Neutral Citation No [2003 NIQB 16 | *Ref:* **CARF3873**

Judgment: approved by the Court for handing down | *Delivered:* **18.02.2003**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JOHN ADAIR FOR JUDICIAL REVIEW

CARSWELL LCJ

[1] In this application the applicant seeks judicial review of a decision by the respondent to the application, the Secretary of State for Northern Ireland, made pursuant to section 1(4)(b) of the Northern Ireland (Remission of Sentences) Act 1995, whereby he revoked the licence granted to the applicant on his release from prison on 15 May 2002 and recalled him to prison.

[2] I can deal briefly with the preliminary issue of the constitution of the court. Under RSC (NI) Order 53, rule 2 in a criminal cause or matter the jurisdiction of the court on or in connection with an application for judicial review is to be exercised by a Divisional Court consisting of not less than two judges. In *Re Coleman's Application* [1988] NI 205 the Court of Appeal adopted the opinion expressed in *R v Hull Prison Board of Visitors, ex parte St Germain* [1979] QB 425 at 453 that "to stamp proceedings as being of a criminal nature there must be in contemplation the possibility of trial by a court for some offence"; cf also *Amand v Home Secretary* [1943] AC 147 at 156, per Viscount Simon. Applying this test, I should be prepared to hold that the present issue was not a criminal cause or matter, on the ground that although the applicant was imprisoned for a criminal offence his licence and recall were a subsequent issue, which was not itself a matter which could lead to a criminal trial for an offence. My jurisdiction to hear the application as a single judge was, however, put beyond doubt by the parties' consent to my doing so, pursuant to Order 53, rule 2(6).

[3] In September 1995 the applicant was convicted of an offence of directing terrorism and sentenced to a term of sixteen years' imprisonment. In March 1999 he was released on licence under the accelerated release provisions contained in the Northern Ireland (Sentences) Act 1998. In August 2000 the

Secretary of State suspended his licence under section 9 of that Act and the applicant was returned to prison. He was released again on licence in May 2002, pursuant to the provisions of the Northern Ireland (Remission of Sentences) Act 1995, having served the requisite portion after remission of his 16-year sentence.

[4] On 10 January 2003 the Secretary of State revoked the applicant's licence, in exercise of the power conferred on him by section 1(3) of the 1995 Act, which provides:

> 1.-(3) The Secretary of State may revoke a person's licence under this section if it appears to him that the person's continued liberty would present a risk to the safety of others or that he is likely to commit further offences; and a person whose licence is revoked shall be detained in pursuance of his sentence and, if at large, be deemed to be unlawfully at large."

The applicant was on that day arrested and returned to prison. By a notice dated 10 January 2003 and given to the applicant the following day he was informed of his right to make representations, in accordance with section 1(4) of the Act. The reasons for the revocation given by the Secretary of State were set out in a further document dated 10 January 2003, in the following terms:

> "REASONS FOR REVOCATION OF LICENCE
>
> Pursuant to section 1(4)(b) of the Northern Ireland (Remission of Sentences) Act 1995 you are hereby advised that your licence was revoked by the Secretary of State because it appeared to him that your continued liberty would present a risk to the safety of others and that you were likely to commit further offences.
>
> 2. In reaching that decision the Secretary of State had regard to information available to him to the effect that you had since May 2002 in Belfast, in Co Londonderry, in mid-Ulster and elsewhere in Northern Ireland engaged in unlawful activity including directing the activities of an organisation concerned in the commission of acts of terrorism; the procurement, distribution and possession of illegal firearms and munitions; threatening acts of violence and inciting and conspiring with others to carry out acts of violence; dealing in illegal drugs; extortion; membership of a proscribed organisation namely the

> Ulster Defence Association; soliciting, inviting support and recruiting for that organisation; being concerned in arrangements whereby the retention and control of terrorist funds was facilitated; money laundering; and supporting proscribed organisations namely the Ulster Defence Association and the Loyalist Volunteer Force; and the absence of any credible information to indicate that you would not persist in such illegal activity if you remained on licence."

