Neutral Citation No: [2010] NIQB 30 | *Ref:* **TRE7781**

Judgment: approved by the Court for handing down | *Delivered:* **5/3/10**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

Knight's Application (Robert Torrens) [2010] NIQB 30

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY ROBERT TORRENS KNIGHT

AND IN THE MATTER OF A DECISION OF THE SECRETARY OF STATE FOR NORTHERN IRELAND ON 27 OCTOBER 2009 SUSPENDING THE APPLICANT'S LICENCE UNDER S.9 OF THE NORTHERN IRELAND (SENTENCES) ACT 1998

_____

TREACY J

Introduction

1. The applicant for judicial review is Robert Torrens Knight a life sentence prisoner who was released on licence on 28 July 2000.

2. By this judicial review he challenges the lawfulness of a decision of the Secretary of State ("the SoS") dated 27 October 2009 suspending his licence and returning him to prison.

3. The grounds upon which relief is sought, as set out in the Order 53 Statement, are as follows:

   (a) The applicant's detention in custody from 27 October 2009 and therefore without there being in force a fresh Judicial Order justifying that detention represented a *violation of Article 5(1)* ECHR in that the detention, not being judicially ordered could not be

considered consistent with the rule of the law in a manner that might be considered 'lawful'; **[Ground 1]**

(b) The decision of 27 October 2009 suspending the applicant's licence and returning him to custody, when considered in the context of the case as a whole and the Secretary of State's actions towards the applicant since becoming aware of the allegations against the applicant in May 2008, represent a breach by the Secretary of State of the applicant's *legitimate expectation*, induced by those prior actions, that the Secretary of State would not be acting on the contested allegations made by the applicant, whilst those allegations were subject to judicial process; **[Ground 2]**

(c) The decision of 27 October 2009 suspending the applicant's licence and returning him to custody was *unreasonable* in that:

(i) in coming to this decision the Secretary of State fettered his discretion in considering whether the applicant had or might breach his licence conditions by considering only whether he had been convicted of criminal offences;

(ii) the Secretary of State unreasonably took account of convictions that were still subject to judicial process and might still be overturned on appeal. **[Ground 3]**

Background

4. The applicant was convicted on *24 February 1995* and sentenced to life imprisonment in respect of 12 paramilitary murders (at the 'Rising Sun' bar in Greysteel on 30 October 1993). He was released on licence on *28 July 2000* under Section 6 of the Northern Ireland (Sentences) Act 1998 ("the 1998 Act"). He was therefore released having served just over 5 years imprisonment from the date of his conviction. His licence contained the following conditions:

> **"(a) that you do not support a specified organisation (within the meaning of Section 3 of that Act);**
>
> **(b) that you do not become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland, and**

(c) <u>that you do not become a danger to the public</u>."

The licence further recorded that:

> **"the Secretary of State may suspend this licence if he *believes* that you have broken or are likely to break all or any of these conditions. If your licence is suspended you will be returned to prison and the *Sentence Review Commissioners* will decide whether to confirm or revoke your licence. If you licence is revoked you will remain in prison in pursuance of your sentence".**

5. On 1 June 2008 the applicant was arrested in relation to an alleged assault on two women and was questioned in relation to two counts of common assault and one count of disorderly behaviour. He was not charged but released pending report.

6. The applicant was then summonsed to appear at Coleraine Petty Sessions on 8 April 2009 in respect of two counts of common assault and one count of disorderly behaviour in a licensed premises. He pleaded Not Guilty but following a contest held on *22 October 2009* he was convicted on all counts. The witness statements of the injured parties were exhibited which indicate that the incident grounding the charges was one of not insignificant violence. The case was listed for sentencing on 27 November 2009.

7. On 27 October 2009 the SoS suspended the applicant's licence. The Notice of Suspension of Licence stated:

> **"In exercise of the power conferred by Section 9 of the above Act I hereby suspend the Licence dated 28 July 2000 on which Robert Torrens Austin Knight was released and recall him to prison."**

8. In a letter dated 27 October 2009 the SoS wrote to the applicant stating:

> **"I write to advise you that the Secretary of State for Northern Ireland has suspended your life licence and ordered that you be recalled to prison.**
>
> **Your licence has been suspended under Section 9(2) of the Northern Ireland (Sentences) Act 1998.**

Attached is a copy of the notice of suspension signed by the Secretary of State.

