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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY DENISE MULLAN FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE DEPARTMENT OF JUSTICE

DENISE MULLAN

Applicant

and

DEPARTMENT OF JUSTICE

Respondent

and

JOHN McNEICE

Notice Party

and

GARFIELD BEATTIE

Notice Party

Mr Desmond Fahy KC with Mr Karl McGuckin (instructed by Phoenix Law Solicitors) for the Applicant
Dr Tony McGleenan KC with Mr Christopher Summers (instructed by the Departmental Solicitor's Office) for the Respondent
Mr Donal Sayers KC with Mr Stephen Toal (instructed by KRW Law Solicitors) for the Notice Party McNeice
Mr Hugh Southey KC with Mr David McKeown (instructed by GR Ingram Solicitors) for the Notice Party Beattie

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COLTON J

Introduction

[1] The applicant is the daughter of Denis Mullan who was murdered by Garfield Beattie on Monday 1 September 1975 at the family home. She was present and witnessed the murder. Beattie was one of the notorious "Glenanne Gang" who were involved in a series of sectarian murders. He was arrested on 11 August 1976 and charged with the murders of Denis Mullan, Frederick McLaughlin and Patrick McNeice. The notice party, John McNeice, is a son of Patrick McNeice. Mr Beattie was convicted of the murders and received a life sentence for each offence. He was released on life licence in or around March 1993 having served 14 years in prison.

[2] For the purposes of the present case Mr Beattie is an "existing licensee" as defined by Article 12(2) of the Life Sentences (Northern Ireland) Order 2001.

[3] On 5/6 September 2017 the applicant was approached by Mr Beattie in Moy, Co Tyrone, when he admitted to murdering her father. On 28 August 2020 the applicant issued civil proceedings against Beattie in respect of her father's murder seeking damages. He was served with formal notification of the civil action on 18 September 2020.

[4] Mr Beattie replied to the applicant's solicitor on 24 September 2020 indicating that he would not be responding to the writ of summons and suggesting that the matter was a waste of time. He sets out his personal circumstances and suggests that the applicant would be better served suing the MOD for their involvement in the Glenanne Gang.

[5] Importantly, for the purposes of this application the applicant received the following written note on or about 28 September 2020:

> "It has been brought to our attention, you are taking High Court Action against Mr Gerald Beattie. This is nothing more than an act of deliberate provocativeness, initiated by an personal vendetta. The contInces of this vendetta in the High Court will have ramifications and consequences.
>
> We will be unambiguous. There will most certainly be ramifications for the fragile Good Friday Agreement. There will be personal consequences for yourself and immediate family.
>
> Therefore, you are been strongly advised to think again and consider the long term consequences on your own personal health.

> East Tyrone
> Ulster Volunteer Force"

[6] Mr Beattie subsequently admitted responsibility for sending this note to the applicant. He was arrested and charged with the offence of attempted intimidation, contrary to section 1 of the Protection of Person and Property Act (Northern Ireland) 1969 along with ancillary offences.

[7] On 11 October 2021 he appeared before Dungannon Magistrate's Court. He pleaded not guilty to the offence on the basis that he had no intent to cause fear or injure the applicant. The District Judge found Mr Beattie guilty stating:

> "The letter speaks for itself; I do not believe a word that came out of the defendant's mouth. I was tempted to dispense with pre-sentence reports and just send him straight to prison. There may also be consequences anyway over his release licence."

He told Mr Beattie to "leave the court with your head down and do not even glance at Ms Mullan." He was sentenced to a period of imprisonment for 15 months. Mr Beattie appealed the matter, and the sentence was increased to 17 months' imprisonment by the County Court.

The legal proceedings

[8] The legal proceedings have had a somewhat chequered history. After receiving the threatening letter, the applicant's solicitors wrote to the Secretary of State on 7 October 2020 asking that "consideration is now given as a matter of urgency to the revocation of Mr Beattie's licence." On 6 November 2020 a reply was sent on behalf of the Secretary of State pointing out that the matter of Mr Beattie's licence was one for consideration by the Department of Justice.

[9] Further correspondence was sent to the Secretary of State on 2 March 2021 which received a similar response to that of 6 November 2020 on 3 March 2021.

