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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY TREVOR HINTON FOR

JUDICIAL REVIEW

KERR J

Introduction

[1] This is an application by Trevor Hinton, a prisoner currently serving a sentence of life imprisonment at HMP Maghaberry, for judicial review of the decision of the Life Sentence Review Commissioners refusing to direct his release under the Life Sentences (Northern Ireland) Order 2001.

Background

[2] On 22 May 1973 the applicant was convicted at Belfast City Commission of four offences including rape and murder. The circumstances of those offences are horrific even by the gruesome standards of many of the crimes committed at that time. The applicant was sentenced to life imprisonment on the charge of murder with a recommendation that he serve at least 20 years. He was sentenced to lengthy periods of imprisonment on the other offences.

[3] The applicant was released on licence on 16 June 1989. He was later arrested on 10 August 1992 on a charge of attempted murder. The circumstances of this brutal sectarian crime were again horrific. For that offence he was sentenced at Belfast Crown Court on 17 December 1993 to a period of 16 years imprisonment. The applicant's licence was revoked under section 23 (2) of the Prison Act (Northern Ireland) 1953 on 13 August 1992.

[4] On 10 November 1999 the Sentence Review Commissioners determined that the applicant's application for early release under section 3 (1) of the Northern Ireland (Sentences) Act 1998 should be granted in respect of the offence of attempted murder (of which the applicant was convicted on 17 December 1993). An application made by the applicant in respect of the offence of murder (of which he had been convicted on 22 May 1973) was refused. The applicant was ineligible by reason of section 3 (6) of the 1998 Act. This sets out one of the conditions that all prisoners serving a sentence of life imprisonment must satisfy. It is to the effect that, if the prisoner were released immediately, he would not be a danger to the public.

[5] A panel of the Life Sentence Review Board considered the applicant's case on 13 June 2001. It concurred with the conclusion expressed by an earlier LSRB panel that the applicant had served a period sufficient to satisfy the requirements of retribution and deterrence. In reaching its decision on risk assessment in June 2001 the LSRB panel was obliged to apply the test set out in Explanatory Memorandum (NIO January 1985) which states that "the overriding consideration is the need to protect the public from the risk of a repetition of the offence or some other crime of violence and that the Secretary of State will be concerned whether the or not the degree of risk is minimal". The panel concluded that the applicant was suitable for consideration for release on licence but recommended that a period of at least 6 months was required to allow for preparation before the commencement of a pre-release home leave scheme which would develop "an appropriate risk management strategy and for making the particular practical arrangements involved". It also recommended that certain licence conditions be imposed by the Secretary of State.

[6] On 29 November 2001 the Secretary of State for Northern Ireland referred the applicant's case to the Life Sentence Review Commissioners under article 9 (4) of the 2001 Order. This caused a number of reports to be generated including one from a principal psychologist, Mandy Wright. In her report Ms Wright recommended that there should be "an extended period of release planning and supervision prior to and after" the applicant was released on licence. In a submission dated 13 May 2002 the Secretary of State expressed the view that the applicant was not yet ready for release on licence. He suggested that further testing and assessment of the applicant was required before he could be reintegrated into the community in a gradual, supported and supervised manner. These procedures should be completed before the applicant was released on licence and that a period of 12 to 18 months would be required for this purpose.

[7] The Life Sentence Review Commissioners conducted an oral hearing on 8 May 2002 and on 14 May 2002 the chairman of the panel wrote to the applicant to inform him of the outcome of their deliberations. The following passages are taken from that letter: -

"1. The Life Sentences (Northern Ireland) Order 2001 requires the Life Sentence Review Commissioners to direct your release only if they are satisfied that it is no longer necessary for the protection of the public that you be confined. The panel of Commissioners who considered your case on 8 May 2002 was not so satisfied and has not directed your release (at this stage). This decision is binding on the Secretary of State.

…

3. In reaching this decision the panel took particular account of the fact that certain areas of potential risk had been identified in current and previous reports. The risk identified included sectarian attitudes, the role of associates, sexual behaviour, low tolerance of stress, coping with change, attitudes to support and supervision and poor presentational skills. The panel accepted that these are important factors and would have to be effectively addressed before a release decision. The panel noted that that there appeared to have been no substantive development of the proposed post release supervision outlined in the report of Ms O'Hare, probation manager, dated 25 April 2001. This programme included pre-release elements that do not appear to have moved beyond three initial accompanied temporary releases between January 2002 and the date of the hearing. The panel also noted that the Life Sentence Review Board on 13 June 2001 had included among its recommendations for future action the suggestion that "during the pre-release scheme a phased programme of overnight stays to the Life Challenge Project (Ark Hostel) in Manchester should be arranged leading to ultimate residence there by the end of the pre-release scheme.

