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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Rodgers' (Robert) Application [2013] NIQB 69

IN THE MATTER OF AN APPLICATION BY ROBERT RODGERS FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

TREACY J

Introduction

[1] The applicant in this case is Robert Rodgers who is currently detained at Maghaberry Prison following a recent conviction for the murder of a young girl. By this application he seeks a number of reliefs including an Order quashing the refusal of the Northern Ireland Office ("NIO") to exercise the Royal Prerogative of Mercy ("RPM") to remit the 16 year sentence imposed upon the applicant on 15 March 2013 for the murder. The principal grounds upon which relief is sought in short form are:

(i) an alleged inequality of treatment amounting to irrationality;

(ii) the failure to apply an alleged policy thus breaching the applicant's legitimate expectation;

(iii) thirdly and alternatively, the failure to formulate and publish a policy is unlawful; and

(iv) fourthly and finally, that the failure to apply the RPM to the applicant breached his fundamental human rights and in particular Art5 of the European Convention whether read alone or in conjunction with Art14.

Background

[2] There is a short affidavit from the applicant in which he exhibits a number of important documents including the judgment of the Trial Judge, Mr Justice Horner convicting the applicant of the murder of Eileen Doherty on 30 September 1973. She was shot dead on the Annadale Embankment when she was 19 years of age.

[3] The applicant was arrested in 1974 and convicted in 1975 having pleaded guilty to the murder of another young catholic called Kieran McIlroy for which he served a lengthy period of time in prison. He served his life sentence and was released officially in July 1990. On 14 December 2010 he was arrested for the offence of the murder of Eileen Doherty. At the time of his arrest he was brought to Antrim Serious Crime Suite and questioned. He made no comment during the course of his interviews and was later that night released on police bail. His trial began in February 2013 and he was convicted on 14 February 2013 and sentenced to life imprisonment. His tariff hearing took place on 15 March 2013 and the tariff of 16 years' imprisonment was imposed by Mr Justice Horner. The court has been informed through the applicant's affidavit that he has lodged an appeal against conviction and I am also informed that the DPP has lodged an appeal against the tariff that was imposed in his case.

Order 53 Statement

[4] The applicant's grounds of challenge are set out in his Order 53 Statement as follows:

> "... the NIO's refusal to remit the applicant's sentence is unlawful in that:
>
> (a) The applicant:
>
> (i) Served a whole life sentence from 1974-1990;
>
> (ii) In Northern Ireland;
>
> (iii) For politically motivated, 'Troubles' related offending;
>
> In other cases where individuals have served less than two years for offences related to the Troubles (the qualifying period for early release), but where they have been sentenced for other qualifying offences for which they have served more than two years, the NIO has applied a policy of using the RPM so as to permit early release in accordance with the spirit of the Good Friday Agreement (and/or further to the Weston

Park Agreement). It is unlawful not to treat like cases alike. There is no good reason to treat the applicant differently to those in analogous positions and to refuse to remit the sentence imposed on him on 15 March 2013. The refusal to do so is in breach of the common law principle of equality, so unfair as to amount to an abuse of power and/or *Wednesbury* irrational.

(b) The NIO has a policy of using the RPM to give effect to the spirit of the early release provisions under the Good Friday Agreement even in circumstances where the precise qualifying conditions under the Northern Ireland (Sentences) Act 1998 are not met (further details of which are expected to be obtained by way of discovery and/or in the discharge of the respondent's duty of candour, should leave be granted). The applicant had a legitimate expectation that this policy would be applied to him and the failure by the respondent to do so represents an abuse of power.

(c) Alternatively, if the NIO is, in fact, not applying a policy of remitting sentences in this way, it is not clear what criteria it is applying to the applicant and to other cases. Where the executive has a broadly-framed power it is obliged to indicate in a transparent manner what criteria it is using to determine whether or not to exercise that power. Individuals can then make meaningful representations about the application of the policy in their case. The failure to formulate and publish a policy is unlawful.

(d) The failure to apply the RPM to the applicant is further in breach of his rights under Art5 ECHR (because the decision as to who will, and in what circumstances they will, benefit from the RPM is arbitrary); and/or in breach of his rights under Art14 ECHR taken in conjunction with Art5 (because there is no proper basis for distinction, either in terms of legitimate aim or proportionate means, between the applicant and those who have been released pursuant to the RPM).

(e) The respondent has failed to give any or adequate reasons for its decision."

[5] A similar argument to this application was raised in *Re McGeough* [2012] NICA 28 in which the applicant appealed against the dismissal of his judicial review against the Secretary to State refusing to recommend the exercise of the RPM in order to relieve him of his obligations to serve any part of the 20 year sentence which had been imposed by Mr Justice Stephens for the attempted murder of a Mr Brush in 1981. I note in passing that the same counsel appeared for the same parties in that case as appear in the present case. The Court dismissed the appeal. The principal grounds upon which the applicant in the present case relies pre-supposes the existence of a policy to use the RPM in the circumstances set out in paras 3(a) and 3(b) of the Order 53 Statement. The refusal to use it in the applicant's case, it is submitted, amounts to unequal treatment and irrationality and or breach of his legitimate expectation.

[6] I reject these contentions. The existence of such a policy has not been established and relatedly the applicant has not identified any relevant comparator to even arguably ground the claim of unequal treatment or breach of legitimate expectation. In *McGeough*, the respondent did not accept that there was a policy but contended that if there was a policy it was confined to considering whether the RPM should be exercised to resolve the situation of any individual whose circumstances might be said to amount to an anomaly, in that they fell within the spirit of the Belfast Agreement but were excluded from the operation of the Sentences Act by technical considerations. At para 25 of its judgment the Court said:

> "If the approach of the respondent can be considered a policy in the circumstances of the present case, we are satisfied that ... the circumstances of each group or individual comparator put forward on behalf of Mr McGeough were far from analogous."

[7] In the present case the claimed policy has not been established and no analogous comparators have been identified on behalf of the applicant and for that reason it seems to me that this application must fail. Had the applicant established the existence of a policy in the terms grounding his unequal treatment and legitimate expectation claims, the court would have been required to determine the lawfulness of any such policy and its compatibility with the convention. Since no such policy has been established the matter does not strictly speaking arise for determination in this case. Such a general policy is asserted on behalf of this applicant going well beyond addressing exceptional cases of anomalies such as those under consideration at para 16 of *McGeough* which would amount to a virtual amnesty for those with previous terrorist convictions. It would in my view be inconsistent with the Statutory Scheme of the Northern Ireland Sentences Act 1998.

[8] Exercising the RPM in the manner contended for by the applicant would be inconsistent with the expressed provisions of that Act which lay down the requirement that persons in the position of the applicant convicted after the Act came into force must serve two years of their sentence before obtaining accelerated release. The applicant's case is that he should not have served, or serve, any time in respect of the murder for which he was recently convicted. Moreover, the effective removal of any penalty upon conviction resulting from the exercise of the RPM in the way sought by the applicant may well be incompatible with or repugnant to the positive obligations imposed upon the state by Art 2 of the European Convention. For example in ***"Human Rights Law and Practice"*** - Lester & Pannick at para 4.2.7 there is a discussion of the State's positive Art2 obligations which require them to put in place effective criminal law provisions to deter the commission of offences backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.

[9] The remaining two grounds in the Order 53 Statement, grounds (c) and (d) were faintly pursued and they are in my view, in any event, plainly unarguable and therefore for these reasons I reject the application for leave to apply for judicial review.