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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY MARK PATRICK TOAL FOR JUDICIAL REVIEW

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

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Before: Morgan LCJ, Stephens LJ and Maguire J

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MORGAN LCJ delivering the judgment of the court)

[1] This is an appeal from an Order of McCloskey J made on 20 December 2017 granting an application for judicial review and making a declaration in the following terms:

> **The court declares** that the discrete decision of the Parole Commissioners whereby the Applicant's application for the deferral of the Commissioners' final decision to enable a resumed hearing entailing oral evidence from specified professional witnesses to be conducted involved errors of law in the terms set forth below and was unlawful on the further ground that it deprived the Applicant of his right to a procedurally fair decision making process, thereby vitiating their substantive decision not to recommend the Applicant's release.
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> (i) The panel misunderstood the Applicant's adjournment application and, in consequence, failed to engage with its essence.
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> (ii) The panel's approach was not guided or informed by a consideration of all material factors, namely those identified at [29] - [30] of the judgment herein.

(iii) The panel failed to give consideration to the issue of procedural fairness to the Applicant.

(iv) The panel failed to acknowledge and appreciate the powers available to it deriving from the Parole Commissioners' Rules (Northern Ireland) 2009 as construed in Re CK's Application [2017] NIQB 34.

It is further declared that the Commissioners are under a public law duty to complete the next phase of their decision making in the Applicant's case as soon as reasonably practicable, which must entail a willingness to accelerate the extant timetable if reasonably feasible.

Mr Sayers appears for the appellant, Mr Southey QC with Mr Heraghty for the respondent and Mr Sands for the Department.

Background

[2] The respondent is 35 years old and prior to his arrest had been living an unstructured, transient lifestyle involving drug and alcohol misuse. On 6 July 2011 he entered a chemist's shop in Carrick Hill around 8.45 am and threatened the shop assistant with a knife telling him to open the safe. When told he could not because of a time delay safety device the respondent demanded tablets and cash from the till. He was given £40 and some boxes of co-codamol. He left the shop but was apprehended not far away by patrolling police officers. He spat at the police officers and damaged the police vehicle and radio by kicking it. He was found to have the knife concealed in his trouser leg.

[3] The pre-sentence report indicated that his father had little involvement in his upbringing after his parents separated when he was five years old. A positive relationship was noted with his mother. Behavioural problems were recorded from an early age and he was referred to the child psychology department of the Royal Victoria Hospital for assessment. At the age of nine he was referred to Foster Green Hospital where he would later claim to have been sexually abused. His mother's abusive partner had a negative impact upon him, introducing him to offending behaviour. He left school at 14 without any formal qualifications and has reported problems with literacy and self-esteem. Drugs and alcohol have played a role in his life and it was noted that at times he was addicted to Temazepam, Diazepam, Cannabis and Cocaine. He reported his predominant addiction had always been alcohol. The respondent said that he had often been homeless and had lived in hostels or at a friend's house. He reported problems with local drug dealers or with people purporting to be from paramilitary organisations.

[4] His criminal record began with convictions for disorderly behaviour and underage drinking in 1997 when he was aged 13. The criminal record printout dated 10 April 2017 disclosed 104 convictions between 1997 and the convictions for the index offences in 2012. Of particular concern were the convictions for 13 robberies, 15 thefts, 19 burglaries, two aggravated burglaries and five serious assaults. There were multiple breaches of court orders.

Statutory Framework

[5] The sentencing regime for offenders convicted of specified offences such as robbery who present a serious risk of serious harm is contained in the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order").

> "14.—(1) This Article applies where—
>
> (a) a person is convicted on indictment of a specified offence committed after [15th May 2008]; and
>
> (b) the court is of the opinion—
>
> (i) that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences; and
>
> (ii) where the specified offence is a serious offence, that the case is not one in which the court is required by Article 13 to impose a life sentence or an indeterminate custodial sentence.
>
> (2) The court shall impose on the offender an extended custodial sentence.
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> (3) Where the offender is aged 21 or over, an extended custodial sentence is a sentence of imprisonment the term of which is equal to the aggregate of
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> (a) the appropriate custodial term; and
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> (b) a further period ("the extension period") for which the offender is to be subject to a licence and which is of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by the offender of further specified offences.
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> (4) In paragraph (3)(a) "the appropriate custodial term" means a term (not exceeding the maximum term) which—
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> (a) is the term that would (apart from this Article) be imposed in compliance with Article 7 (length of custodial sentences); or

(b) where the term that would be so imposed is a term of less than 12 months, is a term of 12 months….

