

Neutral Citation No: [2020] NICA 54

Ref: MOR11344

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

ICOS No:

Delivered: 06/11/2020

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY DEBORAH McGUINNESS
FOR JUDICIAL REVIEW (No 1)

Ms Murnaghan QC with Mr McCleave (instructed by Departmental Solicitors Office) for
the Department of Justice (Appellant)

Mr Scoffield QC with Mr McConkey (instructed by McConnell Kelly Solicitors) for
Michael Stone (Appellant)

Mr Lavery QC with Mr O'Brien (instructed by McIvor Farrell Solicitors) for the Deborah
McGuinness (Respondent)

Before: Morgan LCJ, Lord Stephens and Treacy LJ

Morgan LCJ (delivering the judgment of the court)

[1] These are two appeals by the Department of Justice for Northern Ireland and Michael Stone ("the prisoner") from a decision of the High Court comprising McCloskey LJ and Colton J quashing the decision of the Northern Ireland Prison Service by letter dated 20 September 2017 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. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] The respondent is the brother of Thomas McErlean, deceased, who was murdered by the prisoner on 16 March 1988. The background to this appeal was helpfully set out at paragraph [5] of the first instance decision:

- (i) The murder of the Applicant's brother was perpetrated by the prisoner in a shooting attack on a group of defenceless mourners attending a burial at Milltown Cemetery on 16 March 1988. The prisoner was arrested on 22 March 1988.

- (ii) On 03 March 1989 at Belfast Crown Court the prisoner received a sentence of life imprisonment, having been convicted of six counts of murder, five counts of attempted murder, three counts of conspiracy to murder and 21 further counts (in summary) relating to the possession of explosive substances, the possession of firearms and ammunition, causing an explosion and wounding with intent. The sentence of life imprisonment was imposed in respect of the six counts of murder. Concurrent sentences ranging from 20 to 27 years imprisonment were imposed in respect of the other convictions. The trial judge recommended a tariff of 30 years imprisonment. (This had no binding effect under the legal arrangements then prevailing).
- (iii) On 17 February 1999 the Sentence Review Commissioners made a formal statutory determination acceding to the prisoner's application under section 3 of the Northern Ireland (Sentences) Act 1998 for a declaration of eligibility for early release and specifying that such eligibility would materialise on 22 July 2000.
- (iv) On 24 July 2000 the prisoner was released on licence.
- (v) On 24 November 2006 the prisoner perpetrated another much publicised attack, on this occasion at Parliament Buildings, Stormont.
- (vi) On the same date the prisoner was arrested and he was remanded in custody the following day.
- (vii) On 25 November 2006 the Secretary of State suspended the prisoner's licence under the statutory provisions. The Sentence Review Commissioners became seized of his case afresh.
- (viii) On 06 September 2007 the Sentence Review Commissioners informed the prisoner that they were minded to revoke his licence.
- (ix) On 14 November 2008 the prisoner was convicted of two counts of attempted murder, together with seven further counts consisting mainly of firearms and explosives offences arising out of the incident on 24 November 2006.
- (x) On 08 December 2008 the prisoner received two determinate sentences of 16 years' imprisonment in respect of the attempted murder convictions and other determinate sentences ranging from one year to ten years' imprisonment, all to operate concurrently, all arising out of the Stormont incident.
- (xi) On 06 January 2011 the Court of Appeal dismissed the prisoner's appeals against conviction.

- (xii) On 06 September 2011 the Sentence Review Commissioners formally determined to revoke the licence upon which the prisoner had been released on 24 July 2000.
- (xiii) On 29 July 2013 (in accordance with the statutory regime outlined) the Lord Chief Justice of Northern Ireland determined that the tariff in respect of the life sentence imposed on 03 March 1989 should be 30 years imprisonment.
- (xiv) On 05 September 2013 the Department certified that the release provisions of the 2001 legislation would not apply to the prisoner until he had “... served a period of 30 years, which includes the time spent in custody on remand”.
- (xv) On 10 September 2013 the Northern Ireland Prison Service calculated that the prisoner’s “*parole referral date*” would be 06 September 2017.
- (xvi) 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.

