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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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McVeigh's (David) Application [2012] NIQB 101

IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW BY DAVID McVEIGH

IN THE MATTER OF A REFERRAL MADE BY THE MINISTER OF JUSTICE OF ENGLAND AND WALES TO THE PAROLE BOARD OF ENGLAND AND WALES

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HORNER J

Introduction

[1] The applicant challenges the decisions taken on 7 December 2010 and 18 January 2011 by the Minister of Justice of England and Wales ("the British Minister") not to seek advice from the Parole Board as to the applicant's suitability for "open conditions" and the policy of the British Minister in not seeking a request for advice from the Parole Board as to the suitability of transferred prisoners in Northern Ireland for "open conditions" in general. In essence the complaint of the applicant is that the British Minister did not ask the Parole Board for advice as to whether the applicant was suitable for "open conditions". It is important to note that there are no "open conditions" in Northern Ireland under the prison regime here. But there is a power to recommend a prisoner for the Prisoner Assessment Unit ("PAU") which it is asserted is a broad equivalent and seems to be accepted as such. Both "open conditions" and the "PAU" offer a stepping stone between prison and release into the community. They give a prisoner an opportunity to demonstrate by his behaviour in conditions similar to those existing in the community that he can apply the lessons he has learned in "closed conditions". Unfortunately in Northern Ireland the "PAU" closed in April 2011. It has been replaced by a bespoke, pre-release scheme. It has been agreed that the issue of whether or not the High Court of Justice in Northern Ireland has jurisdiction to hear this judicial review should be

determined as a preliminary issue. It is hoped that this will not prove to be in the words of Lord Scarman, "a treacherous shortcut".

Facts

[2] The background facts can be briefly stated as follows:

(i) The applicant committed the murder and sexual assault/rape of his step sister on 20 May 1995. He was then aged 15 years. He was remanded in custody on 15 May 1995.

(ii) At the time of the offences the applicant was living in England with his father and his father's partner, Hazel Swanson, the mother of the victim.

(iii) The applicant was sentenced on 13 December 1996 to a sentence of detention at Her Majesty's Pleasure. His tariff was initially fixed at 13 years but was reduced by the Lord Chief Justice in England to 12 years on 13 August 2002. The tariff expired on 21 May 2007.

(iv) On 15 October 1998 the applicant was transferred to Northern Ireland as a restricted transfer prisoner to be close to his mother and other family members. His case was referred to the Parole Board in 2004. It considered his case but did not recommend his transfer to "open conditions". Two further referrals took place to the Parole Board. In both of these the Board was asked if it would recommend "open conditions" or its equivalent, but it did not.

(v) Thereafter no such advice in respect of "open conditions" was sought by the Minister. On 7 December 2010 the Minister refused a request by the applicant that such a recommendation should be sought from the Parole Board. A further request for an "open conditions" recommendation was met with a further refusal on 18 January 2011.

(vi) The reason offered was that a recommendation of "open conditions" could not bind the prison authorities here and in any event "open conditions" is a state which does not exist in the Northern Ireland prison regime.

(vii) Proceedings were issued on 21 March 2011 but for some unexplained reason these have progressed slowly through the system. The original decisions, the subject matter of this review, could now be the subject of further referral to the Parole Board given that 2 years have passed.

Legislative Framework

[3] The legislative framework in Northern Ireland is that:

(a) The transfer of prisoners within the British Isles is provided for by Schedule 1 of the Crime (Sentences) Act 1997.

(b) Paragraph 1 of Schedule 1 of the Act provides:

"(i) the Secretary of State may, on the application of –

(a) A person remanded in custody in any part of the United Kingdom in connection with an offence; or

(b) a person serving a sentence of imprisonment in any part of the United Kingdom,

make an order for his transfer to another part of the United Kingdom or to any of the Channel Islands, there to be remanded in custody pending his trial for the offence or, as the case may be, to serve the whole or any part of the remainder of his sentence, and for his removal to an appropriate institution there."

