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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

Log No 2212

IN THE MATTER OF AN APPLICATION BY ALPHONSUS HANNAWAY AND OTHERS AS THE NATIONAL GRAVES ASSOCIATION BELFAST BRANCH FOR JUDICIAL REVIEW

HUTTON LCJ

This judgment is the judgment of the court.

This is an application for judicial review in which the applicants challenge the decision of the Secretary of State for Northern Ireland to refuse permission for the exhumation and removal of the remains of Thomas Williams from within the precincts of HM Prison, Crumlin Road, Belfast.

In 1942 Thomas Williams, who was a member of the IRA, was convicted of the murder of Constable Patrick Murphy and was sentenced to death. Following that conviction and sentence he was executed in HM Prison, Crumlin Road, Belfast, on 2 September 1942 and was buried within the walls of the prison.

Paragraph 2 of the affidavit of Mr Alphonsus Hannaway states:

> "The NGA was formed towards the end of the 1920's to provide for the proper commemoration of persons associated with the Republican movement principally in the Counties of Antrim and Down through the provisions and upkeep of appropriate burial places and memorials. In the furtherance of this work the NGA has for many years maintained and constructed appropriate graves and memorials, organised commemorations, and has liaised with all appropriate authorities as has from time to time been required."

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On 15 June 1992 Messrs John J Rice & Co, the solicitors for the National Graves Association, wrote to the Northern Ireland office requesting the removal of the remains of Thomas Williams from the prison. The letter was in the following terms:

> "Please note that we act on behalf of the National Graves Association who wish to apply for the removal of the Remains of Thomas Williams from within the precincts of Her Majestys Prison, Crumlin Road, Belfast. We enclose a copy Affidavit from Anne Caldwell, a first cousin of the Deceased who was hanged in HM Prison, Belfast, on the 2nd September, 1942.
>
> It is the wishes of the Family of the late Mr Williams that his Remains should be removed from the Crumlin Road Prison.
>
> We would be obliged if you would acknowledge receipt of this letter and confirm that our client's request is being given due consideration."

On 3 October 1992 the Prison Service of the Northern Ireland Office replied to the letter of 15 June, and the material part of the letter was in these terms:

> "I am sorry it has not been possible to respond more quickly to your letter, however as you will appreciate, records of the case have had to be retrieved from storage and legal advice sought. The request for the removal of the remains of Thomas Williams from the precincts of HM Prison, Belfast has been carefully considered and I have to advise you that this is not legally possible. Section 6 of the Capital Punishment Amendment Act 1868, which is still in force, provides that:-
>
> > 'the body of every offender executed shall be buried within the walls of the prison within which the judgement of death is executed on him ...'
>
> and there is no provision for later removal of the remains."

Further correspondence ensued and on 3 November 1993 Messrs John J Rice & Co sent a letter to the Prison Service which contained the following paragraphs:

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"You will recollect that in previous correspondence the request for removal of Remains was made in general terms. It might now be of assistance to you to consider specifically the exercise of Prerogative power in so far as the burial within prison walls is undoubtedly a species of punishment which is, of course, subject to remission or pardon by the Crown.

The recent decision of the English Divisional Court in Bentley's Case will be familiar to you."

The Northern Ireland Office replied by letter dated 29 September 1994 which contained the following paragraphs:

"The Secretary of State has given very careful consideration to your request that he should recommend exercise of the Royal Prerogative of Mercy in order to allow the remains to be removed from the confines of HM Prison, Belfast. He has concluded that it would not be appropriate for him to do so.

By way of explanation I should explain that there are two purposes for which it is considered appropriate to recommend the exercise of the Royal Prerogative namely, to grant a Free Pardon where technical and moral innocence has been established or to remit, in exceptional circumstances, part or all of a punishment imposed by a court.

In this case, your submission does not purport to establish the technical and moral innocence of Mr Williams, or to advance evidence to that effect. Nor is it considered that the statutory requirement for the remains of an executed prisoner to be buried within the precincts of the prison is amenable to remission."

The relief sought by the applicants in their amended statement is stated as follows:

"(a) A declaration that the decision of the Secretary of State for Northern Ireland to refuse permission for the exhumation and removal of the remains of Thomas Williams from within HM Prison Belfast contained in letters from the Northern Ireland Prison Service dated 3 and 22 October 1992 and February 4 1993 and in a letter dated 29

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September 1994 from the Criminal Justice Policy Division of the Northern Ireland Office is unlawful and unreasonable and ultra vires.

(b) A declaration that the Secretary of State for Northern Ireland should reconsider the request for the removal of the remains of Thomas Williams in accordance with law.

(c) Such further or other relief as shall seem just.

(d) Costs.

