

*Life sentence prisoner – recall to prison – recommendation of Life Sentence Review Commissioners under Article 9(1) of Life Sentences (NI) Order – whether panel of Commissioner could make recommendation – whether full body of Commissioners had to consider matter.*

**Neutral Citation no. [2006] NIQB 44**

**Ref: GIRC5598**

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

**Delivered: 19/06/06**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN’S BENCH DIVISION (JUDICIAL REVIEW)**

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**IN THE MATTER OF AN APPLICATION BY FERGAL TOAL  
FOR JUDICIAL REVIEW**

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**GIRVAN J**

[1] The applicant, Fergal Toal, is a life sentence prisoner currently in custody at HMP Maghaberry. He was convicted of murder in Dublin in 1988 and was subsequently transferred to HMP Maghaberry. He was released on licence in May 2000 by a direction of the Secretary of State, his case having been considered by the Life Sentence Review Board. On 3 August 2005 his licence was revoked under article 9(1) of the Life Sentence (Northern Ireland) Order 2001 (“the 2001 Order”). This followed a recommendation by a panel of the Life Sentence Review Commissioners (“the Commissioners”) on 7 July 2005 that his license should be revoked with immediate effect. The substantive hearing of the applicant’s case before a panel of Commissioners has been listed for 14 June 2006.

[2] The applicant contends that the decision of the panel to recommend revocation had no lawful basis since the panel of three Commissioners did not have jurisdiction to make a recommendation under the 2001 Order or the procedural rules made thereunder. In consequence he contended the Secretary of State’s revocation of his license was tainted by illegality and the subsequent and ongoing proceedings of the Commissioners are unlawful.

[3] The point taken by the applicant is one that arose incidentally in the course of another judicial review case Re William Mullan [2006] NIQB 30. In that case the Secretary of State had revoked the prisoner's license under article 9(2) rather than under article 9(1). He so acted because he considered that it was expedient to revoke the license before a recommendation from the Life Sentence Review Commissioners was practicable. He considered that it was not practicable to obtain such a recommendation having regard to the urgency of the situation. The absence of any rule delegating article 9(1) powers to a panel of the Commissioners raised the question whether it would have been practicable to have obtained a decision of the Commissioners if they had to act collectively. It was unnecessary to decide the point for the court was satisfied that the Secretary of State had acted within his powers even if the powers under article 9(1) were exercisable by a panel of the Commissioners. In the course of the judgment I stated obiter:

“In practice it appears that panels are convened to deal with article 9(1) cases, a procedure which may be of questionable legality in view of the shortcomings in the procedural rules. It would appear that appropriate rules should be made as a matter of urgency and such rules could make provision for urgent cases. As matters stand when the minister had to make his decision there was a de facto practice of appointing a panel. I consider it is doubtful whether a single Commissioner could under article 9(1) make a decision, the wording of the 2001 Order pointing to the Commissioners acting as a body except to the extent that the rules empower them to act through a panel or individually.”

While it was not necessary to decide the point in that case, the present case raises the question in a form that requires a definitive answer. In this case the case was fully argued and I am indebted to counsel for their submissions.

[4] Under article 3(1) the Secretary of State is required to appoint Life Sentence Review Commissioners. So far as is reasonably practicable the Commissioners should represent the various fields of expertise referred to in article 3(2) (legal, psychiatric, psychological and expertise in the causes of delinquency, the treatment of offenders and the supervision and aftercare of discharged prisoners). In article 3(3) it is provided:

“The Commissioners shall -

- (a) advise the Secretary of State with respect to any matter referred to them by them which is

connected with the release or recall of life prisoners; and

(b) have the functions conferred by Part III.”

[5] Under article 4 it is provided:

“Schedule 2 (which makes provision about the procedure to be followed in relation to the Commissioners’ functions) shall have effect.”

[6] In Schedule 2 to the Order paragraphs 1 and 2 provide that the Secretary of State may make rules prescribing the procedure to be followed and the rules may provide for the allocation of proceedings to panels of Commissioners or for the taking of specified decisions by a single Commissioner.

[7] The Life Sentence Review Commissioners Rules 2001 (“the 2001 Rules”) were made pursuant to article 4 of Schedule 2 to the Order. By rule 2 these apply to the cases referred to the Commissioners by the Secretary of State under article 6 or article 9(4) of the Order. They thus do not deal with article 9(1) matters. Under article 9(1) it is provided:

“If recommended to do so by the Commissioners, in the case of a life prisoner who has been released on license, the Secretary of State may revoke his license and call him to prison.”

