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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Lundy's application [2008] NIQB 72

AN APPLICATION FOR JUDICIAL REVIEW BY JAMES LUNDY

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GILLEN J

Application

[1] The applicant in this matter seeks leave to judicially review a decision of the Life Sentence Review Commissioners, the proposed Respondents in this matter of 30 October 2007 ("the impugned decision" of the Commissioners").

[2] The application is dated 7 April 2008.

Background

[3] On 14 December 1981 at Belfast Crown Court the applicant pleaded guilty to the murder of two children following his part in the planning of a bomb at Benny's Bar, Garmoyle Street, Belfast in October 1972. He was sentenced to life imprisonment on 16 December 1981. He was subsequently released on licence on 7 July 1996.

[4] On 11 December 2005 he was arrested on foot of a complaint of indecent assault against a five year old girl. After a trial, the accused was acquitted of the charge on 8 September 2006.

[5] In accordance with Article 9(2) of the Life Sentences (NI) Order 2001 ("the 2001 Order") the Secretary of State for Northern Ireland revoked his licence on 26 June 2006 and referred the case to the Life Sentence Review Commissioners under Article 9(4) of the 2001 Order.

[6] The applicant was released from custody on the indecent assault charge but remained in custody pursuant to the revocation of his licence. The Commissioners first convened to hear his case on 4 April 2007. This was adjourned after being part-heard until 20 September 2007. The decision of the Commissioners was delivered on 30 October 2007 refusing his release and recommending that he re-apply in 18 months times.

Statutory framework

[7] The statutory test to be applied by the Commissioners is that set out under Article 9 of the 2001 Order as amended by the Criminal Justice (Northern Ireland) Order 2002.

[8] Article 9(5)(a) provides:

> "The Commissioners shall not give a decision under paragraph (5) unless they are satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner be confined."

[9] Article 3(4) of the Order provides:

> "In discharging any function under this Order the Commissioners shall –
>
> (a) Have due regard to the need to protect the public from serious harm from life prisoners; and
>
> (b) Have regard to the desirability of –
>
> (i) preventing the commission by life prisoners of further offences; and
>
> (ii) securing the rehabilitation of life prisoners."

The hearing before the Commissioners

[10] The Commissioners had considerable documentary material before it, including the police report to the Public Prosecution Service on the case. In addition they had copies of witness statements relating to the report, transcripts of the police interviews with Mr Lundy, a booklet of police photographs of Mr Lundy's home, transcripts of police video interviews with the five year old girl complainant ("X") and her nine year old cousin ("Y"), the transcript of the cross-examination of X and Y at Mr Lundy's trial at Belfast Crown Court, Court Service papers confirming Mr Lundy's acquittal

on the charge of indecent assault on 8 December 2006, the Sentence Planning and Review Board report of 7 June 2007, PBNI reports dated 9 October 2006 and 4 July 2007 and a psychological report by Mr Barbour dated 2 October 2006.

[11] The Panel also viewed the video recordings of the police interviews with X and Y and heard oral evidence from Detective Constable Caskey, Ms Ramsey, PBNI and Mr Barbour. The Panel had the benefit of submissions made on behalf of Mr Lundy by his legal representative Mr Green and by Mr Dunlop on behalf of the Secretary of State.

[12] Mr Lundy declined to make any statement directly to the Panel or to answer any questions at the hearing.

[13] The approach adopted by the Panel was effectively a two stage approach which involved, firstly, consideration being given to the seriousness of the allegation and the likelihood of its occurrence and secondly, an assessment of the quality of the evidence in that context.

[14] The Commissioners accepted the submissions by both counsel that given the nature of the allegations "compelling" evidence would be required in order for the Secretary of State to discharge his burden in reliance on the decision of the N.I. Court of Appeal in Re CD Application for Judicial Review (2007) NICA 33("CD").

