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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

JR63's Application [2011] NIQB 109

IN THE MATTER OF AN APPLICATION BY JR63 FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE PAROLE COMMISSIONERS FOR NOTHERN IRELAND

TREACY J

Introduction

[1] The applicant is a recalled life sentence prisoner, whose case was referred to the Parole Commissioners for Northern Ireland (PCNI) in accordance with article 9(4) of the Life Sentences (Northern Ireland) Order 2001 ("the 2001 Order"). The applicant challenges a decision of the Parole Commissioners dated 28 June 2011 not to make a direction under Article 9(5) of the 2001 Order to release him.

Background

[2] The applicant was released on licence by the PCNI on 12 November 2009. Following an incident on 10th April 2019, the Department of Justice revoked his licence on 21 April 2010 and recalled him to prison. The PCNI found on the balance of probabilities that he had been involved in an incident involving his girlfriend as a result of which a member of the public telephoned the police and described the incident as:

> **"….a verbally aggressive and heated confrontation with [his] girlfriend and also with police officers at the scene and at the police station and that he threatened the witness. The panel also believe that [his] behaviour largely arose from the consumption of alcohol that evening."**

[3] The applicant was subsequently acquitted on charges of assault on a female member of the public who had alleged that he had threatened her with a bottle.

[4] The applicant's index offence was murder and robbery committed when he was sixteen described by the PCNI as:

> **"… a particularly brutal murder of an eighty-three year old retired school teacher. The offence took place in the course of a drunken robbery of the victim's house. The victim received blows to her head and was stabbed. Her home was then set on fire…"**

[5] The PCNI heard evidence over three days, which included evidence from two probation officers, the Life Manager within the Probation Board, Prison Governor, Investigating Officer, and Psychologist and from the applicant. The issues raised during the hearing included the details of the incident of 10 April, the applicant's conduct and co-operation with the Probation Board since release and the risks posed by the applicant.

[6] The Commissioners found that the applicant's recall was lawful. The applicant takes no issue with that conclusion focussing instead upon the question which then arises, which the PCNI correctly posed at para15 of its decision, as *whether it is now necessary that [the applicant] should be confined to protect the public from the risk of serious harm*.

[7] There are two grounds of challenge, both of which are related. Both focus upon para20 of the Commissioners decision, on the issue of whether he should be released, following recall. The decision states:

> **" [20] Given the findings set out above that [the applicant] is assessed as presenting a high risk of re-offending, and would *therefore* present a risk of serious harm, the panel of Commissioners find that they are not satisfied that it is no longer necessary for the protection of the public from serious harm**

that [the applicant] be confined. We therefore direct that he shall not be released."

[8] The application for judicial review is advanced on two grounds:

(i) that the PCNI failed to provide any indication of how the principal important controversial issue of whether the applicant presently posed a *risk of serious harm* was considered, or how this came to be determined against the applicant; and

(ii) that the PCNI expressly misdirected themselves in conflating *risk of re-offending* and *risk of serious harm*, and erred in concluding that a high risk of re-offending was therefore determinative of the statutory test imposed by article 9(5A) of the 2001 Order.

Statutory Framework

[9] There was no issue as to the relevant statutory framework.

[10] This question posed by the PCNI in relation to post-recall risk derives from article 9(5A) of the 2001 Order which provides that:

"The Commissioners shall not give a direction under paragraph (5) 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".

[11] Article 46(2)(a), contained within Part 2 of the Criminal Justice (Northern Ireland) Order 2008 ('the 2008 Order'), provides that:

"In discharging their functions the Parole Commissioners shall … have due regard to the need to protect the public from serious harm".

[12] Article 3 of the 2008 Order (which provides for the interpretation of Part 2) provides that *serious harm* means:

"… death or serious personal injury, whether physical or psychological".

[13] Rule 24(2) of the Parole Commissioners Rules (Northern Ireland) 2009 requires that the decision of the PCNI 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 consideration of the case".**

Jurisprudential Framework

(a) Serious Harm

[14] The concept of *serious harm* was given consideration by the Court of Appeal in ***R v Leon Owens*** **[2011] NICA 48 (**delivered on 12 September 2011) who allowed an appeal against the imposition of an extended custodial sentence under the 2008 Order.

[15] Such a sentence is to be imposed when an offender has been convicted of a specified offence and the court is of the opinion 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.