The panel finds that to date there has been insufficient testing in the community in relation to the identified risk factors and in the absence of evidence of successful testing out of your ability to manage safely in a less constrained environment

the panel is not satisfied that is no longer necessary for the protection of the public that you remain confined.

The panel formed the view that:

(i) The next phase of testing should involve a prison based working-out scheme.

(ii) Determined efforts should be made to find you suitable accommodation with the expectation that this would become your ultimate release address. It would be desirable that you also have short periods of leave from prison at that address prior to your next review. … If it transpires that a move to the Life Challenge Project is not appropriate then the panel would expect that determined efforts would be made to find alternative suitable accommodation taking into account previous concerns in relation to the location of such premises in Belfast. In any event the establishment of a working relationship with the probation officer who will be the prospective community supervisor is particularly important in light of the difficulties the panel find you have in recognising and accepting supervision requirements and restraints.

…

5. The panel recommend that your case should be reviewed in eighteen months, as indicated in the Secretary of State's submission, since it formed the view that the necessary testing and monitoring of your progress towards reintegration into the community could be achieved in this period."

The statutory provisions

[8] The Life Sentence Commissioners are appointed by the Secretary of State under article 3 (1) of the 2001 Order. By virtue of article 3 (3) of the Order the Commissioners are required to advise the Secretary of State with respect to any matter referred to them by him that is connected with the release or recall of life prisoners.

[9] Article 3 (4) provides: -

> "(4) In discharging any functions under this Order the Commissioners shall -
>
> (a) have due regard to the need to protect the public from serious harm from life prisoners; and
>
> (b) have regard to the desirability of -
>
> (i) preventing the commission by life prisoners of further offences; and
>
> (ii) securing the rehabilitation of life prisoners."

It is accepted by both the applicant and the respondents that this is the provision that the Commissioners had to apply in the applicant's case.

[10] Article 5 deals with the determination of tariffs. It provides that, save in certain specified cases, a court imposing a life sentence order that the release provisions shall apply to the offender in relation to whom the sentence has been passed as soon as he has served the part of his sentence which is specified in the order. This article does not apply to the applicant, however, since, obviously, the life sentence passed on him was imposed before the coming into force of the Order.

[11] Article 6 applies to prisoners who are subject to article 5. Article 6 (4) provides: -

> "(4) The Commissioners shall not give a direction under paragraph (3) [*ie* a direction for release] with respect to a life prisoner to whom this Article applies unless -
>
> (a) the Secretary of State has referred the prisoner's case to the Commissioners; and
>
> (b) the Commissioners are satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined."

It was suggested that this provision cannot be reconciled with article 3 (4). The Commissioners are enjoined by that provision to have regard *inter alia* to the desirability of securing the rehabilitation of life prisoners. But by article 6 (4) they shall not give a direction for the release of a prisoner unless they are

satisfied that he will not present a risk of serious harm to the public. Unless they so conclude, the question of the rehabilitation of the prisoner cannot arise. It was suggested therefore that, in reality, there was no opportunity to consider the rehabilitation of the prisoner where the Commissioners felt unable to conclude that it was no longer necessary for the protection of the public that the prisoner should be confined. This may be so but it appears to me that the sub-sections can operate in combination without conflict. Where the Commissioners consider that it is not necessary that the prisoner remain in prison for the protection of the public from serious harm it does not follow automatically that he should be released. When the Commissioners have reached the necessary conclusion to satisfy the requirements of article 6(4) *then* they may – and must - consider the provisions of article 3 (4) (b). But if they fail to reach the conclusion prescribed by article 6 (4) the application of article 3 (4) does not arise.

[12] Article 9 of the Order deals with the recall of life prisoners while on leave. It provides at paragraph (4) that the Secretary of State shall refer the case of a life prisoner recalled under the article to the Commissioners. Paragraph (5) of article 9 provides that where on a reference under paragraph (4) the Commissioners direct the immediate release of a life prisoner on licence under this Article, the Secretary of State shall give effect to the direction.