[10] The applicant wrote personally to the Department of Justice on 10 June 2021. A reply was sent on 22 June 2021 which informed the applicant that:

> "… as a consequence of Mr Beattie's alleged further offending in September 2020, his licence has been amended to include additional licence conditions, including prohibition on directly or indirectly contacting victims and their families. Mr Beattie's life licence is now actively managed under multi-agency arrangements involving

> probation, police, prison service, and the Minister of Justice."

[11] Eventually, a pre-action protocol letter was sent on behalf of the applicant on 22 July 2021 challenging the decision not to recall Mr Beattie to prison.

[12] In its reply of 12 August 2021 the Department repeated the contents of the letter previously sent by the Minister and argued that:

> "As Mr Beattie is currently charged with two offences relating to the matters your client raises, we consider it would be inappropriate for any public law challenge to proceed in advance of the conclusion of the criminal process. The outworking of that process may further inform the need for further action by the relevant criminal justice agencies."

[13] Parallel to this correspondence the notice party, Mr McNeice, also engaged with the authorities about the failure to recall Mr Beattie to prison.

[14] Mr McNeice issued judicial review proceedings on 21 July 2021 and this applicant issued judicial review proceedings on 7 September 2021.

[15] Both applications were case managed by the court from 8 September 2021 onwards. Because of Mr Beattie's appearance in court and his sentence of imprisonment no final decision was made in relation to the leave application until 19 May 2022.

[16] At that stage the final position of the Department had crystalised and the applicant was given leave to amend the Order 53 Statement to reflect the final position.

[17] Finally, on 21 June 2022 the court directed that the Mullan application should proceed as the "lead case" but recognising Mr McNeice's undoubted standing and interest in the matter, it was directed that he be joined as a notice party to the proceedings.

[18] It is recognised that there was significant delay in relation to the issuing of the proceedings, but in light of the ongoing nature of the consideration of Mr Beattie's licence conditions and the public interest in the court examining how terrorist offenders are managed on licence the court determined that leave should be granted.

The decision under challenge

[19] The target of the challenge is now the decision of the respondent made on 7 February 2022 as communicated on 25 February 2022.

[20] It is worth setting out the contents of that correspondence in full:

> "Dear Sir
>
> **Your Client: Denise Mullan**
>
> I would confirm that following completion of a review of the risk presented by Mr Beattie, the Multi-Agency Risk Assessment Panel (MARAP) has concluded that the threshold for initiation of revocation proceedings has not been met. Accordingly, Mr Beattie will remain in prison custody serving the custodial element of the recently imposed Determinate Custodial Sentence. He will be re-released on licence at the custody expiry date of the DCS.
>
> Mr Beattie's case has been subject to considerable scrutiny by the MARA Panel to date; his risk, management and compliance with his licence conditions will be kept under review going forward and any appropriate steps taken where necessary.
>
> In determining whether to initiate revocation proceedings, the Panel agreed to apply the accepted test used by the Parole Commissioners when considering requests to revoke a licence, ie the Panel must be satisfied that the risk of serious harm posed by the offender has increased more than minimally, and the increased level of risk can no longer be safely managed in the community. After extensive consideration, the Panel concluded the risk presented by Mr Beattie can be safely managed in the community, and therefore, it would be inappropriate to initiate revocation proceedings at this time. The Panel accepted and gave weight to the fact that Mr Beattie was recently convicted, sentenced to 17 months DCS for unlawfully caused (sic) by force, threats or menaces or in some other way, namely Ms Denise Mullan, to do or refrain from doing an act, namely discontinue legal proceedings, contrary to section 1(d) of the Protection of the Person and Property Act (Northern Ireland) 1969. These factors alone illustrate that the first element of the test set out above was met, ie the risk of serious harm had increased more than minimally.
>
> Turning to the second limb of the test, the Panel noted and gave weight to the fact that Mr Beattie had not reoffended

following the imposition of revised licence conditions (set by MARAP following consultation with the Parole Commissioners) in May 2021. The Panel also gave significant weight to the fact that he has engaged positively with the supervising officer and has agreed to engage with risk reduction interventions during his period in custody and also within the community upon his release on licence. The Panel gave weight to the fact PSNI confirmed Mr Beattie is not linked or involved with terrorist organisations. The Panel noted that PSNI had confirmed it is not unlawful to be in possession of the type of bow owned by Mr Beattie and, in any event, the bow in question is not functional. The Panel concluded the second limb of the test was not met.