(c) A restricted transfer prisoner such as the applicant, that is one who has been transferred to Northern Ireland under the relevant provisions of the 1997 Act, is under a different regime. At paragraph 6(1)(a) provides that under a "restricted transfer" prisoner he "is to be treated for the relevant purposes as if he were still subject to the provisions applicable for those purposes under the law of the place from which the transfer is made." Thus a prisoner transferred to Northern Ireland from England and Wales will be treated as if were still subject to the provisions relating to his detention under and release from sentence as applies to prisoners in England and Wales.

(d) Under Section 28 of the 1997 Act it is the Parole Board in England, a different organisation entirely to the Parole Commissioners in Northern Ireland, which has a duty to give directions on the applicant's release. It is important to remember that section 28 only applies to prisoners who have been sentenced in England (whether they are transferred or not) and it has no application to any prisoners who have been sentenced in the courts of Northern Ireland.

(e) A "lifer" under the Life Sentences (NI) Order 2001 can insist on a referral to the Parole Commissioners in Northern Ireland on expiry of the tariff and then every 2 years after: see Article 6 and in particular

> Article 6(4)-(5). These are the Northern Ireland equivalent provisions and the same as the English provisions contained in Section 28.

[4] It will also be noted that under paragraph 5(2) of Schedule 1 the applicant is able to seek to have the condition that he remains subject to provisions applicable for detention under and release from his sentence under English law removed. If the applicant had taken that step and been successful, then he would have been treated identically to any other indigenous Northern Irish "lifer" and would thus have become subject to the recommendations of the Parole Commissioners for Northern Ireland under Article 6 of the Life Sentences (Northern Ireland) Order 2001.

[5] In England and Wales Arnott and Creighton's Parole Board Hearings: Law and Practice (Second Edition) at 9.12 suggest that lifers' cases are referred to the Parole Board, and if the Parole Board does not direct release, the Parole Board is also asked to advise on the suitability of the prisoner for "open conditions".

[6] Devolution of justice and the police to the Northern Ireland Assembly was achieved in April 2010. Accordingly, from that date it is the Minister of Justice in Northern Ireland ("the Northern Ireland Minister") who, in general, has responsibility for Northern Ireland prisoners in Northern Ireland prisons. However the British Minister retains control of the detention and release from prison of those prisoners from England incarcerated in Northern Ireland prisons who have been subject to the restricted transfer process. So far as those restricted transfer prisoners are concerned, the Northern Ireland Minister has no control as to when their period of detention should end.

The Jurisdiction Issue

[7] The respondent disputes the Northern Ireland Courts have power to judicially review the decision of the British Minister who is advised by an English body, the Parole Board. The British Minister has no responsibility for Northern Ireland prisons or Northern Ireland prisoners, other than for prisoners who are the subject of restricted transfers from England and Wales. The authorities are far from clear as to what circumscribes the jurisdiction of the High Court in Northern Ireland to review the decision of any public body. In this particular area of law there appears to be a dearth of authority.

[8] Supperstone, Goudie and Walker on Judicial Review (4th Edition) at 2.1.2 state:

> "The modern procedures relating to judicial review of administrative action have evolved through the gradual adaptation of changing social and constitutional circumstances of the ancient writs of certiorari prohibition and mandamus, allied with the subsequent development,

> in common law context, with other remedies, notably declaratory orders and injunctions."

[9] But few of the cases actually consider the limit of the High Court's jurisdiction to carry out a judicial review. It is clear that the parties are not entitled to confer a jurisdiction which the court may not have by consent: see R v Secretary of State for Social Services Ex parte Child Poverty Action Group (1990) 2 QB 540. The Civil Jurisdiction and Judgements Act 1982 does not extend to administrative matters dealing as it does exclusively with civil and commercial matters. Rather Schedule 4 of the 1982 Act introduced rules for the assumption of jurisdiction in disputes which involved the different jurisdictions of the United Kingdom. These are similar to, but not identical with, the provisions of the Brussels Convention. Again, Schedule 4 does not apply to public law cases. The primary rule in these "in personam claims" under the "Brussels Regulation and the Lugano Convention" is that a defendant domiciled in a Member State has to be sued in the courts of that State: see 11.250 of Dicey and Morris and Collins on the Conflicts of Law (15th Edition).

