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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **06/02/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JOHN SHEEHY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Michael Halleron (instructed by Brentnall Legal) for the Applicant
Philip McAteer (instructed by the Departmental Solicitor's Office) for the Proposed Respondent

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HUMPHREYS J

Introduction

[1] On 29 January 2020 the applicant pleaded guilty to terrorism offences, including conspiracy to possess explosives and firearms with intent to endanger life, in respect of which he was sentenced to a determinate custodial sentence ('DCS') of six years by Colton J. The learned judge's sentencing remarks can be found at [2020] NICC 14 paras [304] to [331].

[2] As a result of the enactment of the Counter Terrorism Sentencing Act 2021, which introduced a new article 20A into the Criminal Justice (Northern Ireland) Order 2008, the applicant became obliged to serve two thirds of the DCS prior to being eligible for release, suitability for which is to be assessed by the Parole Commissioners. Under the previous sentencing regime, the applicant would have been entitled to automatic release after the expiry of a period of three years.

[3] The applicant's custody expiry date ('CED') is now 22 December 2023 with his sentence licence expiry date ('SLED') 21 December 2025.

[4] This application for leave to apply for judicial review concerns the arrangements put in place for meetings between the applicant and the Supervising Officer appointed by the Department of Justice ('DoJ') as part of the process leading to consideration by the Parole Commissioners. In short form, the applicant contends

that he ought to be entitled to have his solicitor present at these meetings, and the decision by the DoJ to refuse such attendance was unlawful.

The Evidence

[4] The applicant is aged 39 and states that he has lived his entire life in Co Kerry with his mother. Since his incarceration he has enjoyed only telephone contact with her. His has a son in Limerick and other relatives in Kerry but no familial connections in Northern Ireland. Whilst on bail in Newry he avers that his mental health was badly affected and, as a result, bail was varied to permit him to live in Kerry.

[5] On 21 July 2023 the applicant was notified that an interview with the Supervising Officer was to take place that day. His solicitor emailed Ms Hatfield of the DoJ in the following terms:

> "Our client has requested our presence at this interview, and we would be grateful if you could forward all details to allow us to attend that interview with our client"

[6] That same day Ms Hatfield replied:

> "I am not able to facilitate your attendance at a prison meeting. The purpose of the meeting is to introduce myself to Mr Sheehy and to ascertain his views on forthcoming release as requested by the Parole Commissioner."

[7] A pre action protocol letter followed on 2 August 2023, asserting that the DoJ had acted ultra vires the Parole Commissioner Rules (Northern Ireland) 2009 ('the 2009 Rules') by failing to accord the applicant his right to representation at all stages of the parole proceedings. It was further contended that this decision represented an unlawful fetter on the DoJ's discretion. A reconsideration of the decision pursuant to the 2009 Rules was sought.

[8] The DoJ responded on 4 September 2023, stating that meetings with Supervising Officers did not form part of the parole proceedings and there was no right to representation as claimed. It was also stressed that the DoJ has exercised its discretion to permit licence supervision meetings which take place in the community to be attended by one observer, who may be a friend, family member or legal representative. Attendance at meetings in the prison was a separate issue and given their purpose, no legal representation was either necessary or required.

[9] On 31 October 2023 the applicant's solicitor emailed the Parole Commissioners saying that an issue had arisen in the applicant's case as the DoJ had been unwilling to allow him to have his legal representative present at meetings.

[10] On 13 November 2023 this application for leave was filed.

[11] In his grounding affidavit, the applicant states that he is willing to engage in the process relating to his potential for release, but this is "completely alien" to him. His solicitor has been instructed for the purposes of the parole hearing and he wishes him to be in attendance for any meetings with the Supervising Officer, as would be the case if such meetings were taking place in the community rather than in prison.

[12] This expressed willingness to participate may be contrasted with the Suitability for Release report prepared by Ms Hatfield which indicates:

(i) The applicant had not engaged in any risk reduction work whilst in custody;

(ii) The applicant had consistently declined to engage with the Personal Development Unit; and

(iii) He had also declined to engage with any planned assessment by psychology or psychiatry.

Delay

[13] The DoJ contends that this application for leave is out of time and no good reason has been established which would entitle the court to extend time.

[14] Order 53 rule 4 of the Rules of the Court of Judicature (Northern Ireland) 1980 require an application to be brought:

> "within three 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."

[15] The principles underlying the application of this test are well-trammelled. The caselaw, including *Laverty v PSNI* [2015] NICA 75, *Re McCabe's Application* [1994] NIJB 27 and *Re Tracey's Application* [2021] NIQB 104 establishes the following:

(i) If there has been delay, an applicant must specifically seek an extension of time and each period of delay should be explained;

(ii) The court will examine whether any good objective reason for the delay has been established;

(iii) Time may be extended for good reason consideration of which may include substantial hardship to any person, prejudice to any party or good administration, and the public interest in proceeding;

(iv) Delays in the processing of applications for public funding alone may not constitute 'good reason.'

