

Neutral Citation No. [2011] NICA 73

Ref: MOR8390

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

Delivered: 20/12/11

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE
IN NORTHERN IRELAND

Olchov's (Dimitris) Application [2011] NICA 73

IN A MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR
JUDICIAL REVIEW BY DIMITRIS OLCHOV

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

Before: Morgan LCJ, Higgins LJ and Girvan LJ

MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal from a decision of Treacy J. The appellant challenged the decision of the Parole Commissioners for Northern Ireland (the Commissioners), who refused to give him an oral hearing in relation to the decision to recall him to prison. He argued that the Parole Commissioners Rules (Northern Ireland) 2009 (the 2009 Rules) required the Commissioners to provide such a hearing. Although the issues in this particular case have now been resolved on other grounds we considered that the issue of the proper construction of the 2009 Rules is likely to recur and in those circumstances that it was appropriate to hear the substantive issues on the appeal. We granted leave.

Background

[2] The appellant was convicted at Omagh Crown Court on 8 March 2010 of one count of harassment. He was sentenced to a determinate custodial sentence under the Criminal Justice Order (NI) 2008 (the Order) of 18 months comprising a custodial period of 121 days and a 14 month licence period. He was released from court on 8 March 2010 as a time served prisoner subject to a licence issued under Article 17 of the Order.

[3] On 2 April 2010 the Secretary Of State revoked his licence under Article 28 (2) of the Order. On 8 November 2010 the appellant was taken into custody and consideration of his recall was commenced. On 30 December 2010 the Offender Recall Unit of the Department of Justice wrote to the appellant's solicitors advising that a dossier had been presented to the Commissioners to review the decision to recall him in accordance with the 2009 Rules. By written representations dated 21 January 2011 and 17 February 2011 the appellant's solicitors asked for an oral hearing. By decisions dated 4 February 2011 and 2 March 2011 the Commissioners refused to direct his release or convene an oral hearing panel.

The 2008 Order

[4] Chapter 3 of the Order established a hierarchy of sentences for dangerous offenders. At the top of the hierarchy are those sentenced to life imprisonment. The release of such prisoners continues to be subject to the Life Sentences (Northern Ireland) Order 2001 and they need not be considered further here. The second category of offenders is those subject to an indeterminate custodial sentence which is a sentence of imprisonment for an indeterminate period. In respect of such prisoners the court must impose a tariff which represents the minimum term which the prisoner must serve in custody. The third category of offenders is those in respect of whom an extended custodial sentence is imposed. Such a sentence comprises an appropriate custodial term and a further period for which the offender is to be subject to a licence. Chapter 2 of the Order provides for sentences of imprisonment for a determinate term for offenders who do not fall within the dangerousness provisions. Such a sentence comprises a period to be spent in custody, the requisite custodial period, and a period to be spent on licence. The period in custody must not exceed one half of the term of the sentence.

[5] Chapter 4 of the Order deals with the release of these prisoners on licence. In the case of an indeterminate custodial sentence the prisoner can only be released when he has served the tariff period and the Commissioners have 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 he should be confined. His licence remains in force for the remainder of his life subject to the power of the Commissioners to direct otherwise once a period of 10 years beginning with the date of his release has expired.

[6] In the case of an extended custodial sentence the prisoner may not be released until he has served one half of the period determined by the court as the appropriate custodial term and the Commissioners have directed his release applying the same test as that for those subject to an indeterminate custodial sentence. In the case of those subject to a determinate custodial

sentence once the prisoner has served the requisite custodial period he must be released on licence.

[7] Chapter 4 of the Order also deals with the recall of prisoners while on licence. The Secretary of State may revoke a prisoner's licence and recall him to prison if recommended to do so by the Commissioners or without such a recommendation if it appears to him that it is expedient in the public interest to recall the prisoner before such a recommendation is practicable. In either case the recall is then referred to the Commissioners who can decide whether to direct the prisoner's immediate release on licence. If they so direct, the Secretary of State must give effect to that decision.

[8] It can be seen, therefore, that the architecture of the Order provides for a determination by the Commissioners of the decision to release those subject to an indeterminate custodial sentence or extended custodial sentence by virtue of the imposition of that sentence. In the case of those subject to a determinate custodial sentence the Commissioners by contrast have no role in the decision to release. Where, however, a prisoner on licence has been recalled the Commissioners determine whether he should be released whatever the form of sentence imposed.