[13] Article 11 (5) (a) provides: -

> "(5) Paragraphs (3) to (5) of Article 9 shall have effect as if any life prisoner –
>
> (a) who has been recalled to prison under section 23 of the Prison Act (Northern Ireland) 1953 and is not an existing licensee;
> (b) …
>
> had been recalled to prison under Article 9 on the appointed day."

The applicant was recalled under the relevant provision and is therefore subject to article 3 (4). As I have already pointed out, however, since the application of article 6 is confined to those subject to article 5 and the applicant is not so subject, the provisions of article 6 and in particular paragraph (4) of that article cannot be applied to him. This was common case between the parties.

[14] Article 8 (2) of the Order provides: -

> "A life prisoner subject to a licence shall comply with such conditions (which may include on his release conditions as to his supervision by a probation officer) as may for the time being be specified in the licence; and the Secretary of State may make rules for regulating the supervision of any descriptions of such persons."

It is important to note that the imposition of conditions is directly connected to the licence. In this case it was argued that the Commissioners had no power to impose conditions and certainly not before the grant of the licence.

[15] Regulation 13 (2) of the Life Sentence Review Commissioners' Rules 2001 provides: -

> "The decision of the panel shall be recorded in writing with reasons, dated and signed by the chairman of the panel, and communicated in writing to the parties not more than 7 days after the end of the hearing."

The case for the applicant

[16] For the applicant Mr O'Rourke submitted that the Commissioners had wrongly transposed the test to be applied under article 6 (4) to the applicant's case which ought to have been decided solely by reference to article 3 (4). By doing so they denied themselves the opportunity to conduct the balancing exercise implicit in article 3 (4). There was thus no evaluation by them of the need to rehabilitate the applicant and that factor cannot have played any part in their decision.

[17] It was further argued that the respondents had wrongly believed that they had the power to impose a pre-release programme on the applicant. It was submitted that the Commissioners' decision must be flawed on that account since, in effect, they had delayed reaching a conclusion on the question of the applicant's release in the mistaken belief that it was open to them to do so instead of recognising that they were required to make a decision on the matter. The imposition of conditions was a matter for the Secretary of State under article 8 (2).

[18] Mr O'Rourke also claimed that the Commissioners had failed to consider article 8 (2) before reaching their decision. It was incumbent on them to do so, he submitted, since it was open to them to make recommendations as to the conditions that might be specified in the licence. If the Commissioners had recognised that their role in this matter was to devise the conditions that should accompany the licence rather than the imposition of

conditions prior to release they should have recommended the grant of the licence subject to conditions.

[19] Finally Mr O'Rourke submitted that the Commissioners' direction that the applicant's case should be reviewed in eighteen months' time was made without lawful authority. They had, he said, no power to give such a direction and it was, in any event, an arbitrarily selected period. On both counts, that aspect of the decision should be quashed.

The case for the respondents

[20] For the respondents Mr Larkin QC accepted that the first paragraph of the letter of 14 May 2002 was apt to convey the impression that the Commissioners had applied article 6 (4) of the Order to the applicant's case rather than article 3 (4). He submitted, however, that this had not been done and he pointed out that in an affidavit filed on behalf of the respondents, the chairman of the panel had expressly stated that the Commissioners were "fully conscious that they were required to have regard to … the desirability of securing the rehabilitation of life prisoners".

[21] Mr Larkin argued that the effect of the letter of 14 May was to make recommendations rather than give directions. The Commissioners had not laid down a pre-release programme for the applicant; they had merely indicated the steps that they considered the applicant would be required to take before they could feel confident about making a direction under article 9 (5). It was accepted that the Commissioners did not have power to enforce the recommendations. There was no reason that they should not outline the measures that they considered would be necessary before a favourable direction could be given.

[22] It was submitted that the Commissioners had taken account of article 8 (2). This was clear, it was suggested, from the averments in paragraph 5 of the affidavit of the chairman of the panel to the following effect: -

> "The prison based working out scheme was considered to be the most effective method for addressing the serious concerns that existed about the applicant and the Commissioners did examine whether or not those concerns could be addressed by releasing the applicant under licence, which could include conditions, as permitted by article 8 of the Order. This was rejected as the Commissioners were not satisfied that the concerns … could be addressed adequately and safely in this way."

[23] Mr Larkin contended that there was nothing untoward about the Commissioners' adoption of a period of eighteen months for the review of the

applicant's case. While they were not empowered to *direct* a review, there was nothing in the legislation which forbade the making of a recommendation about the timing of a review and this is what the Commissioners had done. The period selected was in line with the submission of the Secretary of State and was in any event reasonable in light of the recommendation that they had made that the applicant participate in the working out scheme.