[16] The Court of Appeal (at para 17) referred to the observations of Ouseley J in ***R v Terrell*** **[2007] EWCA 3079** in respect of the comparable sentencing provisions of the Criminal Justice Act 2003:

> **"The seriousness of the harm required by the Criminal Justice Act is emphasised by the words 'death or serious personal injury.' The latter phrase is deliberately coloured by the associated word 'death', and stands in contrast with the language of the Sexual Offences Act. And it is on the serious harm occasioned by that offender's re-offending which the Criminal Justice Act requires attention to be focused".**

[17] In ***Owens*** the court noted that a multi-agency risk management meeting had proceeded on the basis that the offender was likely to re-offend and that the injuries inflicted in committing the offence constituted serious harm. The Court concluded at para19:

> **"We entirely accept the conclusion in relation to the risk of re-offending but our review of the caselaw above indicates that multiple superficial injuries are highly unlikely to constitute serious personal injury within the meaning of the legislation".**

[18] The parties agreed that these passages highlight both the nature of the risk upon which the attention of the PCNI required to be focused and the absence of necessary connection between *risk of re-offending* and *risk of serious harm*.

(b) Reasons

[19] In ***South Bucks District Council and another v Porter*** **[2004] UKHL 33,** Lord Brown said:

> **"36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision".**

[20] As I explained in ***LS Banbridge (Phase 2) Ltd*** **[2011] NIQB 106 [para 158]**

> **"As long as the critical issues are dealt with and the reasoning does not give rise to a substantial doubt as to whether the decision maker fell into reviewable error an adverse inference against the decision make will not be readily drawn. As Lord Brown said in the passage referred to above a reasons challenge will *only* succeed if the party aggrieved can satisfy the Court that he is genuinely being substantially prejudiced by the failure to provide an adequately reasoned decision."**

[21] In ***R (Ashworth Hospital Authority) v Mental Health Review Tribunal for West Midlands & North West Region*** **[2001] EWHC Admin 901** Stanley Burnton J listed a series of propositions purporting to set out the relevant law on the need for and the adequacy of reasons given by a tribunal (and in particular by a Mental Health Review Tribunal). At para78 of his judgment he noted:

> **"…the adequacy of reasons must depend on the context, the issues and the evidence. The decisions of Mental Health Review Tribunals are at the most important end of the spectrum of tribunal decisions".**

[22] Stanley Burnton J also said that:

> **"77. (B) Reasons must be sufficient for the parties to know whether the tribunal made any error of law: *Alexander Machinery Ltd v Crabtree* [1974] ICR 120".**

> **"77. (c) Where, as in the case of Mental Health Review Tribunals, Parliament has required that a decision be given with written reasons, those reasons have to be adequate. They may be elucidated by subsequent evidence, but <u>in general, inadequate written reasons cannot be saved by such evidence:</u> *R v Westminster City Council, ex p Ermakov* [1996] 2 All ER 302".** [Emphasis added]

> **"77. (i) In considering the adequacy of reasons the Court is entitled to take into account the fact that**

> **the tribunal has a legally-qualified chairman, and that in the case of Mental Health Review Tribunals the reasons do not have to be given immediately. Rule 23 does not require its decision or its reasons to be recorded in writing immediately after the hearing, and Rule 24 gives the Tribunal 7 days in which to communicate its written decision and reasons".**

[23] The Parole Commissioners Rules (Northern Ireland) 2009 provide for the constitution of panels in Rule 12; Rule 12(3) provides that in so far as reasonably practicable a panel shall include a legally qualified member, and this was so in the applicant's case which was chaired by a County Court judge. Rule 24(2) requires the provision of written reasons. Reserved written reasons were furnished on 28 June 2011.

Discussion

[24] Although I have already set out para20 of the PCNI decision above I will for convenience set it out again at this juncture:

> **"Given the findings set out above that [the applicant] is assessed as presenting a high risk of re-offending, and would *therefore* present a risk of serious harm the panel of Commissioners find that they are not satisfied that it is no longer necessary for the protection of the public that [the applicant] be confined" (emphasis added).**

[25] The applicant submitted that this sentence, given its ordinary and natural meaning, disclosed a clear misdirection since a risk of serious harm did not *necessarily* flow from a risk of re-offending. This much was not disputed by the respondent who contended however that the use of the word "therefore" in para20 was not intended to denote an inevitable connection between the risks of reoffending and of serious harm to the public. Rather the respondent contended it reflected the existence of a strong connection between the two on the facts of this case which stemmed from the nature of the index offence.