As a consequence of his taking this decision you are deemed to be unlawfully at large under Section 9(3)(a) of the Act. You will therefore now be detained again in pursuance of your life sentence of 24 February 1995 and be returned to prison where you will resume the status of a life sentence prisoner.

Reasons for Suspension

In suspending your licence the Secretary of State took account of your conviction on two counts of assault and one count of disorderly behaviour in licensed premises in Coleraine Magistrates Court on Thursday 22 October 2009. He considers that these convictions indicate that you have breached a condition of your licence not to become a danger to the public.

Your case will now be considered by the Sentence Review Commissioners under Section 9(3)(b) of the Act.

Copies of this letter go, for information, to the Commissioners, to the Crown Solicitor's Office and to the Governor and Lifer Management Governor at HMP Maghaberry."

9. On 27 October 2009 the applicant was arrested at his home and returned to prison. In a press statement released by the SoS on 27 October 2009 he stated:

> **"Arising from Torrens Knight's conviction on two charges of assault and one of disorderly behaviour I have, following due consideration, suspended his 'early' release licence. His convictions last Thursday demonstrate that he has breached the terms of his Life Licence and that he presents a risk to the safety of others.**

I will not hesitate to act to suspend the licence of any prisoner who was released under the Sentences Act early release scheme, introduced following the signing of the Good Friday Agreement, if, by their actions, they prove they have become a danger to the public.

My priority is public safety and in the interests of the community at large, I cannot permit freedom to any individual intent on abusing the opportunity they have been given to benefit from the Early Release Scheme."

10. On 28 October 2009 the Sentence Review Commissioners ("the SRC") wrote to the applicant indicating that they were required to consider his case in accordance with Section 9(3)(b) of the 1998 Act and asked him to submit application papers.

11. On 2 December 2009 concurrent sentences of 4 months imprisonment were imposed in respect of the assault convictions and 3 months imprisonment were imposed in respect of the disorderly behaviour (the maximum sentence for common assault is 3 months). The Court appears to have had a Probation Report before it which assessed the applicant as being at a low risk of re-offending. This report was apparently written following liaison with Police and discussion of the risk with police. Bail for Appeal was granted and "the applicant was given Liberty Pending Appeal, despite Crown objections"[1]. A Notice of Appeal against conviction was lodged on 3 December and on 8 December 2009 the appeal was fixed for hearing on 6 January 2010 but did not proceed on that date.

12. On 23 December 2009 the applicant filed application forms with the Sentence Review Commissioners seeking a review of the Suspension of Licence. Within the relevant forms the applicant set out a 'Statement in Response to the Notice of Reasons for the Suspension of Your Licence'.[2]

---

[1] See para.21 of Affidavit of Denise Gillan sworn on 21 January 2010

[2] "The Applicant denies that he has broken a condition of his licence.
The Applicant denies that the Secretary of State's Suspension of his Licence, by way of decision dated 27 October 2009, was appropriate or lawful.
The Applicant contends that the Secretary of State's expressed view that his convictions' for assault and disorderly behaviour indicated that he has become a danger to the public is erroneous.
The Secretary of State's decision is unfair and unlawful. The alleged incident leading to the convictions relied upon allegedly occurred on 30 May 2008. Whilst the Applicant was arrested in respect of the allegations on 1 June 2008, police chose not to charge and remand him in custody;

13. On 6 January 2010 the appeal did not proceed to hearing, owing to the fact that both of the alleged injured parties appeared to have developed medical conditions preventing their attendance at court. At a further hearing on 13 January 2010 the Appeal was re-listed for hearing on 11 February 2010. So far as the Court is presently aware the appeal has not been determined.

