Neutral Citation: [2017] NIQB 2 | *Ref:* **COL10146**

Judgment: approved by the Court for handing down | *Delivered:* **11/01/2017**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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16/84190/01

IN THE MATTER OF AN APPLICATION BY CL FOR LEAVE TO APPEAL FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS BY THE PROBATION BOARD OF NORTHERN IRELAND, THE PAROLE COMMISSIONERS FOR NORTHERN IRELAND AND THE DEPARTMENT OF JUSTICE

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COLTON J

Anonymity

[1] I have anonymised the name of the applicant in this case as he is a person who has been the victim of sexual abuse.

Counsel

[2] I am obliged to all counsel who appeared in this matter for their helpful submissions namely Mr Andrew Clegg for the applicant, Mr Matthew Corkey for the Probation Board for Northern Ireland, Mr Donal Sayers for the Parole Commissioners for Northern Ireland and Mr Philip McAteer for the Department of Justice.

Factual background

[3] The applicant is a determinate custodial sentence (DCS) prisoner. On 2 July 2015 he was sentenced to one year in custody followed by two years six months on licence. This resulted in a custody expiry date of 21 January 2016 and a sentence licence expiry date of 23 July 2018.

[4] The applicant was released on licence on 21 January 2016. Prior to his release the applicant states that he was informed by his probation worker that there were

two hostels available for him to reside in, one in Cookstown and one in Belfast. He states that he was further advised he would not be released to the hostel in Belfast as it contained sex offenders and he himself had been the victim of sexual abuse.

[5] On the day of his release he met with a community probation officer at a hostel in Belfast. He indicated to her that because he had been the victim of sexual abuse he had understood that he would not be required to stay in a hostel which housed sex offenders. After this meeting an officer of the Probation Board for Northern Ireland (PBNI) asked the Parole Commissioners for Northern Ireland (PCNI) to recommend whether the applicant should be recalled to prison.

[6] It is worth setting out the probation officer's account of this meeting in full as set out in the recall report. The report states:

> "I, his supervising probation officer Leslie Bell, met with CL at the hostel at 3.00 pm. (He had arrived around 2.30 pm). On introducing myself to CL in the corridor, I suspected that he smelt of alcohol, which he denied. I asked him would he submit to a breathalyser, which he agreed to then told me that he had consumed two pints before arriving at the hostel. The breathalyser showed 0.29 which staff would say suggests more than two pints of alcohol consumed.
>
> One of the Innis Centre social workers, Ms Brady and I then met with CL to complete the induction interview, which was to go through his licence conditions and conditions of stay at the hostel including no alcohol/drugs and curfews of 8.00 pm-10.00 am, in addition to checking in every two hours at 12 noon, 2.00 pm, 4.00 pm and 6.00 pm.
>
> CL had already been advised of the curfew and was adamant that he would not be keeping to this. He also objected to no alcohol/drugs as a condition of stay at the hostel stating that he was going out to drink some more and then get the bus to Derry the next day to see his children. I explained that if he chooses to go out and drink that he was placing himself in a breach of his licence due to the hostel conditions and that my understanding was that he was not to have contact with his children. He then said he would ring the social worker to arrange it for the next day. I advised that there would be a process to this and encouraged him to work with us and comply with his licence.

> At one point, CL got up and left the interview, agitated about no alcohol and hostel curfews. However, he returned a few minutes later and the interview resumed. I assured him we understood that he was finding the adjustment difficult and encouraged him to engage.
>
> CL became increasingly agitated, threatened to harm other residents who have convictions of a sexual nature and left the interview. He gave his room key to staff at the door and left the building. I waited for approximately 20 minutes to see if he would calm down, reconsider and return. Unfortunately, CL has not returned to the hostel and PBNI holds significant concerns about the increasing risk of serious harm due to his agitation and limited self-control of his emotions, his unwillingness to complete the hostel induction, him stating that he would not adhere to the condition of the hostel and that he would cause harm to other residents, CL's assessment by PBNI as being a significant risk of serious harm, as well as evidenced by his criminal record a propensity to engage in reckless, risk taking behaviour. Furthermore, CL's consumption of alcohol is assessed as an exacerbating factor in his ability to manage his risk and ability to make appropriate decisions. It has also been an aggravated factor in the majority of his previous offending."