[3] It is common case that in computing the 30 year tariff expiry date as 21 March 2018 the Department took into account all of the following periods:

- (a) Upon his release on licence on 24 July 2000 he had been in prison for a total period of 12 years and 124 days pursuant to the life sentence imposed on 3 March 1989.
- (b) Between 24 July 2000 and his arrest on 24 November 2006 he was released on licence for a period of six years and 123 days.
- (c) Between 24 November 2006 and 21 March 2018 he was imprisoned for a further period of 11 years and 116 days.

The issue in the appeals is whether the period during which he 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.

Relevant statutory provisions

[4] Upon his conviction for murder in 1989 the prisoner was sentenced to imprisonment for life pursuant to section 1(1) of the Northern Ireland (Emergency Provisions) Act 1973 (“*the 1973 Act*”). Section 1(2) of the 1973 Act provided that the court may at the same time declare the period recommended as the minimum period which should elapse before the Secretary of State orders the release of that person on licence under section 23 of the Prison Act (Northern Ireland) 1953. That release mechanism has now been replaced by the Life Sentences (Northern Ireland) Order

2001. The statutory scheme proceeds on the basis that a life sentence can be served partly in custody and partly on licence.

[5] The Northern Ireland (Sentences) Act 1998 (“the 1998 Act”) was passed at the end of July 1998 to provide a scheme for the early release of prisoners who had been convicted of qualifying offences as envisaged in the Belfast/Good Friday Agreement. A qualifying offence is an offence which –

- (a) was committed before 10 April 1998,
- (b) was when committed a scheduled offence within the meaning of the Northern Ireland (Emergency Provisions) Act 1973, 1978, 1991 or 1996, and
- (c) was not the subject of a certificate of the Attorney General for Northern Ireland that it was not to be treated as a scheduled offence in the case concerned.

The murders in respect of which the prisoner was convicted on 3 March 1989 were qualifying offences.

[6] The 1998 Act established the Sentence Review Commissioners (“the Commissioners”) and section 3 of the Act provided that a prisoner may apply to the Commissioners for a declaration that he was eligible for release in accordance with the provisions of 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 –

- (i) that the prisoner was not a supporter of a specified organisation;
- (ii) 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
- (iii) that if he were released immediately he would not be a danger to the public.

[7] Section 6 of the 1998 Act provides that when Commissioners grant a declaration to a life prisoner in relation to his sentence they must specify a day which they believe marks the completion of about two thirds of the period which the prisoner would have been likely to spend in prison under the sentence. The prisoner has a right to be released on licence in respect of that sentence on the day specified.

[8] Section 10, however, provides for accelerated release and states that if a prisoner is granted a declaration in relation to a sentence imposed prior to the passing of the 1998 Act he has a right to be released two years after the passing of the said Act. It was on that basis that the prisoner was released on licence on 24 July

2000. The licence was governed by section 9 of the Act and subject only to conditions that he does not support a specified organisation, that he does not become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland and in the case of a life prisoner, that he does not become a danger to the public.

[9] Section 9(2) provided that the Secretary of State may suspend the licence if he believes the person concerned has broken or is likely to break a condition imposed by that section. The Secretary of State suspended the prisoner's licence on 25 November 2006 as a result of which the prisoner was detained on that date. His case was subsequently considered by the Commissioners who revoked his licence and subsequently rejected his application for a further declaration pursuant to section 3 of the Act.

[10] This appeal is directly concerned with the Life Sentences (Northern Ireland) Order 2001 ("the 2001 Order"). Article 5 of the 2001 Order provides for the determination of tariffs -

"5. - (1) Where a court passes a life sentence, the court shall, unless it makes an order under paragraph (3), 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.