Legislative Background

14. Section 9 of the 1998 Act provide as follows:

> **"Licences: conditions**
>
> **9.-(1) A person's licence under section 4 or 6 is subject only to the conditions—**
>
> **(a) that he does not support a specified organisation (within the meaning of section 3),**

---

rather he was released pending report to the PPS. Obviously the Secretary of State chose not to suspend the licence at that time, thus indicating to the Applicant that he would await the outcome of the criminal justice process and would not act precipitately on allegations the veracity of which were not resolved by court process. Given that the veracity of the allegations remain unsolved by the court process (the Applicant having exercised his right to appeal against conviction) the Secretary of State's decision was premature, precipitate and disingenuous given his previous conduct in not suspending the licence since May 2008.
The conviction by the District Judge was against the weight of the evidence and is subject to Appeal.
In the event that the conviction is affirmed on appeal, this conviction does not in any event, indicate a breach of any Licence condition. The Probation Report prepared for the District Judge confirmed that there is a low risk of re-offending in the Applicant's case. This Probation Report was written following liaison with Police and discussion of risk with Police. The District Judge granted liberty pending Appeal, notwithstanding Crown objections on this point. Any incident leading to the convictions, if confirmed, should therefore be seen as an isolated incident, not indicative of any wider risk.
Furthermore, the background circumstances to the incident, confirm the fact that this incident is an isolated one, not indicative of any wider risk, in that the alleged injured parties had for a long time before this incident harassed and provoked the family of this Applicant's wife, thus differentiating themselves from the 'general public' to a significant degree.
Since his release on Licence, the Applicant has led a law-abiding life, has married, has worked, has taken care of children and has had no links with Paramilitaries or with criminality.
The Applicant is not a danger to the public and has not broken a condition of his Licence.
The Applicant respectfully reserves the right to make further statements to the Sentence Review Commissioners, either on receipt of the Secretary of State's Response Papers, or on receipt of a Preliminary Indication."

(b) that he does not become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland, and

(c) in the case of a life prisoner, that *he does not become a danger to the public.*

(2) The Secretary of State may suspend a licence under section 4 or 6 if he *believes* the person concerned has broken or is likely to break a condition imposed by this section.

(3) Where a person's licence is suspended—

(a) he shall be *detained in pursuance of his sentence* and, if at large, shall be taken to be unlawfully at large, and

(b) Commissioners shall consider his case.

(4) On consideration of a person's case—

(a) if the Commissioners think he has not broken and is not likely to break a condition imposed by this section, they shall confirm his licence, and

(b) otherwise, they shall revoke his licence.

(5) Where a person's licence is confirmed—

(a) he has a right to be released (so far as the relevant sentence is concerned) by the end of the day after the day of confirmation, or

(b) if he is at large, he has a right (so far as the relevant sentence is concerned) to remain at large.

…" [Emphasis added]

15. Articles 5(1) and 5(4) ECHR provide as follows:

> **"1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:**
>
> **(a) the lawful detention of a person after conviction by a competent court;**
>
> **…**

> **4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.…"**

Issue

16. This case raises questions regarding the exercise by the SoS of his powers under Section 9(2) of the 1998 Act to suspend early release licence pursuant to the said Act.

The Context of the Statutory Scheme

17. The background to the 1998 Act and what Lord Bingham described as the "extraordinary scheme" it established is reviewed in detail in the decision of the House of Lords in ***McClean*** **[2005] NI 490** see Lord Bingham at paras.[1] – [7]; Lord Scott paras.[42] – [50] and Lord Brown at para.[85].

18. Lord Scott observed:

> **"[49] … The statutory scheme was introduced in the pursuit of a highly important political objective. It was not introduced in order to respond to some requirement of criminal justice nor in recognition of any human rights guaranteed by the Convention. Its well-spring was political, namely, the political imperative of trying to move towards a political settlement in Northern Ireland.**
>
> **[50] This statutory scheme is a single, coherent scheme … The scheme taken as a whole provides prisoners serving sentences for sectarian offences with a clear benefit, namely, the possibility of early release that they would otherwise have no right to expect. But they cannot cherry-pick, embracing parts of the scheme that suit them but complaining of other parts that don't."**

19. In particular, at paras.[42] – [46] Lord Scott analysed the various statutory provisions and the emphasis on the protection of the public which permeates the review procedures prescribed by the Act and the Rules. These include Section 9 which he described as "… another example of the care with which the statutory scheme endeavours to ensure that no-one is

released or, if already released, allowed to remain at large, who is likely to be a danger to the public"[see p.508 Letter B].

