

Judicial Communications Office

9 December 2025

COURT DELIVERS DECISION ON RELEASE OF PRISONERS ON A CONDITIONAL BASIS

Summary of Judgment

The Court of Appeal¹ today, held that the Parole Commissioners for Northern Ireland (“PCNI”) cannot lawfully direct the release of a prisoner on a conditional or contingent basis.

Factual background

On 27 April 2022, Martin McAllister (“the respondent”) was convicted of conspiracy to commit arson, being reckless as to the endangerment of life and received an extended custodial sentence (“ECS”) with a custodial element of two years and an extended licence term of two years. Having completed his two-year custodial term, he was released on 1 August 2023 to Trust accommodation which provided 24-hour supervision. Due to aggressive and unacceptable behaviours on the first night the accommodation was withdrawn. No suitable alternative accommodation was available to him and on 2 August 2023, the Probation Board for Northern Ireland (“PBNI”) sought his recall which was then recommended by a single Parole Commissioner for Northern Ireland (“PCNI”) and authorised by the Department of Justice (“DoJ”) Public Protection Branch.

The respondent’s case was referred to the PCNI on 8 August 2023. On 2 November 2023, the single commissioner provisionally directed that he should not be released. The respondent then exercised his right to have an oral hearing before a PCNI panel. A series of oral hearings ensued during which obtaining suitable accommodation for the respondent was the central feature. This necessitated a number of adjournments between December 2023 and September 2024 while attempts were made to source such accommodation.

The PCNI decision

On 19 September 2024, the PCNI panel delivered its decision directing the respondent’s release. The panel was satisfied that it was no longer necessary for the protection of the public from serious harm that Mr McAllister be confined and directed that he be released on licence. In reaching its decision, the panel concluded that Mr McAllister continued to pose a risk of serious harm, but that that risk could be managed with appropriate licence conditions provided he was placed in suitable accommodation. The panel concluded that Mr McAllister must permanently reside at an approved address identified by the Trust and supported by PBNI. Further that he must not leave to reside elsewhere without obtaining the prior approval of his probation officer.

The Criminal Justice (Northern Ireland) Order 2008

The legislative framework for the imposition of public protection sentences for dangerous offenders is set out in the Criminal Justice (Northern Ireland) Order 2008 (“the 2008 Order”). Article 18 imposes a duty on the Department to release a prisoner serving an ECS “as soon as” the

¹ The panel was Keegan LCJ, Colton LJ and McLaughlin J. Colton LJ delivered the judgment of the court.

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prisoner has served “the relevant part of the sentence” and the Parole Commissioners have directed his release under that Article. The relevant part of the sentence is one-half of the appropriate custodial term.

Article 28 of the 2008 Order makes provisions for the recall of prisoners after release while on licence and provides at Article 28(5) and (6) as follows:

“(5) Where on a reference under paragraph (4) the Parole Commissioners direct P’s immediate release on licence under this Chapter, the Department of Justice shall give effect to the direction.

(6) The Parole Commissioners shall not give a direction under paragraph (5) with respect to P unless they are satisfied that –

- (a) where P is serving an indeterminate custodial sentence or an extended custodial sentence and was not released under Article 20A, it is no longer necessary for the protection of the public from serious harm that P should be confined;
- (b) in any other case, it is no longer necessary for the protection of the public that P should be confined.”

The issue for the court was whether PCNI can lawfully direct the release of a prisoner under Article 28 of the 2008 Order on a conditional or contingent basis.

The court analysed the context and purpose of the 2008 Order in paras [28] – [54] of its judgment. It noted that the equivalent legislation in England & Wales was amended to omit the word “immediate” and to introduce a new power to make provision for reconsideration and the setting aside of Parole Board decisions:

“Self-evidently the use of the word “immediate” must be of significance. Parliament has chosen not to use a term such as “as soon as is reasonably practicable.” In our view, this arises from the fact that if the Commissioners conclude that it is no longer necessary for the protection of the public from serious harm that a prisoner should be confined then there is no lawful basis for his detention. He must be released. It will also be plain from the legislation that there is a temporal element to the Parole Commissioners’ decision – “it is no longer necessary.” If they make a direction under Article 28(5) they must do so based on their assessment of risk at that time.”

The court then considered what is meant by immediate? It was accepted that, by definition, any direction under Article 28 will contain a degree of contingency or conditionality but immediate does not mean instantaneous:

“No prisoner who is released under Article 28(5) will be released without some conditions. Although it is for the DOJ to set licence conditions, the PCNI must ... take into account potential licence conditions. Article 24(3) of the 2008 Order provides that an ECS prisoner will be subject not only to standard prescribed licence conditions but also any other condition which is prescribed and which the DOJ sees fit to specify.”

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For the purposes of this appeal, two conditions set out in regulations which relate to the proposed residence of the prisoner are relevant: the first requires that all licenses contain a standard condition that the prisoner: “permanently reside at an address approved by the [supervising officer] and obtain the prior permission of the [supervising officer] for any change of address.” The second empowers the DoJ to include a “requirement that the prisoner reside at a certain place.” The court said the DoJ can therefore specify the precise address at which a prisoner must reside. Further, pursuant to Article 28(5), the DoJ may not include any discretionary condition or exercise its power to add, vary or cancel conditions, without prior consultation with the PCNI.