[26] In response to the pre-action correspondence claiming inadequate reasoning and material misdirection the respondent replied as follows by letter dated 18 July 2011:

> **"We refer to your letter dated 4 July 2011 the contents of which are noted. The Commissioners**

> **stand over their decision and it is *quite clear* the panel clearly directed their minds to the statutory test.**
>
> **The panel had the benefit of evidence indicating that your client presented a risk of serious harm. They also had the benefit of evidence confirming your client's high risk of reoffending which, given the nature of your client's original index offence, was also clearly relevant to the issue of risk of serious harm.**
> **...**" [Emphasis added]

[27] Following the grant of leave the Chairman of the PCNI panel swore an affidavit on behalf of all three Commissioners including himself. At para4 of his affidavit the Chairman indicated:

> **"I am aware that particular attention has been focused upon paragraph 20 of the Commissioners' written decision and the finding that [the applicant] presented "… a high risk of re-offending and would therefore present a risk of serious harm …". I accept that the wording could be understood to mean that a risk of serious harm follows from a finding of a high risk of re-offending, or that the two concepts have an inevitable connection … If the wording of the decision has led to confusion or misunderstanding on the part of [the applicant] and his advisors, the Commissioners acknowledge and regret this consequence. The Commissioners acknowledge that their conclusions could have been expressed more clearly".**

[28] The affidavit continued:

> **"While our conclusions might have been expressed in clearer terms, the words used were a reflection of our finding (stated earlier in the decision e.g. at paragraph 14) that in this case, there <u>was</u> a connection between a risk of reoffending and a risk of serious harm. The connection arose from the nature and circumstances of the index offence, coupled with the factual similarities surrounding the incident of 10 April 2011 *(sic)*, which led to the**

> **revocation of the licence. It is accepted that the conclusions expressed in paragraph 20 do not expressly refer back to or repeat the reasoning in paragraph 14 which related to the decision to revoke the licence, as distinct from the decision not to release [the applicant]. However, I can provide assurance to the Court that precisely the same reasoning influenced our conclusions on the decision not to release".**

[29] Can the impugned decision be rescued by the subsequent affidavit evidence? This territory is dealt with in *de Smith's Judicial Review* (6th Ed, 2007) at para7-115:

> **"It is unsettled whether the absence or inadequacy of reasons can be remedied by provision of further fresh reasons in evidence when the decision is challenged. However, 'It is well-established that the court should exercise caution before accepting reasons for a decision which were not articulated at the time of the decision, but were only expressed later, in particular after the commencement of proceedings'. Where there is a statutory duty to provide reasons, such that the adequacy of reasons is central to the legality of the decision itself, this caution also applies" .**

[30] In ***Re Hinton's Application*** **[2003] NIQB 7** Kerr J considered a decision of the Life Sentence Review Commissioners in which reference was made to what was considered to be an incorrect test. It was accepted by counsel on behalf of the LSRC:

> **"20. … 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".**

[31] Kerr J went on to note that:

> **"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".**

Conclusion

[32] It is clear from ***Porter*** that reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law. The respondent is of course entirely correct to submit that para20 must not be read in isolation from the rest of the decision. However, the reference at para20 to "the findings set out above that [the applicant] is assessed as presenting a high risk of reoffending" appears to be a reference to para17 of the decision which deals solely with the evidence that was presented from the probation officer that the applicant demonstrated a high risk of reoffending. That, and more critically, the use of the word "therefore" in para20 give rise to a substantial doubt as to whether, as the plain

language of para20 suggests, the panel misdirected themselves by conflating risk of reoffending and risk of serious harm and erred in appearing to conclude that a high risk of reoffending was therefore determinative of the statutory test imposed by Article 9(5)(a) of the 2001 Order.

[33] Obviously the nature of the index offence will inform whether the identified risk of reoffending gives rise to a risk of serious harm. A risk of reoffending may be high giving rise to a risk of some harm but not necessarily a risk of death or serious personal injury. ***Owens*** and ***Terrell*** exemplify that this is a difficult area and one which was plainly of central importance to the exercise before the PCNI. Whilst they, at para15, posed the right question their conclusionary statement in para20 does not elucidate a reasoned basis as to how or why this conclusion was reached and appears to conflate the high risk of reoffending with risk of serious harm.

[34] The affidavit evidence from the Chairman, particularly para4 set out above, constitutes a frank acknowledgement that the terms of the decision do not permit the reader to conclude that the panel did not misdirect themselves. A judicial decision provided in discharge of a statutory obligation to provide written reasons dealing with the liberty of the subject should ordinarily not require, if the reasons are sufficient, elaboration or explanation by affidavit. There are many and evident risks and sound reasons of policy as to why this should be so.The fact that such elaboration or explanation is or is thought to be required may be cogent material enabling the Court to conclude that the reasons are legally insufficient. As pointed out in ***Ermakov*** and ***Ashworth*** inadequate reasons cannot in general be saved by subsequent evidence.

[35] I consider that the decision offends the requirement that the reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law and that it is not saved by the subsequent evidence. Accordingly the decision must be quashed.