*Northern Ireland (Sentences) Act 1999 - Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998 – whether Commissioners independent – whether Act compatible with ECHR Articles 5 and 6 – function of Commissioners at ancillary hearing – whether evidence admissible – whether Commissioners at substantive hearing would be prejudiced by evidence – ECHR Articles 5 and 6.*

Neutral Citation no [2004] NIQB 4

*Ref:* **GIRC4088**

*Judgment approved by the Court for handing down*
*(subject to editorial corrections)*

*Delivered:* **16/01/04**

**2004 No 1**
**2004 No 2**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

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**IN THE MATTER OF APPLICATIONS BY NEIL SHERIDAN FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF DECISIONS OF THE SENTENCE REVIEW COMMISSIONERS**

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**GIRVAN J**

**SYNOPSIS**

Applicant was sentenced as life sentence prisoner. He applied for early release under the Northern Ireland (Sentences) Act 1998. Relying on Articles 5 and 6 of the Convention he challenged the independence of the Sentence Review Commissioners on the ground that they were required to decide issues between him and the Secretary of State who paid the remuneration and who could pay them compensation if they cease to be Commissioners prior to the expiry of their terms of office. Secondly, he challenged the decision of a single Commissioner and an appeal panel on an ancillary hearing to allow the Secretary of State to call witnesses at the substantive hearing. The substance of their evidence which the Commissioners did not analyse or scrutinise in detail was that the applicant was still involved in Dissident Republic activity. This evidence was certified by the Secretary of State as "damaging information" the details of which could not be divulged to the applicant. The applicant contended that the Commissioners on the ancillary hearing should

have analysed the evidence and ruled on whether it should be excluded from the substantive hearing rather than admitting it and leaving it for the Commissioners at the substantive hearing to consider its weight. He contended that the "damaging" information provisions of the Act and rules were so intrinsically unfair that they infringed Articles 5 and 6 of the Convention.

Held:

(1) No fair-minded and informed observer having considered the facts could conclude that there was a real possibility of the Commissioners being biased. In any event the Commissioners were appointed and held office the under statutory provisions. Properly construed in the light of the Human Rights Act 1998 and the Convention the Secretary of State was bound to exercise his powers to remunerate and compensate on a fair and objective basis. No case of actual bias was alleged.

*Porter v Magill* [2002] 1 All ER 465 applied.

(2) The Commissioners on the ancillary hearing were only required to consider the "substance" of the evidence which the Secretary of State proposed to adduce at the substantive hearing. There was nothing to suggest that they had arrived at their decision on anything other than proper basis. They were entitled to leave the question of the weight of the evidence to the substantive hearing.

(3) The Commissioners at the substantive hearing would be free to give such weight if any as they thought fit to the evidence. It was open to them to reject it. They would not be tainted by the knowledge of the outline of the proposed evidence. *Re McClean* (Coghlin J) followed.

[1] The applicant seeks leave to apply for judicial review in two separate applications and I shall deal with each application separately.

[2] In application 2004 No 1 the applicant seeks to have quashed decisions of the Sentence Review Commissioners in respect of the applicant's application for early release under the provisions of the Northern Ireland (Sentences) Act 1998 ("the 1998 Act"). His case in this application is in essence that the Commissioners do not constitute an independent and impartial tribunal consistent with the requirements of Articles 5 and 6 of the European Convention on Human Rights ("the Convention"). He is in addition and in effect challenging the compatibility of the relevant provisions of the 1998 Act with the provisions of the Convention. Mr Ferris QC in his submissions indicated that he would be seeking to establish a right to a declaration of incompatibility in respect of the provisions of the Act. While declaratory relief is sought in paragraph 2(c) of the statement under Order 53

rule 3(2)(a) the application does not in terms seek a declaration of incompatibility and if he were going pursue the point he would require leave to amend the application.

[3] It is argued that the Commissioners are required to decide issues as between the applicant on the one hand and the Secretary of State on the other. The Secretary is the party who charged with certifying information, documents and evidence sought to be admitted in evidence as being "damaging information" which cannot be disclosed to the applicant. It has contended that the independence of the Commissioners and their ability to conduct a fair hearing between the parties and to ensure equality of arms is compromised contrary to Article 6 of the Convention. It is argued that as the Secretary of State fixes remuneration, fees and allowance and may at his discretion pay compensation to a Commissioner ceasing to be a Commissioner otherwise than at the expiry of his term of office the Commissioner cannot be seen as independent. He may or would be perceived by third parties as being in some way beholden to the Secretary of State. Subconsciously they may be influenced by a desire not to do anything that might adversely influence the Secretary of State in relation to any possible later decision by the Secretary of State whether to pay compensation to an outgoing Commissioner and at what rate.

