

Mr Jackson

S.
Mrs Pritchard
 Many thanks. I am grateful for the
 note which you have put into this. I
 hope that copies of your minutes have been
 circulated - if not, this can now be done.

JUDICIAL REVIEW - ACCESS TO PRISONERS AND PRISONS BY SINN FEIN

JLT 3.11.86

1. As requested I attended the judicial review in the High Court on 30 October. The case was heard by the Lord Chief Justice. Eilish McDermott (wife of Oliver Kelly, Solicitor) was Counsel for McCartney. Anthony Campbell acted as Crown Counsel.
2. The argument of the applicant (McCartney) was outlined as follows:-

The Secretary of State had exercised the discretion conferred on him by Rule 58(1) of the Prison Rules (NI) 1982 improperly and unlawfully in that he -

- a. failed to have proper regard for all relevant considerations, including the fact that Mr Sean Keenan had been visiting McCartney in prison on a regular basis since 1977 without there ever being a complaint about his conduct;
- b. took into account irrelevant considerations including the fact that Mr Keenan was elected to public office as a representative of Sinn Fein in May 1985;
- c. failed to give either the applicant or Mr Keenan an opportunity to present their case before the relevant decision was taken;
- d. acted without any evidence being available to him that Mr Keenan could be a threat to discipline, good order or the prevention of crime.

Miss McDermott also made reference to the fact that Sinn Fein was not an illegal organisation, that we had no evidence on which to base a claim that Mr Keenan posed a threat to the security of the prison and that, in any event, if we were concerned about visits by Mr Keenan, Prison Rules made provision for visits to take place within sight and hearing of officers and the visits would therefore be supervised.

3. The 3 affidavits submitted by us were also read out. These were an affidavit from the Town Clerk confirming that Mr Keenan had been elected as a Sinn Fein councillor in May 1985, the affidavit from PUS, and the affidavit sworn by Governor Jackson confirming that Mr Keenan had visited McCartney on only 4 occasions between January 1979 and June 1985. Mr Campbell referred to the 3 grounds under which applications for judicial review could be brought, ie illegality, irrationality, or procedurally incorrect. He argued that as Mr Keenan was a councillor whose party, Sinn Fein, espoused the use of violence then Mr Keenan, either directly or indirectly, supported violence. It was not therefore irrational for the Secretary of State to say that it was unsuitable for such representatives to be allowed to visit prisoners. Mr Campbell contended therefore that the Secretary of State had reasonably exercised the discretion which he had under Prison Rules.
4. Miss McDermott replied that it was not clear what danger the Secretary of State was guarding against when visits could take place in sight and hearing of officers. She also raised the matter of the anomaly whereby successful candidates at elections were prohibited from visiting whereas unsuccessful candidates could continue to visit. Finally she said that Mr Keenan was a bona fide friend of McCartney's and he was not necessarily wishing to visit to discuss Sinn Fein business. The LCJ adjourned the case for a few hours to consider the application.
5. When the case resumed the LCJ read out the affidavit submitted by Oliver Kelly, Solicitor, in which reference was made to a letter which they wrote to the Governor of Maze in September 1985 about the refusal to allow Mr Keenan to visit McCartney in June 1985. The LCJ also read out the reply which we had sent in October 1985 which advised that under the provisions of Prison Rule 58(1) it was decided that it was not appropriate for Sinn Fein elected representatives to visit prisoners, other than members of their immediate families, in view of Sinn Fein's support for the use of violence. He then considered the case made by Eilish McDermott on behalf of McCartney that the Secretary of State had acted improperly or unlawfully in exercising his discretion under Prison Rules as:-
 - a. He had failed to take proper regard of the fact that Mr Keenan had regularly visited McCartney without giving any cause for complaint.

The LCJ here referred to our letter of October 1985 which explained that regard was given to visits by members of the immediate family. However, as Mr Keenan was not a family member there was no substance to this complaint.

- b. The Secretary of State had taken into account irrelevant matters including Mr Keenan's election as a Sinn Fein councillor in May 1985.

The LCJ here referred to the affidavit sworn by PUS which made clear that Mr Keenan's election was not irrelevant. He also referred back to Miss McDermott's point that the policy was contradictory as it did not apply to those who were unsuccessful in elections or to party workers. The LCJ stated that while it might be reasonable to impose a wider ban it was not unreasonable to impose a ban only on an easily identifiable group such as elected representatives.

