Neutral Citation No. [2010] NIQB 139 | *Ref:* **McCL8049**

Judgment: approved by the Court for handing down | *Delivered:* **16/12/10**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

McDonagh's (Patrick) Application [2010] NIQB 139

IN THE MATTER OF AN APPLICATION BY PATRICK McDONAGH FOR JUDICIAL REVIEW

_____

McCLOSKEY J

Introduction

[1] The Applicant is a life sentence prisoner. Initially his detention was on foot of two successive hospital orders, made in November and December 1998 after he had pleaded guilty to a range of offences, including the attempted murder of a fellow prisoner. On 5th February 2008, the Court of Appeal dismissed his appeal against conviction but allowed his appeal against the hospital orders. On 25th June 2008, following a period of almost five months remand on bail, the Applicant was sentenced by the Court of Appeal to life imprisonment. In imposing this sentence, Campbell LJ stated:

> "*… the sentence which we have decided is one of life imprisonment because we are of the opinion that this is necessary to protect the public from serious harm because of the history.*"

Throughout virtually the whole of his period of detention, the Applicant was detained in a high security hospital in Scotland (for some eight years) and then in a low secure unit (for some three years). In determining the minimum term, Campbell LJ added:

> "*To avoid any question of doubt arising as to whether he is to be given credit for the considerable period of time spent in hospital, we are going to make the minimum term a nominal one of one day so that he will be eligible for review by the Parole Commissioners at the earliest opportunity.*"

The court also expressed the "*hope*" that (a) the Applicant's case would be referred to the Commissioners speedily and (b) his recent period of remand on bail would "*… assist them in arriving at their conclusion*". These sentiments are properly described as aspirations and exhortations on the part of the sentencing court.

[2] Within the regime established by the Life Sentences (Northern Ireland) Order 2001 ("*the 2001 Order*"), the order made by the Court of Appeal on 25th June 2008 was, properly analysed, to the effect that "*the release provisions*" would apply to the Applicant after the nominal tariff of one day had been served. Accordingly, upon the expiration of one day, paragraphs (3) – (7) of Article 6 applied to the Applicant's life sentence. Since that date, the Parole Commissioners have **not** formed the opinion which is a necessary pre-requisite to his release. Article 6(3) of the Life Sentences (Northern Ireland) Order 2001 ("*the 2001 Order"*) provides:

> "*(3) As soon as –*
>
> *(a) a life prisoner to whom this Article applies has served the relevant part of his sentence; and*
>
> *(b) the Commissioners have directed his release under this Article,*
>
> *it shall be the duty of the Secretary of State to release him on licence.*
>
> *(4) The Commissioners shall not give a direction under paragraph (3) with respect to a life prisoner to whom this Article applies unless –*
>
> *(a) the Secretary of State has referred the prisoner's case to the Commissioners; and*
>
> *(b) the Commissioners are satisfied that* ***it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined.***"

[My emphasis].

In short, the first of the pre-requisites to the triggering of the Secretary of State's statutory duty to release the Applicant viz. the referral of his case to the Parole Commissioners is satisfied. However, the second, and crucial, pre-requisite is not. The Applicant does not contend the contrary: rather, he complains about a sluggish

process to date. Some two-and-a-half years following expiry of his tariff, the Applicant continues to be imprisoned.

The Judicial Review Application

[3] The subject matter of this application for judicial review is the Applicant's complaint that the Respondent has been guilty of unreasonable delay, giving rise to illegality, in the various pre-release steps which it has taken and pre-release services and facilities provided by it, coupled with alleged delays and omissions in this process. The Applicant founds his challenge on the recommendations contained in (a) a senior forensic psychologist's report dated 18th March 2009 and (b) a joint forensic psychologist's report dated 1st April 2010. On 14th July 2010, a single Parole Commissioner, having considered all available reports, gave a provisional direction that the Applicant should not be released. On 14th October 2010, the Panel of Parole Commissioners concurred. In their written decision, they stated:

> "*[3] The Panel of Commissioners … was not satisfied that it is no longer necessary for the protection of the public from serious harm that Mr. McDonagh be confined …*
>
> *[18] In light of the above, the Panel considers that it is appropriate to recommend that Mr. McDonagh's case should be referred back to the Commissioners for review in time for it to be completed not later than one year from the completion of this reference.*"

[4] On the date of the substantive hearing of this matter (6th December 2010), it was accepted on behalf of the Applicant that the Respondent has now initiated and activated all appropriate measures. The gist of the Applicant's challenge is that this should have occurred considerably sooner. In these circumstances, the Applicant requests the court to grant declaratory relief only, in terms which I would *summarise* as follows:

(a) That the Respondent's failure to act promptly on the recommendations contained in certain reports generated in March and April 2010 was unlawful.