[15] The Commissioners concluded that serious harm was as defined in Article 3(4) of the Order and amounted to "death or serious injury, whether physical or psychological, arising from a criminal offence committed by the prisoner and psychological injuries should be understood as meaning serious psychological stress or mental illness". I note that neither party had sought to have the children X or Y in attendance at the hearing to give oral evidence. It was considered that an appropriate and sufficient appraisal of their evidence did not require them to give live evidence because a transcript of cross-examination was available.

The applicant's case

[16] The grounds upon which the applicant challenged this decision were as follows:

(i) The Commissioners failed to take into account the verdict of the jury at the trial and did not make any reference to the verdict.

(ii) The Commissioners wrongfully took into account the impression of X from her evidence in cross-examination when she had not given evidence before them.

(iii) The Commissioners wrongfully took into account an incorrect understanding of the evidence.

(iv) The Commissioners made a generalised and unsustainable finding of fact that a five year old child and nine year old child would not have the cognitive ability to fabricate a story such as this.

(v) The impugned decision did not involve an offence of serious violence.

(vi) The Commissioners' recommendation that the applicant complete offence-focused work in relation to the recall offence was inconsistent with the jury's verdict and would place an unfair requirement on the applicant.

(vii) The Commissioners' conduct of the hearing breached the applicant's rights under Article 5(4) of the European Convention on Human Rights and Fundamental Freedoms ("the Convention").

Delay

[17] Delay was a live issue in this case. The impugned decision was made on 30 October 2007 and communicated to the applicant's then solicitors on 1 November 2007. The application was not brought before the court until April 2008.

[18] In an affidavit Kathleen O'Hanlon solicitor employed with the applicant's current solicitor McIvor Farrell submitted that there was reasonable excuse for the delay. In essence the excuse was twofold. First, between 1 November 2007 and 16 January 2008, counsel was drafting an application and an opinion for legal aid. An opinion for legal aid was provided on 16 January 2008 and an affidavit and an Order 53 statement drafted on 18 January 2008.

[19] In addition the solicitors then acting on behalf of the applicant failed to process this matter until the file was transferred to the current solicitors McIvor Farrell on 7 February 2008. Thereafter an application for legal funding was made on 4 March 2008 and granted on 3 April 2008. The application was lodged on 7 April 2008.

[20] I have dealt with the principles governing cases of delay in Re Zhanje's Application (2007) NIQB 14. This case adopted the English approach set out in R v Secretary of State for Trade and Industry, ex parte Greenpeace Limited [2000] Env LR, 221 per Kay J which structured determination of the extension of time by posing three questions:

(i) Is there a reasonably objective excuse for applying late?

(ii) What, if any, is the damage in terms of hardship or prejudice to third party rights and detriment to good administration which would be occasioned if permission were now granted?

(iii) In any event, does the public interest require that the application should be permitted to proceed.

[21] I consider that in this case the reasons for delay were outside the control of the applicant and largely lie at the feet of the initial legal advisers. Whilst cases are often fact sensitive, I am satisfied that there are authorities which indicate that such circumstances i.e. delay due to the fault of lawyers which have caused no detriment, can lead to time being extended: see R v London Borough of Neham ex p Gentle (1994) 26 HLR 466 where delay was due to the fault of former solicitors and it caused no detriment. Similarly R v Secretary of State for the Home Department, ex p Florence Jumoke Oyeleye (1994) Imm AR 268, 274 where a claimant had been badly let down by his legal advisers and was not to be criticised for not having legal expertise.

[22] I recognise that even if the applicant can make out a good case for obtaining permission to extend time, the courts still retains an overriding or residual discretion and may refuse permission for example where the public interest does not require the application to proceed especially where the substantive merits are poor. I consider that delay should not be a reason for refusing leave in this case given the absence of any blame resting on the applicant or any prejudice to third parties or good administration. I have decided not to exercise my residual discretion against the applicant on this basis despite my view that the merits are poor.

[23] Therefore I reject the submission by Mr Larkin QC, on behalf of the proposed respondent Commissioners to dismiss this case on the grounds of delay.

Leave applications

[24] In order to obtain leave, an applicant must satisfy the court that there is a proper basis for claiming judicial review. Leave will not be granted without identifying an appropriate issue on which the case can properly proceed.

