

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Olchov's (Dimitrijs) Application (Leave Stage) [2011] NIQB 31

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR
JUDICIAL REVIEW BY DIMITRIJS OLCHOV

AND IN THE MATTER OF A POLICY OF THE PAROLE COMMISSIONERS
FOR NORTHERN IRELAND

AND IN THE MATTER OF DECISIONS TAKEN BY THE PAROLE
COMMISSIONERS FOR NORTHERN IRELAND ON 4 FEBRUARY 2011 AND
2 MARCH 2011

TREACY J

Introduction

1. The applicant was given a determinate custodial sentence (DCS) on 8 March 2010 by which stage, as he was time served, he was released on licence pursuant to the duty imposed by Art 17 of the Criminal Justice (NI) Order 2008 ("the 2008 Order").
2. In circumstances which are not material for present purposes the applicant's licence was revoked, he was recalled to prison and his recall was referred to the Parole Commissioners for NI ("PCNI") under Art 28(4) of the 2008 Order.
3. By decision dated 4 February 2011 a single Commissioner directed that the applicant not be released but indicated that he could "request" an oral hearing which would not be provided unless his case satisfied certain criteria.
4. By Notice dated 17 February 2011 the applicant sought such a hearing and on 2 March 2011 the PCNI refused an oral hearing.

5. At the leave hearing Mr Hutton BL indicated that there were two limbs to the applicant's challenge and the Court agreed to deal with the first limb and to effectively postpone the second limb until I had ruled on the first. I had indicated I would give my judgment next Thursday but have however been able to bring the matter forward to today.

6. The core of the first limb of the challenge is the contention that the Parole Commissioners Rules (NI) 2009 ("the 2009 Rules") "require" the provision of an oral hearing to the applicant. This, in turn, gives rise to a net point of statutory construction as to whether the 2009 Rules apply to so-called DCS cases.

7. Mr Sayers, on behalf of the PCNI, furnished the Court with a very helpful note in relation to what his client submitted was the true scope of the Rules.

Legislative Context

8. Part II of the 2008 Order established a new sentencing framework including the introduction of indeterminate custodial sentences (ICS) and extended custodial sentences (ECS) aimed at public protection in the cases of dangerous offenders (see Art 13 and 14 of the 2008 Order). The 2008 Order also altered the manner in which DCS' would be served. By virtue of Art 8 automatic 50% remission was no longer available and instead sentences are comprised of a custodial element followed by a period of supervision in the community on licence.

9. By virtue of Art 17 of the 2008 Order as soon as a fixed term prisoner, other than a prisoner serving an extended custodial sentence, has served the requisite custodial period, the Department of Justice ("DoJ") is obliged to release the prisoner on licence. The PCNI have no involvement with this aspect of DCS cases. Their jurisdiction is confined to cases in which a DCS prisoner on licence is *recalled*.

10. By contrast Art 18 of the 2008 Order provides that, in the case of prisoners serving an ICS or ECS, as soon as the prisoner has served the relevant part of the sentence *and* the PCNI have directed the prisoner's release the DoJ must release the prisoner on licence. By virtue of Art 18(4) the PCNI shall not give a release direction unless the DoJ has referred the case to them and they are satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined.

11. Art 28 of the 2008 Order makes provision in relation to the recall of prisoners while on licence and applies, *inter alia*, to the recall of DCS, ICS and ECS prisoners. Art 28(2) provides that the DoJ [or the SoS] may revoke a prisoner's licence and recall him to prison if recommended to do so by the PCNI or without such a recommendation if it appears to the DoJ or SoS that it is expedient in the public interest to recall the prisoner before such a recommendation is practicable. Art 28(3) provides that the prisoner shall, on returning to prison, be informed of the reasons

for the recall and of the right to make representations in writing with respect to the recall [Art 28(3)].

12. Art 28(4) provides that the DoJ or (as the case may be) the SoS shall refer the prisoner's recall to the PCNI.

13. Rule 2 of the 2009 Rules, entitled "Application and Interpretation", provides:

"2.(1) Subject to Rules 25, 26 and 31(1) these Rules apply where a prisoner's case is referred to the Commissioners under Art 6 or 9(4) of the 2001 Order or Arts 18 or 28(4) of the 2008 Order".

14. The applicant's case was referred to the PCNI under Art 28(4) of the 2008 Order.

15. Part II of the 2009 Rules sets out the general powers of the commissioner. Part III which is entitled "Prisoners Cases" sets out an elaborate regime for dealing with cases which are referred to the Commissioners under which, *inter alia*, a prisoner is entitled to an oral hearing of his case where he has served a Notice in accordance with Rule 13(5) [see Ruler 17(2)].