[5] A further document entitled "WRITTEN STATEMENT" was issued by the Secretary of State and placed in the Libraries of both Houses of Parliament. A copy was given to the applicant on 11 January. Annexed to this document was a list of measures put in place by the Secretary of State, termed "additional safeguards" for persons whose licences are revoked, in the following terms:

> "ADDITIONAL SAFEGUARDS IN RELATION TO REVOCATION OF LICENCES UNDER THE NORTHERN IRELAND (REMISSION OF SENTENCES) ACT 1995
>
> This note sets out the additional safeguards which will apply in relation to the revocation of a licence granted under the Northern Ireland (Remission of Sentences) Act 1995. They are in addition to the safeguards set out in section 1(4) of the Act.
>
> 1. The Secretary of State will appoint a Commissioner, who holds or has held judicial office, to consider and advise him on any representations made by the recalled prisoner. Any representations shall be passed to the Commissioner as soon as practicable.
>
> 2. The Secretary of State will accept the advice given to him by the Commissioner that the prisoner should be released.
>
> 3. The Secretary of State will meet the reasonable legal expenses of the recalled prisoner in relation to making representation pursuant to section 1(4) of the Act and appearance at any oral hearing that the Commissioner may decide is appropriate.

4. The Commissioner may, subject to points 5 and 6 below, decide the procedure for dealing with any representations.

5. Where the Secretary of State certifies any information as 'damaging information' (as defined in Rule 22(1) of the Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998), the Commissioner shall not in any circumstances disclose it to the prisoner, his legal representative or any other person except any special advocate appointed by the Attorney General to safeguard the interests of the prisoner. A special advocate shall not disclose the damaging information to anyone.

6. The prisoner, his legal representative and any witness appearing for him shall be excluded from any oral hearing whilst evidence is being examined or argument is being heard relating to 'damaging information'.

7. A special advocate may communicate with the prisoner he has been appointed to represent at any time before the Secretary of State makes 'damaging information' available to him.

8. At any time after the Secretary of State has made 'damaging information' available to him, a special advocate may seek direction from the Commissioner authorising him to seek information in connection with the proceedings from the prisoner.

9. Where information has been certified as 'damaging information' the Secretary of State shall, within such period as the Commissioner may determine, give to the Commissioner and to the prisoner a paper setting out the gist of the damaging information insofar as he considers it possible to do so without causing damages of the kind referred to in Rule 22(1) of the 1998 Rules."

On 16 January 2003 the Secretary of State appointed Sir John MacDermott and Lord Sutherland, both retired senior appellate judges of long experience, for a term of five years to act as Commissioners under the arrangements set out in the last-mentioned document.

[6] The applicant denies that he committed any of the acts set out in the Secretary of State's reasons for revocation of his licence. He states that he has never been stopped, arrested, questioned or charged in respect of any of the activities listed in those reasons.

[7] The grounds on which the applicant relied are set out in detail in his Order 53 statement, but as presented in argument they can be marshalled into the following contentions**:**

(a) The appointment of the Commissioners was invalid, since it was a delegation of judicial decision-making powers held by the Secretary of State.

(b) The provision of the additional safeguards, if validly made, did not suffice to satisfy the requirement of procedural fairness imposed by domestic law.

(c) Section 1 of the 1995 Act cannot be read in such a way as to be compatible with the applicant's Convention rights and a declaration of incompatibility should be made.

(d) If it is held to be compatible, the requirements of Article 6(1) of the Convention are not satisfied.

[8] Mr O'Donoghue QC for the applicant founded his argument on delegation on the proposition that the Secretary of State's power of decision, being a judicial power, could not validly be delegated, citing *Barnard v National Dock Labour Board* [1953] 2 QB 18 and de Smith, Woolf & Jowell, *Judicial Review of Administrative Action,* 5th ed, para 6-105; and cf Wade & Forsyth, *Administrative Law,* 8th ed, pp 315 *et seq.* The principle is not confined to acts which are strictly judicial, but extends to a range of bodies and persons exercising functions broadly analogous to the judicial: de Smith, Woolf & Jowell, *loc cit.* It may be said of the Secretary of State's power to revoke a licence that his decisions partake of a degree of policy as well as the process more akin to judicial process of determination of the facts which may have to be established in order to justify the exercise of the power. Nevertheless, it is a matter which is of very considerable consequence to the persons in respect of whom it is exercised and it is specifically conferred on the Secretary of State. In these circumstances there is a good deal to be said for the proposition that, subject to the *Carltona* principle, its exercise is not capable of delegation.

