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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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IN THE MATTER OF AN APPLICATION BY EAMONN MAGEE FOR JUDICIAL REVIEW

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STEPHENS J

Introduction

[1] This is an application brought by Eamonn Magee ("the Applicant") seeking leave to bring a judicial review application in relation to the decision of the Director of Public Prosecutions for Northern Ireland not to refer to the Court of Appeal under Section 36 of the Criminal Justice Act 1988 as amended the tariff imposed by Mr Justice Treacy on 12 May 2017 on Orhan Koca for the offence of the murder of the applicant's son who was also called Eamonn Magee.

[2] Notice of an Application for Leave to refer the tariff to the Court of Appeal must be given within 28 days of the sentence. The time within which notice of a referral can be given expires at 4 pm today Friday 9 June 2017. What is suggested on behalf of the applicant is that in addition to granting leave this court as an interim measure should order the Director of Public Prosecutions to lodge a provisional referral notice until the applicant's case in this judicial review application is resolved.

[3] This matter is a criminal cause or matter and accordingly in accordance with Order 53 it is to be heard by a Divisional Court and the Divisional Court shall consist of three judges, or if the Lord Chief Justice directs, two judges. However, Section 16 of the Judicature Act (Northern Ireland) 1978 provides that except where a statutory provision otherwise provides any jurisdiction of the High Court or a division thereof shall be exercised by a single judge. Order 53 permits a single judge to hear this application if the parties consent. I enquired of both parties and they both consented to this application being heard by a single judge.

[4] Mr Ronan Lavery QC and Mr Sean Devine appeared on behalf of the applicant. Mr Henry appeared on behalf of the Director of Public Prosecutions, the proposed respondent. I am grateful to all counsel for the assistance that they have provided.

Factual Background

[5] At around 2:30am on Saturday 30 May 2015 Orhan Koca stabbed to death Eamonn Magee at the Summerhill Drive/Park area of Belfast, this was a heinous crime. The cause of death was multiple stab wounds to the chest. The circumstances in which the crime was committed are contained in the sentencing judgment of Mr Justice Treacy under reference TRE10286 which was delivered on 12 May 2017. I incorporate the facts contained in that sentencing judgment into this judgment. Mr Justice Treacy imposed a life sentence on Orhan Koca and then on 12 May 2017 fixed the tariff at 14 years. In arriving at that tariff the learned trial judge took the higher starting point of 15/16 years in accordance with the principles set out in *R v McCandless & others* [2004] NICA 1. The learned judge then took into account aggravating features. One of the aggravating features was that the attack on Eamonn Magee was planned though the learned judge went on to state that the planning was "… not necessarily for a prolonged period in advance of the attack." Among the other aggravating features taken into account by the trial judge was that the offender "had armed himself with a knife in furtherance of that plan."

[6] The learned judge also referred to other aggravating features including that the offender had attempted to conceal his clothing, namely the blood splattered jeans and got rid of the knife. Furthermore, that the offence occurred in the context of the offender's jealous and aggressive behaviour towards his wife. In imposing the tariff on the offender Mr Justice Treacy took into account one mitigating factor which was that the offender had pleaded guilty, though belatedly, on the morning of his trial. That was not his first trial, his first trial had been aborted by virtue of the fact that the offender had dismissed his legal team.

[7] It is apparent that during the police interviews the offender stated that he knew nothing about the death of Eamonn Magee, he gave a false account of his movements and actions and he denied all the allegations. The plea of guilty came at a late stage. However, it is important to consider the effect of that plea and therefore the impact of that plea in mitigation. Mr Justice Treacy recorded the effect and impact at paragraph 26 of his judgment in the following terms:

> "[26] Notwithstanding that this was not a timely plea of guilty the Prosecution acknowledge that it was of substantial benefit to the Prosecution and spared the family of Eamonn Magee from the stress of a contested trial and the distressing evidence that would inevitably unfold. Accordingly, I accept, as was urged upon me by

> both the Prosecution and the Defence that the Defendant is entitled to discount for his plea, albeit late, but not the full discount which would have been afforded for a timely plea."

