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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY MALACHY GOODMAN FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY PAROLE COMMISSIONERS FOR NORTHERN IRELAND DATED 28 FEBRUARY 2024

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Mr Lavery KC with Mr Leonard (instructed by McCrudden & Trainor Solicitors) for the Applicant
Mr Sayers KC with Mr Anthony (instructed by Carson McDowell Solicitors) for the Proposed Respondent

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McALINDEN J

Introduction

[1] This is an application brought by Malachy Goodman in respect of a decision of the Parole Commissioners for Northern Ireland dated 28 February 2024. The applicant's Order 53 Statement makes a number of challenges founded on illegality in respect of the decision of the Parole Commissioners not to direct further release after recall of the applicant.

[2] The applicant was sentenced on 19 March 2021 at Belfast Crown Court, to a determinate custodial sentence comprising of one year and three months in custody followed by a period of one year and nine months on licence. The applicant was sentenced in respect of aggravated vehicle taking, dangerous driving, driving whilst unfit through drink or drugs, and driving whilst disqualified.

[3] The applicant's custody expiry date was 31 May 2022 and the applicant's sentence licence expiry date is 1 December 2024. The applicant was released on his custody expiry date, but was recalled to custody on 10 November 2022, on account

of his breach of licence conditions due to him being apprehended for involvement in further offending.

[4] On 10 January 2023, a single Parole Commissioner reviewed the decision to recall the applicant and decided not to direct release. On 27 April 2023, a panel of the Parole Commissioners reviewed the single commissioner's decision and decided not to direct release. On 10 January 2024, a single Commissioner considered whether to direct the further release of the applicant under article 29 and decided to direct an oral hearing before a panel. That oral hearing then took place and on 28 February 2024, the panel of Parole Commissioners, with Mr Small acting as Chair of the panel, reviewed the single Commissioner's decision and decided not to direct release. This is the impugned decision. It is to be noted that the Order 53 Statement in this case is dated 13 June 2024, but at the hearing no issue was taken in respect of delay on the part of the applicant in challenging the decision of the Parole Commissioners.

[5] The applicant is represented by Mr Ronan Lavery KC along with Mr Connor Leonard and the proposed respondent is represented by Mr Donal Sayers KC along with Professor Gordon Anthony.

[6] The challenge to the Parole Commissioners' decision is based on the following propositions. Prior to 2024 as such, the Parole Commissioners were operating on the basis that the test and principles to be applied in respect of such decision making by the Parole Commissioners were set out in the case of *Foden* [2013] NIQB 2 which was a first instance judgment of the Horner J as he then was. In essence, this case decided that the statutory language set out in article 29(7) of the Criminal Justice (Northern Ireland) Order 2008 ("unless they are satisfied that it is no longer necessary for the protection of the public that P should be detained") constituted a statutory test which had to be met for a direction to release to be made. In relation to determining whether a prisoner should be released following his recall for breach of licence, the decision of Horner J steered the Parole Commissioners in the direction of having to consider whether following his original discharge from custody on licence, the behaviour of the person released on licence had given rise to an increased risk to the public. The decision also directed the Parole Commissioners, when considering the statutory test set out in article 29, to have regard to the issue of the impact of licence conditions insofar as they had a bearing on whether the statutory test was met.

[7] Following the handing down of that decision in 2013, the Parole Commissioners proceeded thereafter to apply what was described as the test for release as formulated by Horner J in *Foden*. Matters remained as they were even into 2023 when the Supreme Court in a different parole context gave its decision in the case of *Pearce* [2023] UKSC 13 and, again, the relevance of the *Pearce* decision is simply that the language of the Supreme Court in that case is clearly consistent with the language in *Foden* in that the statutory language used in the legislation which is equivalent to the article 28 and article 29 in the Northern Ireland statute was

considered by the Supreme Court to constitute a test which has to be met before release is granted.

