

Neutral Citation No: [2022] NIKB 7

Ref: ROO11925

ICOS No:

*Judgment: approved by the court for handing down
(subject to editorial corrections)**

Delivered: 13/09/2022

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY BARRY WHITTLE
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

and

IN THE MATTER OF A DECISION OF THE
PAROLE COMMISSIONERS FOR NORTHERN IRELAND
DATED 24 MAY 2022

Mr Michael Wilson BL (instructed by RJW Law Solicitors) for the Applicant
Mr Donal Sayers KC with Ms Lara Smyth BL (instructed by Carson McDowell Solicitors)
for the proposed Respondent

ROONEY J

Background

[1] At Londonderry Crown Court on 15 September 2017 the applicant was sentenced to an extended custodial sentence (ECS) of six years comprising four years in custody and two years on licence for the offence of grievous bodily harm (GBH) which occurred in August 2014. At a further appearance before the same court in November 2017, the applicant was sentenced to a further ECS comprising three years custody and two years on licence for the offence of wounding which the applicant committed in November 2015 whilst on bail for the original GBH offence. The applicant's custody expiry date (CED) is 6 October 2022 and his sentence licence expiry date (SLED) is 6 October 2026.

[2] The applicant's case was referred to the Parole Commissioners for Northern Ireland ('Parole Commissioners') under Article 18 of the Criminal Justice (Northern Ireland) Order 2008 (hereinafter referred to as "the 2008 Order"). As considered in more detail below, Article 18(4)(b) requires the Parole Commissioners

not to direct the release of a prisoner unless they are satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined.

[3] On 13 December 2021 the single Commissioner appointed to consider the applicant's case provisionally directed that he should not be released.

[4] At the request of the applicant, a panel of the Parole Commissioners (hereinafter referred to as 'the Panel') was appointed to consider the applicant's case. Evidence was heard and considered by the Panel on 4 March 2022, 23 March 2022 and 20 May 2022. In a lengthy decision comprising 76 paragraphs, the Panel gave its decision on 24 May 2022, reaching a conclusion that pursuant to the statutory test contained within Article 18 of the 2008 Order, they were not "satisfied that it is no longer necessary for the protection of the public from serious harm that [the applicant] should be confined". Accordingly, the Panel refused to direct the applicant's release ('the impugned decision').

Grounds of Challenge

[5] The applicant seeks leave to judicially review the impugned decision of the Parole Commissioners. In essence, the applicant argues that the application for leave can be confined to a net issue, namely that the Parole Commissioners erred in law by their failure to address the applicability of appropriate licence conditions before applying the statutory test. The applicant alleges that this ground of challenge is based on the principles laid down in *Re Foden's Application* [2013] NIQB 2; *Re Moon's Application* [2021] NIQB 69 and *Re Wright's Application* [2022] NIQB 50.

[6] The applicant seeks a declaration that the proposed respondent has erred in law; an order of certiorari to quash the decision of the Parole Commissioners and an order of mandamus requiring the proposed respondent to order a fresh parole hearing before a new panel of parole commissioners.

Statutory Scheme

[7] Article 18 of the Criminal Justice (Northern Ireland) Order 2008 provides as follows:

"18.—(1) This Article applies to a prisoner who is serving—

- (a) an indeterminate custodial sentence; or
- (b) an extended custodial sentence.

(2) In this Article—

“P” means a prisoner to whom this Article applies;

“relevant part of the sentence” means –

(a) in relation to an indeterminate custodial sentence, the period specified by the court under Article 13(3) as the minimum period for the purposes of this Article;

(b) in relation to an extended custodial sentence, one-half of the period determined by the court as the appropriate custodial term under Article 14.

(3) As soon as –

(a) P has served the relevant part of the sentence, and

(b) the Parole Commissioners have directed P's release under this Article,

the Department of Justice shall release P on licence under this Article.

(4) The Parole Commissioners shall not give a direction under paragraph (3) with respect to P unless –

(a) the Department of Justice has referred P's case to them; and

(b) they are satisfied that it is no longer necessary for the protection of the public from serious harm that P should be confined.

(5) ...