(b) That the Respondent's failure to compile a pre-release plan promptly was unlawful.

I should record that the revised draft declarations placed before the court on behalf of the Applicant are framed in rather more prolix and cumbersome terms.

The Applicant's Two Contentions

[5] The hearing conducted by the court (on 15th December 2010) unfolded against the background outlined above. While the pleaded grounds of challenge are diffuse

and require some interpretation, involving assertions of a whole series of alleged failures and delays on the part of the Respondent, in essence the Applicant's case resolves to two contentions. The first is that the Respondent has been guilty of unreasonable delay, amounting to irrationality, in initiating the relevant measures, to the extent that it has acted unlawfully. The second contention is that it is appropriate for this court to exercise its discretion to grant one or more of the forms of declaratory relief now sought. The interdependence of these two contentions is at once apparent. If the first is rejected by the court, the second must fail automatically. However, the converse does not apply: if the Applicant were to make good the first contention, the second could still founder.

First Contention: The Applicant's Substantive Challenge

[6] As regards the first contention, there are two passages in the main skeleton argument which seem to me to encapsulate the Applicant's case:

> "[1] *The Applicant is challenging the failure of the Prison Service to take prompt action to comply with the recommendations of various psychology and other reports which were before the Parole Commissioners in October 2010 and which have been in existence since in or before March 2009 …*
>
> [39] *It is submitted that the failure of the Prison Service to act on recommendations made by the various experts, steps which would have assisted in and which will assist in securing the Applicant's release is irrational …*"

In resolving the two issues which I have formulated above, it is necessary for the court to form an overall view of the evidence. In summary, on the one hand, the Applicant complains that the Respondent has been guilty of unreasonable and unjustifiable delay. On the other hand, the essence of the Respondent's case is that, throughout the period under scrutiny, it has been acting reasonably, cautiously and conscientiously, bearing in mind the statutory framework set out above. This is encapsulated in the following averments of Dr. Gallagher, a forensic psychologist who has been centrally involved in the various therapeutic assessments and measures to date:

> "*…The psychological inputs into the management of the Applicant have been following a logical chain of incremental progress. Attempting to conduct all the psychological work together or in a more abridged or even rushed fashion would have been, in my professional opinion unhelpful and counterproductive. The Applicant has made good progress in an entirely appropriate timescale and while there is more work to undertake, this will be flexible to take account of progress in the course of the process …*

> *This development requires flexibility in response to a developing understanding of his current needs, rather than a slavish following of the letter of each and every report conducted in respect of him in the past.*"

These averments are contained in an affidavit sworn on 12th October 2010. They clearly fall within Dr. Gallagher's field of professional expertise and, accordingly, are properly to be considered expert evidence. There is no competing sworn expert evidence on behalf of the Applicant.

[7] In support of his first contention, the Applicant invokes the decision of the English Divisional Court in ***Wells and Walker –v- Parole Board and Secretary of State for Justice*** [2007] EWHC 1835 (QB), where the Applicants were "*short tariff lifers*", who had received sentences of imprisonment for public protection. At the outset of his judgment, Laws LJ stated that the ultimate question to be determined was whether the conduct of the Secretary of State "*… falls to be condemned as irrational or otherwise violates established principles of public law*". The crux of the issue to be determined and the court's evaluation thereof is encapsulated in the following passage:

> "*[47] … to the extent that the prisoner remains incarcerated after tariff expiry without any current and effective assessment of the danger he does or does not pose, his detention cannot in reason be justified. It is therefore unlawful.*"

What was the nature of the illegality? It was, said Laws LJ, "*arbitrary and unreasonable on first principles*": see paragraph [48]. For present purposes, the significance of the decision in ***Wells*** is that the Applicant espouses the public law misdemeanour formulated by Laws LJ, namely arbitrary and unreasonable conduct.