[8] Mr Justice Treacy did not state the amount of discount except to state that absent the plea of guilty he would have fixed the minimum term at "*appreciably*" more than the 14 year term that he imposed. It can be seen that in the exercise of the sentencing judge's discretion the discount was accordingly *appreciable*. It would have been helpful if the exact amount of the discount had been articulated but I consider that the sentence can be analysed on a number of different grounds, one of which is that the learned trial judge took a higher starting point of 15 years, that he added two years for the aggravating features less a discount between 15-20% for the plea of guilty.

[9] On 12 May 2017 Mr Justice Treacy when summarising in court his written sentencing remarks stated that a copy of his judgment would be available for the press, the prosecution, the defence and the family at the conclusion of his summary. The applicant was present in court on 12 May 2017. It is clear that Mr Justice Treacy wanted the family and the applicant to have a written copy of his sentencing judgment.

[10] Immediately after Mr Justice Treacy imposed the tariff the Public Prosecution Service sought from senior and junior prosecuting counsel their opinion in writing as to whether there was any question that the sentence was unduly lenient. Written opinions were received from both senior and junior counsel. In arriving at a decision not to refer the tariff to the Court of Appeal the Director of Public Prosecutions has taken into account the opinion of both of the prosecuting counsel involved in the case.

[11] Also immediately after the sentence was imposed the applicant discussed the sentence with senior prosecuting counsel and was advised orally at that stage that there was no basis in the opinion of senior prosecuting counsel for the sentence to be considered unduly lenient.

[12] On 19 May 2017 the applicant's solicitor wrote to the Public Prosecution Service stating that the applicant wished to make representations in relation to the issue of a potential reference to the Court of Appeal. That letter was received by the Public Prosecution Service on 24 May 2017 and a reply was sent on 30 May 2017. It is apparent from the letter of 19 May 2017 that the applicant knew, and those advising the applicant knew, of the very short timescale for the Director to make a reference to the Court of Appeal. The reply dated 30 May 2017 explained amongst other matters that on a reference to the Court of Appeal it must be established not just that the sentence was lenient but that it was unduly lenient. It stated that it had been concluded that there was no legal basis to refer the 14 year minimum tariff to the Court of Appeal as being unduly lenient and it went on to state as follows:

> "I appreciate that your client may not accept this position and I would be happy to offer a meeting to discuss this decision if he would find it helpful. I note that he wishes to make representations about the matter but respectfully note that these will not alter the current position, as the decision to refer or otherwise is based upon evidential considerations and the approach taken by the judge to sentencing, which has been correct in this case.
>
> Should your client wish a meeting can be arranged through my secretary (and then details are given)."

[13] The correspondence between the applicant's solicitors and the Public Prosecution Service continued in that on 2 June 2017 the applicant's solicitors wrote to the Public Prosecution Service. In that letter they stated amongst other matters as follows:

> "In order that we can consider this matter further can you please provide us as a matter of urgency with:
>
> (i) Any written submissions on sentence that were submitted by the Crown and the defence.
>
> (ii) Your note of the sentencing remarks of the court (or any published judgment) in this matter.
>
> We are acutely aware of the 28 day time limit by which a challenge must be brought in order that our client can benefit from an effective remedy. We would therefore be grateful if you could please provide these materials as a matter of urgency."

[14] There was no reply to that letter but rather shortly after 1pm yesterday papers were served on the Public Prosecution Service and the matter came before me at 3pm that is on the day before the expiry of the time for giving notice of a reference. The judge's sentencing remarks were not attached to the application. There was a short hearing yesterday during which I gave directions as to the provision of authorities, the provision of the judge's sentencing remarks and the submission of skeleton arguments.