In summary, the Panel are satisfied the risk presented by Mr Beattie can be safely managed on licence. He will be subject to frequent direct face to face supervision by a supervising officer. In addition, the Department of Justice will be consulting further with the Parole Commissioners in advance of Mr Beattie's release from custody on the likely addition of further conditions designed to support protecting the public, reducing the likelihood of reoffending, and supporting Mr Beattie's rehabilitation.

The Panel recognises that your client will be disappointed that revocation proceedings will not be initiated in this case."

(*Note – the reference to a bow refers to an item found in Mr Beattie's premises – it was considered to be neither illegal or functional).*

The statutory framework

[21] The key provision in this application is Article 9 of the Life Sentences (Northern Ireland) Order 2001 ("the 2001 Order") which reads as follows:

"**Recall of life prisoners while on licence**

9.—(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.

(3) A life prisoner recalled to prison under this Article—

(a) on his return to prison, shall be informed of the reasons for his recall and of his right to make representations; and

(b) may make representations in writing to the Department of Justice or (as the case may be) the Secretary of State with respect to his recall.

(4) The Department of Justice or (as the case may be) the Secretary of State shall refer the case of a life prisoner recalled under this Article to the Commissioners.

(5) Where on a reference under paragraph (4) the Commissioners direct the immediate release of a life prisoner on licence under this Article, the Department of Justice shall give effect to the direction.

(5A) 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.

(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.

(7) The Secretary of State may revoke the licence of a life prisoner and recall him to prison under this Article only if his decision to revoke the licence and make the recall is arrived at (wholly or partly) on the basis of protected information."

[22] Thus, the legislation anticipates two circumstances in which a recall can be made – see 9(1) and 9(2).

[23] The circumstances in Article 9(2) are not apposite given the delay between Mr Beattie's initial arrest and the subsequent correspondence to the Department and the fact there have been no further allegations of negative behaviour attributable to Mr Beattie which would require a recall under 9(2). It is therefore Article 9(1) which is in play in this application.

[24] Article 9 is not prescriptive in terms of who can refer a matter to the Parole Commissioners (PCNI). In the vast preponderance of cases this is done through the Probation Board of Northern Ireland (PBNI) who will be supervising a prisoner under licence. In theory, a reference could come from other agencies.

The background to MARA

[25] At this stage it is useful to set out the background to MARAP which is explained in the affidavit of Steven Allison, who is a Deputy Director of the Department of Justice.

[26] He explains that up until August 2017 the PBNI supervised all individuals on licence in the community, including those convicted of terrorist related offences except for individuals released under the terms of the 1998 Good Friday/Belfast Agreement.

[27] PBNI's operational approach to the supervision of terrorist related offenders on licence in the community fundamentally changed in September 2017 following receipt of a verified threat from dissident republican groups against probation staff.

[28] This resulted in PBNI staff ceasing all supervision of individuals considered by PBNI to be terrorist offenders. Because of the absence of a Northern Ireland Executive, it was not possible to direct the development of a new model designed to address the public safety gaps arising from the operational approach adopted by PBNI.

[29] Following the recommencement of the Northern Ireland Assembly and Executive in January 2020, the Minister of Justice ("the Minister") was briefed on the issue. As a result, the Department under the direction of the Minister, developed an alternative delivery model not directly involving PBNI staff to assess and manage the risk of terrorist related offenders ("TROs"). Pending a longer-term delivery model underpinned by legislative amendment, interim Multi-Agency Arrangements (known as MARA) were developed and commenced on 8 September 2020.

[30] The key component within the interim arrangements was the establishment of a Multi-Agency Review Panel with responsibility for:

(i) Deciding whether individuals should be classified as TROs having regard to criteria set out in the guidance issued by the Minister under Article 50 of the Criminal Justice (Northern Ireland) Order 2008;

(ii) Consider and agree a risk management plan, including additional licence conditions in relation to individual TROs;

(iii) Consider and determine applications submitted by TROs on licence in the community to travel outside Northern Ireland, change address or permanently reside outside the UK; and

(iv) Where relevant to consider what steps were appropriate to address non-compliance with licence/supervision/conditions by TROs including by way of issuing warnings, varying licence conditions and/or initiation of revocation proceedings.

[31] The panel comprised senior representatives from PSNI, the Northern Ireland Prison Service, the PBNI and the DoJ. The DoJ chaired the weekly panel meetings.

[32] Mr Allison confirms that the normal procedure (confirmed by the experience of the court) is that PBNI is responsible for considering whether the risk of harm/serious harm posed by a licensee to the public has increased to the point that the level of risk cannot be suitably managed in the community.