(8) The extension period under paragraph (3)(b).. shall not exceed—

(a) five years in the case of a specified violent offence; and

(b) eight years in the case of a specified sexual offence.

15.—(1) This Article applies where—

(a) a person has been convicted on indictment of a specified offence; and

(b) it falls to a court to assess under Article 13 or 14 whether there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further such offences.

(2) The court in making the assessment referred to in paragraph (1)(b)—

(a) shall take into account all such information as is available to it about the nature and circumstances of the offence;

(b) may take into account any information which is before it about any pattern of behaviour of which the offence forms part; and

(c) may take into account any information about the offender which is before it. ”

[6] The release from custody of those serving an extended custodial sentence is provided for in Article 18 of the 2008 Order.

”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 a 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 Department of Justice 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 Department of Justice 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."

The Parole Commissioners' Hearing

[7] The Department referred the respondent's case to the Parole Commissioners on 13 February 2017. A panel was duly appointed in accordance with the Parole Commissioners' Rules (Northern Ireland) 2009 ("the 2009 Rules") and the hearing took place on 18 August 2017. As described by the learned trial judge the panel had available to it an extensive dossier on the applicant which included a Personal Development Plan ("PDP") Coordinator's report dated 26 March 2017 and a further report dated 14 August 2017. In addition a report from ADEPT was provided on the morning of the hearing. No witness was called by the Department and no request for any witness to give oral evidence was made by the respondent in advance of the hearing. The respondent was represented by solicitor and counsel and gave oral evidence.

[8] The report of 26 March 2017 concluded that the respondent was not suitable for release as at the date of the report. The PDP Coordinator considered that the respondent should complete his work with psychology and with ADEPT prior to any release. The most recent psychological report within the papers was dated November 2016 and did not recommend his release at that stage. The respondent had indicated that he did not consider that any of the interventions would influence

his current future reoffending and therefore they were not necessary. PBNI were concerned that his engagement was superficial and that he still had limited insight in relation to his risks. It was considered that further progress would be required on periods of unaccompanied temporary release ("UTR") before giving consideration to his release on licence.

[9] The updated report of 14 August 2017 noted that there had been a number of satisfactory accompanied temporary releases ("ATR") completed but on his return from his first UTR on 4 May 2017 he was placed in the Care and Supervision Unit ("CSU") due to suspicions of him being under the influence of substances and also in possession of prohibited articles. As a result he was suspended from the temporary release scheme. It was further reported that he had a number of adjudications recorded against him on 9 May 2017 in respect of good order and discipline and endangering health and safety, on 10 May 2017 for refusing a drug test and on 1 and 2 June 2017 for foul and abusive language and endangering health and safety. The updated report recorded that the respondent stated on 13 June 2017 that he did not wish to be considered for temporary release at any stage before he had finished his sentence. The ADEPT report indicated that he had participated in six sessions addressing drug and alcohol dependency issues between 8 June 2017 and 9 August 2017 and was considered to be at a stage suggesting that he was not thinking of using drugs and alcohol and was working to maintain a drug and alcohol free lifestyle.

[10] The PDP Coordinator explained that while the respondent's ACE score had risen to 44 he was no longer considered to meet the serious risk of serious harm test by PBNI. The report explained that the approach to the test by PBNI had changed and that it was only met in circumstances where there was a high likelihood of further offences causing serious harm. The report indicated, however, that the risks surrounding the respondent's offending had not dramatically changed or reduced and remained largely the same. This court has discussed the issues associated with that in Re Mark Toal No 2 where we have made it clear that the alteration in the assessment process by PBNI is not of itself material in determining whether it is no longer necessary for the protection of the public from serious harm that the prisoner be confined. There is also a tendency to characterise that test as requiring "mere" risk of serious harm. The addition of that adjective is misleading and should be discouraged.

