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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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McCauley (James) Application [2012] NIQB 74

IN THE MATTER OF AN APPLICATION BY JOSEPH JAMES McCAULEY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DECISION OF THE PAROLE COMMISSIONERS FOR NORTHERN IRELAND

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TREACY J

Introduction

[1] The applicant challenges the decision by the Parole Commissioners on 13 January 2012 to revoke his licence.

Criminal Cause or Matter

[2] In the course of hearing the leave application on 15 February 2012, the question of whether this was an application in a criminal cause or matter arose. Counsel was afforded the opportunity to consider this question and to submit a note to the court within 7 days. They helpfully submitted a joint note on this issue which I have largely reproduced below. I am very grateful for the assistance received from counsel, Mr Sean Mullen, Mr Donal Sayers and Mr Peter Coll.

[3] Counsel agreed that this is **not** an application in a criminal cause or matter having regard to the decision of Carswell LCJ in Re Adair's Application [2003] NIQB 16 and the decision of the House of Lords in R v Parole Board, ex parte Smith and West [2005] UKHL 1.

[4] Adair concerned revocation of a licence and recall to prison pursuant to the Northern Ireland (Remission of Sentences) Act 1995 in which Carswell LCJ said:

> "2. I can deal briefly with the preliminary issue of the constitution of the court. Under RSC (NI) Order 53, rule 2 in a criminal cause or matter the jurisdiction of the court on or in connection with an application for judicial review is to be exercised by a Divisional Court consisting of not less than two judges. In Re Coleman's Application [1988] NI 205 the Court of Appeal adopted the opinion expressed in R v Hull Prison Board of Visitors, ex parte St Germain [1979] QB 425 at 453 that "to stamp proceedings as being of a criminal nature there must be in contemplation the possibility of trial by a court for some offence"; cf also Amand v Home Secretary [1943] AC 147 at 156, per Viscount Simon. Applying this test, I should be prepared to hold that the present issue was not a criminal cause or matter, on the ground that although the applicant was imprisoned for a criminal offence his licence and recall were a subsequent issue, which was not itself a matter which could lead to a criminal trial for an offence. My jurisdiction to hear the application as a single judge was, however, put beyond doubt by the parties' consent to my doing so, pursuant to Order 53, rule 2(6)".

[5] Subsequently in Smith and West the House of Lords considered the role of the Parole Board in the case of two determinate sentence prisoners whose licences had been revoked. Lord Bingham noted at para 26 that:

> "The sole concern of the Parole Board is with risk, and it has no role at all in the imposition of punishment: R v Sharkey [2000] 1 WLR 160, 162-163, 164",

and Lord Slynn at para56 said that:

> "As Lord Bingham of Cornhill has stated, a primary purpose of sentence after trial is to punish. That is an essential element of the sentence. In Amand v Home Secretary and Minister of Defence of Royal Netherlands Government [1943] AC 147, where the question was whether the Divisional Court's dismissal of an application was a `judgment in a criminal cause or matter,' Lord Wright said,

> `The principle ... is that if the cause or matter is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment such as imprisonment or a fine, it is a 'criminal cause or matter' (p162).
>
> Recall of a prisoner on licence is not a punishment. It is primarily to protect the public against further offences …".

[6] The present application arises out of the reference to the PCNI of the revocation of the applicant's ECS licence and his recall to prison. That process cannot itself lead to conviction or punishment, and accordingly this is not an application in a criminal cause or matter.

Re Murphy's Application

[7] Reference was made in the course of the leave hearing to Re Michael Murphy's Application [2011] NIQB 91, which concerned the revocation in England and Wales of a Determinate Custodial Sentence (DCS) licence, following the licensee's arrest in this jurisdiction on suspicion of aggravated burglary and his remand in custody. Murphy was heard by a Divisional Court. This appears to have been a consequence of the case's focus upon how time spent in custody on remand was to be treated for the purposes of the Treatment of Offenders Act (Northern Ireland) 1968, rather than as a consequence of the licence revocation aspect of the case. Murphy was therefore dealt with by a Divisional Court in accordance with the now-settled treatment of sentence calculation cases[1], and does not affect the conclusion that the present application is not a criminal cause or matter.