[33] Given the operational approach adopted by PBNI post the threat to staff in 2017, the interim MARA arrangements introduced in September 2020 provided the platform to assess and manage the risk posed by TROs and, where applicable, consider initiation of revocation proceedings in individual cases.

[34] Importantly, Mr Allison avers in his affidavit as follows:

> "22. Where a revocation request has been submitted to the Parole Commissioners and the single Commissioner recommends the revocation of the licence, it is a matter for the Department to take the final decision as to whether to revoke the licence. For life licencees, the Minister will take the final decision. For all other licence types, the decision is taken by officials within the DoJ Public Protection Branch. As Deputy Head and, latterly as Head, of this Branch over the past 12 years until May 2022, I have a comprehensive understanding of the revocation process and associated policies/guidance and relevant jurisprudence in this area, together with significant experience in assessing revocation requests and taking the final decision to revoke or not to revoke a licence. I have personally been involved in considering in excess of 1,000 revocation requests. Whilst the Parole Commissioners' recommendations will be highly persuasive, it is not binding on the Department/Minister. The revocation of a licence results in deprivation of liberty, therefore, decisions

> to initiative and, ultimately, revoke a licence must be made through balancing the rights of the public to be protected and the rights of the licencee to be treated fairly and in an objective manner.
>
> 23. I do not agree with the contention that the Department may not answer the question of whether a licencee's level of risk can be safely managed in the community. This second limb of the test applied to revoke a licence, therefore, requires the supervising agencies within the MARA Panel to assess whether revocation is the only appropriate option to manage the risk posed by a TRO. The supervising agencies will be required to evidence how this test was met with the request submitted to the Parole Commissioners for Northern Ireland (PCNI). The final decision maker must be satisfied that the evidence presented to the revocation request demonstrates that revocation of licence is appropriate and justified, and the only appropriate option to safely manage the increased level of risk posed by an offender to the public."

Analysis of the decision under challenge

[35] The decision communicated on 25 February 2022 was the culmination of a series of meetings in which MARAP considered the question of Mr Beattie's licence. The meetings took place respectively on 16 September 2021, 23 September 2021, 18 October 2021, 15 November 2021, 22 November 2021, 29 November 2021, 9 December 2021, 20 December 2021, 24 January 2022, and 7 February 2022.

[36] The court has been provided with the minutes of each of the meetings. For the purpose of this application the key meetings are the last two. The minutes indicate the attendees were, the Chair who is the Deputy Director within the Department of Justice, a MARA team manager, a MARA business manager, Mr LJ, the MARA supervisory officer, and representatives from the PSNI, NIPS, DoJ and a secretary. The minutes of the latter two meetings reflect that the meeting was a "review" having regard to the previous meetings at which Mr Beattie's situation was discussed.

[37] The minutes of the 24 January 2022 meeting run to 29 paragraphs.

[38] The panel reviewed the chronology of Mr Beattie's admission to the interim MARA arrangements of April 2021 and summarised actions taken to date.

[39] The panel addressed the appropriate legal test for revocation. It was noted that if it was considered the threshold to initiate revocation proceedings was met, that the supervising officer would be invited to draft the recall request for consideration, in the first instance, by the PCNI. If the panel considered the threshold to initiate

revocation proceedings was not met, the panel agreed that it should discuss what relevant action should be taken to address the risk posed by Mr Beattie eg augment licence conditions, engagement with a supervising officer, custodial work interventions etc.

[40] It is apparent from the minutes that there was a wide-ranging discussion about the risk presented by Mr Beattie on his release from prison.

[41] In discussion, the following comments were made:

- Mr Beattie is currently in custody on a DCS sentence and will be released at a fixed point in time without consideration by a PCNI panel.

- The victim representation (from the notice party Mr McNeice) suggests that a potential safeguard flowing from the revocation of his licence would mean that Mr Beattie would not be released unless a parole panel assess that his risk of serious harm could be safely managed in the community.

- Mr Beattie appears to be courting the press and may be fully aware of the impact of his actions and comments.

- The panel agreed that the behaviours presented have amplified Mr Beattie's level of risk of serious harm.

- However, the panel considered there may be actions undertaken to manage that risk through a combination of risk reduction work and via licence conditions.

- It was accepted that Mr Beattie committed new offending while on a life licence and been sentenced by the court.