Delay

[15] An application for leave to apply for judicial review shall be made promptly and in any event within 3 months from the date when grounds for the application first arose unless the court considers that there is good reason for extending the

period within which the application shall be made for which see Order 58 Rule 4(1) of the Rules of the Court of Judicature (Northern Ireland) 1980. The courts have consistently emphasised the requirement for promptness, a recent example is found in *Turkington's Application* [2014] NIQB 58 where Mr Justice Treacy said:

> "[32] As indicated by the use of the word "shall" this provision is mandatory. The overriding requirement is that the application for leave must be made "promptly". The three-month time limit is a 'back stop' and a claim is not necessarily in time if brought within the three-month outer limit. The time limit for bringing a claim for judicial review is much shorter than for most other types of civil claims. This short time limit is clearly intentional and its rationale is clear. As Lord Diplock said in *O'Reilly v Mackman* [1983] 2 AC 237, 280H-281A:
>
> > 'the public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision.'"

That passage was referred to by the Court of Appeal in Northern Ireland in *X's (A Minor) Application* [2015] NIQB 52.

[16] Promptness depends on context and the context here includes the 28 day statutory time limit for Notice of a Referral of a sentence to the Court of Appeal. The applicant was informed by senior prosecuting counsel on 12 May 2017 that senior counsel did not consider the sentence unduly lenient. The applicant consulted his own solicitors on 19 May 2017 and by that date he ought to have been aware of the need to bring any judicial review challenge promptly. He was told in writing by the Public Prosecution Service by letter dated 30 May 2017 that it had been decided not to refer the tariff to the Court of Appeal. I do not consider that bringing an application approximately 24 hours before the 28 day time period elapses is a prompt application within the meaning of Order 53.

[17] The next matter to consider under the heading of delay is that Order 53 also permits the High Court to extend the time limit where there is good reason for the delay. The general test to be applied for an extension of time in judicial review applications is found in *R v Secretary of State for Trade and Industry ex parte Greenpeace Ltd* [2000] Environmental Law Reports 221 where Mr Justice Kay adopted and then posed three criteria set out by Mr Justice Laws in *R v Secretary of State for Trade and*

Industry ex parte Greenpeace No: 1 [1998] Environmental Law Reports 415 and [1998] EULR 48. The three criteria are:

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

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

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

[18] These questions though addressed individually require a global assessment of all the circumstances of the case. In the judgment of Mr Justice Kay in *Greenpeace No: 2* it is recorded that it was common ground that when considering delay he should have regard to the merits when assessing the public interest. I consider that I should have regard to the merits, not only from the point of view of assessing the public interest, but also generally as a part of the exercise of discretion. I note that in *Greenpeace No: 1* Mr Justice Laws having considered the material made available to him considered *Greenpeace's* case to be "very difficult". In *Greenpeace No: 2* Mr Justice Kay found that the case on behalf of *Greenpeace* was "not merely arguable but plain".

[19] There are a number of issues to which the court should have regard in the exercise of discretion when considering delay in relation to judicial review applications. Depending upon the circumstances of each individual case these include, but are not limited to:

(i) The length of time since the impugned decision was made.

(ii) Public interest in the issue being raised being resolved.

(iii) Whether the proceedings would cause hardship or prejudice or would be detrimental to good administration.

(iv) The strength of the applicant's case.

(v) The potential consequences to the applicant.

(vi) When did the applicant become aware of the impugned decision having been made.

(vii) When did the applicant become aware that he had grounds to challenge the impugned decision.

(viii) Whether the applicant had taken time to pursue an alternative remedy.

(ix) Whether the applicant had taken time in attempts to resolve the matter with the respondent.