Background

[8] The applicant is a convicted sex offender on an Extended Custodial Sentence ("ECS"). He was sentenced on 18 June 2009 to 30 months custody and 36 months on license on 20 counts of gross indecency with young children. He was also made subject to a Sexual Offences Prevention Order ("SOPO") which prohibited him from:

(i) Associating with children or young persons under 18 years unless approved by Social Services;

(ii) Frequenting or loitering in places associated with child centred activities such as schools, playgrounds, amusement arcades or other

[1] See for example *Re Montgomery's Application* [2008] NIQB 130, *Re McAfee's Application* [2008] NIQB 142, *Re McIlwaine's Application* [2009] NIQB 91, *Re Rea's Application* [2010] NIQB 63, *Re Loughran's Application* [2010] NIQB 121.

places which by their nature are likely to attract or be frequented by children; and

(iii) Undertaking any activity in a paid, private, voluntary or charitable capacity which may afford him access to children or young persons under 18.

[9] The applicant was assessed in September 2010 as no longer posing a risk of serious harm to the public and, following a direction from a panel of Parole Commissioners, he was released on licence on 17 November 2010. The licence included the conditions that he must cooperate with Probation and permanently reside at Dismas House Hostel, Ormeau Road, Belfast, unless Probation approved an alternative residence. Other conditions included the requirements that he must not:

(i) Behave in a way which undermines the purposes of the release on licence (the protection of the public, the prevention of reoffending and the rehabilitation of the offender); and

(ii) Have unsupervised contact either directly or indirectly with children under the age of 18 or vulnerable adults without the prior approval of the probation officer.

[10] The applicant's recall was requested in a probation report dated 28 March 2011. The report outlined five areas of concern which indicated that the applicant presented a risk of serious harm which could no longer be managed in public. These areas included:

(i) That he was in a relationship with an adult female who was physically disabled in such a way that she resembled an 8-9 year old child, who suffered from a learning disability and who was assessed to be vulnerable.

(ii) Concerns about his use of the drug Viagra. There were concerns that the applicant's use of the drug was excessive and that this was an indication of sexual pre-occupation.

(iii) That he was alleged to have entered the Ormeau Park in breach of his SOPO.

(iv) That he had identified a property which he wanted to move into which backed directly onto a primary school. This was feared to be evidence of his inability to manage his own risk.

(v) That he had disclosed to his Supervising Probation Order that his sexual preference was for pre-pubescent female children.

[11] The applicant was duly returned to prison on 29 March.

[12] Following the recall, a further review by a single commissioner took place under Art 28(4) of the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order"). It is the responsibility of the individual commissioner to review and consider the case under Art 28(6)(a), ie whether it is necessary for the protection of the public that the prisoner continue to be confined. The single commissioner may make several directions: he may direct that the prisoner should not be released, he may direct that the matter be considered further by a panel of commissioners, or he may *provisionally* direct that the prisoner should be released, in which scenario the case must be further considered by a panel of commissioners who are empowered to make a *final* direction that the prisoner should be released.

[13] The single commissioner considered the evidence before him and made a provisional direction on 5 July 2011 that the risk of serious harm posed by the applicant had not increased significantly and that he should thus be released.

[14] At this stage, the 2008 Order directs that the matter should be passed to a panel of Commissioners within eight weeks for a final direction. In error the applicant was re-released on licence on the 6 July 2011 before the matter had been considered by a panel of commissioners.

[15] The error came to light on 2 October 2011 and was notified to the applicant's solicitors on the 4 October at which stage it was communicated to the solicitors that a panel of commissioners would be convened as expeditiously as possible to review the case.

