

EMPLOYING EX-OFFENDERS WITH CONFLICT-RELATED CONVICTIONS IN NORTHERN IRELAND

INTRODUCTION

This briefing paper has been prepared on behalf of the Ad Hoc Committee for the Private Security Industry Order 2009 to provide an overview of the legislation and guidance relating to issues regarding employment and those with conflict-related convictions:

- The Rehabilitation of Offenders legislation attempts to create a balance between the re-integration of ex-offenders and the protection of the public by creating 'spent convictions' but also balancing this with a list of excepted professions where an offender may be questioned about his 'spent convictions'.
- The Fair Employment legislation¹ would appear to support the re-integration of ex-offenders by making it unlawful to discriminate against someone on the grounds of religious belief or political opinion. Article 2(4)², however, states that:

In this Order any reference to a person's political opinion does not include an opinion which consists of or includes approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland, including the use of violence for the purpose of putting the public or any section of the public in fear.
- The judgement delivered by Kerr J, in the Damien McComb judicial review case³, appears to support the re-integration of ex-offenders and stated that particular attention should be paid to the fact that a prisoner was released under the terms of the Northern Ireland Sentences Act 1998 has been adjudged not to be a danger to the public.
- The recent case of McConkey and another v Simon Community Northern Ireland 2009⁴ appears to undermine the judgement of Kerr J and takes a narrow view of Article 2(4) of the Fair Employment and Treatment (Northern Ireland) Order 1998 by stating that an employer in Northern Ireland can refuse to employ a person on the ground that they have supported or the employer perceives that they have supported violence for political ends

¹ The Fair Employment and Treatment (Northern Ireland) Order 1998:
<http://www.opsi.gov.uk/si/si1998/19983162.htm>

² Ibid

³ <http://www.courtsni.gov.uk/NR/rdonlyres/89A%A23-1217-4771-99BD-471D6A6D4E1F/O/j-jKERF3984.htm>

⁴ <http://www.publications.parliament.uk/pa/id200809/idjudgmt/jd090520/Conkey-1.htm>

connected with Northern Ireland in the past even if they no longer hold such views.

- The OFMDFM guidelines⁵ appear to support a flexible and supportive approach and state that a '*conviction arising from the conflict should not bar an applicant from obtaining employment.....*'
- The Security Industry Authority guidance⁶ appears to support the re-integration of ex-offenders and base their approach on that on the judgement of Kerr J and the guidance to employers issued by the Office of the First Minister and Deputy First Minister in relation to conflict-related convictions that pre-date the Good Friday Agreement (April 2008).

REHABILITATION OF OFFENDERS (NORTHERN IRELAND) ORDERS- 1978- 2009

The Rehabilitation of Offenders (Northern Ireland) Order 1978⁷ introduced limitations on the requirement to disclose previous convictions. After a specified period of time a conviction can become 'spent' and may no longer be required to be disclosed to employers and others.

Exceptions to the 1978 Order can be categorised broadly in terms of protecting the vulnerable (for example, work with children and vulnerable adults), the administration of Justice (for example, the legal profession and criminal justice practitioners), and national security. There are also exceptions relating to positions in finance and banking, regulated by the Financial Services Authority.⁸

The recent Rehabilitation of Offenders (Exceptions)(Amendment) Order (Northern Ireland) 2009⁹ updates the circumstances under which a convicted person may be required to declare spent convictions. It adds to the list of excepted occupations as a result of new employing offices, bodies and employment patterns, *examples of which would be employment in the Security Industry Authority, taxi driving and employment concerned with working with children or providing case service to vulnerable adults.*

⁵ http://www.ofmdfmi.gov.uk/1.05.07_ex_prisoners_final_guidance.pdf

⁶ Conflict-related convictions: http://www.the-sia.org.uk/home/northern_ireland/conflict_convictions.htm

⁷ http://www.opsi.gov.uk/RevisedStatutes/Acts/nisi/1978/cnisi_19781908_en_1

⁸ There were further amendments to the Rehabilitation of Offenders (Northern Ireland) Order 1978: The Rehabilitation of Offenders (Exceptions) Order (Northern Ireland) 1979 limits the protection afforded to those convicted of offences and increases protection for the public by providing certain exceptions. For example, a person may be questioned about his spent convictions in order to assess his suitability for specified offices or occupations or for admissions to specified professions.

The Rehabilitation of Offenders (Exceptions) (Amendment) Order (Northern Ireland) 2001 amends the Rehabilitation of Offenders (Exceptions) Order (Northern Ireland) 1979 by excepting work which is concerned with the provision of health services and which is of such a kind as to enable the holder to have access to persons in receipt of such services in the course of his normal duties.

The Rehabilitation of Offenders (Exceptions) (Amendment) Order (Northern Ireland) 2003 amends the Rehabilitation of Offenders (Exceptions) Order (Northern Ireland) 1979. It adds further classes of profession to the exceptions listed in the 1979 Order.

