Neutral Citation No: [2022] NIKB 23 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **SCO11981** *ICOS No:* **22/015911/01** *Delivered:* **28/10/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY
CLIFFORD McKEOWN FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE
SENTENCE REVIEW COMMISSIONERS FOR NORTHERN IRELAND

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Steven J McQuitty (instructed by Richard Monteith, Solicitors) for the applicant
Philip McAteer (instructed by Carson McDowell LLP) for the respondents

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SCOFFIELD J

Introduction

[1] By these proceedings the applicant, a life sentence prisoner, seeks judicial review of a decision of the Sentence Review Commissioners (SRC) ("the Commissioners") made on 26 November 2021, whereby they refused his application for a declaration for eligibility for release under section 3 of the Northern Ireland (Sentences) Act 1998 ("the 1998 Act").

[2] The applicant was represented by Mr McQuitty; and the respondents by Mr McAteer. I am grateful to both counsel for their helpful written and oral submissions.

Factual Background

[3] The applicant was convicted of murder and sentenced to life imprisonment in March 2003 for killing Michael John McGoldrick on 6 July 1996. He was given a 24 year minimum tariff; and he has now served over 22 years of this period. The applicant applied for early release to the SRC in September 2010 and was refused a declaration of eligibility for release in August 2012. He applied again in 2014; but his

application on that occasion was not determined by reason of there not having been a material change in circumstances since the refusal of his earlier application by the SRC.

[4] The applicant was moved from HMP Maghaberry to HMP Magilligan in 2017. He made a further application to the SRC in September 2020, which has given rise to the decision which is impugned in these proceedings. The applicant believes that he is the only remaining prisoner who has been sentenced for a scheduled offence and who is eligible for release under the scheme established by the 1998 Act but who has never been released under the Act.

[5] Mr McKeown relies upon a range of factors which he says demonstrate significant progress on his part and/or a process of rehabilitation in which he has engaged over several years. He draws attention to his sustained status as an enhanced prisoner; his having passed drugs tests over a sustained period; his work in the prison in a trusted position as an orderly in the gym; his sustained attempts to engage with the prison authorities to provide him with meaningful opportunities to progress and be rehabilitated; his successful completion of specific victim impact work; the fact that he has served the majority of his tariff period; and his having been successfully tested outside of prison, albeit in a limited way, through organised mental health walks or rambles.

[6] On 30 March 2021, a panel of Commissioners gave a preliminary indication that, on the basis of the available information, they were minded to make a substantive determination to the effect that the applicant's application should be refused on the ground that they were unable to conclude that the second, third and fourth statutory conditions were satisfied. In reaching this decision, the panel is said by the respondents to have taken into account (i) the applicant's significant history of criminal offending and in particular the remarks of the sentencing judge in relation to his exceptionally high culpability in the commission of the index offence of murder; (ii) the absence of evidence of any significant change in Mr McKeown's level of risk or in his ability to self-manage his risks; and (iii) the absence of information about Mr McKeown's future plans in the context of his re-integration into the community following his release. Mr McKeown notified the Commissioners, in accordance with the rules, that he wished to challenge the preliminary indication and a substantive hearing was duly fixed.

[7] That hearing occurred on 15 October 2021. The Secretary of State did not make any contrary submissions in relation to the application but confirmed, through counsel, that this was not a tacit approval of the applicant's release: rather, it was simply a reflection of the Secretary of State's position that fulfilment of the statutory conditions was a matter for the panel to determine on the basis of its assessment of the evidence. The panel heard oral evidence from the applicant. The Commissioners ultimately determined that they were not satisfied that, if released, the applicant would not be a danger to the public. The panel's reasoning is contained in paras 26-31 of its decision, with its conclusion stated in para 32 as follows:

> "Taking account of Mr McKeown's history of criminal offending, his demonstrable lack of insight into his offending and the very limited evidence of a robust risk management plan being in place, including the availability of external support networks if he were released on licence, the panel was left in doubt as to whether Mr McKeown can be released without risk of injury or harm to the public. Accordingly, the application is refused."

[8] The panel appears to have been heavily influenced by the applicant's significant history of criminal offending (which was considerably wider than merely the offence in respect of which he sought the declaration); the nature of the index offence (including that "it was a professional killing as it was a premeditated execution"); his lack of insight into his offending and risk factors; the lack of evidence that any significant rehabilitation work or pre-release testing had been undertaken; and the lack of understanding of risk management strategies he would need to put in place upon release.