[9] The function given to the Commissioners is not to make the decision entrusted to the Secretary of State, but to advise him. I can deal shortly with the suggestion advanced on behalf of the applicant that since there is noting in the 1995 Act permitting the appointment of Commissioners the Secretary of State had not power to appoint them. It seems to me clear that, just as he is entitled to rely on advice from his officials in relation to factual and policy matters, so he may seek advice from any other quarter in order to assist him in reaching his decisions: cf *Re Belfast Telegraph Newspapers Ltd's Application* [2001] NI 178 at 185. So long as the decision itself remains that of the Secretary of State, it will be validly made. In paragraph 2 of the safeguards document it is stated that the Secretary of State will accept the advice given to him by the Commissioner that the prisoner should be released, and this was relied upon as showing that there was an *ultra vires* delegation of his powers. As against that, Mr Morgan QC for the respondent submitted that this was insufficient to constitute such a delegation. The Secretary of State has retained the freedom to decide to release a prisoner even if the Commissioner advises that he should not be released, or he may release him at any time without referring to a Commissioner. I consider accordingly that the arrangements for the hearings by and advice from the Commissioners do not constitute an unlawful delegation of his powers.

[10] It was then submitted on behalf of the applicant that the arrangements did not suffice to constitute a fair hearing. This submission coalesces to an extent with that made under Article 6 of the Convention, which I shall consider later, and some of the considerations are common to both. It was not in dispute that a duty of fairness is owed to the applicant in determining the issue of the revocation of his licence, and the argument centred around the content of that duty in the circumstances of this case. It is well established that that content will vary with the nature of the case: see, eg, de Smith, Woolf & Jowell, *op cit,* para 8-011. In the present case the salient features relied upon by the respondent as proof of the fairness of the procedure were:

- the opportunity to make representations;
- a procedurally fair oral hearing before an independent Commissioner of experience;
- the protection of a Special Advocate in cases involving damaging information;
- legal representation, paid for out of public funds.

Mr O'Donoghue pointed to imperfections in these. He submitted that the reasons furnished were insufficiently detailed to allow the applicant to meet them, as fair procedure requires: see Lord Mustill's sixth requirement set out in his opinion in *R v Secretary of State for the Home Department, ex parte Doody* [1993] 3 All ER 92 at 106. Moreover, the barring of the applicant from hearing evidence of sensitive information, although partly met by the provision of a

Special Advocate, imposes a handicap upon him. The procedure does not, however, have necessarily to be identical with that of a criminal trial. It has to be looked at in the context, as Lord Mustill observed in *Doody*, in order to see whether the applicant is being treated with proper fairness. In my judgment he has been so treated and will continue to be if the procedure is followed as intended. Needless to say, if it is not followed properly in any given case, the person affected may have a ground for attacking the Commissioner's recommendation and the Secretary of State's ultimate decision on his release. I therefore conclude that the requirements of fairness in domestic law have been met.

[11] As I have indicated, that is not the end of the matter, for the requirements of Article 6 of the Convention, in the light of the interpretation put upon it by the European Court of Human Rights, have to be taken into account. Article 6(1) provides, so far as material:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The English Court of Appeal held by a majority in *R (West) v Parole Board* [2002] EWCA Civ 1641 that the consideration by the Parole Board of whether to recommend the re-release of a prisoner whose licence has been revoked did not amount to the determination of a criminal charge against him. I respectfully agree and propose to follow this decision.

[12] The applicant's case was directed more towards the other limb of Article 6(1), that the process involved the determination of his civil rights. The meaning of this phrase, as it has been developed by the Strasbourg jurisprudence – where it carries a very different connotation from comparable terms in our law – was considered in some detail by the House of Lords in the recent case of *Begum v London Borough of Tower Hamlets* [2003] UKHL 5, although none of their Lordships came to a firm conclusion on the issue. Lord Walker summarised the position at paragraph 112 of the report, that Article 6(1) is likely to be engaged when the applicant has public law rights which are of a personal and economic nature and do not involve any large measure of official discretion. The Secretary of State's decision on revocation of a prisoner's licence does involve a considerable degree of discretion, very much more than the typical case of a civil right where the issue is that of entitlement to a welfare benefit. I incline therefore to the view that the applicant's Article 6 rights were not engaged.