[8] Matters appear to have become somewhat more complex when one considers the impact of the *Hilland* decision, which is a decision of the UK Supreme Court given earlier this year, [2024] UKSC 4, in which Lord Stephens JSC gave the principal judgment. Although not dealing with article 29, there is a clear read across between the discussion of the statutory language in article 28 and the statutory language in article 29. What is clear from the *Hilland* decision is that instead of the statutory language constituting a test as described in *Foden*, according to the *Hilland* decision, it must now be regarded as constituting a threshold, a gateway, in the sense that if the statutory language set out in article 29 in relation to a decision whether to release a prisoner back into the community following a breach of a licence condition and the recall of the prisoner, is met, then a threshold has been crossed and the crossing of that threshold then allows the Parole Commissioners to consider whether to direct release and in considering this matter, the Parole Commissioners are engaging in the exercise of a discretion in the context of a policy formulated by the Department of Justice which said policy must reflect, hold true to and adhere to the language of the relevant statutory provision.

[9] The challenge brought by the applicant in this case is that although the applicant's legal representatives, when addressing the Parole Commissioners during the hearing, specifically raised and referred to the *Hilland* decision and drew the *Hilland* decision to the attention of the Parole Commissioners, the Parole Commissioners, when giving their decision on 28 February 2024, did not apply the guidance provided by *Hilland* but simply referred to the *Foden* test which, in essence, it is argued, was overturned by the *Hilland* decision.

[10] Mr Lavery, KC, the applicant's Senior Counsel, has carefully analysed the decision of the Parole Commissioners and has referred, in particular, to paras [57] and [66] of the decision. In essence, the challenge raised by the applicant is that the panel in this case appears to have failed to follow and give effect to the guidance that is set out in *Hilland* and does not appear to have addressed the case using the language of article 29(7) as a threshold criterion which, if crossed, would then entitle the panel to consider whether to direct release in the exercise of its discretion. In essence, it is argued that the more traditional test approach set out in *Foden* has been applied and not the threshold followed by the exercise of discretion approach that is advocated in *Hilland*. In addition to the aforesaid ground of challenge, the applicant argues that the decision not only failed to pay lip service to the *Hilland* approach, but it is also confusing in terms of the approach that was adopted by the panel in that it is not clear from the decision whether the panel when dealing with the statutory language of article 29 did take into account the available licence conditions when considering whether the statutory language set out in article 29 applied in this case, whether it be by way of a test or whether it be by way of a threshold hurdle that had to be overcome prior to the panel considering whether release was appropriate.

[11] On behalf of the proposed respondent in this case, it was ably argued by Mr Sayers KC, that the decision of the panel, read as a whole, makes it patently clear and obvious, that even approaching the task at hand from the *Hilland* perspective, the applicant's case fell at the threshold stage because the panel decided that they were not satisfied that it is no longer necessary for the protection of the public that applicant should be detained (the wording of article 29(7)) and that although not expressed in that manner, the applicant had not persuaded the panel that the threshold criterion was crossed. In essence, it was argued on behalf of the proposed respondent that although it is accepted that there does not appear to have been an open embracing of the analysis that is contained in the *Hilland* decision, the decision of the panel is still consistent with the outcome that would be achieved by the adoption of the *Hilland* approach in that the decision of the panel was that the threshold, although it was described as a test, was not overcome, surmounted or crossed.

[12] In this particular instance, the court has to be particularly alive to the fact that one is dealing with the issue of the liberty of an individual and, therefore, anxious scrutiny must be exercised by the court when examining the decision under challenge. The court is also acutely aware of the expertise that is contained within the Parole Commissioners for Northern Ireland. This is an expert body with a wide range of expertise within its membership and due deference must be paid by the court to the decision making of the Parole Commissioners.

[13] The court is also very much alive to the options that the court has in this respect in terms of how to deal with this case. Humphreys J initially reviewed the case last week and directed that a rolled-up hearing should be undertaken today. The court could simply look at this as a leave hearing and give leave in respect of the matter on the basis that there was an arguable case with a reasonable prospect of success and that would ordinarily result in the respondent then being at liberty to provide affidavit evidence in respect of the reasoning behind the decision under challenge. However, this court must take heed of the guidance given by the appellate courts in this jurisdiction and elsewhere about the advisability, or otherwise, of giving judicial bodies opportunities to explain what their decision making actually meant or what was involved in their decision making. A judicial decision is supposed to be understandable on its face. It is supposed to be coherent and cogent on its face and a judicial decision should not require additional affidavit evidence to explain the rationale or reason behind the decision. Bearing this in mind, I consider that the option of granting leave in this case and then allowing an affidavit to be provided, is not one that is either attractive in the circumstances of this case or correct in relation to law.