[16] In the instant case, it is incontestable that the grounds for the application first arose on 21 July 2023. On that basis, proceedings ought to have been commenced by 21 October 2023. In the event, they were filed over three weeks after that date.

[17] In an affidavit addressing the question of delay, the applicant's solicitor gives the following chronology of events following receipt of the PAP response on 4 September:

15 September	Legal aid application made
2 October	Legal aid refused, and second application issued and refused on the same day
3 October	Third legal aid application made and refused on the same day
25 October	Fourth legal aid application made and refused on the same day
27 October	Legal aid granted on foot of a review
13 November	Proceedings commenced

[18] No explanation is offered in evidence as to the reason for the delay between 3 and 25 October. Most notably, this included the date (21 October) when the three month period expired. This date was allowed to pass without proceedings being issued and no further application made until four days later. Equally, no explanation is proffered as to the delay of 17 days between the grant of legal aid and the issuance of proceedings in a case where time was already sped.

[19] The court cannot be satisfied that good reason has been made out in respect of the delay. No proper explanation has been forthcoming for all periods of delay as required by the jurisprudence.

[20] On this ground alone, therefore, the application for judicial review is dismissed.

The Grounds for Judicial Review

[21] However, having heard full argument on the merits of the application, I propose to address each of the grounds advanced by the applicant. In doing so, I

apply the well-established test for leave, namely that the applicant must make out an arguable case with realistic prospects of success.

(i) Fettering of Discretion

[22] The applicant contends that the DoJ has adopted a policy in relation to its discretionary power to allow prisoners to be accompanied to meetings which falls foul of the principle against the fettering of discretion.

[23] In a well-known statement of principle, Carswell LCJ held in *Re Scappaticci's Application* [2003] NIQB 56:

> "A decision-maker exercising public functions who is entrusted with a discretion may not, by the adoption of a fixed rule of policy, disable himself from exercising his discretion in individual cases … In the customary phrase, he may not fetter his discretion, but must, in another commonly employed phrase, 'keep his mind ajar'. That does not prevent him from adopting and following a policy that all cases of a certain type will be dealt with in a particular way, so long as he does not follow it so rigidly that he fails to entertain the possibility of admitting an exception in an appropriate case: CF R v Secretary of State for the Home Department, ex parte Venables (1998) AC407 at 497, per Lord Browne-Wilkinson."

[24] It was stressed by counsel for the DoJ that if an exceptional circumstances case were made, the possibility of an observer or lawyer being able to attend such a meeting remained open. As a matter of law, therefore, the DoJ had not fettered its discretion.

[25] As a matter of fact, no such case was made by the applicant. In correspondence with the DoJ, no assertion of exceptionality was made. In the PAP letter, it was contended that the DoJ had acted unlawfully in breach of the 2009 Rules. No case was made, at least until these proceedings were issued, that the personal circumstances of the applicant placed him into an exceptional group. Ms Hatfield was never presented with such evidence and could not therefore be criticised for failing to take it into account.

[26] In any event, on the basis of the applicant's own evidence, no proper case of exceptionality is made out. The fact that the applicant has no family support in this jurisdiction and has been subject to the extended custodial requirement for terrorist offenders could not, in the court's assessment, have satisfied an exceptional circumstances test. Such a stage was never reached.

[27] The fact that observers are allowed to attend meetings which take place post-release in the community setting does not render the instant decision unlawful. It reflects the exercise of a different discretion in different circumstances.

(ii) Material Considerations

[28] The applicant also avers that the DoJ failed to take into account material considerations in the decision making process, namely the applicant's personal circumstances. This fails to recognise that these circumstances were not presented to the DoJ for consideration. Instead the applicant merely asserted a 'wish' that his solicitor attend these meetings and then, erroneously, a legal right to have him in attendance.

[29] The fact of his custodial status, the sentencing regime and the facility for observers to attend in the community do not amount to material considerations in respect of the instant decision.

(iii) Immaterial Considerations

[30] The applicant relies upon an email from a single probation officer who states that, in the case of Probation Board interviews with prisoners, the presence or otherwise of a legal representative would be considered on a 'case-by-case basis.'

[31] The fact that this is the position of a different agency cannot impeach the decision in hand on *Wednesbury* grounds. It is wholly unclear why the DoJ would be obliged to take into account the view of a probation officer operating in a different context.

(iv) Irrationality

[32] It is submitted that the policy and the decision in hand are both irrational and arbitrary. This is not remotely arguable. The policy adopted is entirely rational and no exceptional circumstances case has been made out. There is no evidence of any prisoner in the applicant's position having been permitted to have a legal representative present at a meeting or interview with a Supervising Officer.

[33] Moreover, the applicant is entitled to have legal visits and to seek and obtain legal advice into the parole process. He will be permitted to make all relevant submissions in the Parole Commissioner hearing. There is no detriment caused to the applicant by the adoption of the policy or its application to these particular facts.

[34] None of the grounds advanced by the applicant meets the threshold for the grant of leave to apply for judicial review.

Conclusion

[35] The application for leave is dismissed, and I make no order as to costs between the parties.