

Neutral Citation No. [2010] NICA 5

Ref: **GIR7743**

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

Delivered: **12/02/10**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

**ON APPEAL FROM THE HIGH COURT OF JUSTICE
IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)**

Between:

STEPHEN BOYLE

Appellant;

and

SECRETARY OF STATE FOR NORTHERN IRELAND

Respondent.

MORGAN LCJ, GIRVAN LJ AND TREACY J

GIRVAN LJ

Introduction

[1] This is an appeal from an order of Deeny J who refused the appellant's application for a judicial review of a decision made on behalf of the Secretary of State under Article 9(2) of the Life Sentences (Northern Ireland) Order 2001

("the 2001 Order"). Mr Larkin QC appeared with Mr Sayers on behalf of the appellant. Mr Maguire QC appeared with Mr Coll on behalf of the Secretary of State, the respondent to the appeal. We are indebted to counsel for their clear and succinct submissions.

Factual background

[2] The appellant was convicted at the Central Criminal Court in Dublin on 11 July 1997 of the murder of Gerard Hagan and of assault occasioning grievous bodily harm of Mark Brown and Douglas McManus. On 10 May 1999 he was transferred to serve the balance of his imprisonment at HMP Maghaberry in Northern Ireland. In view of his transfer to this jurisdiction Article 10 of the 2001 Order came into play. Pursuant to that provision the tariff to apply in respect of the appellant was fixed at 13 years. Thus in the result the tariff was due to expire on 2 August 2009.

[3] In accordance with relevant procedures the appellant was released on pre-release licence from 9 January 2009 until May 2009. He breached the condition of his pre-release licence by reason of his possession and use of alcohol. He was however granted further release after a case conference in June 2009.

[4] In preparation for the expiry of the tariff period the appellant's case was considered by the Parole Commissioners ("the Commissioners") in July 2009. At a hearing before a panel of the Commissioners on 23 July the appellant emphasised his improving relationship with his former wife. He did not claim to have given up alcohol completely and did not propose to do so. The panel members laid considerable stress on the appellant's relationship with his former wife, daughter and mother. The panel reached the conclusion that he should be released on licence subject to a number of conditions. These included condition F prohibiting him from travelling outside Northern Ireland without prior permission of his assigned probation officer and condition H which included the obligation "to demonstrate acceptable control in the use of alcohol including at times of emotional stress and other pressure."

[5] Once the Commissioners directed the release of the appellant and so notified the Secretary of State Article 6(3) of the 2001 Order obliged him to release the life prisoner on licence. The duty to release under Article 6(3) is inevitably subject to the completion of a number of preliminary steps including the completion of the licence, the explanation of the terms of the licence to the prisoner, the nomination of the relevant probation officer and approval of the proposed home address of the appellant after release.

[6] Before completion of those steps the Prisoner Assessment Unit received information from the appellant's mother that the appellant had been

drinking in the street and shouting during his pre-release licence period. He tested positive to alcohol. In addition the appellant's mobile phone was found to record texts revealing that his relationship with his former wife was at an end. A prison officer learned that the appellant had a girlfriend during his pre-release licence period who had not been mentioned to the Commissioners. Nor had he disclosed that he intended to visit his brother in the Republic of Ireland without permission.

[7] Consideration was given by the Prison Service to what, if any, steps should be taken in light of these developments. The view was taken that the Prison Service was bound by the Commissioners' direction that the prisoner should be released on licence. A check was made with the Office of the Commissioners as to whether there was any further role which the Commissioners could play before the life licence was drawn up and issued. The Prison Service was informed by the Commissioners' Chairman that the view was taken that the panel's decision of 29 July 2009 had to stand and that if the Prison Service wished to recall the appellant the normal process would have to be followed.

[8] The view was taken by the Prison Service that, taking account of the necessity of protecting the public, it would not be appropriate to release the appellant pursuant to the licence ordered by the Commissioners hearing the matter to be addressed by a subsequent reference to the Commissioners under Article 9(1) of the 2001 Order. It was felt that this would have resulted in a period of delay before such time as the Commissioners would have been able to adjudicate on an application by the Secretary of State to make a recommendation as to the revocation of the licence. In view of the new information the view was taken that it would not be a sufficiently robust approach to the protection of the public to adopt the Article 9(1) route and await a reconsideration by the Commissioners leading to a recommendation thereunder.