[10] De Smith, Woolf and Jowell's Principles of Judicial Review state at 3.088:

> "Almost all functions challenged in judicial review claims in the Administrative Court are exercised in England and Wales in respect of claimants based in England and Wales. In a small number of cases, however, the court has had to consider whether decisions relating to other geographical areas are amenable to review."

[11] Further at 3.094 De Smith states:

> "The Administrative Court's jurisdiction to issue judicial review remedial orders in respect of the exercise of functions in the name of the Crown extends beyond the United Kingdom **to overseas territory subject to the Queen's dominion**, at least where in substance (if not in form) the decision is taken on the orders or direction of United Kingdom Ministers."

[12] It goes on to note that the Administrative Court will not, as a matter of international comity, hear a claim for judicial review which amounts to an unwarranted interference in the affairs of an independent member of the British Commonwealth. It follows that it is important to look at the particular statutory duty or power and the relevant statute or statutes to see if it is intended to confer jurisdiction on a particular court or courts.

[13] It does seem that the High Court has jurisdiction where a body making the impugned decision has domicile or a place of business within the jurisdiction of that court. Furthermore, a court may have the jurisdiction to hear an impugned decision

if that decision takes effect within the jurisdiction of that State although that will depend on the nature of the statutory power or duty being exercised. However, there may be a concurrent jurisdiction with another court. In those circumstances a court which has its jurisdiction challenged, will have to consider which is the "forum conveniens". Lord Goff considered this issue in Spiliada Maritime Corps v Cansulex Ltd 1987 (AC) 460. He put forward a number of different propositions:

(i) Usually the legal burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay, although the evidential burden will rest on the party who seeks to establish the existence of matters which will assist in persuading the court to exercise its discretion in his favour.

(ii) If the court is satisfied by the defendant there is another available forum which is clearly a more appropriate forum for the trial of the action, the burden will shift to the claimant to show that there are special circumstances by reason of which justice requires the charge should nevertheless take place in Northern Ireland.

(iii) The burden on the defendant is not just to show that Northern Ireland is not the natural or appropriate forum, but to establish there is another forum that is clearly or distinctly more appropriate than Northern Ireland. If there is no natural forum, then no stay should be granted.

(iv) The court will then look to see what are the factors which point in the direction of another forum as being the natural forum. These will include factors affecting convenience or expense such as other factors as the law governing the transaction, where the parties reside and carry on business.

(v) If the court concludes at that stage there is no other available forum which is clearly more appropriate for the trial of the action, the court should normally refuse a stay.

(vi) If however the court concludes that there is some other available forum which is more appropriate, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should not be granted.

(vii) Lastly, a stay will not be refused simply because the claimant will be deprived of a legitimate personal or juridical advantage, provided the court can be satisfied that substantial justice will be done in the available appropriate forum.

[14] This matter is discussed in more detail at 12-030 of Dicey, Morris and Collins on the Conflict of Laws (15th Edition).

Discussion

[15] It is important to note that under the Interpretation Act 1978 a Secretary of State means one of Her Majesty's principal Secretaries of State. As such the British Minister's jurisdictions extended throughout Northern Ireland in respect of the period of and release from detention of all prisoners until devolution of policing and justice in April 2010. From that date the release and detention of prisoners in Northern Ireland came under the jurisdiction of the Northern Ireland Minister subject to those statutory powers which had been expressly conferred on the British Minister in respect of restricted transfer prisoners "doing their time" in Northern Ireland. This is presumably the reason why the issue of jurisdiction never arose in cases such as Re Faulkner's application for Judicial Review in 1999 (NIJB) 151 because the decision was taken by the Secretary of State at Westminster who then had authority over the Northern Ireland prisons.

[16] The leading decisions, such as they are, need to be viewed with some circumspection for two reasons. Firstly, the facts of each of them are rather different. Secondly, some of the cases involve consideration of Scottish law which is not the same as the law of Northern Ireland. For example, the scope and nature of a judicial review in Scotland is very different.

