

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY GERARD McCRORY
FOR JUDICIAL REVIEW**

GIRVAN LJ

[1] The applicant Gerard William Patrick McCrory brings this judicial review application in respect of a decision of the Criminal Cases Review Commission ("the Commission") made on 8 January 2007 not to make a reference to the Court of Appeal and to close the applicant's file ("the impugned decision").

[2] The applicant was convicted on 24 February 1977 on four counts being counts of murder, attempted murder, possession of firearms with intent and belonging to a proscribed organisation. The applicant was sentenced to concurrent terms of life, 14 years, 10 years and 4 years respectively on the various counts. He applied to the Commission on 17 October 2006 under Part II of the Criminal Appeal Act 1995 asking the Commission to refer the convictions to the Court of Appeal under its powers under Section 10 of the 1995 Act.

[3] It is the applicant's contention that he did not appeal against his conviction at the time because he was ordered not to do so by a paramilitary organisation and he feared that he or his family would be subjected to violence in the event of him appealing.

[4] According to the applicant he sought advice in 2005 with a view to challenging the convictions. Before the Commission could play a role the applicant had to appeal or seek leave to appeal against the convictions and an appeal had to be determined or leave to appeal had to be refused. He lodged a notice of appeal on 4 November 2005 which was an appeal out of time. He was refused an extension of time by the single judge. An application for

extension of time was heard by the full court on 14 September 2006. It appears there was no copy of the judge's reasons leading to his convictions nor was there a transcript of the trial. It was not possible to obtain a copy of the shorthand writer's note of the proceedings.

[5] The Court of Appeal in refusing the application to extend time considered that the delay was so considerable that there was a more onerous duty imposed on the appellant to advance substantial grounds to explain the delay. Campbell LJ in the course of giving judgment in the Court of Appeal on 14 September 2006 stated:

"It is practice not to grant any considerable extension of time and unless the court was satisfied that there were such merits that the appeal would probably succeed. We have also been referred to the principles set out Archbold 2006 by Mr Doran and the principles which it summarised, first of all substantial grounds must be given for the delay. Secondly, the longer the delay the more onerous will be the duty to advance substantial grounds. The court will take account of matters other than the reasons for the delay such as whether or not there might have been a conviction or some other offence on the facts and that the court has been influenced by a likelihood of a successful appeal if the extension is granted. Some regard should be had to the merits of the appeal and in exceptional circumstances where it is apparent that there are matters worthy of consideration an extension of time may be granted even when the delay is inordinate and unexplained. Finally, the court may regard the fact that refusal of an application would mean that the appellant would have to go through the lengthy process of approaching the Criminal Cases Review body."

[6] On 17 September 2006 the applicant submitted an application to the Commission. The application referred to no new evidence or argument and no submission of any kind was made to the Commission. On 11 December 2006 the Commission wrote to the applicant's solicitor stating that the Commission had reached a provisional view that there was no real possibility that the applicant's convictions would be quashed if they were referred to the Court of Appeal. The applicant was given the opportunity to make further submissions in response to the provisional view.

[7] In the section of its letter setting out its provisional view entitled "Analysis and Reasons" the Commission stated:

“The Commission is only able to refer a conviction back to the Court of Appeal where there is a real possibility that the court would quash it on the basis of new evidence or argument. The current application refers to no new evidence or arguments. In fact, no submissions of any kind are made to the Commission. The application for an extension of time for leave to appeal contained full grounds of appeal which the Commission considers had been determined by the refusal of the extension of time by the Court of Appeal. The Commission is reinforced in this view by the detailed argument put forward by counsel, Mr Doran, in his skeleton argument paragraph 2.3 of which lists the matters which the court will consider when considering whether or not to grant an extension and paragraph 2.4 of which gives details of the relevant authorities (Winchester and Bell) which indicate that the merits of the appeal are an important consideration. The Commission notes in particular points (iv), (v) and (vi) at paragraph 2.3. Counsel for the Crown in adopting a position of neutrality drew the same authorities to the court’s attention and also indicated that a refusal of the application would prima facie constitute a refusal of leave to appeal within the meaning of section 13(1)(c) there has been full disclosure in the course of the appeal proceedings and thus there are no materials which the Commission could have obtained by exercise of its powers which have not already been obtained in the course of those proceedings. The transcript of the trial judgment was missing but there no other public body from which the Commission could obtain that document which has not already indicated in the course of the appeal proceedings that it does not have a copy of that document. There are no exceptional circumstances that the Commission can identify which could justify referring Mr McCrory’s case back to the Court of Appeal in the absence of new evidence or argument.”

[8] In response to that provisional finding the applicant’s solicitor in his letter of 4 January 2007 argued that although the potential merits of an appeal are a consideration to be taken into account when deciding whether to extend time for an appeal it was wrong to assume that a refusal to extend time entailed a determination of the grounds of the appeal advanced to the court. The

applicant was at a considerable disadvantage in making submissions on the merits due to the absence of any record of the judgment.

[9] On 8 January 2007 the Commission informed the applicant's solicitor that it had decided not to make a reference for reasons set out in its letter. It stated:

"The Commission is satisfied that it is correct in its understanding of the practice of the Northern Ireland Court of Appeal and that a refusal by the court of Appeal of an extension of time involves a determination by the court of the merits of the grounds of appeal. The Commission is reinforced in this view by the practice of the English Court of Appeal with which the practice of the Northern Ireland Court of Appeal is consistent. In both *Nwogu* [2001] EWCA Crim 1802 and *Collins* [2006] EWCA Crim 516 where long extensions of time were sought the Court of Appeal made it quite clear that on such applications it considered the merits of the grounds of appeal.