The probation officer went on then to recommend the recall of the applicant under Article 28(2)(a) of the Criminal Justice (Northern Ireland) Order 2008.

[7] On 22 January 2016 the PCNI made a recommendation that the applicant should be recalled to prison.

[8] On 22 January pursuant to the PCNI recommendation the Department of Justice (DOJ) revoked the applicant's DCS licence under Article 28(2) of the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order"), and he was recalled to prison.

[9] The revocation of the applicant's DCS licence triggered the mandatory reference, by the DOJ to the PCNI, of the applicant's recall to prison; Article 28(4). This is the statutory mechanism by which the propriety of the applicant's detention is reviewed. The statutory test to be applied is provided for by Article 28(6)(b).

[10] On 20 April 2016, the solicitors for the applicant submitted written representations on his behalf in relation to the review of the recall decision. These representations were considered by a single Parole Commissioner and he directed that the applicant's case be considered by a PCNI Panel.

[11] A PCNI decision was delivered on 17 June 2016 by which the PCNI Panel declined to direct the release of the applicant. The Panel considered the written submissions made on behalf of the applicant who was represented by counsel at the hearing. The Panel heard further submissions on behalf of the applicant from counsel and heard evidence from the applicant and a community probation officer. The hearing took place on 10 June 2016 and a detailed written decision was issued on 17 June 2016.

The applicant's case

[12] The applicant seeks leave for judicial review in respect of a number of decisions namely:

(a) The decision by PBNI to issue a recall report in respect of the applicant on 21 January 2016.

(b) The decision of the PCNI to issue a recall recommendation in respect of the applicant on 22 January 2016.

(c) The decision of the PCNI made on 17 June 2016 whereby it refused to direct the release of the applicant.

(d) The decision of the DOJ to recall the applicant on 22 January 2016.

Legislative framework

[13] The recall of prisoners while on licence is dealt with in Article 28 of the Criminal Justice (Northern Ireland) Order 2008 which provides:

> *"**Recall of prisoners while on licence***
>
> ***28.** – (1) In this Article 'P' means a prisoner who has been released on licence under Article 17, 18 or 20.*
>
> *(2) The Secretary of State may revoke P's licence and recall P to prison –*
>
> *(a) if recommended to do so by the Parole Commissioners; or*
>
> *(b) without such a recommendation if it appears to the Secretary of State that it is expedient in the*

public interest to recall P before such a recommendation is practicable.

(3) P –

(a) shall, on returning to prison, be informed of the reasons for the recall and of the right conferred by sub-paragraph (b); and

(b) may make representations in writing with respect to the recall.

(4) The Secretary of State shall refer P's recall under paragraph (2) to the Parole Commissioners.

(5) Where on a reference under paragraph (4) the Parole Commissioners direct P's immediate release on licence under this Chapter, the Secretary of State 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, 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.

(7) On the revocation of P's licence, P shall be –

(a) liable to be detained in pursuance of P's sentence; and

(b) if at large, treated as being unlawfully at large."

[14] The Department of Justice now exercises the powers of the Secretary of State under Article 28.

Decisions of 21 and 22 January 2016

[15] I propose firstly to deal with the decisions set out in paragraph 12 (a), (b) and (d).

[16] The challenge to the decision by the PCNI to issue a recall report in respect of the applicant on 21 January 2016 is in effect a challenge to two decisions. Firstly the applicant challenges the decision to alter his hostel accommodation on the day of release and secondly the decision to issue the recall report itself. In relation to the former it is argued that the applicant had a legitimate expectation to be accommodated in a hostel in Cookstown and/or not be required to reside in the hostel in Belfast which accommodated sex offenders.