[17] In Bank of Scotland v IMRO 1989 SCLR 38 the Bank of Scotland ("The Bank") sought judicial review of the decision made by IMRO. This was a self-regulatory organisation for the purposes of the Financial Services Act 1986 which had its registered office in London but was concerned with the carrying on of investment business throughout the United Kingdom. The Financial Services Act applied throughout the United Kingdom. The decision in this case turned on a construction of the Civil Jurisdiction and Judgements Act 1982 which need not concern us. But in the course of his judgement, Lord Dunpark said obiter at page 396:

> "Counsel emphasised that the exercise of supereminent jurisdiction of the Court of Session must be confined to bodies in Scotland for it had no power to enforce its decisions against bodies furth of Scotland. I agree entirely with this submission, but I think that as the case was argued, it relates to the competency of the remedies sought by the bank."

[18] In Re Surgeoner 2003 NIQB 62 Weatherup J heard an application for judicial review of the decision made by Northern Ireland Prison Service and the Scottish Prison Service in relation to the applicant who was serving a sentence of imprisonment in HMP Magilligan. He was a restricted transfer prisoner and he wanted to avail of the more generous release provisions which governed Northern Ireland prison. The Scottish Minister argued that the Northern Ireland court had no jurisdiction. He reviewed the relevant authorities at paragraphs 15-18 and I do not need to repeat them. He then reached his conclusion at paragraph 19 where he said:

"In relation to a decision by Scottish Ministers as to a prisoner sentenced to a term of imprisonment in Scotland and concerning that prisoner's transfer out of the jurisdiction of Scotland I consider the position to be as follows –

(a) The primary supervisory jurisdiction should lie in the Scottish courts. The critical question is whether the decision-makers were acting in the context of purely Scottish proceedings. The obvious connection with Northern Ireland is that the applicant is detained in Northern Ireland. However it is necessary to consider the particular decision that raises the jurisdiction issue. That is the decision of Scottish Ministers that a prisoner sentenced in Scotland be transferred out of the jurisdiction of Scotland and that his release should remain subject to the Scottish system. The context of that particular decision is purely Scottish. The consequence of the decision is that the prisoner is located in a different jurisdiction but that does not diminish the purely Scottish context of the transfer decision. Where issues arise about the outworking of the Scottish transfer decision involving the prison authorities in Northern Ireland, those issues would not arise in a purely Scottish context, as was the case in Faulkner's Application and Peart's Application.

(b) However I refrain from concluding that the Scottish courts have exclusive jurisdiction in all circumstances in relation to the transfer decision. There may be cases where there is a concurrent jurisdiction in the Northern Ireland courts in relation to the transfer decision and its impact on the detention and release of the applicant. As the applicant is a prisoner in detention within the jurisdiction of Northern Ireland this court must guard its position so far as the review of his detention and release are concerned. Of course the court will have jurisdiction to deal with this applicant in relation to any issue that does not involve the transfer decision of the Scottish Ministers. However, where the decision of Scottish Ministers has become intertwined with a decision made by the Northern Ireland Prison Service there

may be cases where the Scottish Ministers could not be said to have acted in the context of purely Scottish proceedings. Further, there may be exceptional cases of real emergency where it might be desirable for this court to make an appropriate order. In the present case there are challenges to the decisions of the Scottish Ministers and the Secretary of State for Northern Ireland but those decisions remain distinct and have not become so intertwined that the transfer decision of the Scottish Ministers can no longer be considered to have been made in the context of purely Scottish proceedings. Similarly, there is no emergency arising in the present case that requires an order from this court in relation to the Scottish decision. I adopt the approach of MacPherson J in R v Special Commissioner, ex parte R W Forsyth Ltd and of Brooke LJ in R (On the application of Majead) v IAT and Secretary of State for the Home Department.

(c) In cases of concurrent jurisdiction this court should adjudicate if it is the convenient forum. If I am wrong in the conclusion that there is no concurrent jurisdiction in the circumstances of the present case I would not consider Northern Ireland to be the convenient forum. The connection with Northern Ireland is that the prisoner is now serving his Scottish sentence in a Northern Ireland prison. The relevant decision as to the applicant's transfer remains that of Scottish Ministers and his release is governed by Scottish legislation and the decision of Scottish Ministers. There is no ingredient in the present circumstances that requires the Scottish decision to be adjudicated upon by this court. Comity requires that such decisions of Scottish Ministers be adjudicated upon by the Scottish courts."

