Judicial Communications Office

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COURT DELIVERS MICHAEL STONE JUDGMENTS

Summary of Judgments

The Court of Appeal[1] today delivered two judgments relating to the release of Michael Stone.

Michael Stone ("the prisoner") was given a life sentence in 1989 for the murder of six persons and attempted murder of five others in a shooting attack on mourners attending a burial at Milltown Cemetery on 16 March 1988. The trial judge recommenced a tariff of 30 years imprisonment. The prisoner was released on licence on 24 July 2000 under the terms of the Northern Ireland (Sentences) Act 1998 ("the 1998 Act) which provided for the early release of prisoners who had been convicted of qualifying offences as envisaged in the Belfast/Good Friday Agreement. The 1998 Act established the Sentence Review Commissioners ("the Commissioners").

On 24 November 2006 he 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. The prisoner's licence under the terms of the 1998 Act was also revoked.

The Life Sentences (Northern Ireland) Order 2001 ("the 2001 Order") replaced the release mechanism under which the prisoner had originally been sentenced. It provides for the determination of tariffs where a court passes a life sentence, the release of prisoners at the direction of the Parole Commissioners, and the determination of the duration and condition of licences that will apply on release. The provisions of the 2001 Order were applied to existing life prisoners. In the case of the prisoner, the Lord Chief Justice determined in 2013 that the tariff in respect of the life sentence imposed in 1989 should be 30 years imprisonment and the Prison Service calculated that his "parole referral date" would be 6 September 2017. By letter dated 20 September 2017, the Prison Service (in effect the Department) made a formal statutory referral of the prisoner's case to the Parole Commissioners intimating that the tariff expiry date would be 21 March 2018.

THE FIRST JUDGMENT

This judgment was in respect of two appeals by the Department of Justice ("the Department") and Michael Stone ("the prisoner") from a decision of the High Court quashing the decision to make a formal statutory referral of the prisoner's case to the Parole Commissioners intimating that the tariff expiry date would be 21 March 2018.

The issue was whether the period of approximately six years during which the prisoner was released on licence under the scheme of the 1998 Act comprised part of the period to be included in calculating the serving of his 30 year tariff period. The terms of the Department's certificate of opinion in respect of the prisoner was that "the release provisions of the [2001] Order should apply … as soon as he has served a period of 30 years, which includes the time spent in custody on

[1] The panel for the first judgment was the Lord Chief Justice, Lord Stephens and Lord Justice Treacy. The panel for the second judgment was the Lord Chief Justice, Lord Justice Treacy and Mr Justice Colton. The Lord Chief Justice delivered both judgments.

remand". There was no express reference in the certificate to the inclusion of the period when the prisoner was released on licence.

Article 5(2) of the 2001 Order provides that the tariff period should be such part of the sentence as the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence. Deborah McGuinness ("the respondent"), whose brother Thomas McErlean was murdered in the attack at Milltown Cemetery, contended that the part of the sentence specified in Article 5(2) refers not just to a period of time but to a period of time spent in custody.

The Court of Appeal reviewed the 2001 Order and noted there was no express provision to count a period on release as part of the tariff. It said there was no reason to suppose that Parliament failed to take into account that there were periods of lawful release under the 1998 Act and that if they were not excluded they would contribute to the prisoner serving the relevant part of his sentence. It said it was plainly open to Parliament to have provided for the exclusion of the licence period as a relevant period in fulfilment of the tariff. The Court noted the sensitivity of issues surrounding the release of Troubles related prisoners when the 2001 Order was made and said it was "almost inconceivable" that Parliament would not have been alert to the matter.

The High Court had concluded that the tariff component of every sentence of life imprisonment entailed incarceration for the totality of the gross period, subject only to the lawful deduction of any reckonable pre-sentence period or periods of remand custody. It said the conferral of a further benefit on non-compliant prisoners in the form of full credit for the period of the licence release from prison pursuant to the 1998 Order was impossible to deduce from the statutory provisions and considered that this "windfall" could not have been intended by the legislature.

The Court of Appeal, however, said that if this analysis was correct it meant that the tariff expiry date calculated in this case would have to be recalculated to exclude the entirely of the period during which the prisoner had lawfully been released on licence under the 1998 Act. It said the assessed date for release would extend the period in custody and that such an interpretation "would constitute an interference with the physical liberty of the prisoner and could only arise under clear authority of the law" and in its view this could not be implied. The Court considered that the decision of the High Court effectively rewrote the statute. It recognised that the arrangements in relation to Troubles related prisoners have been a source of considerable concern to many within this community but said those arrangements are unique and extraordinary:

> "They were the outcome of a political process supported by a referendum. They undoubtedly produced a windfall for the prisoners affected. The merits of the provision of that windfall are not for this court to determine".