[9] Mr Goggins MP, the Minister of State, decided that in the exceptional circumstances of this case it was necessary and expedient to apply Article 9(2). It was the respondent's view that Article 9(1) could only be engaged in circumstances where the prisoner had actually been released under a life licence.

[10] On 5 August 2009 the appellant was served with a life licence as directed by the Commissioners and immediately thereafter with a notice revoking the licence and recalling him to prison.

The relevant statutory provisions

[11] The Life Sentence Review Commissioners were renamed the Parole Commissioners for Northern Ireland by Article 46 of the Criminal Justice (Northern Ireland) Order 2008. By Article 46(2) it is provided:

“(2) In discharging their functions the Parole Commissioners shall -

- (a) have due regard to the need to protect the public from serious harm; and
- (b) have regard to the desirability of -
 - (i) securing the rehabilitation of prisoners; and
 - (ii) preventing the commission of further offences by prisoners.

(3) The Parole Commissioner 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 (Northern Ireland) Order 2001.”

[12] Article 6(3) and (4) of the 2001 Order provides -

“(3) So soon as -

- (a) the 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.

(4) The Commissioner shall not give a direction under paragraph (3) with respect to a life prisoner to whom this Article applies unless -

- (a) the Secretary of State has referred the prisoner’s case to the Commissioners; and
- (b) the Commissioners are satisfied that it is no longer necessary for the protection of the

public from serious harm that the prisoner be confined.”

[13] Article 8(2) provides -

“(2) The life prisoner subject to a licence shall comply with such conditions (which may include on his release conditions as to a supervision by a probation officer) for the time being be specified in the licence; and the Secretary of State may make rules for regulating the supervision of any descriptions of such persons.”

[14] Article 9 so far as material provides as follows -

“(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.

...

(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.”

The appellant’s case

[15] Mr Larkin QC argued that Article 6 imposed a duty on the Secretary of State to release the appellant as soon as two conditions are fulfilled, namely the expiry of the tariff and a direction by the Commissioners to release. The Secretary of State’s powers under Article 9 are circumscribed. The decision to revoke a licence and recall a prisoner to prison must ordinarily be taken by the Commissioners. The independent element that the recommendation route provides should not be departed from save in exceptional cases (Re Mullan’s application [2007] NICA).

[16] The Secretary of State had formed the view that the Commissioners had no power to revoke their decision to direct the appellant's release on licence because Article 9(1) could not be engaged until the prisoner had actually been released. Counsel contended that this was erroneous. The trial judge was wrong to conclude that the Secretary of State's view though wrong in law was a tenable interpretation of Article 9(1) so that the Minister was acting not unreasonably and in good faith in invoking Article 9(2) because it appeared to him that Article 9(1) was not available. Counsel argued that the same issue would arise under Article 9(2) as under Article 9(1). If the prisoner must be released before the Commissioners have power under Article 9(1) the same must apply in the case of Article 9(2). In fact, he argued, there was no restriction in obtaining a recommendation from the Commissioners in advance of a release. While the release of the life prisoner on licence is a trigger for the exercise of the powers conferred that does not mean that Article 9 is not engaged until the release on licence of the prisoner. The Commissioners had no power to revoke their directions but the Commissioners were not excluded from involvement in consideration of life prisoner cases in the period between the direction for release and the actual release. Such a hiatus could be dealt with by the Commissioners acting under Article 46 of the 2008 Order. Article 9 contained no statutory impediment on the Secretary of State seeking the assistance of the Commissioners in advance of the release. The Commissioners acted properly in informing the Prison Service that its decision of 29 July 2009 had to stand and if the Prison Service wanted to recall the applicant the normal process would have to be followed. If the normal process had been followed a recommendation could have been obtained and there was no reason to doubt that that could be obtained within a short period of time as indicated by the Chairman of the Commissioners. The Secretary of State's interpretation of Article 9(1) was wrong in law and, accordingly, he had acted on an incorrect legal basis. The judge further erred in concluding that in any event the court should decline to grant relief since the Commissioners would have been bound to make a recommendation under Article 9(1).

Discussion

[17] As Mr Maguire QC on behalf of the Secretary of State pointed out, this case relates to an unusual situation which is unlikely to arise often in practice. It raises the question of what should be done when the Commissioners have reached a determination that a life sentence prisoner should be released and have so informed the Secretary of State but before the release takes place matters arise that call into serious question the correctness of the Commissioners' conclusion on the material which it had before them which did not include the subsequent matter. It was common case that once the Commissioners had made a determination and issued a direction under Article 6(3) they had no jurisdiction to recall their direction which remained binding on the Secretary of State thereby obliging him to follow the statutory steps required relating to the release of the prisoner.