[4] The Commissioners are appointed by the Secretary of State under section 1 of the 1998 Act. At least one must so far as possible be a lawyer and at least one must so far as possible be a psychiatrist or psychologist. In making appointments the Secretary of State shall have regard to the desirability of the Commissioners as a group commanding widespread acceptance throughout the community. It is evident that Commissioners are to be people of standing in the community. As Coghlin J in his judgment in *Re McClean* pointed out the Commissioners received extensive training in relation to the Convention. He further held that because of their independence and training they were capable of reaching a decision whether to leave out of account "damaging information" if they considered it of little or no probative value and he considered that there was no substance in the criticism that in attempting to so do they must inevitably have been biased by having seen the damaging information. It is true that the independence point raised in this case was not raised in *Re McClean*. Nevertheless, the point remains valid that the Commissioners in view of their background and training can be taken to fulfil their functions in an independent way and the suggestion that they might indirectly influenced by a desire to keep themselves right with the Secretary of State in case they might ever need to call for compensation does not really bear scrutiny. Under the common law principle set out in *Porter v Magill* [2002] 1 All ER 465 I do not consider that it could be argued that a fair-minded and informed observer having considered the facts would conclude that there was a real possibility that the Commissioners are biased.

[5] In any event the terms of engagement of the Commissioners are spelt out in the statute and the Commissioners were appointed under and in accordance with the statutory framework. Before any question of a declaration of incompatibility could arise the court would be bound to construe the legislation so far as possible in a manner consistent with the Human Rights Act and the Secretary of State would have to exercise his powers in a way which is compatible with the Convention. The power of the Secretary of State to pay compensation could never be validly or properly exercised in such a way as to punish or reward Commissioners for their past performance and Schedule 1 paragraph 1(4)(1) and (2) would have to be construed accordingly. Accordingly, Commissioners in fulfilling their statutory functions must and can properly be presumed to do so and know they are bound and entitled to do so without hope of favourable treatment or fear of unfavourable treatment in the light of their performance as Commissioners. The statute so construed is compatible with the Convention.

[6] Even if the applicant were correct and the statute were to be held to be incompatible with the Convention nevertheless it remains a statutory provision in force until repealed or replaced. If the only challenge the applicant can make relates to a defect in the statute the Commissioners remain bound to fulfil their statutory duties until the Act is replaced or repealed. If, however, there was evidence of actual bias or lack of independence the applicant would have an argument but no such case is spelt out or implied in the present application. In these circumstances I refuse leave to apply for judicial review in the first set of proceedings.

[7] In the second application (which is also touched on in the first application) the applicant challenges the decision of the panel of Commissioners made on 10 April 2002 permitting the Secretary of State to adduce evidence at the substantive hearing of the application in respect of so-called "damaging information". This decision reached after a hearing on 9 April 2002 at which the applicant was present and represented was made by the panel on appeal from a single Commissioner who had decided that the evidence should be admitted under rule 11 and 12 of the Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998 ("the Rules"). The applicant contends that the Commissioners acted in breach of Article 6(1) of the Convention. The grounds are set out in paragraph 3 of the statement. Mr Ferris QC contended that the panel should, at least, have examined the evidence backing up the assertion that the police had intelligence which indicates that the applicant had and continued to maintain close links with dissident republican elements and would become re-involved in acts of terrorism. On a wider point Mr Ferris challenged the fairness of the whole procedure involved in the damaging information provisions in the rules.

[8] Schedule 2 of the 1998 Act provides that rules may make provision about evidence and information about a prisoner not to be disclosed to anyone other than a Commissioner if the Secretary of State certificates that the evidence or information satisfies conditions specified in the rules. The rules may also make provision about the way in which information or evidence is to be given. Rule 22 gives effect to the former and rule 11(1)(b) of the rules gives effect to the latter provision.

[9] Under rule 21 where a party wishes to call one or more witnesses at a hearing he shall apply by way of ancillary application for leave to do so giving the name, address and occupation of each witness he wishes to call and the substance of the evidence he proposes to adduce.