- It was further accepted that Mr Beattie had not come to adverse police attention since his release on licence in 1993 until the issue of the letter to Ms Mullan in autumn 2020 leading to his recent conviction and sentencing.

- The panel also noted, and gave weight to the fact, that Mr Beattie had not committed any further offences since autumn 2020, and, in particular, since his licence was revised in April 2021 and following a MARA warning in April 2021.

- The panel noted that the PSNI had conducted a search of GB's property following comments made by GB during supervision.

- The panel agreed that more information was needed on Mr Beattie's current mindset and the potential risk reduction work that could be taken forward in custody prior to future release.

- The panel noted that Mr Beattie has engaged with the supervising officer to date.

- The panel acknowledged concerns regarding how Mr Beattie may react in the event of a non-favourable outcome to the civil case. The panel noted the supervising officer's view that work on emotional regulation was required.

- The panel discussed the levels of confidence that Mr Beattie will desist from any contact with victims (directly/indirectly) upon release. The panel agreed it would be helpful if this was explored further during the planned meeting with the supervising officer on 25 January.

- The panel agreed that identifying options to safeguard victims was an important consideration and would be a significant part of any potential risk management plans.

- The panel were concerned that significant grieving thinking may still exist and, on the information currently available, the panel were not wholly confident that he may be safely managed upon release, or respond appropriately to actions which impact on his financial/personal circumstances.

[42] Further, it was acknowledged that on the basis of the PSNI assessment he was not currently linked to terrorist organisations.

[43] The actions decided by the panel on that date were as follows:

> "27. The Chair noted that this was a finely balanced case.
>
> 28. The panel agreed that LJ should meet with Mr Beattie as scheduled and discuss victim empathy, media engagement, and his views on participating in relevant risk assessments. The Chair directed that LJ prepare a full report for consideration of the panel setting out Mr Beattie's current motivations, the risk factors presented, actions that may be undertaken to address risk factors whilst in custody.
>
> 29. Upon receipt of the report, the panel agreed to meet further to discuss the case and agree action."

[44] The panel met again on 7 February 2022 and, again, the court has been provided with a very detailed note of the discussions which took place on that occasion, running to 31 paragraphs.

[45] The panel received an up-to-date report from LJ as anticipated in the previous meeting. The notes record that the Chair advised from the DoJ perspective, the threshold to initiate revocation proceedings had not been met on the basis:

- Although satisfied that Mr Beattie's risk of serious harm had increased, it was evident the increased level of risk had been safely managed through the introduction of revised licence conditions and supervision as illustrated by the commission of no further offences.

- The supervising officer's professional assessment was that the level of risk currently presented by Mr Beattie could be safely managed in the community.

- The supervising officer had set out a combination of risk reduction work to be completed in custody prior to release at the custody expiry date of the DCS.

- The supervising officer was confident that Mr Beattie was committed to engage in the risk management plan and risk reduction work.

- Concerns surrounding the potential use of media can be addressed through imposition of further licence conditions.

- MARAP would maintain responsibility to review the risk management plan and, if need be, adjusting same to reflect any changes to the risk profile.

[46] It is noted that the PSNI agreed with what the panel members had said during the meeting and placed on record their view that public safety concerns still existed but accepted the consensus view of the panel that the threshold to initiate revocation had not been met.

[47] It was noted, however, that whilst the PSNI accepted the panel's consensus it would have preferred to initiate revocation proceedings to submit Mr Beattie's future release for consideration by the PCNI.

[48] In summary, the position is that the Department based on the MARAP reviews has decided not to initiate revocation proceedings.

[49] The panel adopted the same approach required by the PCNI when considering a referral which is a two-fold test. Firstly, whether there has been an increase in the risk of harm/serious harm to the public and, secondly, whether that risk could be safely managed in the community.

[50] The panel accepted that there has been an increase in the risk of harm to the public but determined that it could be safely managed in the community with appropriate licence conditions. Accordingly, the Department decided the most appropriate course of action was to seek a recommendation from the PCNI to put in place additional licence conditions to manage the increased level of risk. Mr Beattie's

situation is under continuing review. This is important since part of the evaluation of risk will include work done by Mr Beattie whilst in custody.

The applicant's submissions

[51] The key public law point raised in this application and the one relied upon by the applicant and notice party is an assertion that in the circumstances of this case there was an obligation on the Department to refer the matter to the PCNI for a recommendation that Mr Beattie's licence be revoked and that he be recalled to prison.