Accordingly, the Commission does not consider that any extension of the time to make further submissions is necessary. The Commission is satisfied that no new evidence or argument has been presented which gives rise to a real possibility that the Court of Appeal would quash the conviction if referred to them and thus confirms its provisional view. Further, the Commission is satisfied that there are no exceptional circumstances that would justify a referral in the absence of new evidence or argument. Should a transcript of the trial judgment be discovered, Mr McCrory may reapply to the Commission if he identifies some new evidence or argument."

[10] The relevant statutory provisions setting out the basis upon which the Commission may refer a case to the Court of Appeal can be found in section 13 of the Criminal Appeal Act 1995. It provides:

"(1) A reference of a conviction, verdict, finding or sentence shall not be made under any of sections 9 to 12 unless -

(a) the Commission consider that there is a real possibility that the conviction,

verdict, finding or sentence would not be upheld were the reference to be made,

- (b) the Commission so consider –
 - (i) in the case of a conviction, verdict or finding, because of an argument, or evidence, not raised in the proceedings which led to it or any appeal or an application for leave to appeal against it, or
 - (ii) in the case of a sentence because of an argument on a point of law, or information, not so raised, and
 - (c) an appeal against a conviction, verdict, finding or sentence has been determined or leave to appeal against it has been refused.
- (2) Nothing in sub section (1)(b)(i) or (c) shall prevent the making of a reference if it appears to the Commission that there are exceptional circumstances which justify making it.”

[11] Mr Maguire QC who appeared with Mr Doran for the applicant argued that on a proper analysis of the respective purposes of section 13(1)(b) and (c) the Commission’s reasoning was flawed. The purpose in section 13(1)(b) was to prevent arguments that had been fully ventilated at a trial or on appeal being reopened. The purpose of the conditions in section 13(1)(c) was to ensure that an applicant had exhausted his avenues of appeal before making an application to the Commission. As regards the first, the grounds of appeal had not been fully ventilated or determined in the sense that they were not and could not have been fully pursued in court. As regards the second the applicant had exhausted his avenue of appeal by means of an unsuccessful application for an extension of time. It was incumbent on the respondent to investigate the grounds of appeal properly before making the final decision on the applicant’s case. In closing the file the respondent failed to have proper regard to its powers under section 19 of the 1995 Act which contains powers to appoint investigating officers and section 14(3) which confers a power to refer a point to the Court of Appeal for its opinion. Counsel argued that the consequence of the approach of the respondent in the present case was that no full or proper consideration had been given to the substance of the applicant’s challenge to his conviction.

[12] Mr Larkin QC on behalf of the Commission submitted that the Commission refused the application placed before it on behalf of the applicant because there was nothing in it that had not been considered by the Court of Appeal and there was in the view of the Commission nothing exceptional about the applicant's case. It was submitted that the Commission was entitled to take this approach. Such an approach and the decision by the Commission did not preclude a further application by the applicant grounded on material that was not considered by the Court of Appeal. He submitted that the applicant was erroneously arguing that the determination of the leave to appeal out of time was being held against him. If the Commission had not taken the view that there was a determination of leave to appeal by the Court of Appeal then there would have been a bar to refer the applicant's case. Put simply, it was argued that the applicant had raised nothing new before the Commission.

[13] Before the Commission is empowered to refer a conviction or a verdict to the Court of Appeal it must consider that there is a real possibility that the conviction or verdict would not be upheld were the reference to be made. Furthermore, before a reference is made the Commission must consider that such a possibility arises out of evidence or an argument not raised in the proceedings or on any appeal or application for leave to appeal. It is a precondition to any reference that an appeal against conviction of sentence has been determined or leave to appeal has been refused. If it appears to the Commission that there are exceptional circumstances which justify making a reference notwithstanding section 13(1)(b)(i) the Commission may make a reference. In this case the Commission concluded that there were no exceptional circumstances justifying a reference and such a conclusion was one which the Commission was entitled to reach in the circumstances. Accordingly nothing in section 13(2) assists the applicant in his present application.

[14] The applicant pursued his appeal remedy by applying unsuccessfully for leave to extend time to bring his appeal out of time. Accordingly, section 13(1)(c) in itself presented no bar to a reference if the Commission concluded that there was a real possibility that the conviction would not be upheld on the basis of some evidence or argument not raised on the trial or in the application for leave to extend time to appeal. The applicant in fact presented no new material and made no submissions to the Commission to raise a new argument or present new evidence which had not been raised in the proceedings or on the application for leave to appeal out of time. The applicant did not lay any ground work that could have led to a conclusion that there was a real possibility that the conviction or verdict would not be upheld if a reference were made.

[15] The Court of Appeal in the application to extend time was bound to have regard to the merits of the appeal challenge and did have regard to them.

The Court of Appeal concluded that there was an absence of material to show sufficient merits to the appeal. The Court of Appeal felt obliged to refuse to extend the time having regard to the inordinate delay and in the absence of evidence that satisfied the court of the possible merits in the appeal. It is this absence of material adduced by the applicant that led inevitably to the Commission concluding that there was no real possibility that the convictions would not be upheld were a reference to be made.

[16] We accordingly dismiss the application.