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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Boyle's (Stephen) Application [2009] NIQB 83

IN THE MATTER OF AN APPLICATION BY STEPHEN BOYLE FOR JUDICIAL REVIEW

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DEENY J

[1] The applicant, Stephen Boyle, is a life sentence prisoner currently held in custody at HM Prison Maghaberry. He is now aged 41 and was convicted at the Central Criminal Court in Dublin, on 11 July 1997 of the murder of Mr Gerard Hagan and of assault occasioning grievous bodily harm on Mr Mark Brown and Mr Douglas McManus. He was transferred from Mountjoy Prison in Dublin to HMP Maghaberry on 10 May 1999. The decision on the tariff applicable to Boyle's offence was fixed by Kerr LCJ pursuant to Article 10 of the Life Sentences (Northern Ireland) Order 2001 at 13 years. This tariff period, it is agreed, was due to expire on 2 August 2009.

[2] The murder and related grave offences were committed by Boyle when intoxicated. Mr Hagan died as the result of multiple stab wounds and the other two victims, who were also associates of Boyle, were the subject of what has been described as uncontrolled violence.

[3] In addition Stephen Boyle has a criminal record involving some 75 other offences including convictions for rape in 1984 and grievous bodily harm in 1993. According to the decision letter of the Parole Commissioners Boyle was in fact living with his mother at her home from 9 January 2009 on pre-release licence until a breach of licence condition in May 2009. He had then been given permission to travel to County Laois to visit his former wife and his daughter. He rang the Prisoner Assessment Unit on 11 May to report that he was sick but when visited by a Probation Officer was clearly under the influence of and in possession of alcohol, contrary to his licence terms. He was returned to Her Majesty's Prison but given further release following a case conference in June. At a hearing before the Parole Commissioners on 23

July Boyle laid stress on the slow but allegedly improving relationship between him and his former wife. Apparently she had become pregnant by him but suffered a miscarriage in mid 2009. The Commissioners heard that he had completed a number of courses in custody. He did not, however, claim to have given up alcohol completely nor even propose to give it up completely. Ms G Rook of Probation Services noted that the Dunlewey Centre which he attended did not suggest abstinence in his case but rather the need for control. The court is not aware of the basis for departing from the long established approach which recommends total abstinence for those afflicted with alcoholism. The panel was struck by the strength and consistency of the opinions of professional witnesses as to the progress Boyle had made. It went on to say –

> "As will be seen considerable importance was placed on Mr Boyle's relationship with his former wife, his daughter and mother; in the circumstances a decision was reached that he be released on licence on conditions, which did not include abstinence from alcohol but did require him "to demonstrate acceptable control in the use of alcohol including at times of emotional stress or other pressure."

[4] Notice of the panel's decision was sent on 29 July 2009 to the Secretary of State. This was pursuant to Article 6 (3) of the Life Sentences (NI) Order 2001. I set out Article 6 (3) –

> " As soon as –
>
> (a) a life prisoner to whom this Article applies has served the relevant part of his sentence; and
>
> (b) the Commissioners have directed his release under this Article,
>
> it shall be the duty of the Secretary of State to release him on licence."

As mentioned his tariff expiry date which constituted the relevant part of his sentence was 2 August and the Secretary of State was therefore under a duty to release him on that date. In fact that date was a Sunday and it might be thought that no great violence was done to the provision by a release on Monday 3 August, although that is not a point on which I rule on definitively.