20. Detailed procedures governing the Commissioners' consideration in, inter alia, Section 9(2) cases are contained in the Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998 SI.1998/1859. In short, these Rules provide a judicialised procedure before the relevant competent authority with detailed safeguards for those who have had their licences suspended pursuant to Section 9(2).

Relevant Law

Ground 1

21. The applicant submitted that the order of the SoS, which has resulted in the detention of the applicant for a period of over 100 days without a fresh judicial order justifying that detention was contrary to Article 5(1). This submission is based on portions of the judgment of the European Court in ***Erkalo v Netherlands*** **28 EHRR 509** at paras.57-60 and paras.56-58 of ***Baranowski v Poland*** **Applic. No. 28358/95 28 March 2000.**

22. The problem with this submission is that an identical submission was rejected by the Court of Appeal in ***Re William John Mullan*** **[2008] NI 258** at para.43 where the Court said, after having referred to those cases, as follows:

> **"… We agree that, if a requirement for the applicability of Article 5(1) in this context is that it be shown that the detention is arbitrary it is impossible to say that a recall prisoner, who is held on foot of his original conviction, is arbitrarily detained. The interplay between Articles 5(1) and 5(4) in the area of recall to prison of released persons who have received automatic life sentences was succinctly described by Buxton LJ in *Noorkoiv* at para.22 in a way that summarises neatly our reasons for rejecting the respondent's arguments on this aspect of the Article 5(1) issue –**
>
> > **'… The reference to Article 5(1) in the context of the present case has served the valuable purpose of concentrating our minds on two fundamental considerations. First, detention between the expiry of the tariff period and**

the determination of the board does indeed need justification, and control in Convention terms. Second, the European Court ... has seen Article 5(4) as the vehicle through which that control should be operated.' "

23. The applicant submitted that arguably the rationale of the Court of Appeal must now be doubted in light of the subsequent judgments of the Supreme Court in ***SoS for Justice v James*** **[2009] UKHL 22** and in particular the following paragraphs:

"51. In my opinion, the only possible basis upon which article 5(1) could ever be breached in these cases is that contemplated by the Court of Appeal at paras 61 and 69 of their judgment (quoted at para 46 above), namely after "a very lengthy period" without an effective review of the case. The possibility of an article 5(1) breach on this basis is not, I think, inconsistent with anything I said either in *Noorkoiv* or in *Cawser*. *Cawser*, it is important to appreciate, was a case all about treating the prisoner to reduce his dangerousness, rather than merely enabling him to demonstrate his safety for release. To my mind, however, before the causal link could be adjudged broken, the Parole Board would have to have been unable to form any view of dangerousness for a period of years rather than months. It should not, after all, be forgotten that the Act itself provides for two-year intervals between references to the Parole Board. Whatever view one takes of the position under article 5(4) (to which I turn next), in my judgment there can be no question of a breach of article 5(1) in the case of any of these appellants." ***Lord Brown***

"128. I should perhaps add that, like Lord Brown, I should not exclude the possibility of an article 5(1) challenge in the case of a prisoner sentenced to IPP and allowed to languish in prison for years without receiving any of the attention which both the policy and the relevant rules, and ultimately common humanity, require." ***Lord Judge***

24. The passages quoted however appear to accept, only as a theoretical possibility, that Article 5(1) might come into play when the causal link was broken in the manner set out in para.51 and para.128. The present case is far removed from the scenarios that the Court had in contemplation in those paragraphs.

