

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Application no. 37536/08
John Hugh BRADY
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 22 May 2012 as a Chamber composed of:

Lech Garlicki, *President,*
David Thór Björgvinsson,
Nicolas Bratza,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić, *judges,*

and Lawrence Early, *Section Registrar,*

Having regard to the above application lodged on 31 July 2008,

Having regard to the declaration submitted by the respondent Government on 11 November 2011 requesting the Court to strike the application out of the list of cases and the applicant's reply to that declaration,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr John Hugh Brady, was an Irish national, who was born in 1969 and who died in 2009. He was represented before the Court by Mr K. R. Winters & Co, a lawyer practising in Belfast.

The United Kingdom Government ("the Government") were represented by their Agent, Mr M. Kuzmicki, Foreign and Commonwealth Office.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant was sentenced to life imprisonment on 25 July 1991 at Belfast Crown Court, having pleaded guilty to murder on 7 May 1991. In 1999, when the applicant had served approximately eight and a half years in prison, he was released on licence in accordance with section 3 of the Northern Ireland (Sentences) Act 1998 ("the 1998 Act").

On 7 November 2003 the applicant was arrested with two other persons in a car. Two firearms were found concealed in a lunchbox that was inside a drawstring sports bag found on the back seat of the car. He was subsequently charged with the offence of possession of a firearm with intent to endanger life and returned to custody. On 13 November 2003, his licence for release was formally suspended by the Secretary of State.

The charges against the applicant and the other persons arrested with him were withdrawn on 3 June 2004. On 7 June 2004 the applicant applied to the Sentence Review Commissioners for a review of the suspension of his licence. On 2 July 2004 the Secretary of State opposed the application and issued a set of response papers. The response papers included a "certificate of damaging information" issued pursuant to Rule 22(1) of the Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998 ("the 1998 Rules") and a notice of the gist of the information issued pursuant to Rule 22(3) of those Rules.

The "gist" provided to the applicant stated:

> "The withheld information relates to intelligence to the effect that you have been and are likely to be concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland. In particular you have had and continue to maintain close links with dissident republican elements and have been involved in serious crime committed by the Real Irish Republican Army and will become involved in acts of terrorism upon release."

On 5 August 2004 the applicant was informed by letter that a panel of Commissioners had considered the suspension of his licence. The letter stated: "the Commissioners could not be satisfied that the Applicant had not broken the licence condition specified in section 9(1)(c) and hereby indicate that they are minded to make a substantive determination to the effect that his licence should be revoked." The letter also stated that the Commissioners did not have sight of the information certified as "damaging" when making the decision.

On 20 August 2004 the applicant challenged this preliminary indication, which was set aside in order that the matter could be considered *de novo* at a substantive hearing. Given that the Secretary of State had certified that information upon which reliance would be placed was "damaging information", the Attorney General was invited by the Commissioners on

24 August 2004 to appoint a special advocate to represent the applicant's interests at any closed session of the substantive hearing. The special advocate accompanied the applicant's counsel to consultations at HM Prison Maghaberry on three occasions for the purpose of taking instructions.

The hearing before a panel of three Sentence Review Commissioners took place over two full days (commencing on 11 August and continuing on 22 August 2005) at HM Prison Maghaberry before a panel of three Commissioners. The applicant was present, as were his legal representatives, the Secretary of State's legal representatives, the special advocate and a representative of the Prison Service. The open part of the hearing took the first day and the morning of the second day. The applicant gave evidence before the Commissioners. He was cross-examined by counsel for the Secretary of State and he was asked questions in turn by each member of the panel. The Commissioners considered the evidence in private following the conclusion of the open part of the hearing. The parties were then recalled and the chair of the panel stated that the Commissioners could not make their decision based on the information that was already before them and that they would have to consider the damaging information in closed session. The damaging information had not been seen by members of the panel or the special advocate before that point.

The applicant and his legal representatives were excluded from the closed session, which lasted for approximately two hours, from 2.30 pm to 4.30 pm on 22 August 2005. From the moment the closed part of the hearing commenced, the special advocate was not permitted to communicate in any way with the applicant or his legal representatives in relation to the case.

The determination of the panel was communicated to the applicant on 5 October 2005. The determination was that the applicant's licence should be revoked. The Commissioners stated that they were not satisfied, on the basis of the evidence presented in the open part of the hearing, that the applicant had breached the conditions of his licence; nor did they think, on the basis of the open evidence, that he was likely, if released, to breach the terms of his licence. The Commissioners did, however, determine that his licence should be revoked on the basis of the evidence heard in closed session:

> "[H]aving fully and carefully considered all of the evidence presented in the closed session, the panel took the view that the Applicant has breached the conditions that he does not support a specified organisation, that he does not become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland and that he does not become a danger to the public".

