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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

CD's Application (No 2) [2011] NICA 21

IN THE MATTER OF AN APPLICATION BY CD (NO 2) FOR JUDICIAL REVIEW

Before: Morgan LCJ, Higgins LJ and Coghlin LJ

MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal from a decision of Weatherup J whereby he dismissed an application for judicial review of a decision by the Life Sentence Review Commissioners (now known as the Parole Commissioners) refusing to direct the release of the appellant, a life sentence prisoner. Mr Hutton appeared for the appellant, Mr Larkin QC and Mr Sayers for the respondent and Mr Maguire QC for the Notice Party, the Secretary of State. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] The appellant was convicted of murder in the early 1980s and sentenced to life imprisonment. He was released on licence in the late 1990s under section 23 of the Prison Act (NI) 1953. Some 10 months after his release he was arrested for alleged sexual offences on foot of allegations made by his two nieces and two days later the appellant's licence was revoked by the Secretary of State acting in accordance with section 23 of the 1953 Act. After a further 10 months, the Director of Public Prosecutions directed that no prosecution be pursued in relation to the alleged sexual offences but the appellant's licence remained revoked.

[3] On 8 October 2001 the Life Sentences (NI) Order 2001 ("the 2001 Order") came into force. On 29 November 2001 the Secretary of State made a reference to the Life Sentence Review Commissioners ("the Commissioners") to review the correctness of the revocation of the appellant's licence and the lawfulness of his detention in accordance with Article 9 of the 2001 Order. On 3 August 2005 a panel of Commissioners under the Chairmanship of Mr. Peter Smith QC ("the Smith Panel") determined that the sexual abuse had

been proved and that the risk was such that the appellant should remain in prison. The appellant sought judicial review of this decision on the grounds, inter alia, the Commissioners had used the wrong standard of proof for making the finding of fact that the sexual abuse had occurred. On 23 May 2006, the appellant's application for judicial review of the Smith Panel determination was refused. The appellant appealed that decision and, on 6 September 2007, the Court of Appeal upheld the appeal and quashed the determination of the Smith Panel on the basis that they had misdirected themselves on the standard of proof regarding the allegations of sexual offences. The Commissioners then appealed this decision to the House of Lords. The appellant cross-appealed on the grounds that the procedure adopted by the Commissioners was unfair, that he had been unlawfully detained in breach of Article 5(1) of the European Convention on Human Rights and that the delay had caused a breach of Article 5(4) of the Convention. On 11 June 2008, the House of Lords allowed the Commissioners' appeal, dismissed the appellant's application for judicial review and re-instated the Smith Panel's determination. The appellant was subsequently released by a Panel after a hearing on 7 October 2008.

[4] Following the decision of the Court of Appeal but prior to the decision of the House of Lords a fresh panel of Commissioners, this time under the Chairmanship of His Honour Judge Rodgers ("the Rodgers Panel"), was appointed to review the appellant's case in order to avoid any delay which could be caused by the ongoing legal proceedings. The matter was first listed for hearing before them on 4 January 2008. On that date it was indicated to the Panel by the Secretary of State's solicitor that he intended to call a witness, Dr Griffin, to deal with the forensic evidence relating to the recall allegations and then witnesses who would deal with risk but who had no evidence to offer on the truth or otherwise of the allegations that led to the recall. It was agreed that the witnesses solely as to risk would be heard on the basis of two hypotheses, that is, that the recall allegations were true or that they were not true. It was agreed by the parties that the lawfulness of the decision to recall the prisoner required to be determined. The chairman of the Panel averred that at no time was it indicated that the Panel's evaluation of risk would be made as soon as the witnesses called solely on the risk issue had given evidence without consideration of all other material in the case. The appellant takes issue with that for the reasons set out below.

[5] At the hearing on 4 January 2008 evidence on risk was given by Governor Allenby who was attached to the Lifer Management Unit and had previous experience of the appellant's case. She had prepared 3 reports dealing with the appellant's progress through the pre-release scheme. It was noted that he had failed to comply with an alcohol condition while staying for a weekend at hostel accommodation as part of his preparation for release. He had been returned to the prison as a result of that but was transferred to the Prisoner Assessment Unit (PAU) in November 2007. Despite his breach of

condition Governor Allenby concluded that the appellant was not a serious risk of harm to the community. She did, however, recommend a further period of 6 months supervision in the PAU.

[6] Dr Clare Byrne is a senior psychologist at Maghaberry Prison. She had prepared 3 reports on the appellant covering the period from 16 March 2007 to 18 October 2007. Her evidence was that the appellant could be safely managed in the community without significant risk of harm to the public with appropriate supervision. She also recommended a further period of 6 months in the PAU to protect his long term rehabilitation.

