| Neutral Citation No: [2019] NIQB 70 | *Ref:* | **McC11017** |
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| *Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Ex tempore Delivered:* | **21/05/2019** |

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

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

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**IN THE MATTER OF AN APPLICATION BY KYLE AIKEN FOR JUDICIAL REVIEW**

**v**

**NORTHERN IRELAND PRISON SERVICE**

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**MCCLOSKEY J**

**Preface**

I deferred approving and issuing this transcript pending promulgation of my judgment in Re Lennon's Application [2019] NIQB 68. In the latter judgment I have reviewed the most recent Supreme Court jurisprudence at [20]–[33]. I refer also to [37]–[39], [43] and [46]. I have applied the same principles in making my decision in the instant case.

[1] The central issue to be determined by the court at this stage of these elderly proceedings is whether the Applicant should be permitted to amend his Order 53 Statement. The Applicant was granted leave to apply for judicial review on the basis of a case founded on Article 5 of the Human Rights Convention in tandem with section 6 of the Human Rights Act 1998. The initial grant of leave restricted the Applicant's case to a finite measured period and the ensuing appeal to the Court of Appeal succeeded in extending this.

[2] Article 14, in every case in which it is raised, gives rise to certain elementary principles and considerations. These are, typically, questions of differential treatment, status, ambit, a suitable comparator and justification. The fundamental question raised is whether there is an adequate evidential foundation for the assertion of differential treatment on the part of the Applicant. That is a question of evidence. It is not a matter for argument and legal submission in either an evidential vacuum or against the context of a deficient evidential framework. I conclude that there is no sufficient evidential foundation for the Applicant's assertion of

differential treatment and that, of course, is fatal to the quest to secure the amendment that is hereby pursued.

[3] The next question which arises is, whether the case should, in the event that the court's primary conclusion is wrong, be permitted to proceed in any event. These proceedings are academic for the Applicant with one qualification, namely, it is suggested that the practical and effective remedy which, if successful, he could secure, is an award of damages. That submission is highly problematic, having regard to the approach to the award of damages generally in the judicial review court. This is not tempered by the case of McCann, invoked on behalf of the Applicant, which properly analysed has no precedent value. McCann belongs to its litigation sensitive and fact sensitive contexts. It is evident that the judge adopted an essentially pragmatic course ultimately, in the context of the proceedings having been completed, with all the various steps and expenditure of resources which that entailed and the preparation of a very lengthy judgment. That is the first material distinction between the McCann context and the present context. And the second is, of course, that the present case entails a very densely detailed factual framework which is, *per se*, unsuitable for consideration and adjudication in this court of supervisory jurisdiction.

[4] Linked to that is the question of whether, again in the alternative, on the assumption that the court's primary conclusion is incorrect, there is a point of law of sufficient importance to warrant a purely academic challenge being permitted to continue. I have been directed to a specific passage in the Applicant's penultimate skeleton argument, namely paragraph 21(f), which is said to formulate a point of law of sufficient importance to attract the favourable application of what has become known as the Salem principle. I find myself quite unable to identify a point of law of those characteristics in the passage concerned, nor have I been further enlightened by the oral submissions on behalf of the Applicant.

[5] I further take into account the lack of affidavit evidence from the Applicant himself. That arises in two respects:

(i) the deficient evidential foundation, to which I have already referred; and

(ii) the discharge of the Applicant's duty of candour to the court. There is only one litigant in these proceedings, namely the Applicant. He is the only person that has standing or, as it is sometimes called, a sufficient interest (a) to bring these proceedings and (b) to continue to prosecute them. There has been a demonstrably inadequate discharge of the Applicant's duty of candour to and co-operation with the court. This has been compounded by the inadequate engagement by the Applicant's legal representatives with successive orders of the court, with the result that one of the mechanisms which could conceivably have addressed the fundamental difficulty with the Applicant's amendment application, namely the lack of a sufficient evidential foundation, which was a

schedule of agreed material facts, has never been provided, notwithstanding the court's repeated attempts to obtain this.

[6] Next, related to the foregoing, I turn to consider the question of whether there has been active prosecution of these proceedings. In a context where the court did not authorise a stay of these proceedings at any stage, there has been a manifest lack of prosecution. At several stages, including the most recent phase of five months, there has been a demonstrated failure on the part of the Applicant to proceed with expedition. That is another freestanding basis upon which the application falls to be refused.

[7] I would add this. As regards the case of Stott, I consider that the orientation of that decision is adverse to, rather than favourable, to the Applicant, providing yet another reason for refusing the application to amend.

[8] And finally, I take into account that the issue of justification is obviously a highly contentious one, linked to my earlier observation that this court would not be a suitable forum for investigation and determination of the densely detailed issues which would arise if there were a sufficient evidential foundation for the Applicant's complaint of differential treatment.

[8] That brings me to the order which flows upon the foregoing assessment and conclusions. As I have pointed out to Mr Southey QC, it would be incongruous for this division of the High Court to order the conversion of a judicial review claim which might, if successful in the Queen's Bench Division, secure an award of some hundreds of pounds, having regard to the settled case law. It would be equally inappropriate to do so in a context where this court has ruled that the case - the reconfigured case which the Applicant seeks to make, does not overcome the threshold of arguability. It is accepted on behalf of the Applicant that, given these considerations, the appropriate order is one of dismissing the application for judicial review. That flows inexorably from the unavoidable acknowledgment that the framework of the Applicant's case, constituted by the order granting leave, is no longer sustainable, having regard to supervening jurisprudential events.

[11] Accordingly, the order of the court today has the following components:

(i) the application to amend the Order 53 Statement is refused;

(ii) the court declines to make an order converting the judicial review claim to the status of a writ action in the Queen's Bench Division;

(iii) I accede to the Respondent's application for costs;

(iv) the Applicant's costs shall be taxed as an assisted person; and, finally,

(v) there shall be liberty to apply.