[20] I note Manning's Judicial Review Proceedings: A Practitioner's Guide observes at paragraph 18.38 that:

> "It cannot be asserted that a particular factor will always, or will never, amount to a good reason for extending time. For almost any case in which the court has extended time on the basis of a specific matter another can be found in which the same matter has been held not to amount to good reason for doing so. The most important consideration in any given case is likely to be the court's view of the overall reasonableness of the claimant's conduct causing the delay judged in the context of the length of the delay, the explanation for it and any hardship, prejudice or detriment to good administration relied on by the defendant or third parties."

[21] In relation to the exercise of discretion in relation to this application I consider that I should apply the general tests set out by Mr Justice Kay in *R v Secretary of State for Trade and Industry ex parte Greenpeace Ltd* and that I should also consider the list of factors set out above. One of the factors set out in the above list is the strength of the applicant's case. In order to exercise discretion amongst other matters I consider that I should form a preliminary view of the strength of the applicant's case.

[22] I will address the three questions in turn.

(i) Is there a reasonable objective excuse for applying late? The reasoning put forward on behalf of the applicant by Mr Lavery included that a legal aid application had to be made, that legal aid application was made on 6 June, it has not as yet concluded. I do not consider that legal aid in this case would be a reasonable objective excuse for applying late. The applicant and those advising him knew or ought to have known the context and the context is a statutory short time limit for referrals to the Court of Appeal. That time limit has policy considerations behind it which impact on third parties. Another reason for applying late which was advanced was that the applicant through his solicitors wished to make attempts in a conciliatory manner through correspondence to seek to persuade the Director to change his mind. Again, I do not consider that is an objective excuse. Again, the context is one where decisions have to be made in a very short time period.

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

occasioned if permission were now granted? The 28 day period for notice of a reference is specified to ensure finality within a fixed period of time so that sentenced offenders are not, for an undue time, kept in a state of uncertainty as to their sentence. I note that the applicant proposes that the offender is subject to a provisional notice of reference. That is not the purpose of the power to refer a sentence to the Court of Appeal, the aim is to ensure that there is a final notice rather than a provisional notice and that the final notice is served within 28 days. So accordingly I consider that compelling the Director of Public Prosecutions to put in a provisional notice would cause hardship and would be contrary to the legislative scheme.

(iii) In any event does the public interest require that the application should be permitted to proceed? I have set out at an earlier stage in this judgment a method by which the learned trial judge could have arrived at a tariff of 14 years. I am obliged to form a preliminary view as to the strength of the case and I consider that any application to judicially review the decision of the Director of Public Prosecutions would be very difficult given the analysis which I have set out in relation to the sentence.

[23] Having answered those three questions I make it expressly clear that I have taken into account all the other matters that I have listed, that is the length of time since the impugned decision was made, the public interest in the issues being resolved and I will not repeat at this stage in this ex tempore judgment all those factors. The answers to the various factors are self-evident from the factual background which I have set out. I do not consider that this is an appropriate case in which to extend time.

[24] I find that the application was not made promptly and I decline to grant the applicant leave to apply for judicial review on the basis of a failure to apply promptly.

The decision not to refer the tariff to the Court of Appeal

[25] The decision in relation to promptness concludes the application for leave to apply for judicial review. However, in case I am wrong in that conclusion I will deal with the substantive application. The principles governing a decision not to prosecute were reviewed by the Court of Appeal in *X's Application* and I refer in particular to paragraph 31 of the judgment of Lord Justice Gillen. That was a decision whether or not to prosecute. The decision in this case is somewhat different. At this stage of a leave application I consider, without formally deciding, that I should follow the principles set out in *Re Loughlin's Application* [2015] NIQB 33.

[26] It is also important to recognise the wording of Section 36 of the Criminal Justice Act 1988. That wording requires the Director of Public Prosecutions to decide for himself that the sentence is unduly lenient. Therefore, in a case where he personally thinks that the sentence is not or might not be unduly lenient but thinks

that the Court of Appeal will or might take a different view he is precluded from bringing a reference. The focus of an application to judicially review the decision is whether or not the Director in arriving at a decision is *Wednesbury* unreasonable in its widest sense in forming a view that the sentence is not unduly lenient.