(2) The part of a sentence specified in an order under paragraph (1) shall be such part as the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence, or of the combination of the offence and one or more offences associated with it."

[11] Article 6(5) of the 2001 Order provides that the life prisoner to whom the Order applies may require the Department of Justice to refer his case to the Parole Commissioners for Northern Ireland at any time after he has served the relevant part of the sentence or after the end of the period of two years beginning with the disposal of any previous reference. Article 6(6) is of some relevance and provides:

"In determining for the purpose of this Article whether a life prisoner to whom this Article applies has served the relevant part of the sentence, no account shall be taken of any time during which he was unlawfully at large, unless the Department of Justice otherwise directs."

[12] As soon as a life prisoner has served the relevant part of the sentence and the Parole Commissioners have directed his release it shall be the duty of the

Department of Justice pursuant to Article 6(3) of the 2001 Order to release the prisoner on licence. The Parole Commissioners shall not give a direction for the release of the prisoner 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.

[13] Articles 8 and 9 deal with licences and recall:

Article 8(1) - (2)

"Duration and conditions of licences

(1) Where a life prisoner is released on licence, the licence shall, unless previously revoked under Article 9(1) or (2), remain in force until his death.

(2) 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 Department of Justice may make rules for regulating the supervision of any descriptions of such persons."

Article 9(1) - (2)

"Recall of life prisoners while on licence

(1) If recommended to do so by the Commissioners, in the case of a life prisoner who has been released on licence, the Department of Justice or the Secretary of State may revoke his licence and recall him to prison.

(2) The Department of Justice or the Secretary of State may revoke the licence of any life prisoner and recall him to prison without a recommendation by the Commissioners, where it appears to it or him that it is expedient in the public interest to recall that person before such a recommendation is practicable."

By Article 9(6):

"On the revocation of the licence of any life prisoner under this Article, he shall be liable to be detained in pursuance of his sentence and, if at large, shall be deemed to be unlawfully at large."

[14] The provisions of the 2001 Order were applied to existing life prisoners by Article 11 of the 2001 order:

“11.-(1) This Article applies where, in the case of an existing life prisoner, the Department of Justice, after consultation with the Lord Chief Justice and the trial judge if available, certifies its opinion that, if this Order had been in operation at the time when he was sentenced, the court by which he was sentenced would have ordered that the release provisions should apply to him as soon as he had served the part of his sentence specified in the certificate.

(2) This Article also applies where, in the case of an existing life prisoner, the Department of Justice certifies its opinion that, if this Order had been in operation at the time when he was sentenced, a direction would have been given that the release provisions should apply to him as soon as he had served the part of his sentence specified in the certificate.

(3) In a case to which this Article applies, this Order shall apply as if -

- (a) the existing life prisoner were a life prisoner to whom Article 6 applies; and
- (b) the relevant part of his sentence within the meaning of Article 6 were the part specified in the certificate.

(4) In this Article “existing life prisoner” means a life prisoner serving one or more life sentences passed before the appointed day but does not include a life prisoner -

- (a) who had been recalled to prison under section 23 of the Prison (Northern Ireland) Act 1953 and who is not an existing licensee; or
- (b) whose licence has been revoked under Article 46(2) of the Criminal Justice (Children) (Northern Ireland) Order 1998 and who is not an existing licensee.”

The exceptions in Article 11(4) of the 2001 Order do not apply in this case.

[15] The certificate of opinion in respect of the prisoner is dated 5 September 2013 and states as follows:

“I certify, in accordance with the recommendation of the Lord Chief Justice, that, under Article 11 (1) of the Life Sentences (Northern Ireland) Order 2001 the release provisions of the Order should apply to Michael Anthony Stone who was sentenced on 3 March 1989 at Belfast Crown Court, to life imprisonment for six counts of murder as soon as he has served a period of 30 years, which includes the time spent in custody on remand.”