[14] In light of the arguments raised by the applicant in this case (and I pause to pay complement to the quality of the written submissions provided to the court by both parties which were ably supplemented by persuasive oral arguments), and in light of the fact that there is a concession by the proposed respondent that there does not appear to have been, let's say, adherence to the guidance set out in the *Hilland*

case, the court clearly feels that the application for leave is merited, that there is an arguable case and that the substance of the matter should now be considered on this occasion by way of a rolled up hearing, rather than adjourning the matter for further affidavit evidence to be provided in this case.

[15] The applicant's arguments are that the matter was finely balanced, in that the panel noted that the applicant had made significant progress, and that, in such circumstances, where there is a finely balanced decision and there is a clear failure to set out a decision in a manner which is consistent with the guidance contained in a recent Supreme Court case, the applicant should succeed and the decision should be quashed and the Parole Commissioners should be required to reconsider the matter afresh.

[16] These arguments have a superficial attractiveness, but they do not provide a complete answer. If this court, a court of supervisory jurisdiction, were to conclude that the decision of the panel is clear, that the decision is unambiguous, and that the statutory language set out in article 29 has been considered and an assessment has been carried out in respect of the statutory language in article 29 and that assessment has resulted in a decision that the panel was not satisfied that it is no longer necessary for the protection of the public that the applicant should be detained; whether the wording contained in article 29(7) is described in the decision as a test as in *Foden* or as a threshold condition as in *Hilland*, then there is a strong argument that despite the absence of a clear adherence to the approach adopted in *Hilland*, the correct decision has been reached. However, having given the matter very careful consideration, the court is satisfied that the applicant's arguments are made out in this case. There is a degree of uncertainty and a degree of confusion between what is said to have been taken into account in para [57] when compared with para [66], particularly in respect of the impact of licence conditions in this case and at what stage regard should be had to the impact of licence conditions This gives rise to an element of uncertainty as to what was actually decided, what was taken into account and how the decision was reached.

[17] There is also a reference in para [57] to the issue of an increase in risk in light of post-release on licence behaviour. That is an issue which was specifically addressed in *Hilland* and was regarded as an inappropriate method of assessment in terms of the article 29 test; because, as Lord Stephens was at pains to point out in the *Hilland* decision, the issue of an increase in the level of risk is an illogical assessment in that no earlier or baseline assessment of risk was or can be carried out on initial discharge of a prisoner subject to a determinate custodial sentence. The discharge is automatic, it is not dependent on any risk analysis being carried out. Therefore, the specific reference in the index decision to the increase in risk as being not the only matter taken account of, but obviously, a matter taken account of is something that introduces an additional element of confusion in this case and highlights the failure of the panel to comply with the *Hilland* guidance.

[18] In general, the issue that is of concern to the court is what actual test, what actual approach, what actual mechanism was applied by the panel to the decision making process in this case. Having regard to the fact that there is that degree of, in the court's mind, confusion, and having regard to the fact that there does appear to have been a failure to embrace the approach adopted in *Hilland*, the court is satisfied that there has been an error of law in this case, sufficient and of such a nature as to justify the quashing of the decision and as to justify the making of an order that the Parole Commissioners should consider this matter afresh in light of the guidance and approach set out quite clearly by Lord Stephens JSC in the *Hilland* decision.

[19] That is the determination of the court in respect of this matter and having invited the parties to address me on the issue of costs, I make an order that the applicant is entitled to his costs against the respondent. I will make the order that the applicant is to have costs, such costs to be agreed and in default of agreement, the applicant's costs to be taxed as a legally assisted person.