[25] It is not enough that a case is potentially arguable, said to justify leave on a speculative basis: see Sharma v Brown-Antoine (2007) 1 WLR 780 (14) (4) per Lord Bingham. Moreover it is not sufficient for the papers to disclose what might on further consideration turn out to be an arguable case: see R v Legal Aid Board ex p Hughes (1993) 5 Admin LR 623 at 628D-G per Lord

Donaldson MR. In terms there must be an arguable case in the sense of one with a real or a sensible prospect of success.

Conclusion

[26] I have come to the conclusion in this case that the applicant has not established a proper basis for claiming leave for judicial review. I find no arguable case for the following reasons.

[27] First, I do not accept that the Commissioners failed or indeed were even bound to take into account the verdict of the jury at the original trial. That was a hearing where the onus was on the prosecution to establish guilt beyond all reasonable doubt. That is wholly different from the present circumstances where, following the Court of Appeal in Northern Ireland in CD, the Commissioners considered whether the Secretary of State had established on the balance of probabilities facts which showed the prisoner no longer satisfied the statutory tests. The Commissioners were aware of the acquittal in the earlier hearing but quite clearly, and properly, they did not consider themselves bound by it. I see no basis for arguing the contrary.

[28] I pause to observe at this stage that I delayed handing down judgment in this case until the House of Lords had given judgment in the case of In re Doherty (2008) UKHL 33. This case was an appeal by the Life Sentence Review Commissioners against a decision of the Court of Appeal in Northern Ireland in the case of CD to which I have earlier adverted. I had delayed lest this case would have an influence on my determination.

[29] The House of Lords has decided that the Panel in these cases has to be satisfied on the balance of probabilities that the person has committed the offence, but that it does not follow that specially cogent evidence was required. It did not accept the decision of the Court of Appeal in Northern Ireland that there was a need to look for compelling evidence to discharge the burden of proof (see paragraph 15 of this judgment).

[30] The court adopted the words of Richards LJ in R (N) v Mental Health Review Tribunal (Northern Region) (2006) QB 468, 497-8 para. 62 where the judge said:

> "Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences of the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus flexibility of the standard lies not in any adjustment to the degree of

> probability required for an allegation to be proved (such that more serious allegation has to be proved to a higher degree of probability), but on the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."

[31] Insofar as the House of Lords accepted that that paragraph effectively states in concise terms the proper state of the law on the topic, the Commissioners in this case dealt with this applicant in an unduly favourable manner having adopted the approach set out by the Court of Appeal. Whilst this has had no influence on my determination in this matter it does serve to underline my conviction there is no arguable case put forward in this instance.

[32] Secondly, judicial review is not a fact finding exercise particularly that of the kind decided by these Commissioners. It had been agreed by counsel before them that oral evidence would not be heard. Accordingly they were entitled to rely on all the documentary/video evidence to which I have earlier referred. I consider it was well within their ambit of discretion not only to draw inferences from the written documentation but also to make assessments of the general tenor of the evidence. They did have the benefit of the video of the child in police interviews and they had the benefit of the transcript of all the evidence at the trial. I consider therefore that it is unarguable that they could not have properly sensed the tenor of her responses and discerned appropriate distinctions to be drawn between her evidence when interviewed by the police and her evidence at trial. I find nothing irrational or unfair about this and indeed the nature of the hearing before them was such that they had no choice other than to do so.

[33] I find no basis for argument that the Commissioners took into consideration an incorrect understanding of the evidence about the issue of the black box. It is the contention of the applicant that the Commissioners were under the impression that the child was very clear under cross-examination that the applicant put his hand down her trousers without the use of any black box as previously suggested in her joint protocol interview. At the hearing before me, counsel drew my attention to an exchange in the cross-examination at trial which occurred in the aftermath of the child saying that the applicant had not put his hand through a box before putting his hand under her clothing. The exchange was as follows:

> "Mr Green: But you clearly told the police last year [X] that he had this box and he used this box whilst he touched your woman. Do you remember telling him that?

[X]: Yes.