25. There is nothing arbitrary about this applicant's detention. He is, by Section 9(3) of the Act, detained "in pursuance of his sentence". Article 5(4) is the vehicle through which control of his detention is operated. The procedures required by Article 5(4) are satisfied by the SRC and the legislative scheme. The applicant has not raised any challenge grounded on Article 5(4). In my view Article 5(1) is simply not in play and the theoretical possibility discussed in ***James*** as to the circumstances in which Article 5(1) *might* be invoked are so far removed from the present case that they provide no basis for a sustainable legal challenge. For present purposes I am satisfied, in accordance with the Court of Appeal's decision in ***Mullan*** that the only relevant vehicle of control for the applicant's detention is Article 5(4).

26. Accordingly, the applicant's challenge grounded on Article 5(1) must be rejected.

Inconsistency/Legitimate Expectation

Ground 2

27. It was, in my view, quite rational for the SoS to have waited in the circumstances of this case until the allegations against the applicant had been either accepted or tested in Court. Waiting for the outcome of the proceedings did not then require the SoS to remain *inactive* in respect of the now proven allegations until the conclusion of any appeal. The SoS' actions in waiting until the outcome of the proceedings did not have the effect of precluding him from acting once the facts had been proven. Such actions were plainly insufficient to induce any expectation much less a reasonable and legitimate expectation that he would *not* act on those allegations whilst they were subject to appeal. Indeed such an expectation would, in any event, be inconsistent with his statutory power/duty under Section 9(2) when the requisite belief had chrystallised.

Unreasonableness

Ground 3

28. By letter of 27 October 2009 the SoS informed the applicant that his life licence had been suspended and his recall to prison ordered. In suspending his licence the letter states that the SoS took account of his conviction on the two counts of assault and the one count of disorderly behaviour and that he considered that these convictions indicate that the applicant had breached the condition of his licence not to become a danger to the public.

29. The Order 53 Statement at para.3(c) sought to impugn the suspension of the licence on the grounds of unreasonableness alleging that the SoS fettered his discretion by considering only whether the applicant had been convicted of criminal offences and acted unreasonably in taking account of convictions that were still subject to appeal and might be overturned.

30. In my view the SoS' decision that these convictions indicated that the applicant had breached the condition of his licence not to become a danger to the public is unimpeachable. Whether or not he is in fact a danger to the public will be decided by the SRC exercising their powers under the 1998 Act. Nonetheless the applicant submitted that the decision-maker should have fully examined the circumstances of the case before coming to a decision that resulted in a loss of liberty and that proper examination of the case would have revealed a report from the probation board that the risk of re-offending in the case was low and specific circumstances relating to the alleged assaults that it was asserted indicated there was no danger to the general public. Aside from the consideration that there is no evidence before this Court indicating that the SoS was unaware of these matters (which I am prepared to assume for the purposes of the judgment in any event) these are matters which will form part of the assessment required of the competent authorities established under the 1998 Act. The submissions of the applicant, if accepted, would appear to recalibrate the safeguards provided in the 1998 legislation and effectively require the SoS to perform the function of the competent authority.

31. The Act lays down no procedure for the exercise by the SoS of his power to suspend. He is, by Section 9(2), entitled to act when he forms the requisite belief. Provided that he acts rationally and in good faith his decision is unassailable. His good faith has unsurprisingly not been impugned. Nor can the rationality of his decision be, even arguably, questioned. This carefully calibrated scheme understandably incorporates the public policy imperative in Section 9 summarised by Lord Scott in the passage quoted at para.19 above. In that context it is impossible to even contend that the SoS' belief that the applicant had broken his licence condition was irrational. In fact if the SoS had not suspended the

applicant's licence in the teeth of a conviction for very serious offences of violence it would almost certainly have attracted public opprobrium and undermined public confidence.

32. The applicant is in effect seeking to import requirements and safeguards which, in my view, are not required for the proper exercise of the Section 9(2) power vested in the SoS. Once he had bone fide formed the requisite belief he is empowered to suspend (but not revoke) the licence. It is at that point that the jurisdiction of the competent authority to consider the case arises. It is to that body, in the context of the detailed statutory scheme, that issues regarding assessment of risk should be properly addressed – see para.[5] of Lord Bingham in ***McClean.***

Conclusion

33. Accordingly I find that the applicant has not made out any ground of challenge and leave must therefore be refused.