[11] In his oral evidence the respondent indicated that as a teenager he found difficulties controlling his anger and emotions when intoxicated and his offending record began. Every offence was committed when he was under the influence of alcohol. He realised now that he had to deal with his alcoholism and wanted to be released to a residential treatment facility for alcoholics. He explained that he had visited his mother's grave during the UTR in May 2017. He was adamant that he had not attempted to smuggle drugs back into custody nor was he intoxicated, despite the impression of prison staff. He was taken to the CSU for monitoring but nothing was found. He claimed that he had accepted drugs that were pushed under his door

in the CSU by another inmate and had taken a number of "blues" while in that unit because he was down and emotional from the visit to the graveside.

[12] He had subsequently sought help for drug abuse from ADEPT. He accepted that his previous conduct made it look as though he was still involved in drugs and that it was the worst thing he could have done. He was asked to explain his comments to his case manager which implied that he wanted to drink after any release on licence on the basis that as an alcoholic it was inevitable he would drink. He felt he had been misunderstood. He said that he knew he needed help but was not getting the right help in custody.

[13] After the respondent was partway through his evidence his counsel asked for a short break to speak with him. After that the respondent's evidence continued touching on how he would avoid alcohol if released. Towards the end of the evidence the respondent indicated that rather than get knocked back he would prefer for the hearing to be adjourned for a few months so that he could get psychology to work with him and he felt he could do that within three months or six months and then come and present himself ready to be released. He repeated this on a number of occasions and at the end of his evidence his counsel made an application that the hearing should be adjourned so that oral evidence could be heard from PBNI, Psychology and ADEPT. The requirement for PBNI was said to be for explanation of the change of policy in the assessment of risk of serious harm but the documents available to the parties made that clear. Although no specific submission was made it appears that Psychology was required in order to demonstrate any improvement he had made and ADEPT was to reaffirm what was said about his then stage. The respondent's counsel also noted that pre-release testing seemed to be at the forefront of the panel's thinking and since the respondent's eligibility for that was on the horizon that was an additional benefit that could be derived from an adjournment.

[14] The panel decided that it should hear counsel's full submissions in the case and then make a determination as to whether or not it should adjourn. It noted that the application was for an adjournment of three months so that oral evidence could be taken from PBNI, Psychology and ADEPT about the risks posed by the respondent and secondly, he could engage in further work with psychology. Such a timescale could allow for some pre-release testing to occur.

[15] In its decision dated 25 August 2017 the panel rejected the adjournment application for three reasons:

(i) Three months would be insufficient to allow any significant pre-release testing to occur.

(ii) Secondly, the panel did not have the power to require witnesses to attend oral hearings.

(iii) Thirdly, the panel felt the position of the parties and witnesses was clearly set out in the dossier.

[16] The panel then set out its reasons for concluding that it was not satisfied that it was no longer necessary for the protection of the public from serious harm that the respondent be confined. It noted the pattern of his offending using weapons to threaten his victims and referred to the factors identified in the pre-sentence report when concluding that the respondent was a dangerous offender. There was limited evidence of any significant change since the last panel sat one year beforehand. There was some evidence of recent good behaviour but work with psychology needed to resume so that the respondent understood the risks he posed, the triggers to his offending and the strategies he needed to help make good choices and self-manage. His conduct in May 2017 showed how far he had to go. He had to spend time showing that he could implement what he has learned. He would have to be exposed to UTRs again and show that he could behave correctly. The panel considered it important to comment on the issue of a possible diagnosis of adult ADHD. The panel considered that it would probably take eight months to progress through ATR's and reach the stage of overnight testing at an approved hostel. Successful completion of that type of testing would be the best way for the respondent to demonstrate that he was ready. The panel then made a series of recommendations indicating that the case should be referred back not later than eight months from the date of their decision.