The determination of the Sentence Review Commissioners that the applicant's licence should be revoked was challenged in judicial review proceedings heard at the High Court in Belfast on 3 May 2006. It was submitted on behalf of the applicant that, since the Commissioners had

decided to revoke his licence on the basis of "damaging information" that had not been revealed to him or his legal representatives, the procedure infringed his rights under Articles 5 § 4 and 6 of the Convention and failed to meet the standards of procedural fairness required at common law. Although he had been afforded the gist of this information, the gist was couched in such broad terms as to make it impossible for him properly to challenge any allegations that were made against him. Although the applicant had the benefit of consultation with the special advocate, at the time of consultation neither of them knew what evidence was going to be presented against the applicant in closed session and it was therefore impossible for the applicant to give proper instructions in respect of the evidence in question. The special advocate had no opportunity to conduct factual research in respect of the "damaging information" and no power to call witnesses or to commission expert evidence in order to challenge the material presented in closed session.

The application was dismissed by Girvan J in a reserved judgment of 30 May 2006 ([2006] NIQB 37). He accepted that Article 5 § 4 applied, since the recall even of someone who had only a conditional right to his freedom under licence amounted to a new deprivation of liberty. However, Girvan J held that the application was essentially a challenge to the underlying unfairness of the Act and the Rules and an attempt to reopen issues that had been established *inter alia* by the House of Lords in *R v Parole Board,* ex parte *Roberts* (see below). In order to succeed, the applicant would have to show that the Commissioners had not properly followed the statutory scheme. The applicant's case was that the procedures had operated in an unfair manner to his detriment, as his detention was based solely on material that he had not seen. That was, however, a result that might inevitably happen in cases involving "damaging information". The protection of the "triangulation of interests" identified in the authorities (the public, the prisoner and the source of sensitive information) might compel the Commissioners to a conclusion adverse to the prisoner solely on the "damaging information".

The applicant appealed to the Court of Appeal against Girvan J's judgment of 30 May 2006. However, the Court of Appeal declined to hear argument on the substantive issues arising from the challenge to the dismissal of the application for judicial review by the lower court. It stated that, following a change to the law, a tariff had to be set in respect of the 1991 offence. This would be done by the Life Sentence Review Commissioners and the Sentence Review Commissioners, in deciding whether the applicant should be released, were *functus officio*. The issue at the heart of the appeal was, therefore, academic. It did not consider that a point of law of general public importance was raised by the appeal and did not, therefore, grant leave to appeal to the House of Lords.

The applicant petitioned the House of Lords for leave to appeal but this was refused on 19 May 2008.

The applicant applied to the Parole Commissioners for release on parole. An open hearing took place on 24 April and 10 November 2008 and a closed hearing was heard on 3 November 2008. The Parole Commissioners declined to direct the applicant's release. He died in prison on 3 October 2009. The application was then taken over by his sister, Mrs Lorna Brady.

COMPLAINT

The applicant complained under Article 5 § 4 of the Convention about the procedure before the Sentence Review Commissioners, which led to the revocation of his licence. In particular, he complained that the Commissioners' decision was based on "damaging information" which was not disclosed to him and that the provision to him of the "gist" of the "damaging information" and the Special Advocate procedure were not sufficient to protect his interests.

THE LAW

Article 5 § 4 of the Convention provides as follows:

> " Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

By letter dated 11 November 2011 the Government informed the Court that they proposed to make a unilateral declaration with a view to resolving the issue raised by the application. They further requested the Court to strike out the application in accordance with Article 37 of the Convention.

The declaration provided as follows:

> "*Violation*
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> 1.The Government of the United Kingdom accept that, in the particular circumstances of this case, there was a procedural violation of Article 5(4) of the European Convention on Human Rights (ECHR). It does so on the basis that:
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> • although the Sentence Review Commissioners conducted a review of the Secretary of State's decision to certify evidence as 'damaging information', the process did not meet the requirements of Article 5(4). This is because the special advocate played no part in this review and was not given an opportunity to make representations as to what could and ought to be disclosed to the prisoner consistent with avoiding damaging disclosure of sensitive information;

• the notice of the gist of damaging information provided to Mr Brady in June 2004 by the Secretary of State was insufficiently detailed: in retrospect, and having reviewed the information in question, it is accepted that more information by way of a gist could have been provided to him without compromising the public interest.

Steps taken/to be taken to rectify the violation

2.The Government accepts that Article 5(4) requires that the Sentence Review Commissioners have a power to review the Secretary of State's decision to certify evidence as 'damaging information'. The Government's position is that (a) rule 6(1) of the Northern Ireland (Sentences) Act 1998 (Sentences Review Commissioners) Rules 1998 ('the 1998 Rules'), particularly when read in conjunction with section 3 of the Human Rights Act 1998, provides the Sentence Review Commissioners with such a power; and (b) this power is wide enough to permit the special advocate to play a full role in the process.

