# Judicial Communications Office

**19 November 2021**

## COURT DELIVERS DECISION IN CHALLENGE TO RELEASE OF MICHAEL STONE

## Summary of Judgment

Mr Justice Colton, sitting today in the High Court in Belfast, granted an application for leave to apply for a judicial review to challenge the lawfulness of the Parole Commissioners' Rules insofar as they prohibit public hearings. Further, the court granted leave to challenge the failure of the Parole Commissioners to make provision for the daughter of one of the victims of Michael Stone to attend at the hearing.

Michael Stone ("the Notice Party") was given a life sentence in 1989 for the murders of six persons. The court recommended he serve a tariff of 30 years imprisonment. He was, however, released on licence on 24 July 2000 under the terms of the Northern Ireland (Sentences) Act 1998 ("the 1998 Act"). On 24 November 2006, the Notice Party carried out an attack at Parliament Buildings, Stormont following which he was convicted of two counts of attempted murder and other offences and received a determinate sentence of 16 years imprisonment. His licence under the terms of the 1998 Act was also revoked. On 25 January 2021, the Parole Commissioners ("the Commissioners") directed the release of the Notice Party under the provisions of the Life Sentences (NI) Order 2001 ("the 2001 Order").

**Applicant's Challenge**

Deborah McGuinness ("the applicant"), whose brother was murdered by the Notice Party, has been involved in a number of legal challenges relating to his release. In this application, she raised two broad issues:

- The decision taken by the Commissioners to conduct the hearing in private and not permit her to attend and to participate; and
- A challenge to the decision by the Commissioners to release the Notice Party on licence.

Rule 22 of the Parole Commissioners Rules (NI) 2009 ("the 2009 Rules") provides for the location and privacy of hearings. On 21 June 2021, Rule 22 was amended to provide that a victim or other person who makes a request for a summary of the reasons for a direction or a decision recorded after oral proceedings before the Commissioners may be provided with a copy unless the Commissioners consider there are exceptional circumstances why the summary should not be produced.

**Right of Attendance/Participation**

Rule 22(2) provides that oral hearings of the Commissioners will be held in private although the Chairman of the Panel has discretion to admit such persons on such terms and conditions, as he considers appropriate. The applicant sought an order compelling the Commissioners to allow her full participation rights, including attendance at any hearing as well as the right to call witnesses, to cross-examine witnesses, to consider all relevant evidence, to hear all oral evidence and to make oral representations. It was argued on her behalf that the 2009 Rules violated her rights under the

common law principles of open justice and her rights under Articles 6, 10 and 17 of the European Convention on Human Rights ("ECHR").

The court accepted that the principle of open justice and the applicant's Article 10 rights are relevant to parole decisions. This principle was confirmed as applicable to Parole Commissioners' proceedings in a case in England and Wales[1] ("*DSD*") which was a trigger for the amendment to the 2009 Rules in 2021. The applicant also contended that the principle applies to the question of whether the proceedings should be held in private. The court took the view that it was arguable that a blanket ban on public hearings by the Commissioners was unnecessary and that some form of "public hearings" should be possible. For this reason the court granted leave to the applicant to challenge the lawfulness of the 2009 Rules insofar as they prohibit public hearings. Further, the court granted leave to challenge the decision of the Commissioners not to conduct a public hearing in this matter and failing to permit the applicant to attend at the hearing.

The court went on to say that the applicant's contention that the 2009 rules should allow for victims and families to become interveners and full parties where appropriate was a different issue. Citing Article 6(1) ECHR which entitles an applicant to a fair and public "in the determination of the civil rights and obligations", the court said there was no basis upon which to conclude that the applicant's Article 6 rights or common law rights were engaged in proceedings before the Commissioners much less violated:

> "The applicant is not a "party" to the proceedings. The statutory function of the Parole Commissioners is to determine whether they are satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined."