[7] The third risk witness was Mr McEvoy, a Probation Officer, who gave evidence on 12 March 2008. He noted that that appellant had been in a hostel for three months as part of his pre-release preparation and had responded well. He said that because the appellant continued to deny involvement in the recall offences there would always be the risk of sexual harm to children. He was assessed as a medium risk of reoffending because of that issue and his use of alcohol. Mr McEvoy recommended a further period of 6 months in the hostel as preparation for release. He noted that important supports were available to him at the hostel. He accepted that the appellant was being managed in the community subject to a tight package of supervision and monitoring but noted that if he were released on licence the prison assessment unit which was playing a key role in his managed return to the community would not be involved. Sexual attack was the only risk of serious harm about which he was concerned. The witness accepted that this assessment of risk was highly dependent on the accuracy of the recall complaint. That was not the position with the other two risk witnesses. If the recall complaints were not proved he would take a more lenient view. The transcript was not available immediately but the latter issue was recorded by the chairman who noted that the witness's view of risk would be more affected by the truth of the allegations than the other witnesses. We do not consider that anything material turns on this.

Statutory scheme

[8] Article 3(4) of the Life Sentences (NI) Order 2001 establishes the matters which the Commissioners must take into account in carrying out their functions.

> "**3.**-(4) In discharging any functions under this Order the Commissioners shall
>
> (a) have due regard to the need to protect the public from serious harm from life prisoners; and

(b) have regard to the desirability of –

(i) preventing the commission by life prisoners of further offences; and

(ii) securing the rehabilitation of life prisoners."

The duty to release certain life prisoners is set out in Article 6:

"6. - (1) …
(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.

(4) The Commissioners 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 should be confined.

(5) A life prisoner to whom this Article applies may require the Secretary of State to refer his case to the Commissioners at any time -

(a) after he has served the relevant part of his sentence; and

(b) where there has been a previous reference of his case to the Commissioners, after the end of the period of two years beginning with the disposal of that reference; and

(c) where he is also serving a sentence of imprisonment or detention for a term, after the time when, but for his life sentence, he would

be entitled to be released, and in this paragraph "previous reference" means a reference under paragraph (4) or Article 9(4)."

[9] Recall prisoners are dealt with in Article 9.

> **"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 –
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> (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.
>
> (5A)3 The Commissioners shall not give a direction under paragraph (5) 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…."

Article 11 provides that any life prisoner recalled under section 23 of the Prison Act (Northern Ireland) 1953 who was not a licensee at the appointed day would be treated as a recalled prisoner.

[10] Article 9(5A) was inserted by the Criminal Justice (NI) Order 2005 subsequent to the decision of Kerr J in Hinton's Application [2003] NIQB 7. That case held that whereas the Commissioners directing a release under Article 6(3) of the 2001 Order had to satisfy themselves pursuant to Article 6(4) that it was no longer necessary for the protection of the public that the prisoner be confined no such requirement was imposed under Article 9 when considering recalled prisoners. In respect of those prisoners the matters set out in Article 3(4) were the material considerations. Kerr J was not referred to the case of R(Watson) v Parole Board [1996] 1 WLR 906 in which in respect of corresponding English legislation the Court of Appeal ruled that since the task carried out by the Commissioners was the same whether under the equivalents of Article 6 or Article 9 of the 2001 Order the test should be the same and the Article 6(4) test could, therefore, be imported into the Article 9 cases.

[11] Following the hearing on 12 March 2008 the Commissioners wrote to the appellant's solicitors on 20 March 2008.

> "The Panel have considered your letter of 13 March and have asked that I reply to it. This case was referred to the Commissioners by the Secretary of State under Article 9(4).
>
> Para. 9(5) provides that where on a reference under para. 9(5) the Commissioners direct the immediate release of a life prisoner under this Article, the Secretary of State shall give effect to the direction.
>
> Para. 9(5)(a) [sic] provide that the Commissioner shall not give a direction under (5) unless they are satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner be confined.
>
> The Panel are aware that they have not heard all the evidence available in this reference.
>
> The Panel consider that it is not possible for them to reach a decision at this stage.
>
> The Panel believe that they are required to hear all the evidence available so that they can come to a decision:
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> (a) whether to direct the release of C D or not, and

(b) If his release was to be directed what licence conditions should be imposed on C D to ensure the protection of the public.

The Panel would ask that the legal representatives of the parties contact the Secretariat to arrange a further hearing date as soon as possible.

A copy of this letter is being sent to the Northern Ireland Prison Service on behalf of the Secretary of State."

The challenge

[12] The appellant submitted that since the Rodgers Panel was dealing with a referral made in November 2001 it erred in law in relying on the risk of serious harm test in Article 9(5A) of the 2001 Order which was not put in place until 2005. It was contended that the relevant considerations which the Panel should have taken into account were those set out in Article 3(4) of the 2001 Order which placed particular emphasis on the rehabilitation of the offender. The learned trial judge rejected the argument that Article 9(5A) could not operate retrospectively and in any event held that the risk of serious harm test in Article 6 should be implied in respect of recalled prisoners.