[52] Mr Fahy, on behalf of the applicant, and Mr Sayers, on behalf of the notice party, developed their arguments that the circumstances of this case required the Department to refer the matter to the PCNI under Article 9(1) in slightly different ways. Mr Fahy described this issue as a "jurisdiction issue." He argued that the decisions on recall have, in effect, been the domain of the PCNI having regard to their specialism and experience.

[53] He submits that the legislation envisages that "deliberative jurisdiction" should be within the remit of those having operational responsibility for the management of offenders <u>and</u> having the capability of evaluating issues of recall independently. He argues that the Department has fettered its discretion conferred on it under Article 9 of the 2001 Order by failing to inform itself of a material consideration (whether revocation is recommended by the Commissioners).

[54] Plainly, it could not be argued that in every case in which there is an alleged breach of a prisoner's licence the Department must refer the matter to PCNI for a recommendation to recall.

[55] As a matter of statutory construction it is clear that the discretion to recall is placed on the Department. If the Department decides that a recall is appropriate, then it must refer the matter to the PCNI for a recommendation. Even after a recommendation is made the Department retains a discretion whether to follow the recommendation. It is free to reject it, if it so decides.

[56] Thus, it is plain, that the decision is one for the Department.

[57] In this context the role of the PCNI is an advisory one. This is clear from Article 46 of the Criminal Justice (Northern Ireland) Order 2008 which provides:

> "46. …
>
> (3) The Parole Commissioners shall advise the Department of Justice or (as appropriate) the Secretary of State with respect to any matter connected with the release or recall of prisoners <u>referred to them</u> under this

> Part or the Life Sentences (Northern Ireland) Order 2001 …"
> [My underlining]

[58] Both the applicant and the notice party rely heavily on the dicta in *Re Mullan's Application* [2007] NICA 47 when the Court of Appeal noted at para [23] that:

> "[23] The structure of Article 9 clearly contemplates that normally the decision to revoke a licence and recall a released prisoner to jail will be taken by the Commissioners. The Secretary of State is empowered to bypass the Commissioners only where it is considered impracticable for them to take the decision and it is expedient in the public interest to recall the prisoner."

[59] As Mr Sayers acknowledges the PCNI do not take a decision in respect of revocation but provide a recommendation.

[60] Echoing Mr Fahy's argument in relation to material consideration, Mr Sayers argues that the existence of a PCNI recommendation is expressly identified as a consideration material to the exercise of the discretion to revoke a life licence.

[61] He does not argue that any potential breach of a licence must be referred to the PCNI. Rather, he submits that it is only where there has been a material increase in the risk of serious harm to the public presented by a prisoner that the question of revocation arises.

[62] Given that such a risk does arise in this case Mr Sayers argues that the DoJ is not equipped lawfully to answer it without knowledge of the PCNI's recommendation.

[63] The applicant and the notice party further rely on the rule against sub-delegation of powers.

[64] The rule is discussed in *De Smith, Principles of Judicial Review*, 2nd Edition 2020, in the following way:

> "**The rule against delegation**
>
> 5-141 The discretionary power must, in general, be exercised only by the public authority to which it has been committed. It is a well-known principle of law that when a power has been conferred to a person in circumstances indicating that trust has been placed in his individual judgement and discretion, he must exercise that power personally unless he has been expressly empowered to

> delegate it to another. The principle has been applied in the law of agency, trust, and arbitration as well as in public law. The former assumption that the principle applies only to sub-delegation of delegated legislative powers and to the sub-delegation of other powers delegated by a superior administrative authority is unfounded. It applies to the delegation of all classes of powers, and it was indeed originally invoked in the context of delegation of judicial powers. It is therefore convenient to travel beyond the delegation of discretionary powers in the strict sense and to view the problem as a whole.
>
> 5-142 The cases on delegation have arisen in diverse contexts, and many of them turn upon unique points of statutory interpretation. The judgments are not always consistent. The principles do not amount to a rule that knows no exception; it is a rule of construction which makes the presumption that 'a discretion conferred by statute is prima facie intended to be exercised by the authority on which the statute has conferred it and by no other authority, but this presumption may be rebutted by any contrary indications found in the language scope or object of the statute. Courts have sometimes wrongly assumed that the principle lays down a rule of rigid application, so that devolution of power cannot (in the absence of express statutory authority) be valid unless it falls short of delegation. This has resulted in an unreasonably restricted meaning often being given to the concept of delegation."