Provision for the attendance of witnesses

[17] Permission to apply for judicial review was granted on the basis that the panel misdirected itself in law in its approach to the attendance of witnesses at oral hearings. As the learned trial judge pointed out paragraph 1 of Schedule 4 to the 2008 Order notes that those appointed as Parole Commissioners possess expertise from a range of material disciplines such as psychiatry, psychology, law and others. The power to make procedural rules is set out at paragraph 4 of Schedule 4 and in particular provides a power for rules about the way in which information or evidence is to be given. The subsequent 2009 Rules in rule 3 gives a wide power to the Commissioners to regulate their own procedure on dealing with any matters they consider appropriate. There are provisions in relation to the documentation that must be provided and rule 15 provides that the panel may at any time adjourn the consideration of a prisoner's case for any purpose they consider appropriate and in doing so shall give such directions as they consider appropriate for ensuring the prompt consideration of the case. Rule 18 enables the chairman of the panel to give, vary or revoke directions for the conduct of a case allocated to the panel including directions in respect of matters such as adjournment of hearings and the calling of witnesses.

[18] Rule 21 makes specific provision for a party who wishes to call a witness. A written application should be made to the chairman of the panel which must be served on the other party at least six weeks before the date of the hearing giving the name, address and occupation of the witnesses whom that party wishes to call and the substance of the evidence that party proposes to reduce. The chairman must communicate the decision to both parties giving reasons in writing in the case of a refusal. Rule 22 dealing with oral hearings provides the parties may then call any

witnesses whom the chairman of the panel has authorised to give evidence in accordance with Rule 21.

[19] Unlike the corresponding Rules in England and Wales the 2009 Rules do not expressly provide a path for a panel of its own motion to call evidence. The issue arose for consideration before Maguire J in Re CK [2017] NIQB 34. That was a case in which a prisoner subject to a discretionary life sentence had served his tariff and was applying to the Parole Commissioners for release. The applicable test was the same as that in this case. Reports had been provided by a principal psychologist, Mr G. His reports were generally favourable to the applicant. He had not been called as a witness by either party and although he had attended prior to the hearing he then left as neither party had called him. In its decision the panel indicated that as no request had been made for Mr G to give evidence the panel was unable to hear from him. It considered that it would have been greatly assisted by hearing his evidence.

[20] Maguire J noted that rule 23 of the 2009 Rules provided for the oral hearing procedure and in particular stated that the panel should conduct the oral hearing in such manner as they consider most suitable to the clarification of the issues before them and generally to the just handling of the case. Although the 2009 Rules did not provide the panel with an express power to call witnesses it did not prohibit the panel from doing so. Rule 23 was a broad power designed to ensure fairness in the proceedings. In those circumstances it provided an adequate basis to ground the power of the panel to call a witness of its own motion where the failure to do so might cause a substantial injustice or a fundamental procedural unfairness.

[21] The learned trial judge made the point that the use of the panel power to seek the attendance of witnesses of its own motion was a requirement imposed by procedural fairness and that accordingly it was inappropriate to describe it by reference to exceptionality. We agree that there is not a separate test of exceptionality but the point being made by Maguire J was that given the structure of the 2009 Rules the intention was that Rule 21 would provide a fair basis for the conduct of parole hearings. It was important that adequate notice was given of the witnesses who were required firstly, in order to ensure their availability and secondly, to secure the fairness of the hearing by alerting the parties to the issues likely to arise at the hearing. It is also important to bear in mind that the 2009 Rules make provision through Rule 8 and Schedule 1 for the provision of extensive information and reports in relation to the prisoner which as we can see are highly detailed. It is unsurprising, therefore, that the use of the power to seek oral evidence by a panel of its own motion is likely to be rare.

[22] There was limited dispute about these matters in this case. It was also accepted that the panel did not itself have the power to require witnesses to attend oral hearings although it could have applied for a subpoena from the High Court if necessary. As the learned trial judge pointed out, however, the issue for the panel was not its power to require the attendance of witnesses but rather the means whereby the evidence of a relevant witness might be introduced. The evidence sought by the respondent was from public agencies and it was accepted that as a

matter of practice such agencies would respond positively to a request from the panel to present oral evidence.