[16] No response was received from the solicitors until 1 November 2011, whereupon an open hearing was convened for 4 November 2011. That hearing had to be postponed due to the illness of a witness and the hearing eventually took place on 15 December 2011.

[17] Having considered the evidence before them, the panel issued a decision on 11 January 2012 stating that the licence should be revoked. The applicant was returned to custody on 13 January 2012.

Grounds upon which leave is sought

[18] The applicant advances four grounds for challenging the decision of the Parole Commissioners to recall him into custody: (1) the decision is tainted by *illegality* due to the failure to follow the prescribed procedure mandated by Rule 6(3)(a) of the Parole Commissioners Rules (Northern Ireland) 2009 ("the 2009 Rules"). These rules stipulate that following a provisional direction from a single commissioner that a prisoner should be released, the case should be considered by a panel **in no more than 8 weeks** from the date of the provisional direction; (2) the decision is tainted by *procedural unfairness* for several reasons (a) the applicant was

mistakenly released due to a failure to follow the authorised procedure and (b) unacceptable and prejudicial delay since, it was asserted, had the panel convened and made a determination at that juncture (ie within the 8 week period rather than almost 6 months later) they would have confirmed the recommendation for release; (3) on the basis of the single Commissioner's decision and the applicant's subsequent release for 6 months without incident, it is asserted that the applicant has acquired a *legitimate expectation* of his release; and (4) the panel's decision of 11 January 2012 was irrational as it focussed on the risk assessment at the point of recall in March 2011 thus excluding consideration of the 6 months that the applicant was released without incident; furthermore the impugned decision also referred to a *disputed* breach of the SOPO (the Ormeau Park incident) listed for contested hearing which, relying on Olchov's (Dimitris) Application [2011] NIQB 70, he contended should not have influenced the outcome because it was disputed and unproven.

[19] The applicant also contended that the decision to recall him has prevented him from maintaining family visits and represents a disproportionate interference with his Art 8 rights.

Statutory Framework

[20] The relevant statutory framework in this case comprises Chapters 4 and 7 of the 2008 Order and the 2009 Rules.

[21] By virtue of Art 18 of the 2008 Order the DOJ is required to release on licence an ECS prisoner who has served the relevant part of his sentence and whose release has been directed by the PCNI. Art 18 provides:

> "Duty to release prisoners serving indeterminate or extended custodial sentences
>
> 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 Secretary of State 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 Secretary of State 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) P may require the Secretary of State to refer P's case to the Parole Commissioners at any time -

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

(b) where there has been a previous reference of P's case to the Parole Commissioners, after the expiration of the period of 2 years beginning with the disposal of that reference or such shorter period as the Parole Commissioners may on the disposal of that reference determine;

and in this paragraph `previous reference' means a reference under paragraph (4) or Article 28(4).

(6) Where the Parole Commissioners do not direct P's release under paragraph (3)(b), the Secretary of State shall

refer the case to them again not later than the expiration of the period of 2 years beginning with the disposal of that reference.

(7) In determining for the purpose of this Article whether P has served the relevant part of a sentence, no account shall be taken of any time during which P was unlawfully at large, unless the Secretary of State otherwise directs.

(8) Where P is serving an extended custodial sentence, the Secretary of State shall release P on licence under this Article as soon as the period determined by the court as the appropriate custodial term under Article 14 ends unless P has previously been recalled under Article 28.

(9) The Secretary of State may by order provide that the reference in paragraph (b) of the definition of `relevant part of the sentence' in paragraph (2) to a particular proportion of a prisoner's sentence is to be read as a reference to such other proportion of a prisoner's sentence as may be specified in the order."

[22] By virtue of Art28(2) of the 2008 Order the DOJ may revoke a prisoner's licence and recall him to prison, and if this is done, must refer the recall to the PCNI. It states:

"Recall of prisoners while on licence

28.-(1) ...