[5] However, the affidavit of Alan Smyth of the Northern Ireland Prison Service, of which he is currently the acting Deputy Director, discloses matters which gave understandable concern to the authorities. It will be recalled that the applicant was on extended release living at home with his mother in Belfast. At 9.50 pm on Friday 31 July a woman who identified herself as the applicant's mother rang the Prisoner Assessment Unit to report that Boyle was "out drinking in the street and causing havoc and shouting". Governor Caulfield then contacted the applicant by phone and instructed him to return to the Unit on the following morning 1 August. On his return he tested positive for alcohol consumption and admitted that he had consumed four or five pints of beer. He was kept in the Unit for the remainder of the weekend. A check was carried out on the applicant's mobile phone and certain text messages were transcribed which have been exhibited to the affidavit of Mr Smyth. These text messages from Boyle's former wife and daughter paint a very different picture from, and entirely inconsistent with, that which Boyle had presented to the Parole Commissioners, who had placed considerable importance on those relationships. Those relationships appeared indeed to be at an end through Boyle's own wishes and actions. The applicant had also told a prison officer about a girlfriend while he had been on leave whose existence had not been mentioned to the Parole Commissioners. He disclosed that he was intending to visit his brother in County Cork without permission which would be a further breach of his licence conditions.

[6] An enquiry was made of the Parole Commissioners as to whether they could revisit their decision of 23/27/29 July. The Commissioners' view was that that was not open to them. Neither Mr Donal Sayers for the applicant nor Mr Peter Coll for the respondent in the hearing before me, in the course of their able and helpful oral and written submissions, disputed that view on the Commissioners' part.

[7] The view was formed on the part of the Secretary of State that the necessity of protecting the public made it inappropriate to release the applicant pursuant to the licence ordered by the Parole Commissioners with a subsequent reference to them under Article 9(1) of the Order. It is appropriate at this time to set out Article 9 –

> **"Recall of life prisoners while on licence**
>
> **9.** - (1) If recommended to do so by the Commissioners, in the case of a life prisoner who has been released on licence, the Secretary of State may revoke his licence and recall him to prison.
>
> (2) The Secretary of State may revoke the licence of any life prisoner and recall him to prison without a recommendation by the Commissioners, where it appears to him that it is expedient in the public

interest to recall that person before such a recommendation is practicable.

(3) A life prisoner recalled to prison under this Article -

(a) on his return to prison, shall be informed of the reasons for his recall and of his right to make representations; and

(b) may make representations in writing to the Secretary of State with respect to his recall.

(4) The Secretary of State shall refer the case of a life prisoner recalled under this Article to the Commissioners.

(5) Where on a reference under paragraph (4) the Commissioners direct the immediate release of a life prisoner on licence under this Article, the Secretary of State shall give effect to the direction

(6) On the revocation of the licence of any life prisoner under this Article, he shall be liable to be detained in pursuance of his sentence and, if at large, shall be deemed to be unlawfully at large."

[8] The concerns which had arisen in the way set out above led the Minister of State, acting on behalf of the Secretary of State, to conclude that it was necessary and expedient to utilise the Article 9(2) route to revoke the licence of the prisoner himself. In such an eventuality it will be noted that he then refers the case to the Commissioners under Article 9(4). Although some thought was given to this matter, it is averred, over the weekend the following steps were taken subsequently. On Monday 3 August a licence was granted pursuant to the direction of the Parole Commissioners of 29 July. But this was not served on the applicant. On Wednesday 5 August Governor Gary McClean in HMP Maghaberry served on the applicant that licence but also a further notice signed 5 August revoking that licence in exercise of the powers of the Secretary of State under Article 9(2) of the Order. There is no affidavit before the court from either the applicant or Governor McClean. The best evidence before the court is that of the applicant's solicitor on instructions from him to the effect that both of these notices were served "at the same time". This is relevant to one of the issues in the proceedings.

[9] It does not, in the event, affect the outcome of these proceedings but to serve the release and the revocation at the same time does not, in my view, comply with Art 9(1). The wording of the paragraph points strongly to a

revocation after release. For the purposes of this application it is not necessary to decide exactly what would constitute compliance. It might be sequential service in the prison. It might require the prisoner to be released with the service on him immediately outside the prison gates of the revocation notice. I am inclined to think the latter is the preferable course. That would meet the natural and ordinary meaning of the words. It would correspond with long-standing practice with regard to defective warrants and the like. It acts as a demonstration of the rule of law. It is, of course, not only a technical matter but one likely to arise only infrequently.