Mr Green: Why did you tell him that if it wasn't true?

[X]: It was true. He put his hand down the wee hole and he dipped it down under my jeans, under my tights and under my knickers right down to my woman."

[34] This extract however has to be seen in context. I was helpfully provided with a transcript of the evidence as a whole. I can fully understand the conclusion of the Commissioners that the child consistently repeated that the applicant put his hand down the front of her trousers and touched her vagina. The tribunal of fact was well aware of the discrepancies as regard to the circumstances in which the girls X and Y came to be in the applicant's home, the child's location in the room at the time of the alleged assault and also the use of the black box in the alleged assault. In particular the Commissioners stated at paragraph 19:

> "In reaching this conclusion, the Panel was influenced by the fact that [X] was quite specific in her details about the manner in which she was playing with Mr Lundy immediately prior to the alleged assault and is very clear under cross-examination that he put his hand down her trousers without the use of any 'black box', as previously suggested."

[35] I agree with Mr Larkin that the extract now relied on by counsel is somewhat ambiguous particularly since it emanates from a five year old child who was under pressure from counsel in cross-examination. The Panel was entitled to consider the cross-examination as a whole and not just one extract therefrom and to come to the conclusion which they did. I consider this to be a classic case where the Commissioners were entitled to take an overall view of all of the evidence and come to a conclusion notwithstanding the discrepancies. Any case to the contrary is unarguable.

[36] I do not consider that the Commissioners acted contrary to modern jurisprudence or in an irrational or unfair manner when they made the following statements at paragraph 20:

> "Furthermore, we do not accept that either a five year old child or a nine year old child would have the cognitive ability to fabricate such a story, to then report it and maintain the allegation consistently over time to different individuals in different settings nor

> do we consider it likely that a nine year old child would have the level of reasoning necessary to exert enough influence over a younger child to sustain a lie of this nature."

[37] The Commissioners come from a varied expert background, with a wide experience of children and knowledge of the world. Moreover their comments cannot be taken out of context from the overall background evidence of which they were aware in this instance. In my view they were perfectly entitled to form the view that they did and to reject the suggestion of concoction. Having read through the transcript of the evidence at the trial provided to me, I share their view that there was neither evidence of concoction nor motivation for the children to fabricate such a story in this instance. The Commissioners had considered the full extent of the evidence about motive and fabrication. It was a very carefully considered judgment having taken into account all the available material. I considered that it was entirely appropriate for such a statement to have been made in the context of this case.

[38] I reject entirely the argument that the recall offence did not amount to serious violence as contemplated by Article 9(4). No-one who has sat in the Family Court, as I have for several years, can be in doubt as to the serious harm which an offence such as this perpetrated on a five year old girl can and usually does occasion. When such crimes are committed in circumstances where the child has reposed trust in the adult the offence becomes all the more repellent and pernicious. I consider that the Panel were entirely justified in concluding that this assault fell squarely within the definition "of serious harm" and amounted to a significantly serious act of violence given the age of this child.

[39] I find no basis for the applicant's submission that the Commissioners' recommendation that he should complete offence focused work was inconsistent with the jury's verdict or placed an unfair requirement on him prior to his next assessment. This is purely a recommendation congruent with the finding of fact that they have made. The applicant would be perfectly entitled in 18 months time to argue before the Commissioners again that he should be released without having carried out the recommended work. It is not a requirement but nonetheless seems to me to be a perfectly reasonable and rational recommendation given the findings of fact that have been made.

[40] It would be obvious from the findings that I have made above that I consider there is no basis for argument that there has been a breach of Article 5(4) of the Convention in this case.

[41] I add that in coming to their conclusion, the Commissioners were also perfectly entitled to take into account the less than strenuous nature of the denials which the applicant had made to the police in interviews, and the fact that he declined to give evidence before them. These factors contributed to the finding by the Commissioners that the evidence was credible and sufficiently compelling in the context of the nature of the particular allegation that Mr Lundy had committed the indecent assault as alleged.

[42] In all the circumstances therefore I have come to the conclusion that an arguable case has not been made out and I reject the application.