Neutral Citation No: [2020] NICA 53 **Judgment: approved by the Court for handing down (subject to editorial corrections)***	*Ref:* **MOR11343** *ICOS No:* **19/054658/01/A01** *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 3)

Mr Lavery QC with Mr O'Brien (instructed by McIvor Farrell Solicitors) for Deborah McGuinness (Appellant)
Mr Coll QC with Mr McAteer (instructed by Carson and McDowell Solicitors) for the Sentence Review Commissioners (Respondents)
Mr Scoffield QC with Mr McConkey (instructed by McConnell Kelly) for Michael Stone

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Before: Morgan LCJ, Treacy LJ and Colton J

Morgan LCJ (delivering the judgment of the court)

[1] This is an appeal against the decision of McCloskey LJ dismissing the appellant's claim that the Sentence Review Commissioners did not have power to entertain a further application for a declaration of eligibility for release pursuant to section 3 of the Northern Ireland (Sentences) Act 1998 in circumstances where Michael Stone ("the prisoner") had been released on licence and that licence had been revoked. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] The appellant is the sister of Thomas McErlean deceased, one of the victims of murders perpetrated by the prisoner in a notorious attack on mourners at Milltown Cemetery, Belfast on 22 March 1988. The prisoner was convicted and sentenced to life imprisonment in March 1989. The Northern Ireland (Sentences) Act 1998 established an accelerated release system for offenders convicted of troubles related offences. The prisoner was released on licence under the 1998 Act on 24 July 2000. On 24 November 2006, he perpetrated another attack at Parliament Buildings, Stormont for which he received two determinate custodial sentences of 16 years on 8 December 2008.

[3] His licence under the 1998 Act was suspended on 25 November 2006 and formally revoked on 6 September 2011. By letter dated 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 on 19 September 2019.

[4] The issue in this appeal is whether the Commissioners were correct to entertain a further application for a declaration of eligibility after the prisoner had his licence under the 1998 Act revoked. This has implications for the prisoner in future and for others who have had or may have their licences revoked.

Statutory provisions

[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 the 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. It 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 on licence two years after the passing of the Act. It was on that basis that the prisoner was released on licence on 24 July 2000.

[9] Section 8 enables the Secretary of State to apply to the Commissioners to revoke a declaration under section 3 at any time before the prisoner is released if the Secretary of State believes that as a result of a change of circumstances an applicable condition in section 3 is not satisfied or new information suggests that such a condition is not satisfied. The Commissioners shall grant such an application if, and only if, the prisoner has not been released and they are of the same view. This is the only circumstance in which the 1998 Act expressly provides for revocation of a section 3 declaration.

[10] A prisoner's licence is governed by section 9 of the Act and is 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.

[11] Section 9(2) provides that the Secretary of State may suspend a licence if he believes that the person concerned has broken or is likely to break the licence conditions. Where the licence is suspended, the prisoner is detained. That was the basis for the detention of the prisoner from 25 November 2006 prior to his sentence for the further offences. The Commissioners are required on suspension to consider his case and if they think that he has not broken and is not likely to break a licence condition they must confirm his licence. Otherwise, they must revoke it and they did so formally in this case on 6 September 2011.

[12] Section 16 provides the Secretary of State with the power to suspend or later revive the operation of section 3 of the Act. That power has not been exercised.

[13] Schedule 2 of the Act enables the Secretary of State to make rules prescribing the procedure to be followed in relation to proceedings of the Commissioners and to make provision for the matters set out in the Schedule. Paragraph 8 of the Schedule provides that rules may prevent successive applications under any provision of the Act being made in specified circumstances.