The Commissioners' powers

[24] The Commissioners are required by article 9 (5) of the 2001 Order to consider whether they should make a direction for the immediate release of a recalled prisoner such as the applicant. In doing so they must observe the injunction in article 3 (4) that they should have regard to the matters set out in that provision. In the case of recalled life prisoners they are not constrained by article 6 (4) to refuse to give a direction unless they are satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined.

[25] It is not clear why the constraint contained in article 6 (4) should not apply to prisoners who have been recalled. One would have thought that if it is right that prisoners who have been sentenced in accordance with article 5 of the Order should be subject to this constraint, then it should apply equally to those who have been recalled. It is accepted by the Commissioners, however, that this provision does not apply to recalled prisoners such as the applicant and that the first sentence of the letter of 14 May 2002 was therefore wrong in its assertion that the Order required the Commissioners to direct the applicant's release only if they were satisfied that it was no longer necessary for the protection of the public that he be confined.

[26] Although the Order does not confer expressly on the Commissioners the power to recommend that certain steps be undertaken before they decide to direct a recalled prisoner's release, it appears to me that such a power must be necessarily incidental to the proper performance of its statutory function — see *A-G v Great Eastern Railway Co* (1880) 5 App Cas 473. While, therefore, the Commissioners may not have the power to direct that a pre-release programme be undertaken by the applicant, there is nothing to prevent them from making recommendations that certain pre-release measures should take place before they are again called on to decide whether to direct his release.

[27] The Commissioners, in deciding whether to direct the release of a prisoner, must, in my opinion, take into account the provisions of article 8 (2) of the Order. There will be many situations where a release could only be sanctioned if it is accompanied by appropriate safeguards and it is obviously necessary that the Commissioners should consider the availability of conditions that may be specified in the licence under that provision.

The Commissioners' decision

[28] It is now accepted that the Commissioners' letter wrongly stated that they could not direct the release of the applicant unless they were satisfied that it was no longer necessary for the protection of the public that he be confined. In an affidavit filed on behalf of the respondents, however, the chairman of the panel of Commissioners asserts that this was not in fact the test applied by them. It is claimed that they decided the applicant's case in accordance with article 3 (4). I was told that the error occurred because a pro-forma letter formerly used by the Parole Board had been adapted to compose the Commissioners' communication to the applicant.

[29] While the good faith of the Commissioners and the explanation that has been offered are beyond question, once that error has been acknowledged, it seems to me that the Commissioners' decision cannot stand. The Commissioners are obliged to give reasons for their decision under regulation 13 (2) of the 2001 Rules. They gave those reasons in the letter of 14 May 2002. It appears to me that it is not now open to them to resile from the reasons that have been conveyed to the applicant and to invite the conclusion that those reasons were not those that underlay their decision. The likelihood that the explicit statement in the first sentence of the letter played some part in the decision simply cannot be dismissed.

[30] I accept, however, that the Commissioners did not purport to lay down a pre-release programme for the applicant. Although the language of the letter might at first sight convey this impression, I am disposed to accept the argument made on their behalf that they did no more than recommend that certain steps be undertaken before they could direct the applicant's release and for the reasons given earlier I consider that this lay within their powers.

[31] I also accept that the Commissioners took into account the provisions of article 8 (2) before reaching their decision. It is clear from the affidavit of the chairman of the panel that the Commissioners did not consider that the concerns that they had could be adequately catered for by the imposition of conditions on the licence releasing the applicant. I am satisfied, therefore, that they were not deterred from directing his release by a failure to take account of article 8 (2)

[32] The recommendation that they review the applicant's case in eighteen months also fell within the Commissioners' powers in my opinion. I am satisfied that this was in the nature of a recommendation rather than a direction. Such a power is necessarily ancillary to the discharge of their statutory function, in my view. It would be anomalous that the Commissioners could suggest steps that should be undertaken in order to address the concerns that prevented them from directing a prisoner's release without also having the power to recommend that they review the matter

when those steps had been taken. The selection of an eighteen month period after which that review should take place, so far from being arbitrary, was in accordance with the recommendation of the Secretary of State and was, in any event, reasonable in light of the steps that required to be taken.

Conclusions

[33] For the reasons that I have given I do not consider that the Commissioners' decision may stand. I will therefore make an order of certiorari quashing the decision. The application will require to be considered afresh. I believe that this should be undertaken by a differently constituted panel.