[13] If, contrary to my opinion, Article 6(1) does apply, it would be necessary to determine the other issue, on which the decision in the *Begum* case turned,

whether the applicant's case was determined by an independent and impartial tribunal established by law. This issue has received a good deal of attention in recent years, both in the European jurisprudence and in domestic case-law. In the Court of Appeal in *Begum v London Borough of Tower Hamlets* [2002] 2 All ER 668 Laws LJ propounded a test based on whether the statutory scheme under consideration lay towards that end of the spectrum where judgment and discretion, rather than fact-finding, play the predominant part. In the House of Lords, however, Lord Hoffmann disagreed with the use of this test, expressing the opinion at paragraph 58 that it was too uncertain. At paragraph 59 he stated:

> "In my opinion the question is whether, consistently with the rule of law and constitutional propriety, the relevant decision-making powers may be entrusted to administrators. If so, it does not matter that there are many or few occasions on which they need to make findings of fact. The schemes for the provision of accommodation under Part III of the National Assistance Act 1948, considered in *Beeson's* case; for introductory tenancies under Part V of the Housing Act 1996, considered in *R (McLellan) v Bracknell Forest Borough Council* [2002] 2 WLR 1448; and for granting planning permission, considered in *R (Adlard) v Secretary of State for the Environment, Transport and the Regions* [2002] 1 WLR 2515 all fall within recognised categories of administrative decision making. Finally, I entirely endorse what Laws LJ said in *Beeson's* case, at paras 21-23, about the courts being slow to conclude that Parliament has produced an administrative scheme which does not comply with constitutional principles."

Lord Bingham of Cornhill examined the Strasbourg authorities at paragraph 11 and concluded that –

> "in a context such as this, the absence of a full fact-finding jurisdiction in the tribunal to which appeal lies from an administrative decision-making body does not disqualify that tribunal for purposes of Article 6(1)."

Lord Millett approached the case in a similar fashion at paragraph 105:

> "In the present case the subject-matter of the decision was the distribution of welfare benefits in kind, and critically depended upon local conditions and the

> quality and extent of available housing stock. The content of the dispute related to the reasonableness of the claimant's behaviour in refusing an offer made to her which, if refused by her, would have to be offered to others on the homeless register. Any factual issue arising in the course of the dispute, even if critical to the outcome, would be incidental to the final decision. In my opinion the subject-matter of the decision and the content of the dispute demanded that the decision be made by an administrative officer with experience of local housing conditions, subject to a proper degree of judicial control; and that a right of appeal to the court on law only was sufficient for this purpose."

[14] The applicant's submission on this part of the case was based on the importance of ascertaining fairly and properly the matters upon which the Secretary of State proposes the revocation of a licence in any given case. This factor, on his argument, takes the case out of the category of those administrative decisions in which the determination of the matter turns largely on the administrative policy of the decider and the proper exercise of judgment and discretion in the light of that policy. Revocation cases are more akin to judicial determinations, dependent to a large extent on ascertaining the facts about the matters alleged against the person on licence. When the facts have been established, then the decision whether to revoke will be to a large extent clear and obvious.

[15] I think that there is a fair amount of force in this argument, though I would not accept unreservedly the suggestion that policy considerations in deciding on revocation play such a minor part. I do agree, however, that the element of judicial-type consideration in establishing the facts tends to make it desirable that there be something more than the opportunity of judicial review of the Secretary of State's decisions. No doubt this was present also to his mind when he resolved to appoint the Commissioners. One has then to look at the whole process, including the Commissioners' role and the added availability of judicial review, in order to determine whether the requirements of Article 6(1) have been satisfied. In my judgment they have been. The Commissioners themselves are manifestly independent and impartial and the Secretary of State has stated his intention to accept any recommendation which they may make in favour of the person on licence. If Article 6(1) is engaged, accordingly, I consider that it has been properly observed.

[16] For the reasons which I have given I therefore dismiss the application.