[17] In relation to the recall report the applicant's case is that it was procedurally unfair by virtue of the failure by PBNI to present relevant information which was within their knowledge. In particular it is his contention that the recall report failed to include information relating to the applicant's objections to residing at the hostel in Belfast or to the change of accommodation on the day of his release. It is submitted that the recall report did not put forward a balanced case to the Parole Commissioners.

[18] In relation to the decisions of 22 January 2016, namely the recall recommendation of PBNI and the Department of Justice revocation of the applicant's licence it could not be argued that these decisions were unreasonable when presented with the recall report. Any challenge to these decisions is dependent on establishing illegality in relation to the recall report. In short the applicant must contend that the decisions made on 22 January 2016 are infected by the alleged deficiency in the recall report.

[19] In my view the application for leave in respect of the decisions in January is fatally flawed for two reasons.

[20] Firstly insofar as the recall report itself is susceptible to judicial review there has been an unacceptable delay on the part of the applicant. A judicial review application was not lodged until 16 September 2016, some eight months post the decision challenged. Order 53 Rule 4(1) requires that applications for leave are "made promptly and in any event within three months from the date when the grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made".

[21] The delay can only be explained by the decision of the applicant to fully engage in the statutory mechanism provided by Article 28 of the 2008 Order which provides for the review of the propriety of the applicant's detention. The failure to challenge the January 2016 decisions by way of judicial review promptly means that the applicant's challenge in my view must now be confined to the decision of 17 June 2016.

[22] This leads to the second reason why the challenge to the January 2016 decision is fatally flawed.

[23] As set out above the applicant contends that the recall report resulted in a procedurally unfair decision to recommend a recall by the PCNI which resulted in the DOJ's decision to revoke the applicant's licence. However it is necessary to recognise that the consideration of the applicant's case by the PCNI was not confined to the making of the recommendation in January 2016. The applicant's case has been subject to a full review by a PCNI Panel which held a hearing at which the applicant was represented and gave evidence. Mr Sayers on behalf of the PCNI in my view rightly submits that this mandatory PCNI consideration of the case of the recall prisoner satisfies the requirements of procedural fairness.

[24] He refers me to the decision in *Re Toal's Application* [2006] NIQB 44 which was a case concerning the revocation of the licence of a life sentence prisoner under the comparable of the Life Sentences (Northern Ireland) Order 2001. In that case Girvan J (as he then was) accepted that there was "… no obligation on the Commissioners under Article 9(1) to seek the views of the prisoner or carry out a procedural investigation fulfilling the rules of natural justice. If a prisoner is recalled under article 9(1) his case is subject to full investigation under article 9(4) with the procedural safeguards that that rule provides." Similarly in *Re William Mullan's Application* [2007] NICA 47, Kerr LCJ (as he then was) agreed with the contention "… that the decision whether to recommend a recall should not be regarded as one that requires the deployment of the full adjudicative panoply".

[25] The applicant chose to fully engage in the review procedure. The concerns raised on the applicant's behalf about the recall decision were considered fully by the PCNI Panel who conducted the review. This was the method chosen by the applicant to raise the concerns about the original recall report and having done so I do not see how he should be permitted to now seek a judicial review of the January 2016 decision. The process under Article 28 has been completed. The applicant clearly took the view that he had an alternative remedy and he availed of it fully. In these circumstances I do not consider that he is entitled to seek to set the clock back and challenge the January 2016 decision.

The June 2016 decision

[26] I turn now to the decision of the PCNI made on 17 June 2016.

