whose life licence derives from Troubles-era offences within the scope of the GFA. From that date 19 October 2018, his status was that of a NISA prisoner whose life licence had been revoked and who had become the beneficiary of a subsequent new life licence. However, he remained within scope of the GFA and the Northern Ireland (Sentences) Act (1998) due to the character of the index offence. He was, and is, subject to parallel regimes for release and revocation – the Parole Commissioners under the 2001 Order and the Sentence Review Commissioners under the 1998 Act. He was also, from this date, subject to overlapping licences in law. One licence derived from his DCS licence and had to conform to the requirements of CJO (2008). No separate DCS licence was ever issued to the appellant. The other (dominant) licence had to conform to the [2001 Order].

(b) The appellant could have been automatically released on 23 January 2017 on licence in accordance with the DCS imposed on 25 March 2014, which would have confirmed on him the status of DCS prisoner released on licence. However, a release of this kind did not occur. The reason is the existence of a life sentence in respect of which release required a direction of either the Parole Commissioners (under the Life Sentences (Northern Ireland) Order 2001) or the Sentence Review Commissioners (under the Northern Ireland (Sentences) Act 1998). On 18 July 2024, the appellant's 12 years DCS expired.

(c) The effect of this was to confer on him the status of life sentence prisoner subject to the parallel regimes of the [2001 Order] and the Northern Ireland (Sentences) Act (1998). From this date he has to be regarded as an individual on licence but one benefiting from the exclusion in section 3.2 of the Respondent's Definitional Criteria (pg 156) as he was no longer someone who had been convicted and was currently serving a sentence since their release under the Belfast Agreement. The appellant contends that the nature of the index offence (as one excluded by section 3.2) is the critical ingredient rather than the specific legislation by which the life licence is created – either the 2001 Order or NISA 1998.

[18] On behalf of DOJ, the core argument of Mr McGleenan KC and Mr McAteer is reduced to the following two submissions:

(i) The appellant neither challenges the decisions of the Parole Commissioners to recommend the impugned varied licence conditions nor the Department's decision to make the said variations. Rather, he challenges their continued application following the expiry of his DCS licence. The appeal therefore raises a single issue, namely, whether the Judge at first instance was correct to find that the exception enshrined in the definition of "terrorist risk offender" did not apply to the appellant.

(ii) The judge was correct to do so and was correct to identify that the key fact was that although the appellant "had at one stage been released as a qualifying prisoner…" under the 1998 Act/Good Friday Agreement, he was not at the relevant time (and is not now) a person released under the 1998 Act. His licence under the 1998 Act had been revoked. He is, rather, released on licence under the 2001 Order.

The last sentence in this formulation is of critical importance, as will become apparent.

[19] Counsels' further written submissions were in these terms:

(i) Pursuant to this new life licence, the appellant was released from prison on 19 October 2018. From that date his status was that of a person released on licence under articles 6 and 8 of the Life Sentences (Northern Ireland) Order 2001. He had no status as a person released on licence under the terms of the Belfast (Good Friday) Agreement 1998 from the point that his licence under the Northern Ireland (Sentences) Act 1998 was suspended (and subsequently revoked).

(ii) The appellant could have been automatically released on 23 January 2017 on licence in accordance with the DCS imposed on 25 March 2014, which would have confirmed on him the status of DCS prisoner released on licence. However, a release of this kind did not occur. The reason is the existence of a life sentence in respect of which release required a direction of either the Parole Commissioners (under the Life Sentences (Northern Ireland) Order 2001) or the Sentence Review Commissioners (under the Northern Ireland (Sentences) Act 1998). On 18 July 2024 the appellant's 12 years DCS expired.

(iii) The appellant's status did not change on this date at all and remains, as relevant, from 19 October 2018, a person released on licence under articles 6 and 8 of the 2001 Order 2001, and that he has had no status as a person released on licence under the terms of GFA 1998 from the point that his licence under NISA1998 was suspended (and subsequently revoked), such that the exemption the appellant seeks to rely upon does not apply to him.