(6) ...

(7) ...

(8) ...”

[8] Article 24 of the Criminal Justice (Northern Ireland) Order 2008 provides as follows:

“24. – (1) In this Article –

(a) “the standard conditions” means such conditions as may be prescribed for the purposes of this Article as standard conditions; and

(b) “prescribed” means prescribed by the Department of Justice by rules.

(2) Any licence under Article 17 or 19 in respect of any prisoner serving one or more determinate custodial sentences of less than 12 months and no determinate custodial sentence of 12 months or more shall include –

(a) such conditions as may be required by the court in passing sentence; and

(b) so far as not inconsistent with them, the standard conditions.

(3) Any other licence under this Chapter

(a) shall include the standard conditions; and

(b) may include such other conditions of a kind prescribed for the purposes of this paragraph as the Department of Justice may for the time being specify in the licence.

(4) The Department of Justice may vary or cancel any conditions specified in a licence under this Chapter and may subsequently include additional conditions.

(5) Where a prisoner is released on licence under Article 18 or 20A, the Department of Justice shall not –

(a) include a condition under paragraph (3)(b) on release, or

(b) subsequently insert, vary or cancel a condition under paragraph (4),

except after consultation with the Parole Commissioners.

(6) For the purposes of paragraph (5), the Department of Justice is to be treated as having consulted the Parole Commissioners about a proposal to include, insert, vary or cancel a condition in any case if they have been consulted by the Department of Justice about the implementation of proposals of that description generally or in that class of case.

- (7) Paragraphs (2) and (3) have effect subject to –
- (a) Articles 25 and 26;
 - (b) Articles 32(2) and 33(3) and (4).
- (8) In exercising the powers to prescribe standard conditions or other conditions referred to in paragraph (3), the Department of Justice shall have regard to the following purposes of the supervision of offenders while on licence under this Chapter –
- (a) the protection of the public;
 - (b) the prevention of re-offending;
 - (c) the rehabilitation of the offender.”

[9] The Criminal Justice (Sentencing) (Licence Conditions) (Northern Ireland) Rules 2009 sets out the standard conditions prescribed for the purposes of Article 24(1) of the 2008 Order. The standard conditions of licence are detailed in Rule 2. Rule 3 provides for the imposition of other conditions of licence for the purposes of Article 24(3)(b) of the 2008 Order. This latter provision leaves it open to the Parole Commissioners to apply conditions which are individually tailored to meet the risks posed by a particular prisoner.

Consideration of the Issue

[10] As stated above, the issue for determination in this application is whether the Panel in their application of the statutory test contained in Article 18(4)(b) of the 2008 Order erred in law by failing to address appropriate licence conditions.

[11] The court remains grateful to counsel for their succinct and erudite written and oral submissions which were prepared on an expedited basis due to the urgency of this matter.

[12] Mr Wilson BL, on behalf of the applicant, ostensibly relies upon the decisions of Horner J (as he then was) in *Re Foden's Application* [2013] NIQB 2 and Colton J in *Re Moon's Application* [2021] NIQB 69 and *Re Wright's Application* [2022] NIQB 50 and argues that the Panel failed to consider appropriate licence conditions in its assessment of the applicant's risk to the public and its application of the statutory test.

[13] Significantly, Mr Wilson BL in both his written and oral submissions states as follows:

“It is very clear the reasons as to why the respondent arrived at the decision to refuse the applicant’s release, but nonetheless the respondent in reaching their decision failed to properly address the question of appropriate licence conditions before applying the statutory test.”

[14] Mr Wilson BL submits that the impugned decision fails to make any reference to licence conditions which could potentially mitigate against any risk posed by the applicant. He refers specifically to the updated report from the Probation Board for Northern Ireland (“PBNI”) which had been directed by the Panel in advance of the hearing on the 20 May 2022. This report contained eleven recommendations in respect of licence conditions. The argument advanced is that there is a striking failure by the Panel within their decision to give any mention, analysis or consideration of the PBNI’s suggested licence conditions or indeed any licence conditions.