[27] I have had the benefit of reading the detailed ruling of the Panel. It is clear from that ruling that the Panel carefully considered a wide range of material. This included written submissions on behalf of CL, oral evidence from CL supplemented by oral submissions from his counsel and oral evidence from the community probation officer who initially recommended the applicant's recall. It also considered reports provided by the Offender Recall Unit (ORU) acting on behalf of the Department of Justice. The Panel had details of the applicant's criminal record and a copy of a pre-sentence report prepared by the Probation Service of Northern Ireland dated 29 June 2015. It also had a suitability for release report dated 23 February 2016 which identified significant risk factors relating to the applicant's

potential release. The Panel came to the conclusion that it was "NOT satisfied that it is no longer necessary for the protection of the public that CL be confined and therefore directs that he not be released at this time".

[28] I can find no fault with this ruling. It was clear that very careful consideration was given to all relevant factors in addressing the issue of the protection of the public. It is a well-reasoned and impressive ruling and could not be susceptible to any rationality challenge in my view.

[29] The applicant was clearly provided with a procedurally fair consideration of his case and the decision itself cannot be criticised.

[30] The Panel also expressly considered the issue of the applicant's recall and came to the conclusion that "his recall was justified". It came to this conclusion fully cognizant of the applicant's complaints about the omissions from the original recall report. It heard evidence from both the applicant and the probation officer in this regard and came to the entirely rational conclusion that the recall was justified.

[31] In the course of submissions the applicant focused on the issue of the original recall and the obligation of the Panel to consider whether that recall was justified.

[32] A considerable focus was placed on a reliance on Article 5(4) of the ECHR.

[33] Article 5 provides:

> *"Right to liberty and security*
>
> *(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*
>
> *(a) the lawful detention of a person after conviction by a competent court*
>
> *….*
>
> *(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."*

[34] There was considerable debate in the hearing as to whether or not Article 5(4) is applicable to the applicant's circumstances. Mr Clegg argued that on the authority *R (Smith and West) v Parole Board* [2005] UKHL 1, a recall of a prisoner on licence is in effect a "new" deprivation of freedom, thereby engaging Article 5(4).

[35] However the Supreme Court clearly departed from this reasoning in the case of *Whiston v Secretary of State for Justice* [2015] AC 176. In discussing this matter Lord Neuberger states at paragraph [38] onwards as follows:

> "[38] If one limits oneself to the decisions of the Strasbourg court to which I have referred, and the reasoning in Giles quoted above, the law appears to me to be clear. Where a person is lawfully sentenced to a determinate term of imprisonment by a competent court, there is (at least in the absence of unusual circumstances) no question of his being able to challenge his loss of liberty during that term on the ground that it infringes article 5(4). This is because, for the duration of the sentence period, 'the lawfulness of his detention' has been 'decided … by a court', namely the court which sentenced him to the term of imprisonment.
>
> [39] That does not appear to me to be a surprising result. Once a person has been lawfully sentenced by a competent court for a determinate term, he has been 'deprived of his liberty' in a way permitted by article 5(1)(a) for the sentence term, and one can see how it follows that there can be no need for 'the lawfulness of his detention' during the sentence period to be 'decided speedily by a court', as it has already been decided by the sentencing court. If that is the law, it would follow that Mr Whiston's appeal in this case must fail.
>
> [40] On this approach, article 5(4) could not normally be invoked in a case where domestic discretionary early release provisions are operated by the executive in relation to those serving determinative terms. I accept that, in the absence of clear Strasbourg jurisprudence, there would be an argument for saying that article 5(4) should apply in such cases. However, as already observed, the notion that the article is not engaged because of the original sentence appears entirely principled, and the consequence that a person under such a regime has to rely on his domestic remedies, at least unless other Convention rights are engaged, seems to me to be not unreasonable in practice.