[8] The present case is, of course, singularly different from ***Wells and Walker***, since the Applicant does not contend that his current detention is unlawful by any standard – whether characterised as irrational, arbitrary or unreasonable, all of these labels being in my view synonymous. Rather, the Applicant's case is that there have been irrational failures on the part of the Respondent to act timeously in the implementation of the reports identified in paragraph [3] above. In summary, the Applicant disagrees with (a) some of the steps and measures taken by the Respondent, (b) the delay in initiating certain other measures and courses and (c) the sequence in which certain steps have been taken. This, he contends, gives rise to irrational delay which, I observe, is of a purely historical nature.

[9] Since the liberty of the citizen is engaged, I accept that the court must anxiously scrutinise the evidence. However, this must be tempered by the inescapable reality that the Applicant, in my view, is in substance inviting the court

to disagree with the expert views, assessments and opinions formed by the Respondent's psychologists from time to time. Thus, to take one main example, the Applicant argues vehemently that with effect from 26th October 2009 he should not have been receiving therapy described as "*trauma treatment work*" arising out of major traumatic incidents in his life on account of his "*Impact of Events (IES) Scale*" score on that date. Furthermore, it is argued that this score should have been the impetus for the implementation of other measures and therapies. I simply cannot accede to these arguments. To do so would require an exercise of interpretation and, in truth, second guessing of various experts which lies outwith the limits of this court's supervisory jurisdiction and, frankly, its expertise. Furthermore, a centrepiece of the Applicant's arguments is that the court should reject the averments of Mr. Gallagher, the Forensic Psychologist concerned, in which he expresses his "*professional opinion*" about how the Applicant should be treated and in what sequence [in paragraphs 5-7 of his affidavit]. While I have considered the various references in the substantial documentary evidence on which this submission is based, I am unable to accept it. Moreover, the evidence contained in Mr. Gallagher's affidavit (coupled with that of Governor Caulfield) is both current and comprehensive and, in the evidential matrix before the court, there is no dissenting or competing expert opinion.

[10] Furthermore, having regard to the difficult nature of the various assessments and decisions being made from time to time and the expertise and professional experience and judgments bearing thereon, I consider that a reasonable margin of appreciation is to be accorded to the officials and professionals involved in a case of this kind. It seems to me that this is no more than a proposition of common sense. It is echoed in, for example, the reluctance which the courts have conventionally expressed to reject the bona fide clinical judgments of *medical* practitioners: see, for instance, ***Re J*** [1992] 4 All ER 614, at pp. 622F-623G. In their particular field, clinical psychologists such as Dr. Gallagher are no less expert than medical practitioners in theirs and, in *both* fields, the court can lay claim to no relevant expertise. In cases of this kind, one brings to mind Lord Bingham's wise words:

> "*'Judicial review' … emphasizes that the judges are reviewing the lawfulness of administrative action taken by others. This is an appropriate judicial function, since the law is the judges' stock in trade, the field in which they are professionally expert. But they are not independent decision makers and have no business to act as such.* ***They have, in all probability, no expertise in the subject matter of the decision they are reviewing. They are auditors of legality: no more, but no less***."

[My emphasis].

[The Rule of Law, p. 61].

Thus, in the context of these proceedings, which includes the obviously important factor of the Applicant's loss of liberty, the court must guard against engaging in any process giving rise to the risk of substituting its inexpert opinion for that contained in affidavit evidence that is current and is provided by deponents possessing relevant professional expertise, credentials and experience.

[11] I have viewed all the evidence in the round and have already highlighted the absence of any competing expert opinion on the Applicant's behalf in the affidavit evidence. Having considered, fairly and objectively, all of the available evidence, I conclude that the position espoused by the Respondent is to be preferred. In brief compass, I reject the Applicant's complaint of unreasonable inertia on the part of the Respondent. Taking into account all of the risks and concerns pertaining to the Applicant, as documented in the evidence and accepting that, properly analysed, the Respondent has been actively discharging the duty which it owes to both the Applicant and the public at large, I find nothing in the evidential matrix which would merit a conclusion that the Respondent's conduct has been, in the language of Laws LJ in ***Wells***, "*arbitrary and unreasonable*".

[12] It follows that the appropriate order of the court is a dismiss of the application for judicial review.