[23] The learned trial judge concluded, therefore, that the second reason advanced by the panel for the refusal of the adjournment was not a material consideration and that the panel had left out of account consideration of how such oral evidence might be introduced whether by virtue of an application under rule 21 of the 2009 Rules for the proposed oral hearing in three months' time or alternatively by the panel directing the attendance of such witnesses of its own motion.

Consideration

[24] The starting point is to identify the parameters of the request finally made by the respondent at the end of the evidence and in the course of final submissions. Essentially there were three parts to the request before the panel:

> (i) The panel were asked to consider whether they were minded to find that they were not satisfied that it was no longer necessary for the protection of the public from serious harm that the respondent be confined. Obviously if they were satisfied that would have resulted in the planned release of the respondent.
>
> (ii) If the panel was not so satisfied it was asked to adjourn the hearing for a period of three months which the respondent said would have enabled some further pre-release testing to occur.
>
> (iii) The third element was connected to the second in that the respondent submitted that such an adjournment would also facilitate the provision of oral evidence from PBNI, Psychology and ADEPT at the adjourned hearing.

[25] We have set out at [16] above the reasons given by the panel for the conclusion that it was not satisfied that it was no longer necessary for the protection of the public from serious harm that the respondent be confined. These included the assessment by the panel that the events of 4 May 2017 indicated how far the respondent still had to go. The panel also concluded that the respondent would need to engage in pre-release testing which in their opinion would require a period of at least eight months. There is a reasons challenge which was rejected by the learned trial judge at the leave stage and which was renewed before us but in our view it is without merit for the reasons given by the learned trial judge.

[26] The panel is an expert tribunal. In R (Walker) v Justice Secretary [2010] 1 AC 553 at [20] Lord Hope stated that the way the Parole Board conducts itself must meet the requirement of procedural fairness. That did not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. That suggested that it was a matter for the judgement of the Parole Board to decide what information it needs to make its assessment and the timetable it should adopt for conducting its review. The panel was, therefore, perfectly entitled to take the view that a period of three months was inadequate for any pre-release testing that might enable it to take a different view. In light of the way in which the panel analysed the

need for pre-release testing it is difficult to see why this was not an independent reason justifying the adjournment decision.

[27] We note that the reason offered for requiring the attendance of PBNI at a subsequent hearing was to examine the reasons for its altered approach to the assessment of a significant risk of serious harm. In Mark Toal No 2 we explained that the enhanced test now adopted by PBNI does not correspond with the statutory test set out in Article 14 (1)(b)(i) of the 2008 Order for the imposition of an extended custodial sentence and in any event the decision of the Supreme Court in R (Sturnham) v Parole Board No 2 [2013] 2 AC 254 establishes that the test for the imposition of an extended custodial sentence is quite different from the test for release for the reasons explained by Lord Mance at [41]-[44] of that decision. There appears to be nothing of relevance to the decision of the panel which would be gained by the attendance of the PBNI for the requested purpose.

[28] We entirely accept, however, that the learned trial judge was correct for the reasons he gave to conclude that the panel had misdirected itself in the second reason it gave for refusing the adjournment. The respondent sought to introduce an argument on Article 5 ECHR to support that conclusion but we were satisfied that this decision is soundly based on common law fairness.

[29] It was submitted that in light of his finding the learned trial judge ought to have quashed the decision rather than issuing a declaration. This was a matter carefully considered by the learned trial judge and we see no error in this approach. Indeed the adjournment application was predicated on the basis that the panel was not satisfied that it was no longer necessary for the protection of the public from serious harm that the respondent should be confined. The directions which had been issued by the panel were undoubtedly likely to be of benefit to the respondent. The option of a declaration was clearly well within the discretion of the judge.

Conclusion

[30] We are satisfied that the panel misdirected itself in law insofar as it relied on the assertion that the panel did not have the power to require witnesses to attend oral hearings in order to reject an application for adjournment of the panel hearing. We consider that a declaration to that effect should issue in substitution for that made by the learned trial judge.