In relation to article 9(4) matters provision is made in rule 3 for the appointment of panels comprising three Commissioners one of whom as far as it is practicable will be a lawyer, one a psychiatrist or chartered psychologist and one representing the other disciplines. Under rule 6 the Commissioners may regulate their own procedure in dealing with each case as they consider appropriate but again that rule relates to matters other than article 9(1) matters.

[8] Mr Smith QC the Chairman of the Commissioners in his affidavit states in para. 2 and 3:

“2. Shortly after our appointment the Commissioners resolved at a plenary meeting that all references of cases of individual prisoners other than those referred under article 6 or 9(4) of the Order which would fall to be dealt with by panels appointed by me under rule 3 of the LSRC Rules 2001 would be processed by panels of three

Commissioners again to be appointed by me. Those panels would consist of a legally qualified Commissioner, one who was a psychiatrist or a psychologist and one draw from the group of Commissioners having a variety of other qualifications and backgrounds.

3. The only practicable alternative was the processing of such references by a single Commissioner. However, the Commissioners were concerned to ensure that in order to safeguard the rights of the prisoner the quality of the decision making would be at the highest possible standard and consistent with that which applied in cases referred under article 6 and 9(4). In relation to article 9(1) references, this was felt to be particularly important as a recommendation to recall would almost certainly mean that the prisoner would be returned to custody for at least a number of months while the consequence reference under article 9(4) of the Order was being processed."

[9] Mr O'Donoghue QC on behalf of the applicant argued that article 3(2) makes clear that the policy of the legislation is to ensure that the Commissioners as a body are representative of the five categories of expertise referred to in article 3(2). Under article 3(3) the Commissioners have the duties of advising the Secretary of State with regard to any matter referred to them connected with the release or recall of life prisoners and have the functions conferred by Part III. Article 4 empowers rules relating to functions. They do not therefore relate to advisory powers. The reference by the Secretary of State to the Commissioner to consider whether a recommendation should be made under article 9 (1) is in effect seeking advice from the Commissioners under article 3(3) and it is only the Commissioners as a body acting collectively who can give that advice. While panels can be established if the rules permit it that relates only to the exercise of "functions". In any event no power to appoint a panel under article 9(1) was established by the rules and in the absence of a rule permitting such a panel there was no implied or other right for the Commissioners to delegate their powers to a panel as happened in this case. While a panel might be entitled to look at the question and can make its views known to the Commission as a whole the Commissioners acting collectively were bound to make the recommendation to the Secretary of State.

[10] Mr McCloskey QC on behalf of the Secretary of State submitted that in the absence of prescribed rules it is open to the Commissioners to regulate their own procedure. In the absence of any statutory prescription or

inhibition they are free to act as they consider appropriate. The procedural dimension of the conduct of the Commissioners is ancillary to the substantive aspect. Counsel relied on section 37 of the Interpretation Act (Northern Ireland) 1957 which provides that words in the singular include the plural and vice versa. Under article 9(1) the Commissioners are called on to make a recommendation. This is unaffected by the number of Commissioners who contributed to its creation. The decision maker is the Secretary of State. Counsel also raised a delay point which he did not press.

[11] Mr Larkin QC on behalf of the Commissioners supported the arguments put forward by Mr McCloskey. In the absence of rules the Commissioners are free to regulate their own procedure. An article 9(1) recommendation is provisional only. It gains its weight from the reasoning of the relevant Commissioners' recommendation. Mr Larkin rejected Mr O'Donoghue's argument that the Commissioners in considering whether to make a recommendation under article 9(1) for carrying out an advisory function under article 3(3)(a). They were carrying out a function conferred by Part III. Mr Larkin relied on Re Crawford [1994] NIJB and Re Shuker [2004] NIQB 20 to support his argument that classical procedural fairness does not apply to the formulation of a recommendation under article 9(1) for reasons similar to those that relate to decisions about arrest and charging which interfere with liberty. Failure to provide an opportunity to make representations until after an adverse decision could not be regarded as procedurally unfair. There is a system of review under article 9(4) following recall to prison.

