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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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

AND IN THE MATTER OF A TRADE AND CO-OPERATION AGREEMENT
WARRANT

Between

ROBERT DUFFY

Applicant

and

(1) JUDGE GEORGE CONNER, DISTRICT JUDGE (MAGISTRATES' COURT)

(2) THE SECRETARY OF STATE FOR NORTHERN IRELAND

Proposed Respondents

Mr Conan Fegan (instructed by KRW Law Solicitors) for the Applicant
Mr Philip Henry (instructed by the Departmental Solicitor's Office) for the First Proposed
Respondent

Mr David J Reid (instructed by the Crown Solicitor's Office) for the Second Proposed
Respondent

COLTON J

Introduction

[1] I am obliged to counsel for their helpful written and oral submissions which were all prepared at short notice as this was a matter which clearly required expedition.

[2] The factual background is not in dispute.

[3] The applicant was sentenced to life imprisonment in July 1996 in Northern Ireland following conviction for murder. He was involved in a planned IRA assassination of a director in a building company who undertook construction work for the security services.

[4] The applicant served four years of that sentence before being released on licence in July 2000 pursuant to section 6 of the Northern Ireland (Sentences) Act 1998 ('the Act') which was introduced as part of the arrangements under the Belfast/Good Friday Agreement. His release was subject to the conditions set out at section 9(1) of the Act, including a condition that he did not become a danger to the public.

[5] On 14 January 2008, the applicant entered a guilty plea and was convicted before the Central Criminal Court, Dublin, for attempted murder and possession of a firearm relating to an incident in March 2007. In the incident he was involved in an altercation with another male in a bar in Dundalk. He left the bar, retrieved a shotgun, returned to the premises, which were described as "packed" and shot twice at the face of the other male. On 1 April 2008, he was sentenced by that court to life imprisonment.

[6] Following that conviction, on 24 April 2008, the Secretary of State suspended the applicant's licence in accordance with section 9(2) of the Act, on the basis that the Secretary of State believed the applicant had broken a condition of his licence, namely that he had become a danger to the public. His case was referred to the Sentence Review Commissioners (SRC) for consideration under section 9(3) of the Act.

[7] On 7 February 2012, following a hearing before the SRC, the applicant's licence was revoked under section 9(4) of the Act. The applicant appeared at the contested hearing before the SRC and was represented by solicitor and counsel. At the hearing he challenged the SRC's jurisdiction to make any ruling on the grounds that the new offence had been committed in the Republic of Ireland and that he was not "detained in pursuance of the sentence" in this jurisdiction at the time of the hearing (relying on section 9 of the 1998 Act). He also challenged the substantive issue of whether he had in fact breached his licence. The SRCs rejected his arguments and the applicant was given written reasons for the commissioners' decision on 11 April 2012.

[8] On 2 December 2013 the applicant was refused leave by Treacy J to judicially review that decision of the SRC. Treacy J provided a written judgment refusing leave on all grounds.

[9] Since that time the applicant has been serving his sentence in the Republic of Ireland. He is due for release in the near future although the applicant does not have a precise release date.

The Impugned Decision

[10] On 8 April 2022 the first proposed respondent sitting at the Magistrates' Court in Belfast issued a surrender warrant for the extradition of the applicant from the Republic of Ireland to Northern Ireland. The warrant was made under section 142 of the Extradition Act 2003, which has been amended to take account of the Trade and Co-operation Agreement between the United Kingdom and the European Union following the United Kingdom's exit from the Union.

[11] It is this warrant which is challenged in this application.

[12] Initially, the application was also directed against the National Crime Agency on the basis that it was the party which had applied for the warrant. However, it was agreed by the parties that the agency was not an appropriate party in these proceedings. It was not involved in the decision to make the application. Whilst the PSNI were the moving party in the application for the warrant, they did so at the request of the Northern Ireland Office (NIO). Whilst the Secretary of State argues that there are no arguable grounds for judicial review he accepts that he should be the second proposed respondent in these proceedings. Accordingly, the Order 53 Statement was amended to name the Secretary of State as the proposed second respondent.

The Warrant

[13] The warrant issued by District Judge Conner on 8 April 2022 was made under section 142 of the Extradition Act 2003 which provides as follows:

"142 Issue of Part 3 warrant

- (1) The appropriate judge may issue a Part 3 warrant in respect of a person if –
- (a) a constable or an appropriate person applies to the judge for a Part 3 warrant, and
 - (b) the condition in subsection (2), or the condition in subsection (2A), is satisfied."