[10] These provisions have been the subject of recent consideration by the courts in Northern Ireland. I refer to the judgments of Girvan J in In Re William Mullan [2006] NIQB 30 and in In Re Fergal Toal [2006] NIQB 44 and of the Court of Appeal in In Re William John Mullan [2007] NICA 47. I have taken these judgments into account in arriving at my decision. In particular I find assistance in the judgment of Girvan J, as he then was, in In Re Mullan and I set out for convenience paragraph 14 of his judgment in that decision:-

> "[14] Article 9(1) and (2) must be seen in their proper context and read in the light of the principles emerging from Convention case law. As pointed out, the 2001 Order as a whole was the state's response to the Convention's requirement to create a properly balanced statutory mechanism that reflected the proper separation of powers between the executive and the courts in relation to dealing with life sentence prisoners. The Commissioners were intended to fulfil the purpose of providing an independent and impartial court or tribunal to oversee the exercise of power relating to the recall of the life sentence prisoner. The element of procedural guarantees in relation to the Commissioners' oversight of a recall of a prisoner negatives any element of inhuman or degrading treatment or punishment (see Lord Hutton in Lichniak at paragraph 37). The propriety of recall must be subject to independent assessment (per Lord Bingham at paragraph 16 in Lichniak). The recall of a prisoner released on licence deprives that individual of his actual liberty, even if in theory he remains a sentenced prisoner (see Weeks v United Kingdom (1988) EHRR 293). Accordingly, the lawfulness of his detention must be decided speedily by a court under Article 5(4). Mr Maguire correctly argued that the prisoner's Article 5(4) rights were intended to be catered for by the referral of his case to the Commissioners after revocation under Article 9. The revocation of his licence under Article 9(2) (which

triggered the right to have the legality of his recall investigated) constitutes a detention falling within Article 5(1), since the recall is in consequence of the alleged breach by the prisoner of the licence obligations fixed by the terms of his licence and release. Article 9(2) provides a procedure fixed by law for the recall of the prisoner. From the wording of the 2001 Order, Article 9(2) is intended to be an exceptional power, exercisable only when an Article 9(1) recommendation is considered to be impracticable and it is considered by the Secretary of State to be expedient in the public interest to recall the prisoner before an Article 9(1) recommendation is practicable. It is for the Secretary of State to satisfy the requirement of showing that it appeared to him to be expedient to recall in the public interest before an Article 9(1) recommendation was practicable. Nevertheless in considering the question, the court is not deciding the question whether in fact it was expedient or whether in fact it was impracticable to obtain an Article 9(1) recommendation, but whether the Secretary of State was acting so outwith the area of judgment called for in Article 9(2) that his decision can be categorised as irrational, arbitrary or otherwise unlawful. Applying the anxious scrutiny test (which I shall assume in favour of the applicant) I have not been persuaded that the Minister erred in law in making his decision to revoke the licence and recall the prisoner. The question as to what is expedient in the public interest before an Article 9(1) recommendation is practicable calls for a balanced judgment. What is required in the public interest requires an assessment based and a view taken as to the risk to the public that would arise from the continued liberty of the prisoner. That view is one that by the statute must be taken by the Secretary of State albeit subject to the judicial review powers of the court. In this case, faced with the police advice and the evidence against the applicant, the decision that it was expedient in the public interest to recall the prisoner is not one that could be regarded as an unlawful one in public law provided that the conclusion by the Minister was impracticable to seek a recommendation of the Commissioners under Article 9(1) was tenably reached."