[14] The Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998 ("the 1998 Rules") were made on foot of that power. Rule 9 deals with further applications –

> "9.—(1) Subject to paragraph (2), any successive application made under section 3(1) or 8(1) of the Act shall be referred to as a further application.
>
> (2) The Commissioners may only determine a further application if in their view:
>
> (a) circumstances have changed since the most recent substantive determination was made in respect of the person concerned; or
>
> (b) 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.
>
> (3) For the purposes of these Rules, an application is successive where it is not the first application to have been made under the section of the Act in question by or in respect of the person concerned."

It is clear from Rule 15 that consideration by the Commissioners of whether a recalled prisoner's licence should be confirmed or revoked is a substantive determination as is the determination of any application under section 3 or section 8 of the Act.

[15] Rule 28 applies when the Commissioners are required to consider whether a recalled prisoner's licence should be confirmed or revoked. Rule 28(2) provides that the recalled prisoner shall be treated as the person concerned and a party to the case as if he were an applicant who had made an application under section 3(1) of the Act and the Secretary of State shall be treated as a party to the case as if he were the respondent in relation to that application. The Commissioners are required to determine the case on that basis save where the provisions of the rule indicate otherwise.

[16] All life prisoners, whether entitled to the benefit of the release provisions under the 1998 Act or not, are entitled to avail of the release provisions established by the Life Sentences (Northern Ireland) Order 2001 which requires consideration by the Parole Commissioners of the position of the prisoner once the tariff has been served. The Parole Commissioners must be satisfied that it is no longer necessary

for the protection of the public from serious harm that the prisoner should be confined. The conditions of any licence under the 2001 Order are likely to be more extensive than those under the 1998 Act.

Discussion

[17] Access to the accelerated release provisions is dependent upon the prisoner persuading the Commissioners that he is eligible for release in accordance with the provisions of the Act. The statutory role of the Commissioners is essentially to ensure the protection of the public and in that respect is similar to that of the Parole Commissioners. The determination of eligibility is made on the basis of the evidential material available. Where there is a dispute, the hearing under the 1998 Rules is adversarial and the parties are the prisoner and the Secretary of State.

[18] It is common case that if an application by a prisoner under section 3 is refused the prisoner can pursue a further application. Rule 9(2) provides that such an application to the Commissioners can only succeed if circumstances have changed or further relevant information is available. The determination by the Commissioners reflects, therefore, their consideration at a particular moment in time on the basis of the evidence then available.

[19] Of course, a change of circumstances may operate to the disadvantage of the prisoner as well as to his advantage. The protection of the public requires that there should be some mechanism to deal with such a change. Section 8 of the Act made provision for the Secretary of State to apply to the Commissioners to revoke a declaration under section 3 if at any time before the prisoner was released there was new evidence or information or a change to the identification of specified terrorist organisations which bore upon the prisoner's circumstances.

[20] It is important to note that the independence of the Commissioners in respect of the declaration was preserved by this process. The Secretary of State has no power to interfere with the declaration on an interim or final basis. That is unsurprising given that the Secretary of State was a party before the Commissioners in their consideration of the making of the declaration. The provision under section 8 ensures that the public are protected as that application can only be made while the prisoner is in custody.

[21] The other feature of section 8 is that such an application can be made by the Secretary of State on multiple occasions as long as the prisoner is still in custody. The conditions prescribed by Rule 9 need to be satisfied but this mechanism is another example of the ability of the scheme to respond flexibly to changing circumstances.

[22] Circumstances can change quickly. State agencies may come into possession of information which raises imminent concerns about public safety. A mechanism was required within the statutory scheme to respond to such circumstances. That

mechanism is found in section 9 of the Act. Clearly, it would have interfered with the independence of the Commissioners if the Secretary of State had been given power to interfere with a declaration. The mechanism for ensuring public safety was to enable the Secretary of State to suspend a licence as a result of which the prisoner would be detained.

[23] The Secretary of State only had power in respect of the licence and it was that issue which was referred to the Commissioners by section 9 of the Act. They had to make the decision whether to confirm or revoke the licence. In doing so, Rule 28 of the 1998 Rules required the Commissioners to consider the matter as if it were dealing with the section 3 application. These provisions reinforce, therefore, the role of the Commissioners as an independent body at the heart of this release mechanism and the importance of that role in ensuring protection of the public.