The first instance decision

[16] The High Court concluded that the resolution of the core issue was not to be found in the express provisions of either the 1998 Act or the 2001 Order. The court proceeded, therefore, to ascertain the implied and unexpressed intention of the legislature. Relying on R (Quintavalle) v Secretary of State for Health [2003] UKHL 13 the court embarked upon an extensive examination of the pre-enacting history and the broader legislative, jurisprudential and policy context.

[17] Lord Justice McCloskey set out the history of the life sentence leading to the present arrangements. He noted that a life sentence takes the form of a punishment which endures for the lifetime of the convicted person. The arrangement under the 2001 Order consists of a period, the tariff period, during which the convicted person must be imprisoned in order to reflect the requirements of retribution and deterrence and a second component during which the convicted person may have to be imprisoned in order to protect the public. The tariff period has been referred to in the decided cases as the minimum term, penal element or actual term.

[18] The court then examined the effect of the 1998 Act. The arrangements were exceptional and extraordinary. The provisions in the Belfast Agreement relating to the early release from prison of convicted terrorist offenders were highly contentious and divisive. The court described the ensuing legislation as reflecting the elements of heavy political compromise which the provisions of the Belfast/Good Friday Agreement entailed. The court also expressed its view that the 1998 Act was compiled with great haste and the legislative gaps identified by the court were unsurprising.

[19] The court noted that the “relevant part of the sentence” referred to in Article 6 of the 2001 order is a prerequisite to the release of a life prisoner. In light of the analysis as to the meaning of the tariff the court concluded that the tariff component of every sentence of life imprisonment entails incarceration for the totality of the gross period, subject only to the lawful deduction of any reckonable presentence period or periods of remand custody. 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 Act was impossible to deduce from the statutory provisions considered in their full context. The court considered that this windfall, wholly unmerited on any reasonable view, could not have been intended by the legislature.

Consideration

[20] The arrangements for the release of prisoners convicted of murder clearly require the most careful scrutiny in order to ensure the safety and confidence of members of the public. The legislative provisions governing the decision-making of the Sentence Review Commissioners under the 1998 Act and the Parole Commissioners for Northern Ireland under the 2001 Order have at their heart the protection of the public as a fundamental consideration. Although the wording of each legislative provision is different, the relevant Commissioners must be satisfied that it is safe to release the prisoner. That is a task requiring considerable judgment and skill. The care and professionalism with which it is carried out is critical to securing public confidence in the justice system.

[21] This case is concerned with the operation of the provisions made by the 2001 Order. At paragraph [20] of its decision the High Court stated that the legislature had not made provision for the inclusion of the licensed release of approximately six years under the 1998 Act in the tariff of 30 years. We agree that there is no express reference to the 1998 Act but the starting point must be to consider the provisions of the 2001 Order.

[22] Under Article 2 of those provisions a life prisoner is defined as meaning a person serving one or more life sentences. Once convicted the prisoner is always serving his life sentence whether in custody or on licence. It is common case that the prisoner was lawfully released on the licence conditions prescribed under the 1998 Act for the six year period at issue in this case and that during that period he was serving his sentence.

[23] Part 3 of the 2001 Order provides for the determination of tariffs. Article 5(1) requires the court to 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. Article 5(2) provides that the part of the sentence specified should be such part as the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence. The respondent contends that the "part of the sentence specified in the order" refers not just to a period of time but to a period of time spent in custody. The terms of the certificate are set out at [15] above. There is no reference to a requirement for any part of the period specified to be served in prison.

[24] Article 6 of the 2001 Order deals with the duty to release certain life prisoners. Article 6(6) expressly excludes any time during which a prisoner was unlawfully at large as a period to be taken into account in determining whether a life prisoner had

served the relevant part of a sentence unless the Department of Justice otherwise directs. The implication is that there are certain circumstances in which periods unlawfully at large would be taken into account as a relevant part of the sentence.