Subsection (2A) provides:

"(2A) The condition is that –

- (a) the person has been convicted of an extradition offence by a court in the United Kingdom,

- (b) his extradition is sought for the purpose of his being sentenced for the offence or of his serving a sentence of imprisonment or another form of detention imposed in respect of the offence, and
- (c) either a domestic warrant has been issued in respect of the person or the person may be arrested without a warrant.

...”

[14] It is not in dispute that the application in this matter was brought by an appropriate person and that District Judge Conner is an appropriate judge for the purposes of section 142.

[15] The application for the warrant is supported by a detailed document which forms the actual warrant when signed by the District Judge.

[16] Section (a) provides information regarding the identity of the requested person.

[17] Section (b) sets out the decision on which the warrant is based and refers to the applicant’s conviction on 5 July 1996 and confirms that he was sentenced in respect of the offence to imprisonment for life.

[18] Section (c) repeats the length of the custodial sentence imposed.

[19] Section (d) confirms that the applicant appeared in person at the trial resulting in his conviction.

[20] Section (e) provides comprehensive detail of the circumstances of the offence including the time, place and degree of participation in the offence by the applicant. It further sets out the relevant history in relation to the applicant’s release under section 6 of the Northern Ireland (Sentences) Act 1998 and that that release on licence was subject to conditions, including a condition that he does not become a danger to the public. The circumstances of his conviction on 14 January 2008 are set out as is the decision of the Secretary of State to suspend the applicant’s licence on 24 April 2008, his referral to the Sentence Review Commissioners and the subsequent revocation of the applicant’s licence on 7 February 2012 by the Commissioners on the grounds that he had breached a condition of his licence. It is then asserted that the applicant’s return to Northern Ireland is required to have him recalled to custody. It goes on to set out the nature and legal classification of the offence and the applicable statutory provision. The relevant provisions of section 142 of the Extradition Act 2003 are set out and it is certified that the warrant is issued with a view to the applicant’s arrest and extradition to the United Kingdom for the purpose of serving

a sentence of imprisonment imposed in respect of the murder offence. It is further certified that the warrant satisfies the conditions of section 142(6) of the Extradition Act 2003 in that:

- The offence is not listed in the Trade and Co-operation Agreement list set out in Schedule 2 of the Extradition Act 2003;
- The offence can be an extra-territorial offence but it is not in this case;
- The sentence passed for the offence is set out in section (c).

[21] Sections (f) and (g) are not applicable.

[22] Section (h) sets out in detail the offences on the basis of which the warrant has been issued. The issuing state gives an assurance that:

“The Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998 provide that Duffy may make a further application to the Sentence Review Commissioners for release. Rule 9(2) provides that the Commissioners may only determine a further application if, in their view:

- (a) Circumstances have changed since the most recent substantive determination was made in respect of the person concerned; or
- (b) Reliance is placed in support of the further application on any material, information, document or evidence which was not placed before the Commissioner when the most recent substantive determination was made in respect of the person concerned.

Upon his return to Northern Ireland Duffy is entitled to make a further application to the Sentence Review Commissioner for release on licence relying on either of the two grounds set out above.

In every case, including cases where a whole life term or a minimum term exceeding 20 years has been imposed, the prisoner may apply for compassionate release under section 7 of the Life Sentences (Northern Ireland) Order 2001 and/or for release under the powers of the Royal Prerogative of Mercy.”

[23] Section (i) then sets out the judicial authority which issues the warrant, in this case, the District Judge (Magistrates' Court) sitting at Laganside Court, Belfast Magistrates' Court.

[24] This was a leave hearing dealt with on an expedited basis and the court did not have an affidavit from the first proposed respondent. However, the court directed that the first respondent submit a position paper which sets out the circumstances in which the application for the warrant was granted as follows:

- "24. The application was heard by DJ Conner sitting in Chambers on 8/4/22, albeit the application was physically conducted in court 6 in Laganside Courthouse to allow for appropriate social distancing.
25. A PSNI Constable was sworn in and adopted the contents of the application form, which also then forms the warrant, if signed. The constable was accompanied by a Crown Solicitor's Office (CSO) solicitor.
26. The only matter of substance the DJ asked about concerned when the applicant was due for release in the Republic of Ireland. He was informed it would be very soon. No notes were kept of the question and answer.
27. The DJ was satisfied that the grounds for the warrant were made out on the basis of the information on the form itself."