The judgment of Colton J

[20] The judgment of Colton J contains the following analysis, at paras [99]–[103]:

> "This case is complicated by the fact that the applicant had at one stage been released as a qualifying prisoner under the Northern Ireland (Sentences) Act 1998 ("the 1998 Act"). [100]. This Act was enacted to give effect to the commitments under the Belfast/Good Friday Agreement to permit the accelerated release of prisoners who had been involved in offences arising from the Troubles and who met various eligibility requirements.
>
> [101] Although controversial, this legislation was deemed appropriate as part of bringing an end to the Troubles and creating new political arrangements which would ensure that Northern Ireland would not return to the violence of the past.
>
> [102] The respondent was clearly alive to the situation regarding those released under the 1998 Act which was part of the outworking of the Belfast/Good Friday Agreement.
>
> [103] Thus, the Article 50 guidance expressly provides that those released on licence under the terms of the Agreement, be exempt from the definition of TROs. Thus, the scope (as set out above) excepts from the criteria "anyone released on licence under the terms of the Belfast Agreement 1998 (known as the Good Friday Agreement) who has not been convicted and currently serving a sentence (listed above) since their release under the Belfast Agreement."

This is followed by the crux of the judge's reasoning, at para [104]:

> "The difficulty for the applicant is that his licence when released under the 1998 Act has been revoked. Whilst on licence he has been convicted of another offence. He has been serving a sentence for that offence which expired on 18 July 2024. **He is also serving his life sentence for the murder in 1995. It is this licence which has been varied.** He is not subject to the licence arrangements under the 1998 Act. This is the fundamental difficulty he faces in relation to his arguments about the Belfast/Good Friday Agreement. He has not made a further application for a

declaration of eligibility for release under the 1998 Act. Therefore, his status is someone who is serving a life sentence for the murder committed in 1993, who is not on release as a result of the 1998 Act. As such, he clearly comes within the definition of a TRO and within the scope of the MARA scheme." [our emphasis)

[21] The judge added at para [107]:

> "The outworkings of the Belfast/Good Friday Agreement through the legislative vehicle of the 1998 Act are fully respected under the current scheme by the exclusion from scope of those prisoners who are released under the 1998 Act, but not someone who is serving a current sentence for offences which have been committed in connection to terrorism, or in connection to terrorist activity, something which applies to the applicant in respect of both his convictions.
>
> As a matter of law and policy, given effect through a combined reading of the Northern Ireland (Sentences) Act (1998), the Life Sentences (NI) Order (2001), the Criminal Justice (NI) Order (2008) and the Licensing Rules devised thereunder, offences which come within the scope of the prisoner release provisions of the Good Friday Agreement (GFA) are distinct from other criminal offences.
>
> 1. That approach extends to the respondent's published guidance – namely the Article 50 guidance
>
> 2. At the present time the appellant is subject to a life licence deriving from his conviction for murder in 1995. This is an offence which comes with the scope of the Good Friday Agreement (GFA) provisions on prisoner release and the Northern Ireland (Sentences) Act (1998). He is a prisoner within the meaning of section 12(3) of the Northern Ireland (Sentences) Act (1998).
>
> 3. The conditions imposed on that life licence must be consistent with the requirements of the Life Sentences (NI) Order (2001) rather than the Criminal Justice (NI) Order (2008). Further, any conditions imposed on the life licence by the respondent must be consistent with its published policy in the Article 50 MARA guidance."

Analysis

[22] Properly understood, we consider that the appellant's case resolves to the contention that the impugned act on the part of DOJ via the impugned Notice, whereby the appellant's conditions were varied, in one specific respect which he dislikes, is vitiated by error of law, namely a misconstruction of para 3.2 of the extant Article 50 guidance.

[23] At this juncture, we turn to consider the fundamental issue of the appellant's legal status, as this has evolved, during the 30 year period under scrutiny.

(i) Between the 31 March 1995 and 28 July 2000 the appellant's status was that of an orthodox sentenced prisoner further to his convictions for the March 1993 terrorist offences.

(ii) From 28 July 2000 his status was that of a life prisoner released on life licence pursuant to section 6 of the NISA 1998.

(iii) From 18 July 2012 he acquired the new status of a prisoner remanded in custody further to a charge of possession of a firearm in suspicious circumstances.

(iv) On 28 August 2013 his NISA licence was suspended by SOSNI. His status of remand prisoner continued unchanged.