[65] Returning to the statute, as has already been indicated, the power to revoke the prisoner's licence and recall him to prison is expressly conferred on the DoJ.

[66] The affidavit evidence on behalf of the Department confirms that the MARA Panel which Mr Sayers argues is distinct from the DoJ has responsibility for "initiation of revocation proceedings." It is argued therefore, that it is apparent that in the event of a conclusion by MARAP that "the threshold for initiation of revocation has not been met", the Department will have no power to revoke the prisoner's licence as such powers available, under Article 9(1) can only be exercised on the recommendation of the PCNI. Thus, returning to Mr Fahy's point he argues that the discretion to revoke a licence is in such circumstances fettered by the decision of MARAP in a manner that amounts to the effective surrender of the Department's Article 9(1) power to the decision of the MARA Panel.

[67] In the court's view it is clear that there is no statutory obligation which requires that a referral is made to the PCNI in circumstances where a revocation of licence is being considered.

[68] The correct approach must be that the relevant agency (in this case the DoJ) must first make an assessment as to whether the matter should be referred to the PCNI for a recommendation.

[69] In those circumstances it must be correct that the supervising authority (in this case the DoJ) should first consider whether the test for revocation is likely to be satisfied when considering whether to seek a referral to the PCNI for recommendation for recall. In so doing, it is entitled to, and must, make an assessment of both limbs of the legal test. I can see no logical basis for arguing that it should only make an assessment of the first and, if it decides that this limb is met it must then refer the matter to the PCNI.

[70] In this case, the Department exercises this function by means of the MARA Panel which is chaired by a representative of the Department, and which receives advice and guidance from relevant agencies including the PSNI, the PBNI, NIPS, and a specifically designated supervising officer.

[71] It seems to the court that the mechanism whereby the Department decides whether to initiate revocation proceedings via MARAP cannot be criticised. It does not constitute a delegation of its decision making. The panel is chaired by a representative of the DoJ and takes advice from relevant agencies. The supervising officer is an experienced probation officer qualified to carry out assessments as to the risk posed by terrorist risk offenders. It is entirely appropriate that such a person carry out assessments to inform the decision making in relation to the risk posed by Mr Beattie. It is clear from the minutes of the meeting that the assessment made by LJ was subject to anxious scrutiny by the panel.

[72] In short, the court concludes that the Department clearly has the jurisdiction to make a decision as to whether to refer the matter to the PCNI and is clearly competent to do so. There is no legal obligation on it to refer the matter to the PCNI if it considers that the test for revocation of a licence is not met.

Additional arguments

[73] Mr Fahy makes cogent submissions in support of a submission that this is a case where referral to the PCNI (and ultimately a revocation of the licence) was appropriate. As the MARAP Chair conceded it was a "finely balanced case." He reminds the court of the factual context of this application. Mr Beattie has been convicted of the heinous sectarian murder of the applicant's father. That murder was carried out at the behest of a paramilitary organisation. Many years later when the applicant seeks a legal remedy against Mr Beattie, he responds with a threat issued in

the name of the same paramilitary organisation. He was convicted of a criminal offence as a consequence and sentenced to a term of imprisonment. In what essentially is a rationality challenge he argues that the case for revocation of Mr Beattie's licence was overwhelming.

[74] The applicant is also critical of the panel's failure to carry out further inquiries. In this regard Mr Fahy makes a number of criticisms. He refers to a "failure" to afford the applicant the right to provide testimony as to the nuance of the offences and the impact that it had upon her. He complains about a failure to obtain the sentencing remarks of the Magistrate or County Court judges. He argues that the panel placed too much emphasis on the role of LJ of PBNI and, in effect, delegated its duty of enquiry to him. He suggests that this was an appropriate case for obtaining medical evidence in relation to Mr Beattie's mental health.

[75] He argues that without a proper interrogation of these issues it was not possible for the panel to consider the extent of the risk presented by Mr Beattie and whether it could be safely managed in the community.

[76] On the issue generally, the panel had the benefit of a pre-sentence report compiled by LJ. It also had access to medical evidence in the form of a psychiatric report on Mr Beattie which dealt with his ability to plead to the charges. LJ is an experienced probation officer who is qualified to carry out assessments as to the risk posed by TROs. He was appointed by the respondent to manage the licence conditions which included the assessment and management of risk. It is entirely appropriate that he carry out such assessments to inform the decision making in relation to the risks posed by Mr Beattie and how they should be managed.

