Judicial Communications Office

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COURT DISMISSES APPEAL AGAINST TERRORIST OFFENDER NOTIFICATION REQUIREMENTS

Summary of Judgment

The Court of Appeal[1] today dismissed appeals by Anthony Lancaster, Sharon Rafferty and Anthony McDonnell ("the appellants") who are all Registered Terrorist Offenders ("RTOs") and subject to notification requirements. The court held that the notification requirements did not breach ECHR, EU or domestic law.

The appellants were convicted of terrorism offences in the mid-2010s and as part of their sentence were subject to notification requirements under the Counter Terrorism Act 2008 ("the 2008 Act") and the Counter Terrorism Act 2008 (Foreign Travel Notification Requirements) Regulations 2009 ("the 2009 Regulations"). The regime prescribed by the 2008 Act and 2009 Regulations required RTOs to notify the PSNI prior to leaving the jurisdiction of the UK for a period of more than three days. This regime was amended by the Counter Terrorism and Border Security Act 2019 ("the 2019 Act") to the effect that RTOs would have to provide notice every time they left the UK, no matter the duration of their journey[2]. Each of the appellants in this case advanced personal factual circumstances in relation to travelling to the Republic of Ireland and contended that the current notification requirements breach articles 7 and 8 ECHR, are discriminatory contrary to article 14 ECHR and breach EU rights.

Ground 1: Compliance with article 8 ECHR

Article 8 requires respect for private and family life. In this case, most focus was upon the question of whether the notification regime amounts to an unjustifiable interference in the appellants' private lives. They contended that the measure offends the quality of law test and that it is disproportionate to the legitimate aim. The appellants did not dispute that the notification regime had a basis in law but questioned whether it was sufficiently precise and accessible to satisfy the quality of law test.

The trial judge dealt with this point at paragraphs [67]-[80][3] of his judgment. The Court of Appeal considered the competing arguments advanced by the appellants and the respondents[4]. Having done so it accepted the respondents' argument on the question of legal certainty. It considered the appellants can access and read the law and understand the effect of it with the benefit of legal advice. The court was entirely satisfied that an RTO can regulate his or her activities with a reasonable degree of foreseeability. It referred to the clarification provided by the trial judge at para [71] of his judgment where he said that there was plainly *no* requirement within the 2008 Act or the 2009 Regulations that an RTO explain the purpose of their cross-border travel; nor that they

[1] The panel was Keegan LCJ, Treacy LJ and Horner LJ. The LCJ delivered the judgment of the court.
[2] The 2019 Act also placed new requirements on RTOs including a requirement to provide contact details, financial information and information about identification documents and notification of vehicles which the individual owns or uses.
[3] [2023] NIKB 12
[4] The Police Service of Northern Ireland and the Secretary of State for the Home Department

set out their destination (unless they are staying overnight, in which case the address where they will stay for their first night should be notified); nor their intended route (other than the points of departure and entry to the United Kingdom and, in the event that more than one country is being visited, the point of arrival in each such country). Where an RTO wishes to provide a block notification for non-overnight trips to the Republic of Ireland, they need only disclose: the relevant dates of intended travel or the day of the week for regular travel from which those dates can be gleaned; and the point of arrival and return, namely where they will cross the border. The Court of Appeal was satisfied that the requisite standard set by the European Court of Human Rights ("ECtHR") may be met and therefore the quality of law test is met.

The court then turned to the question of proportionality. The trial judge explicitly set out his reasons for finding that the notification regime was proportionate at paras [128]-[134] of his judgment. He noted that the regime will cause the appellants "some inconvenience", but that it remains entirely possible for the appellants to manage the bulk of their affairs in a predictable and foreseeable manner. He said it was difficult to see how the State's objective could be achieved without requiring notification of all cross-border travel. The trial judge concluded that the requirement for notification in person was entirely proportionate. The appellants contended that the SSHD had paid insufficient attention to the nuances presented by the land border, and it was simply not possible over a 10-year period to organise one's daily affairs seven days in advance. They said they have decided to stop travelling spontaneously in order to avoid the risk of prosecution.

The courts in NI have dealt with four travel notification cases in 2023 to date which the Court of Appeal said contain some general points of principle which can be used in this case. They are *Lancaster* [2023] NIKB 12 (the original trial decision), *Gabriel Mackle's Application* [2023] NIKB 13, *JR123* [2023] NICA 30 and *Ward's Application* [2023] NIKB 92.

The Court of Appeal concluded that the trial judge had not erred in his decision. It noted that there will, in reality, be some cases that must, compelling though they may be in isolation, be contained within a given framework to ensure the effectiveness of the law in general. It noted that the RTO regime is a UK-wide regime, so it will encompass RTOs who will rarely have cause to cross a border without notification (for example, travelling from the UK to Europe). It said that, even in a recognised exceptional case, the RTO regime is not so onerous as to entirely prohibit travel. Therefore, it must be considered that the general measure is sound and proportionate, despite the recognised additional effect on the appellants. The court said it understood the additional inconvenience of in person notification however it accepted the respondents' evidence on the necessity for that.