(v) From 25 March 2014 the appellant had the status of sentenced prisoner, pursuant to a determinate custodial sentence (DCS) of 12 years (6/6) imposed under CJO 2008.

(vi) When on 10 February 2015 his NISA licence was revoked by the Sentence Review Commissioners his status of sentenced prisoner continued unchanged.

(vii) When on 10 January 2018 the LCJNI made a tariff determination of 21 years imprisonment in respect of his index (1994) offending the appellant's status of sentenced prisoner continued unchanged.

(viii) From his licensed release from prison on 19 October 2018 the appellant's status was that of a person at liberty pursuant to an LSO licence. This continues to be his status.

[24] The impugned act of DOJ (via the Variation Notice) occurred on 6 September 2021. We consider it abundantly clear that as of that date the appellant's status was that of "terrorist risk offender" because, in the language of the definition (para [11] above), he was unable to satisfy the exception enshrined in the definition, namely "an individual on licence, with the exception of anyone released on licence under the terms

of the [1998 Agreement] who has not been convicted and currently serving a sentence (listed above) since their release under the [1998] Agreement", for the following reasons.

[25] The construction of the definition of "terrorist risk offender" is a question of law for the court. Doctrinally, the orthodox approach is that the construction of any document is a question law for the court and its meaning is to be ascertained objectively and by reference to its full context. This is conventionally the guiding principle: see for example *Re McFarland's Application* [2004] UKHL 17, para [24] per Lord Steyn. No contrary submission was canvassed by either party.

[26] In short, at the time of the impugned Notice, on 6 September 2021, the appellant was a person who (a) had been released on licence further to the 1998 Agreement and NISA and (b) had such licence revoked because (c) he had subsequently reoffended and was serving a sentence. The appellant's NISA licence, which had been revoked in 2015, was neither reinstated at any time nor substituted by a new successor. Being extinct, it could not as a matter of law confer any relevant legal status on the appellant thereafter. Neither the fact nor the legality of this revocation is in issue. Both the impugned Notice and all related surrounding documents plainly relate to the LSO (2018) licence.

[27] The inescapable thrust of the appellant's case must be that when the impugned Notice was made he was, in the language of the TRO definition/exception, a person "released on licence under the terms of the [GFA]." The appellant, in substance, invites this court to construe this phrase as a person who historically had been released on licence under the terms of the GFA and whose NISA licence was subsequently revoked. We consider this proposed construction untenable for two reasons, one textual and the other contextual.

[28] The <u>textual</u> reason for rejecting the appellant's construction is that, while the words under scrutiny are not free of grammatical and syntactical blemish, this construction seeks to read far too much into the express text, thereby distorting it's tolerably clear meaning. In a nutshell, the appellant's NISA licensed prisoner status was no more. It had been extinguished. In substance the appellant advances the manifestly untenable contention that a prisoner released under a NISA licence which is subsequently revoked remains a person subject to the same (revoked) licence. The unsustainability of this argument is manifest.

[29] The <u>contextual</u> reason for rejecting the appellant's construction has two elements. First, no contextual factor supporting the appellant's construction has been demonstrated. Second, qualifying prisoners under the GFA/NISA received special and exceptional treatment. They acquired an unusual and controversial status. There was neither any express provision nor implied intention in GFA or NISA that this unique status should continue indefinitely, come what may, irrespective of subsequent material events. In the case of this appellant, these events were twofold namely (a) he subsequently committed a serious offence and (b) his NISA licence was

revoked. Thus, the construction of the relevant words which we have espoused is supported by the wider context to which they belong.

[30] In summary, this court prefers the submissions of the respondent and endorses in substance the reasoning and conclusion of Colton J. It follows from the foregoing that the appellant's appeal must be dismissed.

[31] Finally, this court canvassed with the parties the following question. Have these proceedings effectively been purely theoretical from the outset, given that (a) the appellant has never been compelled to answer an objectionable question from the MARA supervising officer and (b) there may be no obvious possible sanction for such refusal? Following reflection, we consider that this issue would benefit from more detailed argument in a suitable future case, having regard to the revocation and recall provisions of Article 9 LSO 2001.

Conclusion

[32] For the reasons given, this court affirms the judgment and consequential order of Colton J and dismisses the appeal.