The statutory scheme

[9] The 1998 Act established an extraordinary scheme for the early release of certain prisoners, which was introduced to give effect to the agreement relating to early release contained in the Belfast Agreement. For present purposes, the crucial provision of the 1998 Act is section 3, which governs eligibility for the grant of a declaration facilitating early release. It provides (in material part) as follows:

> "(1) A prisoner may apply to Commissioners for a declaration that he is eligible for release in accordance with the provisions of this Act.
>
> (2) The Commissioners shall grant the application if (and only if)—
>
> (a) the prisoner is serving a sentence of imprisonment for a fixed term in Northern Ireland and the first three of the following four conditions are satisfied, or
>
> (b) the prisoner is serving a sentence of imprisonment for life in Northern Ireland and the following four conditions are satisfied.
>
> (3) The first condition is that the sentence—

(a) was passed in Northern Ireland for a qualifying offence, and

(b) is one of imprisonment for life or for a term of at least five years.

(4) The second condition is that the prisoner is not a supporter of a specified organisation.

(5) The third condition is that, if the prisoner were released immediately, he would not be likely—

(a) to become a supporter of a specified organisation, or

(b) to become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland.

(6) The fourth condition is that, if the prisoner were released immediately, he would not be a danger to the public."

[10] Section 3(7) defines a qualifying offence for the purpose of section 3(3)(a). There is no dispute in this case that the applicant is serving a sentence for a qualifying offence. Section 3(8) defines what is meant by "specified organisation" for the purposes of the early release scheme. These are organisations which are concerned in terrorism connected with the affairs of Northern Ireland, or in promoting or encouraging it, and which have not established or are not maintaining a complete and unequivocal ceasefire.

[11] As can be seen from the provisions of section 3 which are set out in para [9] above, there are four conditions which must be met in order for a prisoner to be eligible for release where that prisoner is serving a sentence of imprisonment for life. Accordingly, in this case, the applicant was required to meet all four conditions (to which I will refer as conditions 1 to 4 respectively). It is on the application of condition 4 by the Commissioners that his challenge in these proceedings is focused.

[12] The statutory scheme with which these proceedings are concerned has now been considered on a number of occasions by the courts. Recent examples are the judgments of McCloskey LJ in *Re McGuinness' Application (No 2)* [2019] NIQB 85 and of the Court of Appeal in *Re McGuinness' Application (No 3)* [2020] NICA 53; [2021] NI 572. Perhaps the most important and most well-known is the decision of the House of Lords in *Re McClean's Application* [2005] NI 490, to which further reference is made below.

Summary of the parties' cases

[13] The applicant contends that the Commissioners failed to take into account a material consideration, namely the cumulative effect of his having satisfied conditions 2 and 3, when considering whether he also satisfied condition 4. He then contends that the impugned decision is irrational, particularly by being arbitrary or inconsistent in a manner which breaches the principle of equal treatment. In short, the applicant contends that his application has been treated in a more strict or rigorous way than those of others before him who have secured release, particularly that of Mr McClean (whose case gave rise to the House of Lords authority mentioned above). Allied to that case, the applicant further submits that the Commissioners left relevancies out of account or took irrelevancies into account. Finally, the applicant contends that the definition adopted by the Commissioners as to what constitutes a "danger to the public" is too broad and therefore inconsistent with the statutory scheme they were called upon to apply, when properly construed.

[14] The respondents contend that they have faithfully applied the statutory test, including by addressing the four conditions separately; and that the applicant's challenge is, in reality, an impermissible merits challenge. They rely both upon the deference which the court should properly pay to a specialist tribunal with experience in risk assessment and the protection of public safety; and on the fact that they had the benefit of seeing, hearing and assessing the applicant's evidence in person.

Consideration

[15] Assuming the applicant is correct in his averment that he is the only remaining prisoner sentenced for a scheduled offence who is eligible for release under the Belfast Agreement early release scheme who has never been released under that scheme, that is a double-edged sword. On the one hand, it allows the applicant to contend (as he does) that he has been treated in a much more strict way than other prisoners who have been granted declarations for release. On the other hand, it may simply illustrate that the Commissioners are applying a proper degree of scrutiny and judgement to the applications which come before them and have found a proper basis upon which it can be said that this applicant is not eligible for release, whereas many others have been. I return to this issue in addressing the applicant's complaint that there is inconsistency amounting to irrationality as between how he and other prisoners have been treated. In general, however, I do not consider his assertion that he is the only eligible prisoner who has not yet been released under the Good Friday Agreement to be of any particular probative value.

The cumulative effect issue

[16] The applicant's first ground of challenge relates to what has been referred to as the 'cumulative effect issue', namely his contention that the cumulative effect of his having been adjudged to satisfy conditions 2 and 3 – *viz* that he is not (now) a

supporter of a specified organisation and that, if released, he would not be likely to become a supporter of a specified organisation or become concerned in Northern Ireland related terrorism – ought to have been taken into account (and considered to be a significant factor) in relation to the Commissioners' assessment of whether the applicant satisfied condition 4. The applicant relies upon the following passage in the respondents' response to pre-action correspondence:

> "The Panel reject the prisoner's contention that it was required to take into account its positive assessment of the second and third conditions, when assessing the prisoner in respect of the fourth condition."