[13] Secondly it was submitted that in light of the evidence on risk received by the Panel there was now an obligation to secure the immediate release of the appellant in order to vindicate his Article 5(4) ECHR right to a speedy determination of the lawfulness of his detention. The appellant argued that the true import of the evidence was that the appellant could now be safely managed in the community and that his release was being unreasonably delayed by the need to put in place licence conditions which should already have been prepared. As a result the appellant had been unlawfully detained for the period between March 2008 and October 2008.

Consideration

[14] The respondent took the preliminary point that the effect of the decision of the House of Lords on 11 June 2008 was to render the Rodgers Panel a nullity as the House of Lords Order reinstated the decision of the Smith Panel. That outcome would be all the more surprising as the House of Lords were entirely unaware of the conduct of the Rodgers Panel. We do not consider that the submission affects the issues before us. It is common case that any order for release made by the Rodgers Panel on 20 March 2008 would have had legal effect leading to the release of the appellant. It is the failure to release at that time that is the subject of challenge. The appellant seeks vindication of the right for which he contends and his entitlement to a hearing

in respect of it could not be quashed by the subsequent decision of the House of Lords.

[15] In his consideration of the statutory background in Hinton's Application Kerr J stated at paragraph 24 that if prisoners sentenced in accordance with Article 5 of the 2001 Order were subject to the Article 6(4) test then it should apply equally to those who have been recalled. He was faced, however, with a concession on the part of the respondent that the provision did not apply to recalled prisoners and quashed the decision on the basis that the Article 6(4) test had been applied to a recalled prisoner.

[16] He had not been referred to R(Watson) v Parole Board (1996) 1 WLR 906. That was a case where the Parole Board considered the position of a recalled prisoner under the Criminal Justice Act 1991. The legislative scheme was similar to the 2001 Order. The public safety test was expressly set out in the provisions dealing with the initial review of prisoners but no such test was prescribed in relation to recalled prisoners.

[17] The court concluded that the Board's function on the initial review and the review after recall was the same, namely, whether to direct the release of the prisoner. It was bound to approach its task in the same way in both cases under the statutory scheme. We agree with the observations of Rose LJ that in both cases the need to protect the public is paramount. We consider, therefore that no criticism can be made of the imposition of the risk of serious harm test contained in Article 6(4) in a recall case irrespective of the applicability of Article 9(5A) of the 2001 Order.

[18] In any event we do not accept the submission that Article 9(5A) of the 2001 Order is not capable of being relied upon by the Commissioners because it is retrospective. This is a provision which provides for the future consequences of past events. The presumption against retrospective legislation is based on fairness and legal certainty which require that accrued rights and the legal status of past acts should not be altered (see R v Field [2003] 3 All ER 769). This provision is designed to secure the safety of the public and can only operate prospectively. It does not in our view interfere with accrued rights or the legal status of past acts. We do not, therefore, consider that it is retrospective. The appropriate approach to retrospectivity is that set out in The Boucraa [1994] 1 All ER 20 which requires the court to look at the degree of unfairness in the application of the provision in order to assess the strength of the objection to its application. In light of the prospective application of the provision and its public safety purpose we detect no such unfairness and consequently no objection to the provision in this case.

[19] The appellant's submission under Article 5(4) ECHR depends on the conclusion that the evidence of risk before the Commissioners must inevitably

have led them to the conclusion that it was no longer necessary for the protection of the public that the prisoner should be confined. In support of that submission Mr Hutton pointed to the fact that at the start of the hearings the chairman of the Panel had suggested a "back to front" approach where the evidence of risk would be taken before the evidence concerning the occurrence of the alleged incident. Although the appellant still maintained that he had not carried out the acts alleged he was prepared to adhere to licence conditions predicated on the basis that he probably did those acts.

[20] Although it is certainly arguable that the evidence of Governor Allenby and Dr Byrne did not disclose any risk such as to justify the continued detention of the appellant we cannot accept that the same can be said of the evidence of Mr McEvoy. He maintained his concerns about the risk of reoffending in relation to sexual assault and pointed to the tight package of supervision and monitoring provide by the PAU as a result of which the appellant was capable of being maintained in the community. He noted that the involvement of the PAU would cease on release on licence. The letter of 20 March 2008 makes it plain that the Commissioners wished to hear further evidence to enable them to decide whether they should direct the release on licence of the appellant and in light of the concerns expressed by Mr McEvoy we consider that they were perfectly entitled to take that course.

[21] We do not accept the appellant's argument on either of the grounds argued and in those circumstances the appeal must be dismissed.