[15] In his argument, the applicant relies heavily on the decision of Colton J in *Re Wright’s Application* [2022] NIQB 50. Wright was a 44 year old man who was sentenced to life with a minimum tariff of 15 years for murder, together with a concurrent six year sentence for arson endangering life arising out of an incident on 26 December 2004. Wright was sentenced at Belfast Crown Court on 22 March 2007. His tariff expired on 12 June 2020. The applicant’s case was referred to the Parole Commissioners for Northern Ireland (PCNI) under Article 6 of the Life Sentence (Northern Ireland) Order 2001 on 30 July 2021 to consider whether or not to direct his release under the Order. The applicant’s case came before the Parole Commissioners on 2 February 2022 and by a decision dated 7 February 2022 they declined to release him on life licence. The court noted that the Panel’s decision made only one express reference to licence conditions. Having carefully considered the contents of the impugned decision, Colton J came to the following conclusion at paragraph [35]:

“[35] The court considers that this is very much a borderline case but, on balance, has decided that the panel has, indeed, erred in law by failing to properly address the question of appropriate licence conditions before applying the statutory test.”

[16] Mr Wilson BL argues that a principle was established in *Re Foden’s Application* [2013] NIQB 2 that a Panel must consider appropriate licence conditions before applying the statutory test. This court remains unconvinced that such a principle emanates from the ratio of Horner J in *Re Foden*.

[17] The facts in *Re Foden* differ significantly from the facts in this case. *Foden* received a determinate custodial sentence of 12 months custody and 12 months release on licence. *Foden* breached some of the conditions and a decision was made to revoke his licence under Article 20(2) of the 2008 Order. One issue for the court

was to determine the basis upon which a prisoner on licence could be recalled to prison. The applicant submitted that a recall should only be on the basis of an increase of risk of harm to the public and not on whether the conditions of the licence to manage that risk had been breached. Horner J disagreed and stated that the lawful approach to recall by the Department was to consider the risk of harm to the public in all the circumstances, including the conditions imposed and any breach of the licence conditions.

[18] Therefore, *Foden* had been released with the imposition of licence conditions to manage risks which *Foden* posed to society. The imposition of external controls was designed to reduce the risk of harm to the public. *Foden* breached some of those conditions and the court considered that it was lawful for the Department to take into consideration the breach of the licence conditions when assessing whether there was an increased risk of harm to the public.

[19] In contrast to *Foden*, the applicant in this case had not been released subject to conditions. The proposed respondent does not dispute that an assessment of standard conditions and bespoke conditions are integral to the Panel's application of the Article 18 statutory test, namely, whether they are satisfied that it is no longer necessary for the protection of the public from serious harm that the applicant should be confined. In the exercise of their powers under Article 18 and Article 24 of the 2008 Order, an experienced Panel of the Parole Commissioners will have regard to the standard conditions of licence and other conditions of licence contained in the Criminal Justice (Sentencing) (Licence Conditions) (Northern Ireland) Rules 2009. However, the proposed respondent argues that the availability of licence conditions can only affect the outcome of the statutory test where the evidence affords the Panel of the Parole Commissioners with sufficient confidence in the prisoner's ability and willingness to comply. If, having considered the evidence, the Panel is not satisfied that the prisoner is able to manage himself and is willing to comply, the availability and imposition of licence conditions cannot assist the Parole Commissioners in their assessment that the prisoner can be safely managed in the community. The proposed respondent submits that to impose licence conditions on a prisoner whose ability and willingness to comply is doubtful will set the prisoner up to fail and gamble impermissibly with public safety.

[20] Turning to the impugned decision, Mr Sayers KC, on behalf of the proposed respondent, strenuously argues that an objective consideration of the decision and, in particular, the reasons given, makes it clear that the Panel were alive to the issue of licence conditions and the potential for breach of those conditions. According to Mr Sayers KC, the key issue for the Panel was whether the evidence satisfied them that the applicant had the ability and the willingness to comply with licence conditions.

[21] Mr Sayers KC makes the following submissions. Firstly, there is no evidence that the Panel failed to properly apply the statutory test found in Article 18(4)(b) of the 2008 Order. Reference to paragraph 72 of the impugned decision unequivocally

demonstrates that the Panel directed itself correctly on the statutory test, emphasising that it was a strict mandatory test and, as the concern was focused on the safety of the public, such consideration was one of the utmost gravity.