The court, explaining its conclusion on article 8, reiterated the fact that there are strong policy considerations that suggest a wide margin of appreciation should be afforded to the legislature in the present case:

- National security and counterterrorism are recognised as "excepted matters" within the meaning of Schedule 2 to the Northern Ireland Act 1998. This indicates a level of uniformity that needs to be applied on a UK-wide basis, thus militating against any holding of incompatibility within Northern Ireland. However, it further prevents the Northern Ireland Assembly from legislating a different regime. Therefore, the appellants' contention that Stormont may have decided differently is by and large moot. The court said it was also not prepared to say that the parliamentary process had been so flawed so as to render the

resulting legislation unlawful principally because of the aim of this legislation to counter terrorism including cross border activities;

- As a matter of national security, there is a well-established line of caselaw that demonstrates a wide margin of appreciation owed to the State.
- Within the specific RTO policy, the PSNI has stipulated that the instance of cross-border travel gives rise to particular monitoring issues which could be capitalised on by those seeking to perform terrorist activities. For similar reasons, it must be accepted that notification in person, while an infringement on the private life of an RTO, reduces the likelihood of manipulation of the notification regime. In this sense, it can be said that the 2019 amendments pursue a legitimate aim, and that the courts should not unnecessarily interfere with the counterterrorism policy of a democratically elected Government.

Accordingly, the ground of appeal based on article 8 ECHR therefore failed. The court added that whilst the argument focused on the notification requirement for any travel, it did not consider that any of the other aspects of the law in relation to financial notification or renotification failed on article 8 grounds for the reasons given by the trial judge.

Ground 2: Compliance with article 14 ECHR

Article 14 ECHR prohibits discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The courts generally consider whether a person in an analogous situation has been treated differently and whether there is an objective justification for that. In this appeal, it was accepted that the subject matter comes within the scope of article 14.

The appellants claimed that they had been discriminated against "as compared with RTOs resident in Great Britain, on the basis of their status as being resident in Northern Ireland and/or associated with a national minority." They argued that they had suffered indirect discrimination. While the trial judge was prepared to assume that RTOs resident in Northern Ireland as a cohort are disproportionately affected by the notification regime as compared with RTOs resident in Great Britain, he did not agree that the appellants suffered indirect discrimination by their association with a national minority (para [176]).

The appellants disputed the court's rejection of the "association with a national minority" status. The respondents, however, argued that the relationship between the appellants and the national minority status was not directly connected to the core grounds. As such, the burden becomes less onerous when dealing with an allegation of indirect discrimination. The respondents contended that the appellants' comparison with RTOs in Great Britain failed to appreciate the significance of the land border between NI and ROI.

The trial judge was satisfied that the appellants' treatment could be justified. In the period between oral submissions and the original trial judgment, the UKSC's judgment in *R (SC and Others) v Secretary of State for Work and Pensions* [2021] UKSC 26 was handed down. This judgment confirmed that a balanced approach to discrimination must be taken, allowing courts to use the "manifestly without reasonable foundation" ("MWRF") test as indicative of the wide margin of appreciation. In that judgment, Lord Reed further suggested that the MWRF test is appropriate in cases of national security.

The court agreed with the trial judge's legal analysis of the article 14 argument:

> "In essence, the treatment of the appellants is purely by virtue of their being an RTO. They face notification requirements not because they are Irish or resident in Northern Ireland; it is because they have been found to pose sufficient risk to national security that they are subject to additional preventative measures in order to minimise the likelihood of terrorist attack. This regime has a basis in law and is, as held above, proportionate within the meaning of article 8 ECHR."

The court also considered that the appellants' assertion that they have suffered discrimination because they have not been treated the same as an RTO resident in Great Britain is unsustainable. It said this argument avoids the fact that an RTO resident in Great Britain would be the subject of the same notification regime were they to seek to consistently travel between the UK and Ireland. Additionally, the appellants asserted that their association with a national minority further evidenced their discrimination. The court said that while the appellants' status within the Irish national minority group may be maintainable, that status is merely incidental in the present proceedings:

> "Every member of the Irish national minority group resident in Northern Ireland is not subject to a notification regime. Thus, the difference in treatment is not between Irish nationals/nationalists and non-Irish nationals/nationalists as a whole. The difference in treatment is solely between RTOs and non-RTOs. As such, the treatment of the RTOs in the present proceedings is not manifestly without reasonable foundation. The RTO regime pursues legitimate security aims and has been found by the trial judge to not interfere unjustifiably with the RTO's private lives. It follows that the difference in the appellants' treatment is justified, and that there is no violation of article 14 ECHR."