[18] Faced on the one hand with a binding decision of the Commissioners requiring that effect be given to the duty to release and, on the other, with fresh evidence persuading the Secretary of State that it is not in the public interest for the appellant to be at large, a decision had to be made by the Secretary of State as to what should be done in the circumstances. If the prisoner had in fact been released on licence, a revocation of the licence and recall to prison could properly occur if the Commissioners' recommended revocation under Article 9(1). That is the normal and appropriate route unless the Secretary of State may justifiably conclude that it is expedient to recall the release prisoner before such a recommendation is practicable. That decision would require the exercise of a judgment by the Secretary of State taking account of the proper considerations and would be subject to judicial review in accordance with the principles stated in Re Mullan's Application [2006] NIQB 30 and [2007] NICA 47.

[19] Article 9(1) empowers the Commissioners to make a recommendation for recall only after the prisoner has been released. There is presumption that Parliament does nothing in vain and accordingly the court must endeavour to give significance to every word of an enactment. It is presumed that if a word or phrase appears it was put there for a purpose and must not be disregarded. As Brett J stated in Storie v. Yeovil Corporation [1876] 1 CPD 691 at 701 -

"It is a canon of construction that, if it be possible, effect must be given to every word of an Act of Parliament or other documents; but if there be a word of phrase therein to which no sensible meaning can be given it must be eliminated."

[20] The words "in the case of a life prisoner who has been released on licence" are not words devoid of a clear and sensible meaning. Had they not appeared in Article 9(1) the Commissioners would clearly have had power to make a recommendation before actual release had taken place on foot of a direction. The provision does not include the necessary implication of additional words such as "or directed to be released under Article 6(3)." On the wording expressly adopted by the legislation the Commissioners could not under Article 9(1) make a recommendation in the case of the appellant whose release had been directed but not yet effected. Accordingly, we accept as correct Mr Maguire's argument that the Commissioners could not make a recommendation under Article 9(1). Nor can we accept the proposition that the position is altered by the provisions of Article 46 of the 2008 Order. The functions of the Commissioners include the general function of advising the Secretary of State in relation to the release and recall of prisoners under Article 46 of the 2008 Order, giving directions under Article 6(3) of the 2001 Order and the making of a recommendation under Article 9(1) of the 2001 Order. While it may have been open to the Commissioners to provide advice in relation to the

question of revocation and recall in respect of the appellant in the period between their direction and his actual release they could not make a recommendation under Article 9(1) for the reasons given. They did not purport to give advice when they were asked if there was any further role for them to play in the process and they indicated that the Prison Service should follow the normal process. They did not accordingly provide the Secretary of State with any advice as to what should be done.

[21] Mr Larkin contended that if Article 9(1) only confers on the Commissioners jurisdiction to recommend revocation of a licence if the prisoner is released, by the same logic the Secretary of State could only recall a prisoner under Article 9(2) if he has actually been released. There is however a clear difference between the wording of Article 9(1) and the residual power vested in the Secretary of State under Article 9(2). The Secretary of State has power to revoke a licence and recall the prisoner to prison. Article 9(6) makes clear that on revocation of a licence the prisoner is liable to be detained in pursuance of his sentence. Recall to prison confirms the requirement that the prisoner should be in prison. Article 9(6) clearly envisaged situations in which revocation of the licence may occur before the prisoner is at large, that is outside the confines of the prison where he should be detained. Physical and actual release is, accordingly, not a necessary preliminary to giving effect to the revocation of the licence. The powers of the Secretary of State under Article 9(2) accordingly are exercisable before actual release whereas the power under Article 9(1) cannot be exercised by the Commissioners because it is only exercisable after release.

[22] Faced with the situation in which he found himself the Secretary of State, in the absence of a recommendation by the Commissioners under Article 9(1), which was not practicable at the time, and without any advice from the Commissioners, was entitled to take the view that it was expedient in the public interest to revoke the licence which he was bound to grant to the appellant on foot of the unrevoked direction of the Commissioners under Article 6(3). The Secretary of State had ample material to lay the basis for a rational conclusion that the licence should be revoked and the appellant recalled to prison.

[23] Accordingly we must dismiss the appeal.