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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY MERVYN MOON FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE PAROLE COMMISSIONERS FOR NORTHERN IRELAND DATED 15 JUNE 2020

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Mr Southey QC with David McKeown (instructed by GR Ingram & Co Solicitors) for the Applicant
Donal Sayers QC (instructed by Carson McDowell Solicitors) for the Respondent

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COLTON J

Background

[1] On 16 September 2008 the applicant pleaded guilty to the murder of MM, a 15 year old boy, and was sentenced to life imprisonment. At the time of the murder the applicant was 17.

[2] On 1 May 2009 his tariff was set at 10 years and his tariff expiry date was subsequently set as 5 May 2016.

[3] The applicant was released on licence on 8 May 2017. He was recalled on 31 October 2017.

[4] On 27 January 2020 his case was referred to the Parole Commissioners for Northern Ireland ("PCNI") under Article 6 of the Life Sentence (Northern Ireland) Order 2001.

[5] On 30 April 2020, a single Commissioner, appointed to consider the case provisionally directed that the applicant be released from prison. A panel of

Commissioners was appointed to consider the case in accordance with Rule 12(2) of the Parole Commissioners' Rules 2009.

[6] On 15 June 2020 the Commissioners determined that they should not direct the release of the applicant from prison.

[7] The panel directed that the applicant's case should be referred back to the Commissioners for further review within 6 months. The applicant's release was subsequently directed by a panel of Commissioners on 15 December 2020.

[8] In this judicial review the applicant challenges the decision of the Parole Commissioners of 15 June 2020.

Applicable Principles

[9] Essentially the appropriate legal principles are not in dispute.

[10] The statutory test under Article 6(4)(b) of the 2001 Order provides that the PCNI should not direct a prisoner's release on licence unless "*satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined*."

[11] This determination involves an evaluative judgement to which the concept of a burden of proof is inapt (see *R v Lichniak* [2002] UKHL 47 at [16] per Lord Bingham):

> "I doubt whether there is in truth a burden on the prisoner to persuade the Parole Board that it is safe to recommend release, since this is an administrative process requiring the board to consider all the available material and form a judgment."

[12] Within the cohort of those convicted of murder "*there will be those … who may reasonably be judged very unlikely to resort to violence again*": *Lichniak* at [15].

[13] The PCNI are to be concerned with the risk to the public assessed at the time of their decision, not at some earlier date (see *R(Gulliver) v Parole Board* [2007] EWCA Civ 1386 at [35].

The Applicant's Challenge

[14] In essence the applicant argues that, properly analysed, the PCNI decision under challenge in effect imposed a burden on the applicant that required him to prove that he was no longer a risk of serious harm, a burden which could only be met by further testing. Inter-related to this is what he says is a focus by the decision

maker on historic risk and not current risk. As a consequence it is argued that the PCNI has approached the statutory test for release in an incorrect manner.

[15] The respondent contends that a proper reading of the decision indicates that the PCNI panel applied the appropriate test. It fully set out the background and context of the decision. It had available to it a wide range of material which it properly considered. It evaluated that material and formed a judgement that there was "*a credible risk that the applicant might use serious violence again*" and that risk could not be safely managed in the community so that the protection of the public from serious harm could be assured. It is argued that this was an entirely lawful conclusion in light of the material before it and in no sense did it impose any improper burden on the applicant. It is submitted that the panel formed a rational evaluative judgement of the type envisaged by Lord Bingham in *R v Lichniak* [2003] 1 AC 903.

Consideration

[16] In circumstances where the legal principles are not in dispute this case turns on the court's analysis of the panel's decision.

[17] In analysing that decision it is apparent that the panel properly identified the legal test to be applied under Article 6 of the Life Sentences (Northern Ireland) Order 2001. As set out above, this provides that the Commissioner should not 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.** Although serious harm is not defined in the 2001 Order it has been defined by statute in Article 3 of the Criminal Justice (Northern Ireland) Order 2008 as "*death or serious personal injury, whether physical or psychological*." It seems this is a reasonable definition to be applied by the panel in its consideration of the applicant's release.

[18] As already indicated it is common case that no burden of proof is imposed on the applicant.

[19] Having identified the appropriate statutory test the panel sets out in detail the material available to it including oral evidence and submissions. This involved setting out the background to the index offence, a consideration of various reports prepared over the years, the applicant's personal background and the history of his release from prison on 6 May 2017, his return to prison on 13 October 2017 and the reasons for that together with his conduct in prison since that return.