[77] The authority in *Re Mullan* runs contrary to the suggested approach of the applicant that decisions on recall should be adjourned or delayed whilst an exhaustive inquiry is made:

> "… the decision whether to recall is directed to the question whether there is sufficient immediate cause to revoke the licence and recall the prisoner. That decision is taken in the knowledge that there will thereafter be a review of his continued detention. Of its nature it is a more peremptory decision than that involved in the later review. While one should naturally aspire to a high standard of decision making, the need to ensure that there is an exhaustive and conclusive appraisal of the facts is self-evidently not as great at the recall stage as it will be at the review stage."

[78] The principle that the judicial review court exercises a supervisory role in this context and that it should pay due deference to the agency which has been vested with the discretion is well-established. There are ample examples in the jurisprudence

concerning challenges in the analogous situation in relation to the release of prisoners on licence.

[79] Dealing with such decisions, Mr Justice Scoffield in *Maughan's Application* [2021] NIQB 7, refers to the judgment of McCloskey J in *Re Hegarty's Application* [2018] NIQB 20. Both judgments reaffirm the inclination of the court towards a high threshold for judicial intervention in a rationality based challenge to a decision of this type coupled with the heightened standard of scrutiny which applies in a case involving the liberty of the citizen. In his judgment, McCloskey J quotes with approval the opinion of Lord Kerr in *Re Corey* [2014] NICA 516 where he gave the following warning to judges hearing a challenge to a decision of a Parole Body:

> "Put simply, the legislature has placed in the hands of a panel of experts the difficult decision as to when a life sentence prisoner should be released. Their role should not be supplanted by a judge who does not have access to the range of information and skills available to the commissioners."

[80] It is clear from the detailed minutes of the consideration of the issue by the Department that it applied the correct legal test, it considered all the relevant issues, and it came to a rational conclusion in relation to the recognised risk presented by Mr Beattie and how it should be managed. I agree that it could also have come to a different decision and referred the matter to the PCNI. Had it done so, it is unlikely the court would have intervened, recognising the finely balanced nature of the case and the discretion available to the Department. I conclude that the decision of the Department falls within the range of reasonable options open to it and cannot be considered as irrational or unlawful.

[81] The court well understands the applicant's and the notice party's strongly held views on this issue. They are entirely understandable. The question for the Department, however, is whether the risk which has been identified can be managed in the community without the requirement to refer this matter to the PCNI for a recommendation on revocation. It has set out a rational basis for that decision and it remains one which is under review.

[82] The applicant's complaint that there has been a failure by the Department to publish a policy relating to its approach to the issue of recall can be readily dismissed. The applicant relies on the case of *R(Lumba and another) v Secretary of State for the Home Department* [2011] UKSC 12 for this proposition. This authority does not establish a public law requirement for a publication of a policy on the Department's approach to recall or referral of cases to the PCNI. *Lumba* is only authority for the proposition that where a policy is in existence it should be published. It is not an authority for the proposition that every element of decision making by a public authority must be accompanied by a published policy, nor is there any authority to that effect. As has been pointed out in this judgment, the Department adopt the same approach required

by the PCNI when considering a referral, namely the two-fold test as to whether there has been an increase in the risk of harm/serious harm to the public and, whether that risk could be safely managed in the community. Article 9(5A) of the 2001 Order imposes a clear statutory test focussed on risk. Whilst that article applies following recall, the proper interpretation of the 2001 Order makes it clear that it also applies to the Department in the exercise of its discretion to seek a recall.

[83] The applicant complains about the response to the decision to preclude her from attending the relevant MARA meetings in order to make oral representations, and also asserts that the respondent failed to provide written reasons sufficient to enable her to understand and engage with the determination and rationale relied upon in support of it. In relation to the former there is no legal authority for the asserted entitlement to attend at the meetings. In this case the panel was aware of the strongly held views of the applicant and more importantly invited written submissions from the applicant who (unlike the notice party) objected to providing such submissions. Leave was not granted in respect of these arguments but in any event, the court concludes that they do not establish any irregularity or unlawfulness in respect of the respondent's decision.

[84] The court identifies no public law error in the decision under challenge.

[85] Accordingly, the application for judicial review is dismissed.