The Applicant's Second Contention: Discretionary Declaratory Relief

[13] For the reasons which I shall explain, the court would not have been disposed to grant a declaration in any event. The governing principles, in this respect, are expounded *in extenso* in the admirable treatise The Declaratory Judgment (Zamir and Woolf, 3rd Edition). The authors of this work espouse the view that a declaration should serve some useful purpose. See in particular paragraphs 4.092 and 4.093:

> "*In practice what will be determinative of whether relief is granted is the court's assessment of whether the declaration will serve some useful purpose. The courts will not grant declarations which are of no value but, if a declaration will be helpful to the parties or the public, the courts will be sympathetic to the claim for a declaration even if the facts on which the claim is based or the issue to which it relates can be described as theoretical …*
>
> *If it can be shown that a declaration would not serve any practical purpose, this will weigh heavily in the scales against the grant of declaratory relief.*"

It is clear from various authoritative texts that the adjectives "*theoretical*", "*academic*" and "*hypothetical*" are, in essence indistinguishable. The factor common to all of the decided cases and leading texts bearing on this subject is the breadth of the court's discretion. This is illustrated in, for example, ***R –v- Ministry of Agriculture,***

Fisheries and Food, ex parte Live Sheep Traders [1995] COD 297, where the court concluded that declaratory relief was inappropriate as a declaration would focus on the past only and would have no prospective impact. Simon Brown LJ stated (at p. 299):

> "*Of course there will be occasions when, as the Law Commission envisage, it will be just and convenient that this court grant declaratory relief essentially by way of advisory opinion. But that will be looking prospectively to the future, not retrospectively at the past.*"

While acknowledging the two quite different contexts, I consider that the sentiment expressed in this passage resonates in the current proceedings. The same sentiment is echoed in Judicial Review (Supperstone and Goudie, 4th Edition), where the authors cite various decisions in support of their proposition in paragraph 16.23.1:

> "*While final declarations may be made if they have some current or future value, they will not be made just as a comment on past events, whether or not the Applicant had a legal right at the time when the proceedings were begun.*"

While I would decline to interpret this as an inflexible rule, it provides, nonetheless, a barometer of some weight.

[14] Notably, the reflections in The Declaratory Judgment quoted above are expressed following the authors' consideration of ***R –v- Secretary of State for the Home Department, ex parte Salem*** [1999] 1 AC 450. In that case, the House of Lords declined to grant any relief on the grounds that the appeal was fact sensitive and the grant of relief would serve no wider purpose. In a well known passage, Lord Slynn stated (at p. 457):

> "*The discretion to hear disputes, even in the area of public law must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.*"

In ***Re McConnell's Application*** [2000] NIJB 116, the Northern Ireland Court of Appeal, having considered Lord Slynn's statement observed (at p. 119):

> "*It is not the function of the courts to give advisory opinions to public bodies, but if it appeared that the same situation was likely to recur frequently and the body concerned had*

> *acted incorrectly they might be prepared to make a declaration, to give guidance which would prevent the body from acting unlawfully and avoid the need for further litigation in the future.*"

It is clear, therefore, that there is a substantial overlap between the court's discretion in judicial review proceedings to grant any form of relief (on the one hand) and what has become known as the "***Salem***" principle (on the other). In a later passage in the text, the authors add that ***utility*** requires that the proposed declaratory relief "*… should solve a real difficulty with which the claimant or Applicant is faced*": see paragraph 4.096.

[15] Addressing the hypothetical question of whether the court would have been prepared to grant the Applicant declaratory relief, the intensely fact sensitive nature of the present case requires no elaboration. This is the first consideration which would have militated strongly against the grant of declaratory relief. Secondly, a declaration would confer no practical and effective benefit on the Applicant. Thirdly, I am satisfied, based on the evidence before the court, that a declaration would not serve some broader function. Fourthly and finally, a declaration would not illuminate any particular issue of legal principle or statutory construction.