[11] In applying the legal principles to be found in the statutory provisions as elucidated by my brethren I take into account the current practice of the Parole Commissioners. This was clarified for the assistance of the court by Mr Peter Smith CBE QC, Chief Parole Commissioner for Northern Ireland in a letter of 15 September 2009. He had been given the opportunity to become a notice party to this application but, entirely reasonably, was content to provide this letter for the assistance of the court. Mr Coll of counsel did not dispute the matter set out therein. From that one learns, no doubt following the decision in William Mullan, that the Parole Commissioners have a procedure in place whereby when a life sentence prisoner's case is referred under Article 9(1) of the 2001 Order the reference is dealt with by a single Commissioner within 24 hours from receipt. This is so even if the reference is furnished at weekends. Mr Smith goes on to say:

> "As far as the period 31 July/1 August is concerned I have no reason to believe that a reference could not have been dealt with within 24 hours of receipt."

[12] It can be seen therefore that the Minister of State was not justified in issuing a revocation pursuant to Article 9(2) to the extent that it was in fact "practicable" to obtain a recommendation from the Commissioners over the few days in question.

[13] However, Mr Coll relies on the words in Article 9(2), cited above by Girvan J, to the effect that the power rests in the Secretary of State "where it appears to him that it is expedient in the public interest to recall that person before such a recommendation is practicable". His submission is that it was not clear to the Minister and his advisers that they could ask the Commissioners for a recommendation under Article 9(1) while the prisoner was still in custody. On one reading of Article 9(1) the Secretary of State could only act after the prisoner had been released. Mr Coll, in effect, accepted the submission of Mr Sayers that the preferable reading of the paragraph was that, while no revocation could take effect until after the prisoner was released on licence there was nothing in the paragraph which prevented the Secretary of State seeking a recommendation before release. In support of that reading of the paragraph Mr Sayers pointed to Article 46 of the Criminal Justice (NI) Order 2008 which provides inter alia that the Parole Commissioners:

> ". . . shall advise the Secretary of State with respect to any matter connected with the release or recall of prisoners referred to them under this Part or the Life Sentences (NI) Order 2001."

If so then logically the Secretary of State is entitled to seek their recommendation in advance regarding Article 9(1). It seems to me that that is the preferable reading of Article 9(1) and I so find.

[14] However Mr Alan Smyth in the affidavit filed on behalf of the applicant avers at paragraph 20 as follows:

> "It was and remains the respondent's view that Article 9(1) can only be engaged in circumstances where the prisoner concerned has actually been released under a life licence.For the reasons outlined in the foregoing it appeared to the respondent that it would not be in the public interest to allow the applicant to be released, that an Article 9(1) recommendation could only practicably come post release and that accordingly it was in [sic] expedient in the public interest to revoke the licence under Article 9(2) and recall the applicant to prison before a recommendations would be practicable."

It is now accepted by the respondent, as one might have thought was known at that time, that the Parole Commissioners could in fact respond within 24 hours. The court has taken the view that the reading of Article 9(1) by the Minister or his advisers was erroneous. However, I accept the submission of Mr Coll that that view could reasonably be taken as a proper interpretation of Article 9(1) and that therefore the Minister was acting not unreasonably and in good faith in invoking Article 9(1) because it appeared to him that it was not available to him and therefore it was expedient to recall Boyle under Article 9(2). I accept that that view was within the area of judgment called for by the Minister, even applying the anxious scrutiny test. I find the decision was therefore a lawful one.

[15] I accept the further submission of Mr Coll that, in any event, despite the technical flaw identified at paragraph 9, above the court should not in its discretion quash the decision of the Minister and grant certiorari. He submitted this because the facts were such that any single Parole Commissioner invited to make a recommendation under Article 9(1) would have inevitably reached the same view as the Minister. I find this submission well based as the evidence obtained by the Prison Service over these few days clearly went to the heart of the panel's previous recommendation that it was safe to release this man. I therefore decline to issue certiorari and find the decision of the Minister lawful, save for the very narrow issue of service on the applicant. I will hear counsel as to whether it is appropriate to make any Declaration with regard to the same or whether it is sufficient to let this judgment speak for itself.