> [41] However, the issue is complicated by the decision of the House of Lords that article 5(4) was engaged in West, because, if the legal analysis just summarised were correct, article 5(4) would not have been engaged in West. I am bound to say that the decision in West appears to me to be unsatisfactory in relation to article 5(4) - and, it should be emphasised, only in relation to article 5(4). First, although the relevant Strasbourg cases were cited in the judgments they were not followed on this point, and, save in the opinion of Lord Slynn, there was no explanation why not. Secondly, although Giles was referred to in argument, it was not cited in any opinion, and therefore no consideration appears to have been given to the observations of Lord Hope quoted above. Thirdly, at least in the four majority judgments it was not so much decided that article 5(4) was engaged; rather, it seems to have been simply assumed. Fourthly, in the fifth judgment, Lord Slynn's explanation as to why he departed from his initial view that article 5(4) was not engaged was, with respect, plainly unsatisfactory, as the Strasbourg decision he relied on, Weeks, was a case involving an indeterminate sentence."

[36] In light of the Supreme Court judgment in *Whiston* the height of any submission the applicant can make is that there is an argument for saying that Article 5(4) is engaged in this case. However even if it is engaged the Commissioner's Panel clearly examined the circumstances giving rise to the recall and came to the view that it was justified. Furthermore they went on to decide that the protection of the public called for the further detention of the applicant. This is not a case where they have failed to examine the lawfulness of the original recall. The opposite is the case. They considered evidence and submissions on the point and came to a rational conclusion, in my view. In fact the Panel has exercised a degree of supervisory responsibility over the original decision in the full knowledge of the deficiency complained of by the applicant. In this regard the comments of Sir Igor Judge in the case of *R (Gulliver) v Parole Board* [2007] EWCA Civ 1386 are particularly apposite. At paragraph [42] he states:

> *"Between them, however, the legislation and the authorities lead to the conclusion that the process by which the Parole Board considers the revocation of a prisoner's licence by the Secretary of State, and his consequent recall to prison, is a single process with at least two aspects.*
>
> *43. The decision of the Secretary of State is made on the basis of the information available to him. The decision of the*

> *Parole Board, to recommend or refuse to recommend immediate release, is made on the material available to it. This includes the material available to the Secretary of State, together with any further or additional material which may have come to light for the use of the Parole Board. The effect of this process is that the Parole Board exercises a degree of supervisory responsibility over the Secretary of State's decision and the process which led to it. Nevertheless, whatever its view of that decision, or the circumstances in which it was reached, it is with public safety in mind that the Parole Board must address and decide whether to recommend the release of the prisoner. It is not divested of that responsibility merely because of reservations about the original decision by the Secretary of State.*
>
> *44. The supervisory responsibility provides a valuable check on the original decision-making process. The recall order is examined by an independent body, the Parole Board. This provides a discouragement for the slovenly or the cavalier or the corrupt. It may very well be that in such cases, if they arise, the very fact that the process has been so characterised may lead to the Parole Board to conclude that the risk to public safety is not established. Nevertheless, in the end the decision required of the Parole Board must depend on its assessment of public safety. I doubt whether it is possible to envisage any circumstances in which the Parole Board can recommend release, where it would otherwise refuse to recommend release on public safety grounds, merely because of deficiencies in the revocation and recall process."*

[37] It is correct of course to say that Sir Igor goes on to say at paragraph [45] that

> *"There may, of course, be exceptional cases where the revocation decision process is so subverted that the prisoner may seek a different or separate remedy, by way of judicial review or, indeed, habeas corpus. In such cases the court may be satisfied that the Parole Board may not be able to provide an adequate or sufficient remedy. If so, it will deal with the application accordingly."*

[38] If this is the case made by the applicant then as I have already indicated he should have sought judicial review of the decision made back in January 2016. However I make it clear that I have not come to the view that this is such a case. The statutory and mandatory review undertaken in this case in my view provided a procedurally fair process to the applicant and the ultimate decision is not susceptible to a tenable challenge on the grounds being put forward by the applicant.

[39] Finally, I should point out that I do not consider the applicant has made the case that Article 28 is in some way incompatible with Article 5(4) of the Convention, in the sense that there is a different test for recall under Article 28(1) as compared with the test for review under Article 28(6). This case is not made in the Order 53 application and in any event would need to have been made promptly post the January 2016 decision.

[40] Accordingly, leave for judicial review is refused.