(2) The Secretary of State may revoke P's licence and recall P to prison—

(a) if recommended to do so by the Parole Commissioners; or .

(b) without such a recommendation if it appears to the Secretary of State that it is expedient in the public interest to recall P before such a recommendation is practicable. ..."

[23] The 2009 Rules prescribe the procedure to be adopted in considering such a reference. In the case of a recalled ECS prisoner, Part 3 applies (subject to Rule 25(a),

the effect of which is to substitute for specified prescribed periods of time a discretion vested in the PCNI to determine appropriate periods of time).

[24] The structure of the 2009 Rules involves the appointment under Rule 12(1) of a single Commissioner for the purpose of conducting proceedings under Rule 13. Rule 13 provides for consideration of the case by the single Commissioner, who is empowered by Rule 13(2) which states:

> "13.-(1) ...
>
> (2) The single Commissioner shall either:
>
> (a) provisionally direct that the prisoner be released;
>
> (b) provisionally direct that the prisoner not be released; or .
>
> (c) direct that the case be considered by a panel appointed under rule 12(2).
>
> ..."

[25] The 2009 Rules do not provide for a final direction for release to be made by a single Commissioner. Rule 13(7) of the 2009 Rules provides, in so far as relevant, that:

> "... directions made under paragraph (2)(a) or (b) are provisional directions only, final directions shall only be made pursuant to Rules 16 or 17."

[26] Rule 16(1)(a) provides that in any case where the single Commissioner has made a provisional direction under Rule 13(2)(a) that the prisoner be released, the prisoner's case shall be considered by a panel appointed under Rule 12(2). Rule 16(2) provides that in the absence of agreement between both parties and the panel, such consideration shall involve an oral hearing. The panel is empowered by Rule 16(3) to make a direction – which is final – that the prisoner be released, or that the prisoner not be released.

Respondent's Submissions

[27] The respondent admits that the release of the applicant on 6 July 2011 pursuant to the provisional direction of a single Commissioner was an error and does not seek to avoid responsibility in relation to that error. It is submitted that this error deprived the release of any legal status or authority with the result that the

applicant was unlawfully at large between July 2011 and January 2012 (through no fault of the applicant).

[28] Upon realising their error the PCNI properly considered the matter and found that the statutory test that it was no longer necessary for the protection of the public from serious harm that the applicant be confined was not satisfied. In light of this it is submitted that his return to custody was –and always has been lawful.

Discussion

[29] The analysis of the legal situation put forward by the respondent is accepted. The initial release in July 2011 was *ultra vires*. In Ellerton v SOS for Justice [2010] EWCA Civ 906 Sedley LJ notes at para15:

> "A conditional licence for the release of a serving prisoner is an administrative act which is, on ordinary principles, not valid if issued without power".

[30] The consequence of this is to 'render the act incapable of ever having had any legal effect' quoted in Ellerton at para 19 per Lord Diplock in Hoffman-La Roche v Secretary of State for Trade and Industry [1975] AC 295. Clearly this has the effect that, through no fault of his own, the Applicant was unlawfully at large throughout the period of 6 July 2011 to 13 January 2012. This analysis must colour the responses to the issues raised by the applicant which are considered below.

[31] It is accepted by both parties (though not the Department of Justice) and the court that the initial release was an error and ultra vires the Parole Commissioner's powers. The Parole Commissioners, upon realising this, were then in an awkward position. To permit the Applicant to remain unlawfully at large without completing the full assessment procedure which must culminate in a final direction would be incompatible with their statutory duty expressed at Art 18(3) and (4)(b) of the 2008 Order, ie that a prisoner will not be released until the Parole Commissioners have (lawfully) directed his release on the basis that 'they are satisfied that it is no longer necessary for the protection of the public from serious harm that P should be confined...'. On the other hand to return him to custody *before* finalizing their direction, and on the basis of their own error, might be thought unfair.