The 2009 Rules

[9] The 2009 Rules apply where a prisoner's case is referred to the Commissioners under Articles 18 or 28 (4) of the Order. Article 18 deals with the release of prisoners serving an indeterminate or extended custodial sentence and Article 28 deals with the release of prisoners who have been recalled. "Prisoner" is defined as including an extended custodial prisoner, an indeterminate custodial prisoner and a life prisoner. We accept that there is no reason to construe the definition of prisoner narrowly and that it also includes a prisoner serving a determinate custodial sentence. It follows, therefore, that we accept that the 2009 Rules apply to such prisoners.

[10] Part 2 of the 2009 Rules describe the general powers of the Commissioners. These provide that the Commissioners may regulate their own procedure in dealing with any matter as they consider appropriate. So far as is practicable they are to give priority to the consideration of cases under Parts 4 and 5.

[11] Part 3 is entitled "Prisoners' Cases". It provides a timetable for the hearing of cases referred under that Part and also contains a mechanism whereby a prisoner can require an oral hearing by a panel. The appellant's case is that this Part applies in relation to the consideration of whether he should be released subsequent to his recall.

[12] Part 4 is entitled "Recalled Prisoners". The subheading is "Recalled life, indeterminate and extended custodial prisoners". Rule 25 provides that where an indeterminate custodial or extended custodial prisoner's case is referred to the Commissioners under Article 28(4) of the Order the timescales prescribed by Part 3 can be amended to take account of the desirability of reaching an early decision on the case. It is common case that Part 4 has no application to recalled determinate custodial sentence prisoners.

[13] Part 5 deals with extended custodial prisoners who by reason of time served have less than 26 weeks left before they will have served one half of the appropriate custodial term. In those cases also the timescales are amended so as to ensure that the cases can be dealt with more speedily. It is again common case that Part 5 does not apply to those subject to determinate custodial sentences.

Consideration

[14] The interpretation of the 2009 Rules must be informed by the powers and duties conferred upon the Commissioners by the Order. The Order engages the Commissioners in two classes of cases; firstly, those cases where by reason of the sentence imposed by the court the Commissioners are required to make a determination of dangerousness; secondly, those cases where because of a recall when on licence the Commissioners are required to determine whether to release. In our view that distinction is repeated in Parts 3 and 4 of the 2009 Rules. Part 3 is concerned with the procedure applicable for the consideration of cases where the Commissioners are involved by reason of the sentence imposed. Part 4 is concerned with recalled prisoners.

[15] That distinction is confirmed when one examines the detail of the Rules. Rule 8, within Part 3, requires the Department of Justice to serve on the Commissioners and the prisoner or his representative the information specified in Part A of Schedule 1. Schedule 1 is entitled:

"Information and Reports for Submission by the
Secretary Of State on a Reference to the
Commissioners under Article 6 of the 2001 Order or
Article 18 of the 2008 Order"

The 2001 Order applies only to life sentence prisoners and Article 18 of the Order applies only to those serving indeterminate or extended custodial sentences. There is no express provision for the submission of information in relation to those serving determinate custodial sentences. That reflects the fact that the determination of the release date for such prisoners is a matter with which the Commissioners are not concerned. We do not accept that the general power to adduce further information contained in Rule 8 affects the force of this point.

[16] We also consider that the structure of the Rules as contended for by the appellant would be anomalous. The appellant accepts that Part 4 cannot apply to a person serving a determinate custodial sentence. Part 4 is designed to ensure that there is an expeditious hearing for those who have been recalled. If the appellant is correct a recalled prisoner subject to a determinate custodial sentence would be subject to the processes contained in Part 3 and would not be entitled to the benefit of the expedited provisions in Part 4. There is no sensible reason why prisoners subject to a determinate custodial sentence should be disadvantaged in this way.

[17] In coming to this conclusion we have not had to take into account the Explanatory Note accompanying the 2009 Rules. If we had been in any doubt we consider that the court would have been entitled to take into account that the Explanatory Notes indicate that the 2009 Rules were designed to prescribe the practice and procedure to be followed in dealing with the hearing of cases for life prisoners and indeterminate and extended custodial prisoners. In this case the Explanatory Notes might have been of assistance in identifying the object of the Rules (see R (Westminster City Council) v National Asylum Support Service [2002] 4 All ER 654).

Conclusion

[18] For the reasons given we consider that Part 3 of the 2009 Rules do not apply to recalled prisoners serving determinate custodial sentences. The practice and procedure for such prisoners is to be regulated by the Commissioners under their general powers in Part 2. Since the obligation to hold an oral hearing is only found within Part 3 of the 2009 Rules it follows that the appeal must be dismissed.