[22] Secondly, according to Mr Sayers KC, there is no basis for the contention that the Panel approached this case without recognising the relevance of licence conditions as a means by which the applicant's risk in the community could be managed. Mr Sayers KC states that, if there is any doubt that the Panel was mindful of the availability of licence conditions, then this doubt must be dispelled by a reference to the impugned decision itself which is, according to him, "peppered with reference to licence conditions." In this regard, Mr Sayers KC refers to paragraphs 36, 38, 55, 56 and 60 of the decision.

[23] Thirdly, the court was directed to paragraphs 4 and 5 of the decision which provided that in reaching their decision, the Panel took into consideration all the documents placed before it, the oral evidence of the witnesses and the oral submissions made on behalf of the applicant. The Panel also looked at reports prepared by the Probation Board of Northern Ireland and a dossier of documents provided by the Department of Justice and shared with the prisoner's legal representatives. Furthermore, consideration was given to letters provided by the applicant's father and sister and also written representations made by the applicant's legal advisers.

[24] The reasons for the Panel's decision are detailed in paragraphs 62-75 and will be scrutinized in more detail below. Mr Sayers KC urges the court to consider not only the reasons provided by the Panel but also the totality of the decision, which reveals that the Panel carried out a detailed review of the provisional direction of the single Commissioner and particularly her assessment of the relevant risk management factors. Whilst acknowledging that positive progress had been made with the applicant to the end of September 2021, the single Commissioner observed that all professionals working with the prisoner identified that there was still work to be done before release on licence could be considered. This assessment is significant. The single Commissioner considered that it was essential that sufficient evidence should be provided from pre-release testing to demonstrate that the risks could be managed outside of custody.

[25] In light of the recommendations from the single Commissioner, the Panel gave various directions which included obtaining an updated psychological risk assessment from a higher psychologist. This report identified risk factors and a structured approach dealing with the risk of violence with regard to the applicant. The proposed respondent states that the Panel were correct to have regard to this report in reaching their decision not to release the applicant subject to licence conditions but rather progress the applicant through unaccompanied releases and overnight releases to fully establish the applicant's ability to manage himself in the community setting.

Decision

[26] Having considered the comprehensive submissions made by the parties, the court concludes that in reaching its decision, the Panel of Parole Commissioners correctly focused its attention on the statutory test for release as provided in Article 18(4)(b) of the Criminal Justice (Northern Ireland) Order 2008, namely that in cases where the prisoner is serving an indeterminate custodial sentence or an extended custodial sentence, the Parole Commissioners shall not direct the release of the prisoner unless “they are satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined.”

[27] It is clear that a consideration of potential licence conditions forms an integral part of the Panel’s application of the statutory test. An experienced panel of Parole Commissioners will undoubtedly be cognisant of the provision of licence conditions contained within Article 24 of the Criminal Justice (Northern Ireland) Order 2008 and the Criminal Justice (Sentencing) (Licence Conditions) (Northern Ireland) Rules 2009. In circumstances where the Parole Commissioners direct the release of a prisoner serving an indeterminate custodial sentence (ICS) or an extended custodial sentence (ECS), such release will be subject to licence conditions. The said licence conditions may be standard licence conditions as set out under Rule 2 of the 2009 Rules, or additional licence conditions recommended by the Parole Commissioners to ensure that the prisoner can be released safely into the community. With regard to additional or bespoke licence conditions, the Parole Commissioners may consider the conditions of licence contained within Rule 3 of the 2009 Rules. However, the Parole Commissioners are entitled to take into consideration other relevant and bespoke conditions. Whatever conditions are imposed, they should be specific to the prisoner’s circumstances having regard to:

- (a) the protection of the public;
- (b) the prevention of re-offending; and
- (c) the rehabilitation of the offender.

[28] The decision in this case was made by an experienced Panel of Commissioners who, in the view of this court, were clearly aware of their statutory functions and provisions under the 2008 Order and the said 2009 Rules. This court rejects the contention that the Panel of Commissioners approached this case without recognising the relevance and availability of licence conditions as a means by which the prisoner’s risk in the community might be managed.