Grounds of Challenge

[25] The applicant seeks an order quashing the warrant and a declaration that it is unlawful, ultra vires and of no force or effect on various standard public law grounds.

[26] It is argued that the decision to issue the warrant (and the decision to apply for it) was "Wednesbury unreasonable"; it is suggested that it was unlawful by reason of "unfairness"; that there was "insufficient inquiry" carried out by the learned judge; that he took into account immaterial considerations and failed to take into account material considerations; that the delay arising from the time of the revocation of the licence on 11 April 2012 to the application for and the issuing of the warrant on 8 April 2022 was so inordinate as to amount to an abuse of the Magistrates' Court processes and, relying essentially on the same point, this delay constituted a breach of the applicant's Convention rights under Article 6 ECHR.

[27] Properly analysed the applicant focuses on a narrow point. It is argued that in exercising his discretion under section 142 of the 2003 Act the District Judge failed to take into account public law obligations. In turn, this is based essentially on two arguments. It is argued that the warrant should not have been granted without the District Judge making further inquiry. It is submitted that this was necessary because the revocation decision was made 10 years ago on the basis of an assessment of risk at that time. Given the passage of time and the fact that the authorities in the Republic of Ireland deemed it safe to release the applicant then at the very least the District Judge should have made further lines of enquiry in relation to the current risk. Allied to this is the argument that the delay in bringing the application itself constituted an abuse of process and a breach of the applicant's article 6 rights.

[28] Mr Fegan constructs much of his argument on the reasoning of McCloskey LJ in the case of *Hughes' (Andrea) Application v a Lay Magistrate and the Police Service of Northern Ireland* [2021] NIQB 113.

[29] That case dealt with a challenge to search warrants issued by a lay magistrate under the provisions of Article 10 of the Police and Criminal Evidence (NI) Order 1989 ('PACE'). The applications involved the presentation to the lay magistrate by the PSNI of two pro-formae forms PACE 5A and PACE 5B.

[30] In assessing the obligations of a lay magistrate in these circumstances he indicated at para [16]:

"It is in the highest degree desirable that a comprehensive coherent and legible record addressing all of these issues be made by the Lay Magistrate contemporaneously. Awareness of and adherence to this duty will serve to remind Lay Magistrates of their independent adjudicatory function. Transparency would favour making this record on the face of form 5A subject only to public interest considerations."

[31] At para [17] McCloskey LJ reinforced the general obligations on persons exercising judicial functions in the issuing of warrants, in the circumstances of that case, search warrants. At para [17] he says:

"[17] Fundamentally, acceding to search warrant applications should never be a matter of course or routine. The adjudication of every such application involves the solemn discharge of an important judicial function in a context where important individual rights are at stake. Lay Magistrates must fearlessly interrogate applications presented to them in such a manner as the particular context dictates. Slavish, unquestioning

acceptance of everything presented to them both in writing and orally by the applying police officer would entail dereliction of their solemn judicial duty. They should not hesitate, in any case where considered appropriate, to identify the shortcomings in the application and to refuse it accordingly. Where this occurs, the police will have the option of reconsidering their position and, if appropriate, reconfiguring and re-presenting the application. In cases where this occurs in practice, it would be desirable that the same Lay Magistrate consider the reconfigured application.”

[32] Applying this general principle it is submitted that the District Judge in this case should have made further enquiries about whether the applicant remained a risk to the public in light of the intervening ten years and the fact that it was considered that he was safe to be released by the authorities in the Republic of Ireland.

[33] It is beyond doubt that a District Judge exercising his function under section 142 should do so conscientiously and avoid “slavish, unquestioning acceptance of everything presented to them.” As Lord Justice McCloskey acknowledged this must be done in such a manner “as the particular context dictates.”

[34] Mr Henry conceded that it would have been better had a detailed note of the proceedings been prepared by the District Judge but says that in the circumstances of this case this is of no substance.

[35] Turning then to the particular context of this case, the starting point is of course the statute itself and in particular section 142. In exercising his power whether or not to issue a warrant the District Judge must look at the specific statutory criteria set out in section 142. In this case this must mean an assessment of the conditions set out in sub-section (2A). It is clear from the application, and indeed it is not in dispute, that all of the conditions set out in sub-section (2A) have been met.