[12] In Sin Poh Amalgamated (MK) Limited v Attorney General [1965] 1 All ER 225 section 2 of the Hong Kong Commissioners Power Ordinance 1886 empowered the Governor and Council to appoint "Commissioners" to conduct any enquiry deemed advisable. Section 3, which dealt with procedural matters, gave Commissioners judicial powers of enforcing attendance of witnesses, compelling production of documents, punishing for contempt and ordering inspection of property and provided that a summons issued under the hand of the chairman or presiding member of the Commission should be equivalent to process issue in an action and that warrants for committal to prison should be under the hand of the Chairman or presiding member of the Commission. In 1963 the Governor and Council purporting to act under section 2 of the Ordinance appointed a sole Commissioner to conduct an enquiry into certain allegations and reports in the appellant's newspapers. The appellants claimed a declaration of the appointment of a sole Commissioner was ultra vires the Ordinance and that the appointment was null and void. The Full Court of Hong Kong applying the provision of the Interpretation Ordinance 1950 (which provides that the singular includes the plural and vice versa unless a contrary intention appears) held that the reference in the Commissioners Powers Ordinance to Commissioners in the plural included a sole Commissioner and that the

appointment was valid. The Privy Council upheld the reasoning of the Hong Kong court. Lord Pearce stated:

“If an Ordinance refers to Commissioners in the plural it is undoubtedly an alteration of its express intention if one reads it as referring to Commissioners or sole Commissioner. But the mere reference to the plural is not sufficient to show a contrary intention. If it were then the Interpretation Ordinance would never apply at all ... It is in the appointing power in section 2 of the Commissioners Powers Ordinance that one naturally looks first to see whether it contains any intention contrary to reading the plural 'Commissioners' as including the single 'Commissioner'. Beyond the bare fact that the plural is used the section contains no evidence of any such intention. If one inserts after the word 'Commissioners' the words 'or sole Commissioner' no difficulty is thereby created so far as that section is concerned.”

Lord Pearce then went on to state:

“There is nothing inherent in the Ordinance (apart from the mere fact that the plural is used) which is in any way unsuitable to the appointment of a single commissioner. There was nothing in the context of the Ordinance which could make the power to appoint a single Commissioner seem out of accord with the intentions of the legislature. Such a power would seem to be a useful means of carrying out the general purposes and intention expressed in the Ordinance.; and the fact that certain matters of procedure are drafted to suit the appointment of more than one Commissioner appears to be attributable to no more than the fact that the Ordinance is drafted in plural terms. The Interpretation Ordinance was intended to avoid multiplicity of verbiage and to make the plural cover the singular except in such cases as one finds in the context of the legislation reason to suppose that the legislature, if offered such amendment to the Bill, would have rejected it. Here their Lordships cannot find any such reason. There is thus no contrary intention sufficient to exclude the

operation of the Interpretation Ordinance and the appointment was validly made."

[13] It is true that Sin Poh was dealing with a different issue from the one arising in the present case but nevertheless it is of some assistance in arriving at the proper approach to the 2001 Order. Clearly a number of Commissioners must be appointed under article 3(1) to reflect the fields of expertise referred to in article 3(2). Thus a single commissioner could not be appointed. However, it does not follow that when carrying out its article 9(1) functions (and I am satisfied that article 9(1) gives rise to a function rather than relates to the more general advisory powers contained in article 3(3)) the Commissioners as a collective body must meet and decide the matter. As Mr Larkin argued, what the Secretary of State requires under article 9(1) is assistance from the Commissioners in arriving at the decision which the Secretary of State must take whether to recall the prisoner to prison. That assistance could be in the form of a recommendation based on an assessment carried out by one or more Commissioners. The force of the recommendation comes from the analysis carried out by the Commissioners who looked at the question. The context of the legislation does not point to a need to construe the plural "Commissioners" as solely a plural term. The Commissioners under article 9(1) are not governed by specific procedural rules. In the absence of specific rules there is no logical reason why a recommendation reached by the Commissioners could not include one reached by a Commissioner or a limited number of Commissioners since the plural term Commissioners includes the singular. In the absence of rules there is no reason why they could not organise their affairs in the manner in which they have in relation to article 9(1) matters. The requirement under the rules to establish three person panels for article 9(4) investigations would preclude an individual Commissioner making a decision and the requirement to have panels was clearly intended to enhance the decision making process. On its proper construction the requirement for a panel does not give rise to the inference that in the absence of a power to have a panel the Commissioners have to act as a body. The decision of the Commissioners to establish panels for article 9(1) cases falling outside the framework of the procedural rules which were not made to govern the situation was, as Mr Smith points out, intended to enhance the decision making process. Accordingly, notwithstanding the comments made in Re Mullan on a point which was not fully argued in that case I have reached a conclusion that the arguments put forward by the Secretary of State and the Commissioners are correct.

[14] For the reasons put forward by Mr Larkin I accept 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.

[15] In the circumstances I dismiss the application.