- c. The Secretary of State had failed to give McCartney or Mr Keenan an opportunity to present their case before the decision had been taken.

The LCJ stated that the facts which had been taken into account were incontrovertible and that the Secretary of State had power under Prison Rules to impose restrictions either generally or in a particular case on visits to prisoners. The complaint was therefore without substance.

- d. The Secretary of State acted without evidence that Mr Keenan posed a threat to the security of the prison.

The LCJ referred to Miss McDermott's statement that if the Secretary of State was concerned about Mr Keenan visiting then under Prison Rules 58(5) and 58(6) the visits could take place in sight and hearing of officers. In his view, however, the decision to ban the visits was still defensible by the test of administrative reasonableness laid down by Lord Greene MR in the case of *Associated Provincial Picture Houses v Wednesbury Corporation* (1948).

6. Summing up the LCJ referred to the matter of Sinn Fein councillors being allowed to take part in council business. There was provision in law entitling

the councillors to take their seats and they could not therefore be stopped from doing so. However there was provision in Prison Rule 58(1) stopping visits provided that the discretion to do so was exercised reasonably. There was therefore absence of statutory power (ie no power to stop councillors from taking seats) and discretionary power (ie under Prison Rule 58(1)). The LCJ referred to the judgment which he had given last week in the Christopher Neeson case in which he said that he did not subscribe to the view that Sinn Fein has to be regarded as a lawful organisation (or by necessary implication as a "legitimate political party") just because it has been allowed since 1975 to operate as a political party without being proscribed. He had also taken note of the affidavit tendered which showed that Mr Keenan made only 4 visits to McCartney. However he stated that his decision would have been the same even if more visits had been made. The application was dismissed.

7. After the hearing ended I asked Counsel if they thought it likely that an appeal would be lodged - there is 6 weeks in which to do so. He felt that this was unlikely as McCartney's Counsel had made little of the case in the morning and appeared to have put little effort into it. I was surprised that the case attracted little attention. There were no Sinn Fein representatives, including Mr Keenan, in court during the hearing. The case was confined purely to visits to McCartney by Mr Keenan and no attempt was made by Miss McDermott to extend it to a wider challenge of Government policy.
8. I will of course let you know if an appeal is lodged.

Pritchard (Mrs)

D M PRITCHARD (Mrs)
Prison Regimes Division

31 October 1986

cc PS/PUS
Mr Palmer
Mr Kendrick
Mr Jones
Mr Brown
Mr Hammond

Mr Rickard
Mr J Hamilton
Mr Harner

'86 10/29 10:10
'86 09/18 14:00

'86 09/12 14:36

'86 09/12 11:50

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29 OCT 1986

OUTGOING FAX TO: MR. CAROL JACKSON, PRISON REGIMES III

FROM: MRS. M. MADDEN, C.S.O, LAW COURTS, BELFAST.

DATE: 29/10/86.

TIME: 9.10 am.

NO: OF PAGES FOLLOWING: 1

ORIGINAL/COPY WILL ALSO BE SENT BY POST

YES
NO

PLEASE ACKNOWLEDGE RECEIPT

YES
NO

1986 No. 889

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY RAYMOND PIUS MCCARTNEY FOR JUDICIAL REVIEW OF A DECISION OF THE SECRETARY OF STATE FOR NORTHERN IRELAND MADE ON OR BEFORE 12th, JUNE 1986.

SKELETON ARGUMENT OF APPLICANT

1. That the Respondent exercised the discretion conferred on him by Rule 58 (i) of the Prison Rules (N.I.) 1982 improperly and unlawfully in that he:-
 - (a) failed to have any or proper regard for all relevant considerations including the fact that Mr. Sean Keenan had been visiting the Applicant in prison on a regular basis since 1977 without there ever being a complaint about his conduct.
 - (b) took into account irrelevant considerations including the fact that the said Mr. Keenan was elected to public office as a representative of Sinn Fein in May 1985.
 - (c) failed to give either the Applicant or Mr. Keenan an opportunity to present their case before the relevant decision was taken.
 - (d) acted without any evidence being available to him that Mr. Keenan could be a threat to discipline, good order or the prevention of crime.

2. That the Respondent acted in excess of his jurisdiction in that he acted without any evidence being properly available to him.

Dated this 27th day of October 1986.

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O.J. Kelly, Steele & Co.,
Solicitors,
14/16, High Street,
Belfast.