[36] The details set out in the application for the warrant are accurate and not in dispute. They are comprehensive. By signing the warrant, the District Judge was adopting the content therein as reflecting his reasons. This approach has been deemed to be acceptable; see *R (Cronin) v Sheffield Magistrates’ Court* [2002] EWHC 2568 (Admin); [2003] 1 WLR 752; which was adopted by the Divisional Court in Northern Ireland in *Re Donaghy and others* [2017] NIQB 123, para [58].

[37] Given that the statutory criteria were clearly met on what basis can it be said that the District Judge has acted unlawfully or ultra vires?

[38] In answer to this question Mr Fegan says that a District Judge should have made further inquiry in light of the delay and, in particular, should make some attempt to establish whether or not the applicant was still considered a risk to the public.

[39] Fundamentally, it seems to the court that this conflates two different statutory schemes. It is not the function of the District Judge to make any assessment on risk. That is the role of the Sentence Review Commissioners under the Northern Ireland (Sentences) Act 1998 and the role of the Parole Commissioners when a tariff is set for the applicant's life sentence.

[40] Importantly, the statutory rules that accompany the 1998 Act, namely the Northern Ireland (Sentencing) Act 1998 (Sentence Review Commissioners) Rules 1998 permit a prisoner to reapply for release.

[41] Section 3 provides:

"3. Applications

- (i) A prisoner may apply to commissioners for a declaration that he is eligible for release in accordance with the provisions of this Act."

[42] Rule 9 provides:

"9. Further Applications

9.—(1) Subject to paragraph (2), any successive application made under section 3(1) or 8(1) of the Act shall be referred to as a further application.

(2) The Commissioners may only determine a further application if in their view:

- (a) circumstances have changed since the most recent substantive determination was made in respect of the person concerned; or
- (b) reliance is placed in support of the further application on any material information, document or evidence which was not placed before the Commissioner when the most recent substantive determination was made in respect of the person concerned.

..."

[43] It will be seen that the issues raised by the applicant in terms of whether he remains a risk to the public are precisely of the kind he will be permitted to argue before the Sentence Review Commissioners pursuant to this rule.

[44] These provisions were considered by Morgan LCJ in the Court of Appeal in the case of *McGuinness (No.3)* [2021] NI 572 at [35] where he stated:

“We are satisfied that the provisions of the 1998 Act and the 1998 Rules enable a prisoner who has had his licence revoked to apply under section 3 for a further declaration of his eligibility for release under the 1998 Act. Whether his application is determined depends upon whether he satisfies the conditions in Rule 9(2) of the 1998 Rules.”

[45] It is important to note that this information was provided in the application for the warrant and therefore the District Judge was fully sighted of the applicant’s entitlement to request his release by the Sentence Review Commissioners.

[46] On behalf of the Secretary of State Mr Reid argues forcefully that the reality is that the applicant is subject to a lawful custodial sentence in this jurisdiction. Until such time as that sentence is set aside or varied, or he is released on licence by either the Sentence Review Commissioners or the Parole Commissioners, that custodial sentence remains extant and he is subject to it. He has not yet been detained in pursuance of the sentence to which the licence relates.

[47] The applicant clearly fulfils the conditions set out in the section 142(2A) of the 2003 Act, which allows for the Part 3 warrant to be issued.

[48] The warrant has been granted not on an “out of date risk assessment” but rather on the basis of a lawful decision of the Sentence Review Commissioners, endorsed by this court in a judicial review application challenging that decision.

[49] Although it is not necessary to do so in light of the clear legal position, one questions what enquiries the District Judge in practice could have made? Was he to refer the matter to the Sentence Review Commissioners and ask that they were satisfied that the applicant remained at a risk to the public? Was he to make some enquiries to the authorities in the Republic of Ireland as to the basis for the decision to release him from custody there? In the court’s view there would be no statutory basis for making such enquiries and they are clearly impractical and unrealistic.

[50] The court considers that there is no merit in any of the grounds of challenge set out in the Order 53 Statement.

[51] The issuing of the warrant was lawful and in accordance with the statutory provisions which granted the District Judge the power to issue the warrant in question.

[52] It was made on the basis of a comprehensive application, addressing all the statutory criteria necessary for the issuing of the warrant and in the court's view was clearly lawful.

[53] In light of this the proper procedure now is for the applicant to be extradited to this jurisdiction in accordance with the warrant where he can exercise his statutory rights to apply for release should he be minded to do so.

[54] The application for leave to apply for judicial review is therefore refused.