The Court was satisfied that interpreting the words of the statute in their context led to the conclusion that the period that the prisoner spent lawfully on licence ought to be included in the relevant part of his sentence specified in the certificate as required by Article 5 of the 2001 Order. It therefore allowed the appeals.

THE SECOND JUDGMENT

On 25 January 2019, the prisoner made a further application for a declaration of eligibility for release under the 1998 Act which was refused by the Sentence Review Commissioners. The issue in this

appeal was whether the Commissioners were correct to entertain a further application after the prisoner had his licence under the 1998 Act revoked. The Court of Appeal noted that this has implications for the prisoner in the future and for others who have had or may have their licences revoked.

Section 3 of the 1998 Act provides that a prisoner may apply to the Commissioners for a declaration that he was eligible for release in accordance with the Act. The Commissioners were required to grant the application in the case of a qualifying offence resulting in a life sentence if and only if three further conditions were satisfied:

- That the prisoner was not a supporter of a specified organisation;
- That if he were released immediately he would not be likely to become a supporter of a specified organisation or to become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland; and
- That if he were released immediately he would not be a danger to the public.

If an application by a prisoner under section 3 is refused he can pursue a further application but this can only succeed if the prisoner's circumstances have changed or further relevant information is available.

The issue in this appeal was whether the statutory provisions enable a prisoner whose licence has been revoked to make a further application under section 3 seeking a declaration of his eligibility for release. The Court said the resolution of this issue depends upon the meaning of the statutory provisions based on the interpretation of the words of the 1998 Act informed by the context, principally, a recognition of the independence of the Commissioners and their role in ensuring public safety. There is no prohibition in the 1998 Act upon repeated applications and the Court said the statute clearly contemplated such applications and the circumstances in which they were permitted was to be governed by the Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998 ("the 1998 Rules). Rule 9 deals with successive applications and prescribes the conditions under which the Commissioners can determine such applications (an application is successive where it is not the first application to have been made by the person concerned).

Such applications are identified by the 1998 Rules as "further applications". The Commissioners may only determine a further application under section 3 if two conditions are satisfied:

- The circumstances much have changed since the most recent substantive determination was made in respect of the person concerned;
- Reliance is placed in support of the further application on any material information, document or evidence which was not placed before the Commissioner when the most recent substantive determination was made in respect of the person concerned.

The Court noted the two principal submissions advanced on behalf of Deborah McGuinness (the appellant). The first was that the issue had been determined by the Court of Appeal in 2007 in John Brady's application (unreported extempore application) where the court indicated that the Commissioners were effectively *functus officio* as their jurisdiction was effectively extinguished by the 2001 Order. The Court, however, said there was no indication that any of the arguments advanced in this case were relevant to the Brady appeal and no indication that the statutory provisions opened in this appeal were considered in that case. The Court said the statutory

provisions under the 1998 Act are still speaking and there was no support for the proposition that they have been extinguished in any way.

The second submission sought to rely on statements made by the Secretary of State in answer to questions in Parliament. Case law on the admissibility of such statements provides that reference to parliamentary matters should only be permitted where legislation was ambiguous or obscure or led to an absurdity, the material relied upon consisted of one or more statements made by a Minister or other promoter of the Bill and the statements relied upon were clear. The Court did not consider that these conditions were satisfied in this case:

> "Having carefully scrutinised the legislation we detect no ambiguity or obscurity and the outcome is not absurd. In any event the answering of a question by a Minister in the course of open questions is different from the terms of a formal Parliamentary Statement. If any issue of ambiguity had arisen we consider that the court would, in any event, have been required to take into account the principle that state interference with the liberty of the citizen requires clear authority of law. It seems likely that this principle would have enured to the benefit of the prisoner."

The Court was satisfied that the provisions of the 1998 Act and the 1998 Rules enable a prisoner who has had his licence revoked to apply under section 3 for a further declaration of his eligibility for release under the 1998 Act. Whether his application is determined depends upon whether he satisfies the conditions in Rule 9(2) of the 1998 Rules. It dismissed the appeal.

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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