The court further ruled that the applicant's argument in respect of Article 17 ("Prohibition of Abuse of Rights") could not succeed as its focus was on the use of the ECHR itself in order to destroy or limit any rights contained therein. The court accepted that is was arguable that Article 10 supported an argument requiring the Commissioners to have the power to conduct a public hearing at which the applicant could attend subject to the discretion of the Panel but that it fell well short of an entitlement to the participative rights sought by the applicant. The court therefore concluded that there was simply no identifiable legal basis for the right to participate in the oral hearings of Commissioners and refused leave to argue this ground.

**The challenge to the decision of the Commissioners dated 25 January 2021**

The applicant challenged the lawfulness of the decision on the following grounds:

1. **Misdirection as to the statutory test[2]**: The applicant contended that the Commissioners appeared to have adopted a "two limb" approach to the statutory test in that they considered whether the prisoner can be safely managed in the community after having considered the appropriate licence conditions. Counsel argued that having found the prisoner presented a serious risk of serious harm to the public they were bound to refuse to release him and that

[1] *Regina (D & Anor) v Parole Board & Anor; Regina (Mayor of London) v Parole Board; Regina (News Groups Newspapers Limited) v Parole Board and another* [2019] QB 285; [2018] EWHC 694 (Admin)

[2] The test to be applied by the panel, which is set out in the 2001 Order, was considered in the case of *Re Foden* [2013] NIQB 2.

the finding should have been made in a holistic manner considering all relevant risk factors and protective factors.

The court said that on reading the Commissioner's decision it was clear that they properly directed themselves as to the statutory test and that the effectiveness of licence conditions was plainly a relevant consideration in their task. The court agreed with counsel for the applicant that in applying the statutory test, the Commissioners should approach their task in a holistic manner considering all relevant risk factors and protective measures:

> "In the court's view any fair analysis of [the Commissioners'] reasoning should conclude that this is exactly what the Commissioners did. … Commissioners correctly took into account licence conditions as a factor in the assessment of risk in applying the statutory test. Whether any risk of serious harm posed by Mr Stone could be safely managed in the community by licence conditions was clearly a proper matter for the Commissioners to consider. Such an approach is clear from the language of the statutory test itself which focuses on the protection of the public from serious harm."

The court concluded that it was not arguable that the Commissioners misdirected themselves in law as to the statutory test.

2. **Irrationality**: It was submitted that the Commissioners had not taken account of five material considerations and three immaterial considerations. The court noted that the 2001 Order does not identify matters which the Commissioners should consider and in such circumstances the identification of material considerations is a matter for the decision-maker, subject only to *Wednesbury* review. The approach to complaints about failures to take account of relevant factors in the context of challenges of such decisions is set out in para [141] of *DSD*. Applying these principles the court then considered the five issues raised on behalf of the applicant in respect of material/immaterial considerations:

- Evidence in the form of a psychiatric and/or psychological assessment of the prisoner. The panel considered that there was no evidence that the Notice Party was suffering from an underlying mental illness which would be relevant to the risk of further offending. They had before them a health care report and a letter from the Governor of the prison. The Panel referred to the lack of any evidence that the prisoner was suffering from an underlying illness or psychiatric condition which would be relevant to the risk of further offending.
- The refusal of the prisoner to engage in a psychiatric and/or psychological assessment. The Commissioners expressly noted that it appeared the Notice Party would not have consented to or co-operated with such an assessment. The court said the Commissioners therefore plainly took this matter into consideration and their approach and decision was well within the range of reasonable decisions open to them.
- The failure to obtain or take into account assessments of the current risks associated with the prisoner. The court commented that the level of enquiry is a matter for the Commissioners. It said they plainly had a significant amount of material regarding risk before them, were focussed on this issue and were cognisant of the nature and severity of the original offences. It was acknowledged that the task was made more difficult by the absence of professional assessments from the Probation Service but the court said it had been accepted by the Court of Appeal that their risk assessment tools were not fit for

terrorist offences[3]. In this case the Commissioners had been provided with a social history and a record of the activities of the Notice Party during his period in prison to assist their decision about risk. The Commissioners also took into account that the Notice Party had availed of pre-release testing and had adhered to all conditions set. The court concluded that the Commissioners had a significant amount of material regarding risk before them and that this ground had no reasonable prospect of success.