3. The grounds on which the said relief is sought are as follows:-

(a) The Secretary of State improperly fettered his discretion in considering whether to grant the said permission.

(b) The Secretary of State misdirected himself in law in considering whether to grant the said permission.

(c) The said refusal of the Secretary of State is unreasonable and disproportionate."

In his submissions to this court Mr Harvey QC, for the applicants, made it clear that he sought only the relief set out in paragraph 2(b), namely, a declaration that the Secretary of State for Northern Ireland should reconsider the request for the removal of the remains of Thomas Williams in accordance with law, and that the only ground on which he sought that relief was the ground set out in paragraph 3(b), which was that the Secretary of State had misdirected himself in law in considering whether to grant permission for the exhumation and removal of the remains.

It is clear from the correspondence and from the affidavit of Miss L P Sloan, a deputy principal in the Northern Ireland Office, that the Secretary of State had taken the view that by reason of the provisions of section 6 of the Capital Punishment

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Amendment Act 1868 there was no power available to him to grant the request made by the applicants. Section 6 of the 1868 Act is in the following terms:

> "The body of every offender executed shall be buried within the walls of the prison within which judgment of death is executed on him: Provided, that if one of Her Majesty's Principal Secretaries of State is satisfied on the representation of the [board of visitors] of a prison that there is not convenient space within the walls thereof for the burial of offenders executed therein, he may, by writing under his hand, appoint some other fit place for that purpose, and the same shall be used accordingly."

Therefore the Secretary of State rejected the request of the applicants on the ground that, having regard to the provisions of section 6 of the 1868 Act, it would be unlawful for him to direct that the remains of Thomas Williams be removed from within the walls of the prison and that section 6 required the remains to continue within the prison.

It is also clear that the Secretary of State found support for this view from the consideration that section 25 of the Burial Act 1857, which applies in England, does not apply in Northern Ireland, section 25 providing:

> "**Bodies not to be removed from burial grounds, save under faculty without licence of Secretary of State**
>
> Except in the cases where a body is removed from one consecrated place of burial to another by faculty granted by the ordinary for that purpose, it shall not be lawful to remove any body, or the remains of any body, which may have been interred in any place of burial, without licence under the hand of one of Her Majesty's Principal Secretaries of State, and with such precautions as such Secretary of State may prescribe as the condition of such licence; and any person who shall remove any such body or remains, contrary to this enactment, or who shall neglect to observe the precautions prescribed as the condition of the licence for removal, shall, on summary conviction before any two justices of the peace, forfeit and pay for every such offence a sum not exceeding [level 1 on the standard scale]."

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Whilst on first consideration by this court of section 6 of the 1868 Act the view of the Secretary of State appeared to be correct, the submissions of Mr Harvey have satisfied us on further consideration that, having regard to the historical background to, and context of, section 6, the Secretary of State would have power to direct the removal of the remains of Thomas Williams from the prison in exercise of the Royal prerogative of pardon on behalf of the Queen.

We are of opinion, first, that the requirement that the body of every offender executed should be buried within the walls of the prison where the execution took place was part of the punishment and sentence for the offence of murder or other capital crime and, secondly, that as burial within the walls of the prison was part of the punishment and sentence, there is power to remit that part of the punishment in the exercise of the Royal prerogative.

A number of cases and statutes and textbooks make it clear that burial within the walls of the prison was part of the punishment and sentence for murder. Sir James Stephen in his ***History of the Criminal Law*** of England Vol. 1 states at p. 477:

> "In the reign of George II an act was passed which was intended to make the punishment for murder more severe than the punishment for other capital crimes. This was 25 Geo. 2, c.37, which provided that a person convicted of murder should be executed on the next day but one after his sentence (unless he was tried on a Friday, in which case he was to be hanged on the Monday). He was to be fed on bread and water in the interval, and his body, after death, was either to be dissected or to be hung in chains. The judge, however, had power to respite or to remit these special severities. Under this act murderers were usually anatomized, but sometimes gibbeted. By the 2 & 3 Will. 4, c.7, s.16 (for the regulation of schools of anatomy), it was enacted that the bodies of murderers should no longer be anatomized, but that the sentence should direct that they should either be hung in chains or be buried in the prison. Several persons were gibbeted under this act, but by the 3 & 4

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> Will. 4, c.26, s.2, it was enacted that the bodies of murderers should no longer be hung in chains, but that the sentence should direct that they should be buried in the precincts of the prison in which they should last have been confined before their execution, and this direction is repeated in 24 & 25 Vic. c.100, s.2, which is now in force."