Ground 3: Compliance with article 7 ECHR

The court considered written arguments on this ground as well as the recent decision of the Supreme Court in *Morgan v Ministry of Justice (Northern Ireland)* [2023] UKSC 14. Article 7 provides that no person shall be held guilty of a criminal offence on account of any act or omission which did not constitute a criminal offence at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

The appellants argued that the trial judge had erred in considering that the notification requirements did not constitute a penalty and that he was wrong to consider that no alternative approach to sentencing was available. The appellants further pointed to the fact that, in Mr Lancaster's case, a sentence of one day less would have left him outside of the notification regime. As such, they submitted that had the 2019 amendments been known to Mr Lancaster's lawyers before sentencing, they would have made submissions to ask the judge for a more appropriate sentence. Finally, the appellants argued that the court was wrong to decide that the possibility of prosecution for not complying with the notification regime points away from the fact that the regime is a penalty. The respondents submitted that the notification provisions are not a penalty, but rather are, "measures which were introduced to provide a means of monitoring the activities, whereabouts and travel plans of convicted terrorists and to allow police to intervene where required. They are designed as administratively imposed preventative measures".

The court said the debate on article 7 had been overtaken by the Supreme Court's decision in *Morgan v Ministry of Justice.* In that case, section 30 of the Counter Terrorism and Sentencing Act 2021 ("the 2021 Act"), which altered the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order"), was challenged. Under the original scope of the 2008 Order, prisoners could be released on licence before serving the full term of the sentence imposed. The effect of section 30 was that instead of being released on licence after serving half of their custodial sentence, offenders would be referred to the Parole Commission once two-thirds of their sentence had been served (section 20A 2008 Order). The challenge in *Morgan* was that this amendment was contrary to article 7(1) ECHR. The Supreme Court held that article 20A had not imposed an additional penalty on the offenders. Rather, they found that the original custodial sentence was the original penalty. Thus, the Supreme Court rejected the argument that section 30 of the 2021 Act extended the custodial period beyond that which the Crown Court had formerly declared to be commensurate with the circumstances of the respondents' offending. Further, the Supreme Court did not find that section 30 redefined or modified the scope of the penalties imposed. They placed weight on the fact that the purpose of the legislation was "to protect the public from terrorist prisoners by confining them for a longer period under their determinate custodial sentences". Thus, as section 30 of the 2021 Act and article 20A of the 2008 Order related to the "execution or enforcement of a penalty" they did not fall within the concept of law within the meaning of article 7(1) ECHR.

The court said that having considered the full implications of the *Morgan* case, it was difficult to see how the article 7 challenge could succeed. It said the appellants' relied on the classification of the 2019 amendments as punitive but the Supreme Court's decision in *Morgan* comprehensively demonstrated that the only punishment within the meaning of article 7(1) was the original determinative sentence:

> "This holding translates to the present appeal. The effect of the 2019 amendments, though they might be more onerous on the individual concerned, do not alter the punitive measure incumbent on the appellants. That is plainly the sentence they received. Rather, the 2019 amendments alter the application of an order that was in effect before any of the appellants were sentenced. They (or at least their counsel) knew that the notification scheme applied to them, and that they would have to regulate their activities accordingly. The change in regime is thus not an additional punishment, but a change in policy to enact preventative measures. Accordingly, there is no violation of article 7 ECHR, and this ground of appeal must also fail."

Ground 4: Compliance with EU Law

This challenge focussed on the Citizen's Rights Directive ("CRD") (2004/38/EC) - the right of exit from one member state to travel to another (article 4) and general principles on the freedom of movement (article 27). The trial judge's decision regarding EU Law was set out at paras [201]-[222] of his judgment where he found that restrictions on freedom of movement could be justified on the grounds of public interest (namely, national security). The appellants disputed this conclusion arguing that the 2019 amendments amounted to an unjustifiable restriction on their free movement rights.

The court could not accept the appellants' arguments based upon EU law. It said the trial judge analysed this aspect of the case fairly and was right to conclude that the notification requirements do not amount to a restriction on freedom of movement. Even where article 27 CRD was engaged, it was reasonable to conclude that the appellants have each been judged to pose "genuine, present

and sufficiently serious threat[s]" to public security. The court said this had been decided by virtue of their offending sentences:

> "Therefore, it may be said that there has been an individual consideration of each appellant made by the respective sentencing judge, and that there is a legitimate public security ground to limit the right of exit in the appellants' circumstances. In summary, as to the appellants' EU challenge, there is nothing to suggest unjustified restriction on their rights as EU citizens. Instead, the restriction on a right of exit is founded upon the same proportionality issues as in the challenge to the Convention law and is lawful."

Overall conclusion

All other ancillary arguments were addressed and dismissed. The Court of Appeal broadly agreed with the conclusions of the trial judge and found no breach of Convention, EU or domestic law in this case. Accordingly, the appeal was dismissed on all grounds.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://www.judiciaryni.uk/).

ENDS

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