[27] I have already analysed the sentence. I do not consider that there is any arguable case, that the Director is *Wednesbury* unreasonable in adhering to the view that the sentence is not unduly lenient. I emphasise that the burden is that the sentence can only be increased if it is unduly lenient, that is if it falls outside the range of sentences which the judge having regard to all the relevant factors including case law in the Court of Appeal guidelines could reasonably consider appropriate. That is a high standard to establish. There has been reference in particular by Mr Lavery on behalf of the applicant to the suggestion that the trial judge was confined to a 10% discount for mitigation. I do not consider that there is an arguable case that the Director is precluded from considering that a discount in the region of 15-20% is within the range of appropriate discounts in this case. Accordingly, I consider that even if I had decided that this application was brought in time I would have refused to grant leave on the basis that there was no arguable case to be made against the Director in relation to the decision not to refer the case to the Court of Appeal.

[28] In arriving at that conclusion I would also emphasise the role of representations of a victim's family. The sentences that are imposed have as one of the principle constituents the element of retribution. In that respect the statements and representations made by the victim's family are an important factor to be taken into account. However it is important to bear in mind the decisions of the Court of Appeal in Northern Ireland in *Attorney General's NI Reference No: 3/2000 Rogan* [2001] NI 366. The Court of Appeal in that case quoted with approval the principle enunciated by Mr Justice Judd in *R v Nunn* [1996] 2 Crim App R 136 at 140 as follows:

> "The opinions of the victim or the surviving members of the family about *the appropriate level of sentence* (emphasis added) do not provide any sound basis for reassessing a sentence. If the victim feels utterly merciful towards the criminal and some do the crime has still been committed and must be punished as it deserves. If the victim is obsessed with vengeance which can in reality only be assuaged by a very long sentence as also happens the punishment cannot be made longer by the court than otherwise would be appropriate. Otherwise cases with identical features would be dealt with in widely differing ways leading to improper and unfair disparity."

I also refer to another passage in *R v Nunn* which is as follows:

> "It is an elementary principle that the damaging and distressing effects of a crime on the victim represent an important factor in the sentencing decision and those distressing consequences may include the anguish and emotional suffering on the victim or where there has been a death, as here, his surviving close family."

[29] The obligation on the Director is to take into account the statements of the victim's family in relation to the damaging and distressing effects of the crime on the family. The obligation on the Director is not to take into account the statements of the victim's family in relation to *the appropriate level of sentence*.

[30] As a matter of fact the applicant has made his views clear publicly and I have no doubt that the Director took those views into account in arriving at his decision. Indeed, the Director has received all the written arguments put forward on behalf of the applicant in relation to what is the appropriate sentence and has taken those into account. I do not consider that there is any arguable case that there is a failure to consult in relation to this sentencing exercise. There were representations which were made to the trial judge, those representations in relation to the effect on the victim's family were before the Public Prosecution Service when it took a decision not to refer the matter to the Court of Appeal. The representations were repeated in public, the representations have been repeated again during the course of this judicial review application. All the documents have been considered again and accordingly on that basis I consider that there is no arguable case that leave should be granted for a judicial review application.

[31] In the event I refuse leave to apply for judicial review on those cumulative grounds.

[32] I add that judicial review is a discretionary remedy and to compel the Director of Public Prosecutions to put in a provisional notice which has to set out some basis upon which he contends that the tariff was inappropriate is a matter which would cause the court considerable concern in the exercise of discretion. Accordingly even if I granted leave I would have considerable concerns as to whether in the exercise of discretion, particularly at this late hour, the court should compel the Director to put in, what is called a provisional notice. I have not come across any such provisional notice and I would have thought that if a provisional notice was put in that it would cause the Director considerable difficulties in the Court of Appeal.

Conclusion

[33] I refuse the application for leave.