⁹ http://www.opsi.gov.uk/sr/sr2009/nisi_20090173_en_1

FAIR EMPLOYMENT LEGISLATION¹⁰

The Fair Employment and Treatment (Northern Ireland) Order 1998

FETO makes it unlawful to discriminate against someone on the ground of religious belief or political opinion. This includes a person's supposed religious belief or political opinion and the absence of any, or any particular, religious belief or political opinion.

2 (4) In this Order any reference to a person's political opinion does not include an opinion which consists of or includes approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland, including the use of violence for the purpose of putting the public or any section of the public in fear.

Damien McComb- application for Judicial Review (2003)¹¹

This was an application by Damien McComb for judicial review of the decision of His Honour Judge Hart QC, the Recorder of Belfast, dismissing the applicant's appeal against the refusal of his application for a public service vehicle license.

It was concluded that the fact of the applicant's release under the 1998 Act should have been considered by the department and on appeal by the courts in deciding whether he should be granted a taxi driver's licence. Kerr J stated he was satisfied that this was not considered. The application for judicial review was granted and the decision of the Recorder was quashed.

McConkey and another v Simon Community Northern Ireland¹²

The House of Lords concluded in this case that an employer in Northern Ireland could refuse to employ a person on the ground of his having supported the use of violence for political ends connected with the affairs of Northern Ireland even if the job-seeker has since repudiated such views.

The House of Lords so held in dismissing an appeal by John McConkey and Jervis Marks against the dismissal by the Court of Appeal in Northern Ireland (Lord Justice Higgins, Lord Justice Girvan and Mr Justice McLaughlin) (\ NI CA 16) of their appeal from a decision of the Fair Employment Tribunal that they were not unlawfully discriminated against by the Simon Community Northern Ireland, contrary to the Fair Employment and Treatment (Northern Ireland) Order (SI 1998 No 3162 (NI 21)).

Article 19(1) of the 1998 Order made it unlawful for an employer to discriminate against a person by refusing him employment for which he applies. Article 3(1) of the Order defines discrimination as including "discrimination on the ground of religious belief or political opinion.

"Political opinion" was not defined by the order but article 2(4) provided that "any reference to a person's political opinion does not include an opinion which consists of or includes approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland, including the use of violence for the purpose of putting the public or any section of the public in fear."¹³

¹⁰ The Fair Employment and Treatment (Northern Ireland) Order 1998:

<http://www.opsi.gov.uk/si/si1998/19983162.htm>

¹¹ <http://www.courtsni.gov.uk/NR/rdonlyres/89A%A23-1217-4771-99BD-471D6A6D4E1F/O/j-KERF3984.htm>

¹² <http://www.publications.parliament.uk/pa/id200809/idjudgmt/jd090520/Conkey-1.htm>

¹³ The Times, May 26 2009, 'Refusal to employ former Republicans is justified; Law Report: <http://business.timesonline.co.uk/tol/business/law/reports/articles6360717.ece>

OFMDFM- RECRUITING PEOPLE WITH CONFLICT-RELATED CONVICTIONS, EMPLOYERS' GUIDANCE¹⁴

The OFMDFM guidance states that 'a conviction arising from the conflict should not bar an applicant from obtaining employment..' The report supports the judgement of Kerr J in the Damien McComb case:

The Agreement contemplated that mechanisms would be put in place for the accelerated release of prisoners and that those prisoners who benefited from that programme would be reintegrated into the community. It appears to me, therefore that particular attention should be paid to that fact that a prisoner released under the terms of the Northern Ireland Sentences Act 1998 and has been adjudged not to be a danger to the public.

SECURITY INDUSTRY AUTHORITY GUIDANCE¹⁵

- The criteria we apply in deciding whether to grant a licence are approved by the Secretary of State (section 7(5) of the Private Security Industry Act 2001).
- We have a statutory duty to apply those criteria in our decision making (section 8(3) of the Private Security Industry Act 2001).
- When considering a criminal record, we take into account the relevance, seriousness, recency and the disposal of each offence.
- We consider all offences on a person's criminal record, regardless of whether in other circumstances they might be considered 'spent'.
- We believe that our approach to considering offences is consistent with the judgement of Kerr J (in the matter of a judicial review by Damien McComb), and the guidance to employers issued by the Office of the First Minister and Deputy First Minister in relation to conflict-related convictions that pre date the Good Friday Agreement (April 1998).
- The Kerr J judgement in the Damien McComb case and the Office of the First Minister and Deputy First Minister employer guidelines are relevant to our decision making. The fact that an offence was conflict related and pre-dates the Good Friday Agreement will be taken into account when considering the whole of a person's criminal record.

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¹⁴ http://www.ofmdfmi.gov.uk/1.05.07_ex_prisoners_final_guidance.pdf

¹⁵ Conflict-related convictions: http://www.the-sia.org.uk/home/northern_ireland/conflict_convictions.htm