[29] It will always be the situation that the applicant, as a prisoner who is serving an extended custodial sentence, will be subjected on release to the imposition of

statutory standard conditions and/or prescribed conditions specifically tailored to the particular circumstances of the applicant's case and his risk to the public. The question for the Panel in this case was whether the applicant should be released on conditions immediately or at some stage in the future.

[30] The decision of the Panel of the Commissioners makes it clear that they were aware of the availability and significance of licence conditions. The decision contains six particular references to licence conditions. This should be contrasted with the facts in *Re Wright* where the impugned decision made only one direct reference to licence conditions suggested by the Probation Board.

[31] The applicant argues that the Panel failed to have regard to and make reference to the licence conditions recommended by the Probation Board in its report dated 16 May 2020. However, this argument ignores two essential matters. Firstly, the Probation Report specifically stated that the applicant continues to be assessed at a high likelihood of re-offending and is a significant risk of serious harm. Secondly, the ultimate decision, applying the statutory test, rests with the Panel of Commissioners and not with Probation. Therefore, if contrary to the view taken by Probation, the Panel of Commissioners made an assessment that the applicant was manageable in the community, it is only then that it would be open to the Panel of Commissioners to consider the licence conditions put forward by Probation.

[32] The proposed respondent argues, and I agree, that the efficacy of licence conditions depends upon the prisoner's compliance. The fact that licence conditions are available to the Panel can only affect the outcome of the statutory test where the evidence considered by the Panel of Commissioners convinces them of the prisoner's ability and willingness to comply. Where the evidence presented does not afford the Panel with such sufficient confidence, the availability of licence conditions will not assist the panel in its determination that the prisoner can be safely managed in the community. The court agrees that, to impose licence conditions on a prisoner whose ability and willingness to comply is doubtful is setting the prisoner up to fail and gambling impermissibly with public safety.

[33] Paragraph 5 of the decision of the Panel of Commissioners specifically refers to the fact that it took into consideration all the documents and materials before it, the oral evidence and the submissions on behalf of the applicant and the witnesses in attendance. The witnesses included the Deputy Director of Community Restorative Justice Ireland and the applicant's sister. Furthermore, the Panel considered the provisional determination of the single Commissioner, the reports from the higher psychologist and the Probation Board. The impugned decision also refers to evidence from a prison officer at HMP Magilligan, a prisoner in HMP Magilligan and the PDU Governor. The Panel also considered three probation reports prepared by the applicant's PDP co-ordinator since September 2020. Following the PDP co-ordinator's unavailability due to illness, a different PDP co-ordinator gave evidence to the Panel in March 2022 effectively adopting her predecessor's previous reports.

[34] The single ground of challenge advanced by the applicant is that the decision by the proposed respondent to refuse the applicant release on licence was unlawful because, in their application of the statutory test in Article 18(4)(b) of the 2008 Order, the proposed respondent failed to properly address the question of appropriate licence conditions before applying the statutory test.

[35] The contention that the Panel erred in law by failing to take into account material considerations, such as licence conditions, is disputed by the proposed respondent. In this regard, the court was directed to the decision of the Court of Appeal in *Re SOS (NI)* [2013] NICA 15 in which Carswell LCJ stated at paragraph [19]:

“[19] It is for an applicant for leave to show in some fashion that the deciding body did not have regard to such changes and material considerations before issuing its decision. It cannot be said that the burden is imposed on the decider of proving that he did so. There must be some evidence or a sufficient inference that he failed to do so before a case has been made out for leave to apply for judicial review”.

[36] This court is not satisfied that the applicant has produced evidence or persuaded the court to draw a sufficient inference that the Panel has failed to take into consideration and address the question of appropriate licence conditions.

[37] If the argument advanced by the applicant is interpreted as a reasons challenge, the proposed respondent referred the court to the decision of the House of Lords in *South Bucks District Council v Porter* [2004] UKHL 33, in which Lord Brown stated as follows at paragraph 36:

“36. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.”