[19] The last case for consideration is Tehrani v Secretary of State for the Home Department (2006) UKHL 47. The applicant had arrived by plane in London in March 2001 but, within a month, had been sent to Glasgow where he had lived continuously ever since. His application for asylum was refused in May 2001 by an order from the Immigration and Nationality Directorate in Croydon. Within two days, he had given notices of appeal and, in February 2002, the appeal was heard by an adjudicator sitting in Durham – apparently to suit the convenience of the

applicant's representative for the hearing who lived in Sheffield. Later the same month, the appeal was dismissed and, in March 2002, the Immigration Appeals Tribunal (IAT) sitting in London, refused leave to appeal – a decision which was not of itself accessible to appeal. The applicant's subsequent petition seeking reduction of the decision was refused in April 2003 by Lord Philip in the Court of Session when the Secretary of State's plea to the jurisdiction of the court was sustained. His reclaiming motion was refused by an Extra Division in April 2004. The case was then appealed to the House of Lords. The issue there was what court should hear a judicial review where there was an inter-jurisdictional element. (For a detailed summary of the facts in that case see the article by Chris Himsworth in the 2007 Edinburgh Law Review at page 278).

[20] Lord Nicholls of Birkenhead said that UK legislation can make provision for appeals to Appellate Tribunals which also operate throughout the United Kingdom. That was the primary remedy of the citizen disappointed with the decision of the Tribunal. Sometimes however the citizen will want to challenge by judicial review a decision in respect of which there is no statutory right of appeal. In those circumstances the issue is:

> "But to which court should this be and on what principle
> should the choice be made?"

[21] The House of Lords suggested there were two alternatives open. The first was that there are separate jurisdictions, and that under the Immigration and Asylum Act 1999 which operates throughout the United Kingdom, a decision taken by a Tribunal in England should be reviewed by the English High Court only and could not be reviewed by the Court of Session in Scotland. Alternatively, a concurrent jurisdiction approach could be adopted and the doctrine of forum non-conveniens used to determine which was the appropriate court. This principle of forum non-conveniens applied to petitions for judicial review in the same way as the principle applied to ordinary actions. On the exceptional circumstances of that case it was determined that the Court of Session did have concurrent jurisdiction to hear that particular judicial review.

[22] The relevant provisions which apply to the applicant in this case are contained in a UK Statute. However, it seems tolerably clear that:

(i) The applicant must be treated at all times for the purpose of his detention under and release from his sentence as if he were still subject to the provisions applicable for those purposes under English law. The relevant section is 28 and it applies to prisoners convicted in England but transferred to other jurisdictions, including Northern Ireland.

(ii) The whole issue of the applicant's release has to be the subject of recommendation to the British Minister by the Parole Board which is an English organisation acting pursuant to a statutory provision which applies

exclusively to prisoners who are under the control of the British Minister so far as release and detention are concerned: see Section 28 of the 1997 Act.

(iii) Since April 2010 the British Minister has had no responsibility for Northern Ireland prisons or for prisoners in those prisons, those functions having been devolved to the Northern Ireland Assembly and the Northern Ireland Minister, save in the case of restricted transfer prisoners.

[23] If the applicant is correct in his contentions then by a parity of reasoning if the applicant remained in an English prison, he would still have been able to apply for judicial review in the Northern Ireland High Court in respect of any decision of the British Minister effecting his release date in England. It is suggested that the High Court in Northern Ireland has no such jurisdiction. There seems to be considerable force in the suggestion made in Valentines Civil Proceedings – Supreme Court 19.21 where he says:

> "The author's view is that the challenged decision can be reviewed in Northern Ireland High Court only where the source of the authority for it is a law applicable to the whole of the United Kingdom in general or of Northern Ireland in particular, subject to the discretion to refuse review."

[24] In this particular case the source of the authority namely section 28 of the 1997 Act does not apply to the whole of the United Kingdom in general or to Northern Ireland in particular. It applies only to those restricted transfer prisoners from England and Wales who remain exclusively under the control of the British Minister for the purposes of detention and release. Accordingly I consider that the English courts have exclusive jurisdiction in respect of decisions as to the release of restricted transfer prisoners and which are taken by the British Minister on the advice of the Parole Board.