[32] An analogous situation arose in Ellerton. At para 3 Sedley LJ observed:

> "Acting on the premise that Mr Ellerton had therefore been unlawfully at large for the 228 days of his mistaken release, NOMS recalculated his release date following his return to prison..... As the judge said at para15 of her judgement:

> Thus, despite the fact that (a) the administrative error was not his fault; (b) he was ignorant of the mistake; and (c) he was ostensibly released on licence pursuant to an official order signed by the relevant person, and made subject to stringent licence conditions, the effect of not counting the 228 days spent on licence towards his sentence is that Mr Ellerton had to spend an additional 7 months in prison. On the face of it that seems unfair."

[33] Sedley LJ continued in the next paragraph:

> "The question, however, is what, if anything, a court of law can now do about it?"

[34] The original release was *ultra vires*, the failure to follow the prescribed 8 week procedure flowed directly from that and the applicant was unlawfully at large. The Parole Commissioners continued to be bound by their overriding statutory duty to protect the public. The mistaken release could not have acted to absolve them from that duty. To permit the applicant to remain unlawfully at large without a completed assessment of the risk that he poses to the community would have been a further and more serious illegality. If the PCNI had so acted it would have amounted to a conscious and unjustified abrogation of their clear statutory duty exercised in the public interest and would have materially compounded the original error. Accordingly I reject the contention that the decision is tainted by illegality. For the same reasons I reject the applicant's complaint regarding delay.

[35] In terms of the legitimate expectation argument, there may be rare cases where fairness requires an expectation to be fulfilled, even where the public body exceeds its authority (see Rowland [2005] Ch.1 and De Smith's Judicial Review at 12-061-12-079). However just because a legitimate expectation has arisen, it does not necessarily follow that it must be fulfilled by the public body:

> "The protection of the public interest is entrusted to the representative bodies and to the ministers. It would be quite wrong that it should be pre-empted by a mistaken issue of a printed form – without any authority in that behalf... when the result would be to damage the interests of the public at large."
>
> Denning J at para 223 Cooperative Retail Services Ltd v Taff-Ely BC (1980) 39 P&C [see also De Smith at 12-067].

[36] The applicant was released on license only and was liable to be recalled at any time if it was assessed that the level of risk which he posed had significantly

increased and could no longer be managed in the community. His case appears to be that having been released for 6 months without incident he had acquired an expectation of [continued] release. This ignores the precarious and conditional nature of such release and his liability to recall. I very much doubt that an ultra vires act leading to the unlawful discharge of a prisoner who then (through no fault of his) is unlawfully at large could generate any enforceable expectation. Especially so when such an expectation would be fundamentally inconsistent with the legislative scheme and the overriding statutory duty imposed on a panel of Parole Commissioners to protect the public by completing an assessment of risk before making any final determination.

[37] Therefore even if (which I very much doubt) a legitimate expectation did in fact arise on the part of the applicant the Parole Commissioners would not be bound to yield to that expectation where to do so would be against the public interest which they are entrusted by statute to protect.

[38] I reject the applicant's irrationality challenge. The impugned decision is based on the panel's critical assessment of risk. I accept the respondent's contention that the PCNI panel did not determine the allegation of a SOPO breach (which is a matter for a criminal court) but properly considered, on the basis of evidence before them, whether facts were proved on the balance of probabilities that indicated that the risk posed by the applicant had increased since his original release on ECS licence and was at the time of recall significant. This is, I agree, the unobjectionable discharge of the PCNI's function.

[39] It is clear in the decision that the period from July was considered in assessing the risk posed by the applicant. The conclusion that the panel reached was that in that period there was not sufficient evidence to suggest that the heightened risk of harm which was evident at the time of recall had not reduced between July and January. The panel were empowered to reach a rational conclusion based on the totality of the evidence before them and I find no irrationality vitiating their decision.

[40] Art 8 is not engaged as the applicant is in lawful detention.

Conclusion

[41] For the reasons above I would dismiss this application.