[38] This court does not accept that the Panel of Commissioners failed to provide an adequately reasoned decision. On the facts of this case, there is no evidence that the applicant has been substantially prejudiced. Indeed, to the contrary, the applicant’s counsel in his written and oral submissions specifically stated that, “the reasons as to why the respondent arrived at the decision to refuse the release” were very clear.

[39] Turning to the decision of Colton J in *Re Wright’s Application* [2020] NIQB 50, it is my view that the impugned decision in this case is clearly distinguishable from the decision of the Parole Commissioners in *Re Wright*.

[40] In paragraph 4 of the impugned decision, the Panel of Commissioners stated that they agreed with the reasons given by the single Commissioner not to direct the provisional release of the applicant. It is noted by the Panel, the single Commissioner observed that all the professionals working with the applicant identified that there was still work to be done before release on licence could be considered. The single Commissioner considered it essential that sufficient evidence should be provided from pre-release testing to demonstrate that the risk posed by the applicant could be managed outside of custody. The single Commissioner emphasised that the applicant's record of past breaches of suspended sentences and his breach of bail at the time of commission of the second index offence underlined the importance of "building a solid basis of evidence that the skills learned can be transferred to a community setting."

[41] The single Commissioner concluded as follows:

"... It is my assessment of all the evidence available that the test for release has not been met. It remains essential for a final phase of phased testing that involves exposure to periods of unaccompanied and overnight leave that will establish Mr Whittle's capacity to generalise and consolidate the "new me" skills he has learned and begin to practice in a custodial setting."

[42] At paragraph 65 of the impugned decision, the Panel took into consideration the violence risk assessment carried out by the higher psychologist in reports dated April 2021 and January 2022. The Panel concluded that the higher psychologist's analysis of current risk management factors was concerning, particularly the finding that all risk management factors were partially present or indeed present and were said to be at moderate or high relevance. Particular problems with "stress/coping" were also highlighted.

[43] It is clear from the Panel's analysis that they were looking at whether it was safe to release the applicant on licence conditions. The Panel were not so satisfied. The higher psychologist did not support the applicant's release on ECS licence and noted as follows:

"It remains that Mr Whittle has had little time to practice his 'new me' interventions learning and had minimal opportunity to demonstrate that he can manage himself and his addictions beyond the control present environment."

[44] It is the view of this court that the Panel were correct to conclude that the applicant was not able to manage himself and control his addictions outside custody. The focus of the Panel quite correctly was on the applicant's ability and on his needs to comply with licence conditions. For this reason, following the

recommendation of the higher psychologist, the Panel were keen to facilitate the provision of opportunities for unaccompanied pre-release testing at the earliest opportunity.

[45] It is noted that difficulties arose with regard to the arrangement of unaccompanied temporary releases. Nevertheless, it is the view of this court that the Panel was justified in relying upon the evidence and the assessment of the professional witnesses that the statutory test for release had not been met. At paragraph 74 of the impugned decision, the Panel stated as follows:

“[We] agree with the thinking of the professional witnesses, the previous panel and the single Commissioner, that it is crucial that Mr Whittle can evidence the skills he has learned in custody in the community and that the process of pre-release testing is not something that can be truncated in this case. Full pre-release testing is regarded by the Panel as essential. The Panel is not satisfied that it would be appropriate to bypass normal well-tested procedures by way of full pre-release testing under strict supervision and move directly release on licence.”

[46] In conclusion, it is the view of this court that the Panel, in a comprehensive and well-reasoned decision, were justified in accepting the assessment of the professional witnesses that the applicant had little opportunity to demonstrate that he could manage himself and his addictions in the community. The Panel were clearly aware of and considered the availability of licence conditions. However, as emphasised above in paragraph 74 of the decision, prior to moving directly to considering release on licence, the Panel were not satisfied that it would be appropriate to “bypass normal well-tested procedures by way of full pre-release testing under strict supervision.”

[46] The Panel Commissioners correctly applied the statutory test under Article 18(4)(b) of the 2008 Order. No error of law is demonstrated in the impugned decision. Leave to apply for judicial review of the impugned decision is refused.