[24] The issue in this appeal is 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 resolution of that issue depends upon the meaning of the statutory provisions based on the interpretation of the words of the statute informed by the context, principally, a recognition of the independence of the Commissioners and their role in ensuring public safety.

[25] Turning to the words of the Act, there is no prohibition upon repeated applications. Indeed, a total prohibition on such applications was not at issue in this appeal. Paragraph 8 of Schedule 2 makes provision for the prevention of successive applications to be governed by the 1998 Rules. That is a clear indication that the statute contemplated such applications and the circumstances in which they were permitted was to be governed by the Rules.

[26] Rule 9 deals with successive applications made under Section 3. An application is successive where it is not the first application to have been made under the section in question by the person concerned. That applies in this case as the prisoner has previously made a section 3 application. Such applications are identified by the Rule as further applications.

[27] The Commissioners may only determine a further application under section 3 if two conditions are satisfied. The first is that the circumstances must have changed since the most recent substantive determination was made in respect of the person concerned. It is necessary, therefore, in this case to identify the most recent substantive determination. As indicated at paragraph [14] above, the revocation of his licence was the most recent substantive determination.

[28] The second condition is that reliance is placed in support of the further application on any material information, document or evidence which was not placed before the Commissioners when the most recent substantive determination was made in respect of the prisoner. That is a matter which clearly depends upon the material available at the time of determining the application. In common with

renewed applications under section 8 of the Act, the process does not depend upon a reconsideration of the original decision.

[29] There is, therefore, express provision within the Rules for the making of a further section 3 application after a substantive determination that a licence should be revoked. The procedure for the making of such an application also respects the independence of the Commissioners in determining the issues between the prisoner and the Secretary of State and the role of the Commissioners in protecting the public. We repeat what this court said in McGuinness (No 1) about that issue:

> "[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."

[30] There were two principal submissions advanced on behalf of the appellant. The first was that this issue had been determined by this court in *John Brady's Application*. That was an unreported *ex tempore* judgment delivered on 15 November 2007. We were informed by counsel that the appeal arose from a judicial review of a determination by the Sentence Review Commissioners to revoke a licence. The appellant had been charged with firearms offences but had not been prosecuted at the relevant time.

[31] In the transcript comprising the five paragraph judgment, the court indicated that the Sentence Review Commissioners were effectively *functus officio*. The passage upon which the appellant relied stated:

> "True it is that there is no explicit provision in the 2001 Order which extinguishes the jurisdiction of the Sentence Review Commissioners under the 1998 Act. We consider that the respective purposes of the two items of legislation are only reconcilable and compatible on the basis that – as Mr Maguire QC has put it on behalf of the notice party – when a life sentence prisoner moves from the dimension or context of accelerated or early release under the 1998

> Act to the different context of release under the 2001 Order, that supervening jurisdiction effectively extinguishes the earlier jurisdiction."

[32] There is no indication that any of the arguments advanced in this case were relevant to the Brady appeal and certainly no indication that the statutory provisions opened to us were considered in that case. The court resolved the appeal by applying the principle in Salem [1999] 1 AC 450. On the basis of the information available to us, we consider that we should be very cautious about any reliance on those observations. The statutory provisions under the 1998 Act are still speaking and there is no support for the proposition that they have been extinguished in any way.

[33] Mr Lavery also sought to rely on statements made by the Secretary of State in answer to questions in Parliament. The admissibility of such statements is governed by *Pepper v Hart* [1993] AC 593. Lord Browne Wilkinson concluded that reference to parliamentary materials would 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.

[34] We do not consider that these conditions have been 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.

Conclusion

[35] We are 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. For the reasons given, in agreement with the learned trial judge, we dismiss the appeal.