3.The Government also accepts that, having regard to *A v the United Kingdom* (2009) 49 EHRR 29, it is in general necessary in a context such as the present for sufficient information to be provided to the prisoner to enable a special advocate to be given effective instructions. However, it should be noted that the gist in this case was provided before the principles in *A v the United Kingdom* were established. The Government reserves its right to submit, in a future case in which the issue arises, that Article 5(4) permits the use of evidence by a court or tribunal in such a context even if, on the particular facts, it is not possible for compelling reason to make any disclosure to the prisoner.

4.The Government intend to ensure that in any similar case in the future steps are taken to ensure that the prisoner has disclosed to him such information, relevant to the issues in his case, as can be disclosed to him consistent with avoiding damaging disclosure of sensitive information.

5.The Government also intend to ensure that in a similar case the special advocate is fully involved in the disclosure issues. In that respect, whilst no analogous case has come before the Sentence Review Commissioners since 2004, in 2009 the case of Martin Corey was referred to the Parole Commissioners under Article 9(4) of the Life Sentences (Northern Ireland) Order 2001. The Parole Commissioners were required to direct the prisoner's release only if satisfied that it was no longer necessary for the protection of the public from serious harm that he be confined. This involved the Parole Commissioners conducting a review of the Secretary of State's decision to certify evidence as 'confidential information'. They utilised a similar power under the Parole Commissioners Rules 2009 (rule 3(1)) to that contained in rule 6(1) of the 1998 Rules. Further, the special advocate in that case had full access to the closed material on which he made written submissions as to what could and ought to be disclosed to the prisoner consistent with avoiding damaging disclosure of sensitive information. Thereafter, he engaged with Counsel for the Secretary of State and as a result further voluntary open gists were provided to the prisoners. Matters that could not be resolved by agreement were adjudicated on by the Commissioners in a closed hearing in which the special advocate played a full role. It is the intention of the Government to invite the Parole Commissioners to adopt the same process in a similar upcoming case and to invite the Sentence Review Commissioners to do the same in cases where gisting is required.

6. The steps outlined above will ensure that the process, by which the Secretary of State's decision to certify evidence as 'damaging information' and the sufficiency of the gist provided to an applicant, will be consistent with an applicant's Article 5(4) procedural rights.

Compensation

7.In these circumstances, and having regard to the particular facts of the Applicant's case, the Government declares that it hereby offers to pay to the Applicant, Miss Lorna Brady, the amount of €3,000 (three thousand euros), which includes any legal costs and expenses, to be paid in pounds sterling to a bank account named by the Applicant within three months from the date of the striking-out decision of the Court pursuant to Article 37 of the ECHR. This payment will constitute the final settlement of the Applicant's case."

In a letter of 15 December 2011 the applicant's representative expressed the view that the sum mentioned in the Government's declaration was unacceptably low. He did not challenge the terms of the Government's acceptance that there had been a violation, but asked the Court to award damages of EUR 10,000, together with GBP 7,500 legal costs and GBP 486.68 expenses.

The Court recalls that Article 37 of the Convention provides that it may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to one of the conclusions specified, under (a), (b) or (c) of paragraph 1 of that Article. Article 37 § 1 (c) enables the Court in particular to strike a case out of its list if:

"for any other reason established by the Court, it is no longer justified to continue the examination of the application".

It also recalls that in certain circumstances, it may strike out an application under Article 37 § 1(c) on the basis of a unilateral declaration by a respondent Government even if the applicant wishes the examination of the case to be continued.

To this end, the Court will examine carefully the declaration in the light of the principles emerging from its case-law, in particular the *Tahsin Acar* judgment (*Tahsin Acar v. Turkey*, [GC], no. 26307/95, §§ 75-77, ECHR 2003-VI); *WAZA Spółka z o.o. v. Poland* (dec.) no. 11602/02, 26 June 2007; and *Sulwińska v. Poland* (dec.) no. 28953/03).

Having regard to the nature of the admissions contained in the Government's declaration; the amount of compensation offered, which is consistent with compensation awarded by the Court in comparable cases (see, for example, *A. and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009); and the fact that the applicant's objection is limited to the amount of the compensation and not to the terms of the Government's concession of a violation, the Court considers that it is no longer justified to continue the examination of the application (Article 37 § 1(c)).

Moreover, in light of the above considerations, the Court is satisfied that respect for human rights as defined in the Convention and the Protocols thereto does not require it to continue the examination of the application (Article 37 § 1 *in fine*).

In view of the above, it is appropriate to strike the case out of the list.

For these reasons, the Court unanimously

Takes note of the terms of the respondent Government's declaration and of the modalities for ensuring compliance with the undertakings referred to therein;

Decides to strike the application out of its list of cases in accordance with Article 37 § 1 (c) of the Convention.

Lawrence Early
Registrar

Lech Garlicki
President