Accordingly, unless the address is specified in the licence, the problem which arose in this case is capable of arising in every case unless the address at which the prisoner will reside is known at the time of the PCNI hearing or sufficient information is known about the availability of suitable accommodation. Where the prisoner’s accommodation arrangements are material to the public protection risk, in the absence of information about the availability of suitable accommodation, it will be difficult therefore for the PCNI to discharge its functions. This is why the DoJ, PBNI, and other accommodation providers such as a Health Trust regularly contribute to or participate in PCNI hearings. The PCNI will then be in an informed position when assessing the likely effectiveness of the proposed release conditions and hence whether it is appropriate to give a direction for immediate release.

To give proper effect to the use of the word “immediate” and the purpose and context of the legislation it should be construed in such a way that any licence conditions attached to the direction are capable of being put in place in the immediate future as opposed to an indefinite time in the future. Where it is considered by the PCNI that a risk posed by the prisoner could be sufficiently mitigated by the use of conditions, they must therefore know the nature of the proposed condition. If the proposed condition is itself to be subject to future contingencies, assessments or decisions, the PCNI must have sufficient information and evidence to be able to satisfy themselves that the implementation of those conditions is either within the control of the DoJ or that any third parties within a sufficiently short period of time to enable the DoJ to facilitate immediate release of the prisoner, without further delay or uncertainty and consistently with the requirements of public protection. In a case where the proposed address proves problematic, what must be known is that at least one identified option in terms of address will be acceptable and be available to facilitate an immediate release.

The court acknowledged that administrative steps will be required to put the necessary arrangements for release in place and that “immediate” release does not mean “instantaneous” release. It said the DoJ must be afforded a short period of time to take the necessary administrative steps to ensure release without delay and it is impossible to prescribe a precise timescale, and the facts of any particular case will guide whether any delay in release is excessive. What is not lawful or permitted by the statute is that release depends on further contingencies, assessments or decisions by third parties, if their outcome or delivery is material to the risk posed by the prisoner. In such a case, there is an impermissible conflict between the duty of the DoJ to effect an immediate release of the prisoner and ensuring that the conditions necessary to mitigate the risks to the public are all in place.

The fundamental flaw in such an approach is that it means that at the time the direction is given the PCNI cannot say, as required by the statute, that “it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined.” Equally it cannot be said that it can be so satisfied at some unknown point in the future. The risk in such an approach is

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that a decision made at an indefinite period of time in advance of actual release is unable to take any account of changes to risk profile which may affect public protection considerations in the intervening period. It is simply impossible to make the necessary evaluative judgment on risk at an indefinite period of time in advance of actual release:

“In our view, a direction for “immediate release” under Article 28(5) of the 2008 Order cannot leave open a condition whose fulfilment is uncertain until such times as further assessments and/or decisions need to be taken to implement the condition if they are material to the risks posed by the prisoner. ... Prisoners could therefore experience both delay and uncertainty in achieving release, with limited scope for legal redress against those parties, particularly if the Department lacks the power to direct and control their actions. We note that in this case judicial review proceedings were threatened against both the Department and the Trust before [the respondent] was released. We do not accept that the legislature could have intended the potential for uncertainty or even arbitrariness of this nature to undermine a decision of the Commissioners to release a prisoner and we do not consider that it is consistent with the statutory requirement for immediate release.”

Counsel for the PCNI contended that the potential for a material change in risk to occur between the date of their direction and actual release could be addressed by means of releasing the prisoner on the original conditions but then making a recall decision. The court did not accept this. It said that in the first instance, it would appear to run entirely contrary to the statutory scheme, since it would involve the release of a prisoner in circumstances in which the risks posed by the prisoner had not been properly assessed. Second, it is not clear if or when the grounds for a recall might be established. The court did not accept that the release and recall of a prisoner is a mechanism which the legislature intended for addressing the potential of a material change in risk while a prisoner is awaiting implementation of a direction for release.

The court noted that the PCNI made a “recommendation” that release be on a “graduated” basis. It said that no such option is available as a direction under the 2008 Order. Since this was merely a recommendation and did not form part of the direction it is not amenable to judicial review. However, again whilst well-intentioned, it suggests that the panel was contemplating an approach which was ultra vires the 2008 Order.

The court suggested the matter can be resolved should the legislature decide to introduce the amendments that were made in England & Wales to cover this very scenario and that this is a matter for the DoJ to consider. It said, however, that it must apply the law as it stands.

Conclusion

The court concluded that the decision of the PCNI to direct the release of Mr McAllister in this case was unlawful as the PCNI cannot lawfully direct the release of a prisoner under Article 28 of the 2008 Order on a conditional or contingent basis.

The court said this does not mean that a prisoner should be released instantaneously with a direction for immediate release. It said the Order permits some time for administrative or logistical arrangements to be put in place to comply with conditions of release:

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“Article 28 of the 2008 Order does not permit the release of a prisoner on conditions which require future assessments, decisions or contingencies which are unknown at the time of the direction for immediate release, if these are material to the risks posed by the prisoner. Fulfilment of any condition which is necessary to mitigate the risks must either be within the control of the DoJ or the PCNI must have sufficient information to be satisfied that the relevant condition can and will be fulfilled within sufficient time to facilitate the immediate release of the prisoner, in the sense explained above.”

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available shortly on the Judiciary NI website (<https://www.judiciaryni.uk/>).

ENDS

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