Concluding Observations

[16] I would observe that the unwillingness of the Applicant's legal representatives to meet Governor Caulfield, in response to his suggestion, two months before the initiation of these proceedings, though doubtless well intentioned, was somewhat unfortunate. This occurred in the midst of a barrage of letters. The justification proffered for declining to meet Governor Caulfield was that a reply to lengthy letters was deemed preferable. I would observe that correspondence of this kind can have an undesirable polarising effect. If the recipient volunteers to meet the correspondent, this should ordinarily be accepted, positively and constructively. Any other course will be in clear disharmony with the contemporary approach to the resolution of **all** potentially litigious disputes and the over-riding objective enshrined in Order 1, Rule 1A of the Rules of the Court of Judicature.

[17] Furthermore, there has been a related failure to comply with the Judicial Review Pre-Application Protocol. This must be highlighted, in light of the court's recent experience of serial failures in this respect on the part of various firms of solicitors. This raises questions of education and litigation culture which, I am confident, can be satisfactorily addressed without subjecting the profession to any undue burden. For the avoidance of any doubt, I take this opportunity to emphasize that scrupulous compliance with the Judicial Review Pre-Application Protocol is indispensable in *every* case, subject to the very narrow exceptions recognised in the text. Inevitably, the court will give priority to those cases where the Protocol has been duly observed, since such cases are in a fit state for consideration and

processing. In non-compliant cases, delays are likely, to the detriment of all concerned and there may also be costs implications.

[18] Secondly, I would observe that the Applicant did not swear any affidavits in these proceedings. This is unconventional and is to be discouraged. Affidavits constitute solemn, sworn evidence. The importance of scrupulously drafted and properly sworn affidavits complying fully with Order 41 of the Rules of the Court of Judicature cannot be overstated and has been repeatedly emphasized in a number of reported cases. The court accepts that, in exceptional cases, some justification for this failure might be proffered. However, none existed in the present case. One consequence of this was that the affidavits sworn by the Applicant's solicitor [the contents whereof suffered from no impropriety] could not, for obvious reasons, deal with purely factual issues relating to the various steps and measures being taken by the Respondent's professionals and evolving circumstances. A second consequence was that the Applicant's ultimate submission to the factual case made in the Respondent's affidavits regarding the initiation of relevant steps, courses and measures was not signalled until the substantive hearing had begun. This emerged only following detailed inquiry undertaken proactively by the court and an ensuing interruption of the hearing. The Respondent's affidavits had been sworn some seven weeks previously. In this kind of matrix, it is incumbent on the Applicant's legal representatives in every case to communicate with the court and, moreover, to highlight the updated state of play unequivocally in the skeleton argument. These elementary steps will assist the court in the planning and programming of its business and the proportionate allocation of its scarce resources, as required by the overriding objective. They are also dictated by the duty of candour.

[19] Thirdly, in any judicial review proceedings where new facts or altered circumstances render the challenge academic or theoretical or hypothetical, if the court is nonetheless invited to convene a hearing for the sole purpose of deciding whether discretionary declaratory relief should be granted, it will ordinarily be necessary to have a further affidavit from the Applicant setting out precisely *why* such relief is being pursued. Any such affidavit should be strictly confined to purely factual averments, avoiding sworn argument.

[20] Finally, the question of whether, in legally assisted cases, there should be further engagement with and, perhaps, fully updated reporting to and/or specific authority from the Legal Services Commission in cases of this kind lies outwith the purview of this judgment. It is, however, a matter which may properly require consideration in the appropriate forum. One of the powers potentially in play is that enshrined in Regulation 21(1)(c) of the Legal Advice and Assistance Regulations (Northern Ireland) 1981, which provides for the withdrawal of public funding where "*… it is unreasonable in the particular circumstances*" to maintain it. In the particular case of judicial review proceedings, there is not infrequently a marked contrast between the evidential and legal matrix at the time when legal aid is granted to bring proceedings and the matrix which emerges following completion of all the evidence, in advance of the hearing. The present case is a paradigm illustration of

this truism. It may be that the Legal Services Commission will consider the grant of *conditional legal aid* in appropriate future cases. This is long established in High Court litigation where, for many years, legal aid certificates restricted to the taking of certain steps – such as acquiring an expert's report or securing counsel's Opinion on the merits or pursuing litigation to a certain stage only – have become a well recognised phenomenon. This could have the additional merit – a powerful one – of encouraging non-litigious dispute resolution, thereby furthering a series of public interests.

Disposal

[21] The appropriate disposal is, therefore, an order dismissing the application for judicial review. If the Applicant is a legally assisted person, this will be reflected in the final terms of the order.