16. When the case of a recalled prisoner is referred to the PCNI under Art 28(4) of the 2008 Order the 2009 Rules apply subject to Rules 25, 26 and 31. Of these Rule 25 provides for modifications to various Part III Rules which are to "apply as if for references to the periods of time specified there were substituted a reference to such period of time as the Commissioners, the single Commissioner or the Chairman of the Panel shall determine, keeping account of both the desirability of reaching an early decision in the prisoner's case and the need to ensure fairness to the prisoner; and (b) Rule 8(1) shall apply as if for the reference to the information and reports specified in Schedule 1 there were substituted a reference to the information and reports specified in Schedule II".

17. The 2009 Rules were made by the SoS in the exercise of powers conferred by Art 100(4) of, and para4 of Schedule 4(2), the 2008 Order. The Rules came into operation on 1 April 2009 and Rule 2 specifies the application and interpretation of the Rules and, as already observed, provides that subject to Rules 25, 26 and 31(1) these Rules apply where a prisoner's case is referred to the Commissioners under, *inter alia*, Art 28(4) of the 2008 Order.

Discussion

18. The applicant's case is that as a prisoner whose case was referred to the PCNI under Art 28(4) of the 2008 Order the Rules apply to his case. He submits, in effect, that the modifications introduced, in particular by Rule 25, substituting references to

time periods, does not otherwise affect the scope and application of Part III Rules to DCS recall cases.

19. The 2009 Rules contain no *express* provision as to the procedure to be adopted in relation to recalled DCS prisoners. That the 2009 Rules were *not* intended to apply to recalled DCS prisoners is clear from the absence of an applicable schedule providing for the information and reports to be submitted on a reference of a recalled DCS prisoner's case – see Rule 8(1) and Rule 25(b) and Schedule 1 Part A.

20. The title to Schedule 1 is “Information and Reports for Submission by the Secretary of State on a Reference to the Commissioners under Art 6 of the 2001 Order or Art 18 of the 2008 Order”.

21. The title to Schedule 2 is “Information and Reports for Submission by the Secretary of State on a Reference to the Commissioners under Art 9(4) of the 2001 Order or an *indeterminate custodial prisoner's* or *extended custodial prisoner's* case under Art 28(4) of the 2008 Order”.

22. Part III of the 2009 is entitled “Prisoners Cases” and sets down a series of prescribed timescales throughout the Part III Rules. [The effect of Rule 25A (in Part IV) was to substitute for those prescribed periods, in the case of prisoners referred to the PCNI under art.9(4) of the 2001 order or an ICS or ECS prisoner referred under 28(4), that time be set at the discretion of the PCNI taking account both of the desirability of reaching an early decision in the prisoner's case and the need to ensure fairness to the prisoner.] It is, in my view, clear that the timescales prescribed for Part III prisoner cases are inappropriate for the processing of DCS recall cases and cannot have been intended to govern such cases. The substitution of special rules for ICS and ECS cases makes this plainer still.

23. The Explanatory Note to the 2009 Rules states:

“These Rules prescribe the practice and procedure to be followed by single parole commissioners and panels of commissioners in dealing with the hearing of cases of life prisoners under the Life Sentences (NI) Order 2001 and indeterminate and extended custodial prisoners under the Criminal Justice (NI) Order 2008 (“the 2008 Order”) ...”

24. Bennion on Statutory Interpretation (2008, 5th Ed) pp265-266 states:

“Although an explanatory note attached to regulations is not part of the regulations it “is of use in identifying the mischief which the regulations were attempting to remedy”. Lord Hope of Craighead said “In my opinion an

explanatory note may be referred to as an aid to construction where the statutory instrument to which it is attached is ambiguous." This dictum needs to be construed widely. It may be necessary to refer to the explanatory note in order to determine whether the instrument is ambiguous or otherwise uncertain. As always, the primary need is to give the instrument an informed construction."

Conclusion

25. That the 2009 Rules were not intended to apply to DCS recall prisoners is, in my view, clear from:

(a) The absence of an applicable schedule providing for the information and reports to be submitted on a reference of a DCS recalled prisoner's case – see para20 above;

(b) The substitution in Rule 25 of special rules for ICS and ECS cases reinforces this view – see para19 above;

(c) The timescales prescribed for Part 3 prisoner cases are plainly inappropriate for the processing of DCS recall cases and cannot therefore have been intended to govern such cases – see para23 above.

(d) Insofar as the Rules are ambiguous (which I very much doubt) the Explanatory Note makes it abundantly clear, if it were not already so, that the Rules, whilst they apply to ICS and ECS cases, do not apply to DCS cases – see para24 above.

Accordingly I reject the applicant's submission that the 2009 Rules provide for a requirement of an oral hearing in the case of a recalled DCS prisoner. It therefore follows that the PCNI were, by virtue of Rule 3(1), entitled to regulate their own procedure in dealing with this matter as they considered appropriate. In recognition of the absence of express provisions as to the procedure to be adopted the PCNI have applied an "*interim policy on the processing of determinate custodial sentence cases (other than ECS cases) referred under Art 28 of the Criminal Justice (NI) Order 2008.*" In light of my conclusion rejecting the contention that the 2009 rules do not govern DCS recall cases the attack on the interim policy (as being inconsistent with the 2009 rules) must also fail.