[10] The ancillary application brought by the Secretary of State was "to enter into evidence the attached intelligence summary and notice pursuant to rule 22(3) of the rules and to call the witnesses named in the attached document to the substantive hearing." The attached summary referred to Detective Chief Superintendent Flanagan who, it was proposed, would give evidence about police intelligence which indicated that the applicant had had and continued to maintain close links with dissident republican elements and would become re-involved in acts of terrorism upon police and Detective Sergeant William Gordon Whiteman who would give evidence in relation to the police investigation of the murder for which the applicant was convicted.

[11] The note of the decision of the panel stated in paragraph 2:

> "Admissibility
>
> The criteria for admissibility of evidence in a criminal trial are not applicable to these proceedings, nor to the substantive hearing (rule 19(6)). The question of whether information was lawfully obtained is a matter in which our rules are silent but clearly this is a matter that could be pursued in an oral hearing and could affect the weight given by the panel to the information in question.
>
> Disclosure
>
> We see the force of the point the Commissioners should be able to inquire whether they have received all relevant information, and in particular whether there is any information withheld from the Commissioners which could be of assistance to the applicant's side or which might tend to

> undermine the Secretary of State's case. There is an important general point here about procedural rights. We note that under rule 23 Commissioners can request further information, but we also consider that the argument made here on the applicant's behalf is relevant and important to the panel dealing with the substantive hearing."

The decision went on to state that in relation to the argument that "the first police witness would giving hearsay information, and that it is not possible to validate the claim that the persons with whom the applicant was allegedly associating were Republican Dissidents were matters to be properly examined at the substantive hearing. In relation to the second police witness it was argued that all relevant evidence was or should have been placed before the court of trial, and secondly that the police could have used the mechanism of the public interest immunity certificate for information to be excluded. We were not persuaded by this argument. It is quite possible that the police could have gathered information relevant to the questions with which we are dealing, but which would not have been relevant to the finding of fact in the trial."

[12] Mr Ferris argued that the Commissioners should have heard the actual evidence and ruled on its admissibility in the light of the totality of that evidence rather than ruling that it should go in and that its weight if any be assessed at the substantive hearing. The scheme of the rules, however, clearing indicates that at the ancillary hearing the panel was directed to consider whether witnesses could be called. The Secretary of State was properly applying to call the witnesses. Rule 21 requires him to give the name, address and occupation of witnesses and "the substance of the evidence he proposes to adduce." The rules do not point to the ancillary hearing being a form of voir dire at which the evidence is sifted, analysed and weighed and then ruled upon in its totality. The decision of the panel to permit the witnesses to give evidence to be adduced before the substantive hearing was to be arrived at by looking at the substance of the evidence and the panel had to be alive to the needs so far as possible within the statutory framework to protect the procedural rights of the applicant. There is nothing in the recorded decision to point to the Commissioners falling into error in their approach to the matter. At the substantive hearing the panel will have to proceed in a way that is compatible with a fair hearing so far as possible within the statute and rules properly construed. The proposed evidence is clearly potentially relevant as the panel has held. Weight will be a matter for the substantive hearing and the panel at the substantive hearing would of course have to keep under review whether in the light of circumstances at the substantive hearing the evidence should be disregarded and what weight should be given to it.

[13] Mr Ferris contended that the panel hearing the substantive application will be tainted by the knowledge of the outline of the proposed evidence and that they could not fairly determine the matter for even if they excluded the evidence or gave it little weight their minds would be affected by the knowledge of the outline of the Secretary of State's case. Furthermore he argued, the Commissioners on the substantive hearing having heard the evidence adduced by the police witnesses would be tainted by its content even if they ultimately rejected it. It is clear from *Re McClean* that Commissioners having heard and rejected this type of security evidence are not so tainted as to be able to fairly determine the application on the rest of the evidence. As Coghlin J at page 9 of his judgment said:

> "Taking into account their independence and training I am satisfied that the Commissioners were able to reach a decision without taking into account the damaging information and that there is no substance in the criticism that in attempting to do so they must inevitably have been biased by having seen the damaging information."

[14] I would dismiss the application for leave on the ground that the decision of the panel on the ancillary application was not flawed procedurally or as a matter of law for the reasons discussed. It was entirely open to the panel to decide as they did. In any event any application is premature. The applicant can proceed with his substantive application. He may have grounds for challenging the ultimate decision. It is fully open to him to pursue his arguments in relation to the weight of the security evidence and the procedural issues raised by it. In these circumstances I refuse leave in relation to the second application also.