[20] The panel considered in detail the most recent report from the Probation Board for Northern Ireland ("PBNI") dated 18 May 2020 which did not support the applicant's release as:

> *"Mr Moon has not provided sufficient evidence to address the concerns surrounding his ability to comply with the requirements of any licence."*

[21] In addition to the PBNI concerns at paragraphs 27-31 of the decision the panel referred to the psychological risk assessment carried out by the PBNI. It recorded that:

> *"In term (sic) of historical risk factors, a history of problem with violence, relationships, substance use, violent attitudes and treatment or supervision response were all found to be present and of high relevance. The history of problem with personality disorder ('avoidant' and 'anti-social') and traumatic experiences (relating to the aftermath of the index offence) were said to be present and of moderate relevance."*

The report also identified clinical risk factors evident within the last six months and the recent problem with treatment or supervision response.

[22] The author of the report considered that:

> *"Alcohol and drugs were found to be a precipitating factor in the index offence … the report noted that his feeling of having missed out was sufficiently strong as to outweigh his recognition of the potential negative consequences of breaching the requirements of supervision and that his strong desire to make up for lost time had led him to be less than open and transparent with supervision."*

[23] These were some of the factors which led to the PBNI report's conclusion.

[24] The key passages for the court's consideration are the reasoning of the panel set out in paragraphs 57-64, which I set out in full:

> *"**Reasons***
>
> *57. In applying the aforementioned test the panel has taken into account the principle in the case of **Re Foden Judicial Review** [2013] NIQB 2 that the correct approach regarding the assessment of risk is to apply the statutory test after having considered appropriate licence conditions. For reasons given below, having taken into account the oral and written evidence of all the witnesses as well as the submissions made, the panel is not satisfied (even with the imposition of licence conditions) that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined.*

58. The panel take the view, bearing in mind all of the circumstances, that for reasons given below Mr Moon is an offender who certainly has in the past posed a risk of serious harm. He is a convicted murderer. It is correct that Mr Moon is not currently assessed as presenting a significant risk of serious harm in line with PBNI's recently amended policy and it may not be "highly likely" that he will use serious violence again, as probation assesses. However, the panel is satisfied that there is a credible risk that in particular circumstances (involving, inter alia, alcohol and stress) he might do so.

59. Moreover, Mr Moon has not successfully completed the testing regime recommended for him and therefore the panel cannot be satisfied that the risks he poses have reduced and that he has built up the internal controls required.

60. In the judgment of the panel Mr Moon has placed an over reliance on external factors and controls (such as his nascent relationship with SL as well as his physical fitness regime) and there is a real risk that if he is released on licence now, without the necessary pre-release testing, he will return to consuming alcohol and drugs as a coping mechanism in the face of the increased stressors that he will likely face in the community.

61. In the absence of clear unambiguous evidence that Mr Moon no longer presents a risk of serious harm if released now on licence the panel can only consider release when confident that whatever residual risk of serious harm may remain can be safely managed in the community so that the protection of the public from serious harm can be assured. For reasons given the panel is not satisfied that this has been established.

62. The panel notes that no expert witness in this case recommended that Mr Moon be released on licence now prior to completing testing under the pre-release scheme. In the judgment of the panel progress under the pre-release scheme must occur (and be evidenced) before the panel can be satisfied that it is no longer necessary for the protection of the public from serious harm that Mr Moon should be confined. This is the view of the Probation Officer who gave evidence in the matter. In this case, the panel concludes that licence conditions are crucial to managing the risk posed by Mr Moon. However, he has failed to demonstrate that he can manage himself and comply with any licence conditions established to manage his risk.

> *63. The panel concludes that it has not been established that Mr Moon is ready to make the major, stressful step of returning to live full-time in the community. A successful period on temporary releases and progression through a pre-release scheme is essential to demonstrate that Mr Moon is able to comply with the conditions imposed to manage his risk.*
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> *64. In light of all the circumstances, the panel is therefore not satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined. The panel concludes that the Commissioners can only be so satisfied after testing and supervision in the community under the pre-release scheme is completed as recommended by the professional expert witness."*

[25] In analysing the panel's reasoning the court bears in mind the comments of Sir Brian Leveson in the well-known case of **R***(D) and another v Parole Board and another* [2018] EWHC 694 at paragraph 117 when he said:

> *"117. The evaluation of risk, central to the Parole Board's judicial function, is in part inquisitorial. It is fully entitled, indeed obliged, to undertake a proactive role in examining all the available evidence and the submissions advanced, and it is not bound to accept the Secretary of State's approach. The individual members of a panel, through their training and experience, possess or have acquired particular skills and expertise in the complex realm of risk assessment.*
>
> *118. The courts have emphasised on numerous occasions the importance and complexity of this role, and how slow they should be to interfere with the exercise of judgment in this specialist domain. In* ***R (Alvey) v Parole Board*** *[2008] EWHC 311 (Admin), at [26] Stanley Burnton J, neatly encapsulated the position as follows:*
>
> > *'The law relating to judicial review of this kind may be shortly stated. It is not for this court to substitute its own decision, however, strong its view, for that of the Parole Board. It is for the Parole Board, not for the court, to weigh the various considerations it must take into account in deciding whether or not early release is appropriate. The weight it gives to relevant considerations is a matter for the Board, as is, in particular, its assessment of risk, that is to say the risk of re-offending and the risk of harm to the public if an offender is released*

early, and the extent to which that risk outweighs benefits which otherwise may result from early release, such as a long period of support in the community, and in some cases damages and pressures caused by a custodial environment.'"

[26] The court therefore is cognisant of the expertise of the panel and considers that its decision should be read fairly in the context of that expertise.

[27] That different panels may have come to different conclusions based on the material before it is evident from the fact that the single commissioner in this case recommended release on 30 April 2020. In addition, the PCNI panel which considered the application on 15 December 2020 directed the applicant's release. The applicant points out that a consideration of that decision does not identify any significant change in the risk posed by the applicant compared with June 2020, and indeed, because of the restrictions imposed by the Covid-19 pandemic the applicant had not completed the testing envisaged as essential before a decision for release in June 2020. That this is so does not render the decision under challenge unlawful. This court does not sit as an appellant jurisdiction. It is open to two different public authority decision makers to both lawfully make different decisions based on the same information when applying the same test. The court asks the question whether the decision made was one that was open to a reasonable decision maker properly directing itself in law.

[28] Returning to the reasoning at paragraph 57 the panel identifies the correct approach, namely to apply the statutory test after having considered appropriate licence conditions. As Mr Sayers correctly points out the test for release can be met by an applicant in two ways. It may be considered either:

> *"(i) That the prisoner does not present a risk of serious harm; or*
>
> *(ii) That the risk of serious harm that the prisoner presents can be safely managed in the community."*

[29] In terms of assessing the risk the panel goes on at paragraph 58 to assert that the applicant is an offender "*who certainly has in the past*" posed a risk of serious harm.

[30] The applicant is critical of the focus and emphasis on the past risk of serious harm. The reference to "*certainly*" suggests uncertainty about current risk. This is followed by a reference to the fact that he is a convicted murderer which does not of itself necessarily mean that the applicant posed a significant risk when he committed the index offence, or more importantly, that he presents such a risk currently. Mr Southey argues that what is absent from the analysis of the offence is the extent to which it is indicative of a current risk. By way of contrast the decision of the

single commissioner dated 30 April 2020, which was in favour of release, when analysing the index offence states:

> *"The violence used in the index offence by Mr Moon while extreme, must … be considered in its context as an isolated incident committed some 14 years ago when he was an adolescent."*

[31] A similar approach is adopted by the PCNI panel on 15 December 2020 which directed the applicant's release. That panel, referring to the index offence in the context of risk, stated that:

> *"The only real evidence of actual serious harm the panel has before it is Mr Moon's role in the index offence. The panel are of the view that the index offence was probably a moment of madness by a 17 year old Mr Moon, who had consumed alcohol, who had taken cannabis and who was caught up in a pack mentality with a group of violent peers as they pursued the innocent victim."*

[32] The panel in the impugned decision acknowledge that Mr Moon is not currently assessed as presenting a significant risk of serious harm in line with PBNI's recently amended policy and it may not be "highly likely" that he will use serious violence again. Of course, this is not the test to be applied by the Parole Commissioners. It is well-established that the test for the commissioners is a different one from that applied at the sentencing stage with a lower risk to be established in the context of eligibility for release – *Sturnham v Parole Board (No.2***)** [2013] AC 254.