[25] Section 24 of the Prison Act (Northern Ireland) 1953 is the only legislative provision setting out circumstances in which a prisoner lawfully released from custody may not have the period of release counted as part of his sentence-

“Temporary discharge of prisoners on account of ill-health.

24.- (1) If the Department is satisfied that by reason of the condition of a prisoner's health it is undesirable to detain him in prison, but that, such condition of health being due in whole or in part to the prisoner's own conduct in prison, it is desirable that his release should be temporary and conditional only, the Department may, if the Department thinks fit, having regard to all the circumstances of the case, by order authorise the temporary discharge of the prisoner for such period and subject to such conditions as may be stated in the order....

(4) Where a prisoner under sentence is discharged in pursuance of an order of temporary discharge, the currency of the sentence shall be suspended from the day on which he is discharged from prison under the order to the day on which he is received back into prison, so that the former day shall be reckoned and the latter shall not be reckoned as part of the sentence.”

[26] The Prison and Young Offenders Centres Rules (Northern Ireland) 1995 provide at Rule 27 that a prisoner may be temporarily released for any special purpose or to enable him to have medical treatment, or to engage in employment, to receive instruction or training or to assist him in his transition from prison to outside life. There is no provision for that period not to count as part of his sentence for the purpose of Article 5(1) of the 2001 Order. It would be absurd if there was. It would mean that a prisoner released to assist his transition would be told that he would have to serve an additional period in prison equivalent to the period for which he was to be released.

[27] Article 7 of the 2001 Order provides a power to release life prisoners on compassionate grounds. The responsibility to determine release is given to the Department of Justice although the Secretary Of State may notify the Department that the life prisoner is not to be released without the Secretary of State's agreement. There is no suggestion that during the period of such release the prisoner is not serving the relevant part of a sentence. The contrast with Article 6(6) strongly supports the inference that during a period of release on compassionate grounds the

prisoner is serving the relevant part of the sentence. That was recognized as arguable by the High Court but no further inference was drawn from it. In our view these provisions point firmly against any implication that the period of release under the 1998 Act was not to be included in the period specified in the certificate.

[28] There is a general principle that Parliament is a rational, reasonable and informed legislature pursuing a clear purpose in a coherent and principled manner (Bennion on Statutory Interpretation, Seventh Edition Section 9.3 and the cases there cited). In this case there is 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 was plainly open to Parliament to have provided for the exclusion of the licence period as a relevant period in fulfilment of the tariff but the sensitivity referred to below suggests that any implication to that effect would be unjustified.

[29] That conclusion is supported by the fact that this Order in Council was made on 18 July 2001 just after the First Minister of the Assembly had resigned on 1 July 2001. The history is helpfully set out in *Robinson v Secretary of State for Northern Ireland and others* [2002] UKHL 32. The suggestion that Parliament would not have been alert to issues surrounding the release of troubles related prisoners at that stage is almost inconceivable having regard to the sensitivity of the issue.

[30] If the analysis of the High Court is correct it means that the tariff expiry date calculated by the Northern Ireland Prison Service would have to be recalculated to exclude the entirety of the period during which the prisoner had lawfully been released on licence under the 1998 Act. The assessed date of release would extend by the length of the period on licence. The longer the period on licence the greater the extended period in custody. Such an interpretation would constitute an interference with the physical liberty of the prisoner and could only arise under clear authority of law. In our view it could not be implied.

[31] We consider that the decision of the High Court effectively rewrote the statute. The court concluded that the inclusion of a period on licence pursuant to the 1998 Act would constitute a windfall. We take no issue with the fact that many people would support that view but the policy decision must be for the legislature to make. At paragraph [49] of the decision the court said:

“We consider that this windfall, wholly unmerited on any reasonable view, cannot have been intended by the legislature.”

[32] We recognise that the arrangements in relation to troubles related prisoners have been a source of considerable concern to many within this community. 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.

Conclusion

[33] We are satisfied that interpreting the words of the statute in their context leads 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. The appeals are, therefore, allowed.