- The failure to take into account the decision of the Sentence Review Commissioners on 18 September 2019 that the prisoner remained a danger to the public. The court commented that the Sentence Review Commissioners were carrying out a different assessment under a different statutory test (where the licence conditions are significantly more limited) and held that the Parole Commissioners were perfectly entitled to come to a different conclusion.
- The failure to take into account the representations made by the applicant as a victim before making the decision. It became clear during the application that representations dated 20 December 2018 made on behalf of the applicant were not included in the updated parole dossier provided to the Commissioners by the Department of Justice in December 2020. The court said this should not have occurred, particularly as the applicant was actively engaged with the Parole Commissioners throughout the process, however it was clear that nothing in the representations spoke to the risk posed by the Notice Party.

In addition to these matters, it was also submitted that the Commissioners took into account the following immaterial facts:

- The change in attitude expressed by the prisoner towards his crimes and association with terrorist organisations. The court commented that it was for the Commissioners to assess the weight attached to them. It added that the applicant's attitude was a proper matter for consideration and the Commissioners were entitled to take the view that it constituted a protective factor in terms of risk, notwithstanding the difficulties in assessing the genuineness of the change of attitude.
- The evidence of the prisoner's medical condition particularly with regard to his likelihood to reoffend or support or be a member of a paramilitary organisation. The court said it seemed that the Notice Party's medical conditions were potentially relevant and it was a matter for the Commissioners to assess what weight to give. It would not be irrational to conclude that it may be less likely that a prisoner will offend or that it will be easier to control him depending on his medical conditions. The court said this was not a determinative factor but clearly one that the Commissioners were entitled to take into account.
- The absence of current risk assessments as evidence of a lack of current risk or, in the alternative, as mitigation of a current risk. The court noted that the Commissioners were aware of the state of the risk assessments and took appropriate account of all the information before them. It added that there was no basis for the suggestion that any absence of risk assessments was relied upon as a factor that positively established a lack of risk or was relevant to the mitigation of risk.

Overall, in terms of material/immaterial considerations, the court concluded that there was no basis for an irrationality challenge:

[3] *Re Nash's Application* [2015] NICA 18 at paragraph [21].

> "The applicant's real challenge is an attack on the weight which the Commissioners attached to those factors identified. … The court's view is that the applicant has failed to make an arguable case that the court should interfere with the exercise of judgment in the specialist domain being carried out by the Parole Commissioners."

3. **Failure to provide reasons**: It was contended that the Commissioners failed to provide reasons for their decision. The court, however, noted that the Commissioners had provided the applicant with the entirety of the reasons for their decision. It was cognisant of the fact that neither the applicant nor the court had been provided with the full dossier and that some of the reasons had been redacted when referring to the Notice Party's health conditions:

> "However, on any fair analysis the reasons are clear, detailed and substantial. They enable a clear understanding of why the Commissioners came to their decision. Much of the material upon which they relied is referred to in the reasoning. Any complaints about inconsistency in the reasons is in essence a repeat of the applicant's complaints about the irrationality of the decision."

4. **Error of fact**: The applicant contended that the Commissioners erred in concluding that they had no evidence that the Notice Party would be likely to become re-involved in paramilitary activity if he was released into the community. The court said this was not a factual question but one which involved a very evaluative judgment by the Commissioners. It fully understood the strongly held views of the applicant but was satisfied there was no arguable basis upon which it could interfere with the decision of the Commissioners to release the Notice Party on the relevant licence conditions which, in its view, had been carried out lawfully.

**Conclusion**

The court granted leave to the applicant to challenge the lawfulness of the Parole Commissioners' Rules insofar as they prohibit public hearings. Further, the court granted leave to the applicant to challenge the failure of the Parole Commissioners to make provision for the applicant to attend at the hearing.

**NOTES TO EDITORS**

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 on the Judiciary NI website (https://judiciaryni.uk).

**ENDS**

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