[33] The panel went on to say that in the absence of "*clear unambiguous evidence that Mr Moon no longer presents a risk of serious harm if released*" it could only consider release when "*confident*" that whatever residual risk of serious harm that may remain could be safely managed in the community. The panel concluded that it was not satisfied that "*this had been established*."

[34] The fact that he had not successfully completed a testing regime meant there was a risk that if released on licence without that testing he would return to consuming alcohol and drugs as a coping mechanism in the face of increased stressors was sufficient to persuade the panel not to direct the applicant's release.

[35] The suggestion that in the absence of "*clear unambiguous evidence that Mr Moon no longer presents a risk of serious harm if released*" allied to the assertion that the panel could only consider release when "*confident*" that whatever residual risk of serious harm may remain can be safely managed in the community led the panel to conclude that it was not satisfied that "*this has been established*."

[36] The applicants argue that by adopting this approach it erred in law by in effect imposing a burden on the applicant.

[37] This theme is reinforced by the contents of the subsequent paragraphs which refer to the applicant only being released if he "*establishes*" that he is ready to be released when he completes a "*pre-release scheme*." Resort by the panel to phrases such as the applicant has "*failed to demonstrate*" and "*it has not been established*" and "*the Panel is therefore not satisfied*" point towards the imposition of a burden of proof on the applicant.

[38] In assessing this matter the court bears in mind the expertise of the panel. It also recognises that different panels could come to different conclusions in what is a difficult evaluative judgement.

[39] The contents of paragraph 61 of the panel's reasoning caused concern for the court and persuaded it to grant leave for judicial review. Of course paragraph 61 should not be considered in isolation. At paragraph 58, the panel determined that it was satisfied there was a credible risk that in particular circumstances (involving, *inter alia*, alcohol and stress) the applicant might use serious violence again.

[40] The court takes the view that it was open to the panel to conclude that the index offence demonstrated that at that time the applicant did present a risk of serious harm given his conduct and the manner of the brutal assault on his victim. In addition, it was appropriate to recognise that the conduct was influenced by the fact that the applicant was under the influence of drugs and alcohol. There clearly was material upon which the panel could make that assessment.

[41] The panel did not say that this was determinative but was entitled to take it into account when assessing risk.

[42] The history of the applicant's conduct when he was granted temporary release, as evidenced by the requirement to revoke his licence, demonstrated that he was still vulnerable to using drugs and alcohol and unable to comply with licence conditions imposed to prevent such abuse. Thus, at paragraphs 59 and 60 the panel explained that it was not satisfied that the applicant had built up the necessary internal controls to avoid a return to using alcohol and drugs as a coping mechanism in response to increased stressors he was likely to face in the community.

[43] The decision was not based on a risk as at the time of the index offence but rather on the basis of all the material available to it. It is the court's view that all of this material was sufficient to establish a current credible risk. One can see that the panel could rationally reach that decision given the clear nexus between the applicant's abuse of drugs and alcohol and his violent conduct at the time he committed the offence. Previous licence conditions imposed did not prevent his use of alcohol and drugs. Therefore, the import of the paragraph 58 determination was that the applicant was not a person who did not present a risk of serious harm. In

those circumstances the panel could only recommend release if that risk could be safely managed in the community. Paragraphs 61 and 62 should be read in this context. Here again, the panel was making an evaluative judgement based on the material before it.

[44] Having identified the credible risk at paragraph 62, the panel confirms its view that "*licence conditions are crucial to managing the risk posed by Mr Moon*." Given the applicant's history, it was clearly open to the panel to conclude as it did that the applicant had "*failed to demonstrate that he can manage himself and comply with any licence conditions established to manage his risk*." Having reached these evaluative judgements and having critically examined the material before it the decision records that it was not considered by the PCNI panel that the risk of serious harm in the applicant's case could be safely managed in the community, and therefore the statutory test for release was not met. A full reading of the judgment indicates that no improper burden was placed on the applicant. Rather the panel came to a rational evaluative judgement based on all the material before it.

[45] The issue is not whether this court or a different panel would have reached a different decision, rather whether or not the panel has misdirected itself in coming to its evaluative judgement.

[46] Notwithstanding the concerns raised by the applicant which were sufficient to grant leave the court considers that the overall reasoning of the panel is capable of withstanding proper scrutiny.

[47] Analysing the decision as a whole and considering in particular paragraph 61 in context the court concludes that the grounds for judicial review have not been made out.

[48] Judicial review is therefore refused.