[25] If I am wrong and because the British Minster as Secretary of State in constitutional theory is domiciled in the whole to the United Kingdom, despite the devolution of policing and justice powers to the Northern Ireland Assembly and to the Northern Ireland Minister, I consider that the appropriate forum for this dispute is England, not Northern Ireland for the following reasons:

(i) Section 28 of the 1997 Act applies to English prisoners and English restricted transfer prisoners only and who serving out their sentence in Northern Ireland.

(ii) The Parole Board is based in England and its members are almost exclusively made up of persons living in England and Wales.

(iii) The British Minister is advised by the Parole Board and advice is given to him in England.

(iv) The British Minister makes his decisions in England.

(v) It is likely given the nature of the proceedings that it would be more convenient that the proceedings take place in England and given that the place of residence of the staff advising the British Minister and the Parole Board are resident in England.

(vi) The policy being attacked was devised in England and applies only to prisoners sentenced in England but who are restricted transfer prisoners under the transfer regime.

[26] I also consider that so far as prison discipline is concerned, which is the domain of the prison governor, then the Northern Ireland Minister has exclusive jurisdiction because the restricted transfer prisoner is specifically subject to the Northern Ireland prison regime while a prisoner is incarcerated in Northern Ireland. Accordingly if there is a dispute about a decision in respect of a transferred prisoner's actual conditions of detention that dispute should take place in Northern Ireland only. If I am wrong, and the Northern Ireland court has concurrent as opposed to exclusive jurisdiction, then I consider that the more convenient jurisdiction to challenge a governor's decision on, for example, discipline is Northern Ireland.

[27] There is also a claim for breach of Convention rights and for damages for those breaches. I have not heard detailed submissions on this issue. But on the basis of the skeleton arguments my provisional view is that the applicant's Convention rights are not engaged because the treatment complained of does not fall within the ambit of Article 5(4) of the Convention. Further, it does not appear to me that the applicant has been able to establish that he has been less favourably treated in comparable circumstances. My preliminary conclusion is that Northern Irish lifers and English lifers are not comparable for the purposes of Article 14.

[28] On the premise that the applicant does have a potential claim for infringement of his Convention rights, it is accepted he is entitled to bring a claim for damages in Northern Ireland because the injury has been suffered in Northern Ireland and in any event the concept of jurisdiction is territorial in respect of Convention rights and the territorial area is that of the United Kingdom. It is reasonably clear that the claim for breach of Convention rights is very much secondary to the main claim which relates to the attack on the decisions of policy of the British Minister. However, I do consider England to be the more convenient forum for the reasons which I have previously set out. Accordingly, if I am wrong in my conclusion that the High Court in Northern Ireland does not have jurisdiction to consider the central issue in this judicial review, I remain of the opinion that the Northern Ireland courts should decline jurisdiction. The more convenient

jurisdiction for hearing any judicial review in respect of the alleged infringement of the applicant's Convention rights is England given the way the applicant's present proceedings are framed.

[29] I note that the decisions complained of were taken at the end of 2010 the beginning of 2011. As I have stated it would have been possible in the interim for the applicant to have applied to have the condition removed so as to become a non-restricted transfer prisoner pursuant to paragraph 5(2) of Schedule 1 in the 1997 Act. This would have allowed him, if his application had succeeded, to have been treated in the same way as every other Northern Irish prisoner. In any event given the time that has passed he would now be in a position to make a further application to the British Minister who will then refer it on to the Parole Board pursuant to his statutory duty.

[30] I conclude that:

(i) In respect of the decisions which have been challenged, this court has no jurisdiction.

(ii) If I am wrong, I believe that the forum conveniens is the High Court in England and Wales, not Northern Ireland, and the present proceedings should be stayed.

(iii) In so far as the applicant's claim for infringement of his Convention rights is concerned, my provisional view is that these rights are not engaged.

(iv) In any event, the forum conveniens is England and Wales and the Northern Ireland court should decline jurisdiction. I will stay the present proceedings based on interference with his Convention rights, if so requested.