Section 3 of 24 & 25 Vic. c.100, the Offences Against the Person Act 1861, provided:

> "The body of every person executed for murder shall be buried within the precincts of the prison in which he shall have been last confined after conviction, and the sentence of the court shall so direct."

Section 3 was in force at the time of the execution of Thomas Williams although it was subsequently repealed in 1966 by section 10(3) of the Criminal Justice Act (Northern Ireland) 1966.

In R v Hartnett and Casey (1840) Jebb 302 the following point was laid before the Judges for their opinion by a Judge of Assize:

> "At the last Assizes held for the city of Cork (Spring Assizes, 1840) James Hartnett and Thomas Casey were convicted before me of murder. After conviction they were asked, in the usual way, whether they had anything to say, why sentence of death should not be pronounced upon them; and I then pronounced sentence of death, but did not at that time direct that their bodies should be buried within the precincts of the gaol. When ruling the book in a day or two after, I directed in open Court that their bodies should be buried within the precincts of the gaol. The prisoners were not in Court on this latter occasion.
>
> It has been suggested by Mr Coppinger, one of the counsel for the prisoners, that the above proceeding is open to objection, and that the prisoners are entitled to derive some benefit from the objection. I have not been apprized of the ground of the objection, nor whether the counsel contends that there is error in the proceeding. On communicating with the Attorney-General, he has suggested that I ought to lay the facts before your

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> lordship, in order to have your opinion, and that of the other Judges: and for that purpose I have taken the liberty of making the above statement to your lordship."

The opinion of the majority of the judges was as follows:

> "All those Judges, except Perrin, J., rested their opinion upon the ground, that the original sentence, of death only, was illegal, because it did not contain an order that the bodies should be buried within the precincts of the gaol; that the 4 & 5 W. IV. c.26, s.2, was not merely directory, but made the order a part of the sentence; and that the amendment would have made it right, if made in the presence of the prisoners, but that as it was made in their absence, they were not affected by it."

The Lord Chief Justice of Ireland wrote to the Lord Chief Justice of England about the point and in his reply the Lord Chief Justice of England stated:

> "Certainly in this country no sentence for murder will omit hereafter to include direction for burying the convict's body."

It is also relevant to observe that when Thomas Williams was sentenced to death the sentence of the court would have been pronounced in the following terms as set out in the 1934 edition of Archbold:

> "The sentence of the Court upon you is, that you be taken from this place to a lawful prison and thence to a place of execution, and that you be there hanged by the neck until you be dead; and that your body be afterwards buried within the precincts of the prison in which you shall have been confined before your execution."

Therefore we are satisfied that in 1942 the requirement that the body of the prisoner should be buried within the walls of the prison was regarded as part of the sentence and punishment for murder. The Capital Punishment Amendment Act 1868 was enacted in order to lay down a number of administrative provisions in respect of the carrying out of capital punishment within prisons, and we are further satisfied that

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section 6 was not intended to, and did not, alter the legal position that burial within the prison walls was part of the punishment and sentence for murder.

In R v Secretary of State for the Home Department, ex parte Bentley [1993] 4 All ER 442 at 445g in delivering the judgment of the English Divisional court Watkins LJ stated:

> "it is, we think, helpful to recite parts of the affidavit of Mr Austin Peter Wilson, an Assistant Under-Secretary of State and head of the criminal policy department in the Home Office at the present time.
>
> In it he draws on past Home Office files, records and memoranda, as well as well-known standard works including Pollock and Maitland ***The History of English Law*** and Stephen ***A History of the Criminal Law of England***. Constitutionally, he states, the prerogative is exercised by the sovereign on the advice of the Home Secretary in one of three ways, namely: (a) the grant of a free, ie unconditional, pardon; (b) the grant of a conditional pardon, whereby the penalty is removed, on condition that a lesser sentence is served; and (c) the remission, or partial remission, of a penalty."

Therefore as burial within the prison walls was part of the punishment or penalty for murder, and as the Royal prerogative can be exercised to effect partial remission of part of a penalty, we consider that the Secretary of State would have power to exercise the prerogative to direct that the remains of Thomas Williams be exhumed and removed from within the walls of the prison for burial elsewhere and that that prerogative power is not restricted by the administrative provisions contained in section 6 of the 1868 Act.

Therefore we shall make a declaration that the Secretary of State should reconsider the request for the removal of the remains of Thomas Williams in accordance with our ruling that there is power under the Royal prerogative to direct that the remains be removed from within the walls of the prison.

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However we desire to emphasise that, unlike the Divisional Court in the very different circumstances of the Bentley case, we express no view whatever as to whether or not the Secretary of State should exercise the prerogative to order the removal of the remains. There are arguments for and against such a course and the decision whether to exercise the prerogative in this case is one for the Secretary of State and not for this court.

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