[17] The respondents accept that they did not take into account their *conclusions* on conditions 2 and 3 in considering whether condition 4 was satisfied. Rather, they contend that the statutory conditions are separate and that they were not legally required to consider the matter in the way for which the applicant contends. At the same time, Mr McAteer submitted that the Commissioners were obviously not *unaware* of the applicant having satisfied conditions 2 and 3, since that was a determination they reached in the very same decision-making process which gave rise to their ultimate conclusion. He also made clear that the Commissioners accept, as one would expect, that the underlying *factual* position is relevant and to be considered across each of the four conditions.

[18] Mr McAteer relied upon Lord Bingham's judgment in the *McClean* case, at para [25], where he said that:

> "It is evident that the four conditions laid down in s 3 are not of the same character. The first is a matter of formal record, readily susceptible to proof. The second is purely factual, however difficult to resolve on inadequate or disputed evidence. The third, relating to what a prisoner would or would not be likely to do in future if released immediately, calls for a predictive judgment. So does the fourth condition: the commissioners are called upon to make the best judgment they can on the material available."

[19] Lord Bingham went on (at para [26]) to observe that:

> "There are dangers in an unduly legalistic approach to what may well be a very difficult predictive judgment."

Addressing a number of general propositions concerning the correct approach to condition 4, he said (at para [27]) that:

> "There can be no presumption that [a life sentence prisoner] would not be a danger to the public if released immediately."

Although Mr McAteer characterised the applicant's position as a suggestion that, once conditions 2 and 3 were considered to be met, there was a presumption that condition 4 was also met, Mr McQuitty disavowed any such suggestion. Nonetheless, he did submit that this was relevant and that the way in which the Commissioners had approached condition 4 meant that they had "inaptly prepared the scales." Each side accused the other of adopting the dangerous "unduly legalistic approach" which had been counselled against in *McClean*.

[20] The resolution of this issue is ultimately a question of statutory construction. I reject the applicant's case that the SRC's *conclusions* on conditions 2 and 3 *must* be taken into account in considering whether he also met condition 4. Section 3 of the 1998 Act appears to me to set out individual and specific conditions which must be met separately. Each is dealt with in its own sub-paragraph of the section; and each is given its own separate number. It is correct to say that there is a natural flow to the sequence of the conditions in one sense, with the assessment of whether each is met likely to get harder if one progresses through them sequentially. However, there would be nothing to preclude the Commissioners rejecting an application for a declaration if, for instance, they considered condition 3 not to be met, without having reached any concluded view on whether condition 2 was satisfied. Each condition stands on its own. Had the legislature intended them to be more closely linked, or for conclusions on conditions 2 and 3 to provide some in-built weighting when the Commissioners came to assess condition 4, that could (and should) have been made explicit.

[21] In particular, condition 4 applies only to life sentence prisoners. As Mr McQuitty was driven to accept, it is not necessarily linked to terrorism in the same way that conditions 2 and 3 are. The notion of "danger to the public" inevitably goes beyond danger caused by terrorist acts. Otherwise, condition 4 would add little to condition 3. Put simply, a life sentence prisoner should not be released under the 1998 scheme even if they are not (or will not be) involved in terrorism if they nonetheless *are* a danger to the public. Such a danger may arise from matters *other than* support for, or involvement in, a specified organisation. The applicant's argument proceeds on the flawed basis that condition 4 – and the statutory scheme as a whole – is focused on paramilitary or terrorist violence. That is undoubtedly an important facet of the scheme, expressed chiefly in conditions 2 and 3. However, those who are subject to life sentences will be those who are guilty of the most serious crimes, usually that of murder. Those who are capable of such crimes for terrorist purposes may well be capable of those crimes, or other dangerous offending, for other purposes or reasons also. They are also likely to be the persons in respect of whom the public may have the most concern as regards early release.

[22] As a matter of ordinary construction, the fourth condition within section 3 of the 1998 Act is *not* confined to danger arising from terrorist acts or through support of a terrorist organisation. If conditions 2 and 3 have been determined in a prisoner's favour, in most cases danger arising in those ways may be unlikely to cause him (or her) much of a difficulty in the Commissioners' assessment of condition 4. At the same time, however, that determination also does not give such a prisoner much of an advantage, if any, in the Commissioners' consideration of the fourth condition, since condition 4 is directed to a wider enquiry *and* requires a different level of certainty. In his judgment in *McClean*, Lord Scott compared the "stark and absolute terms" of condition 4 ("*would not* be a danger") with the "more flexible language of the third condition" ("would not *be likely* to become…").

[23] It follows that I reject the applicant's submission that, if conditions 2 and 3 are met, that determination itself has the effect of rendering it "(much) more likely" that condition 4 will be satisfied. That may or may not be the case, depending upon the circumstances. Provided the Commissioners have, when considering each condition, considered all relevant factual considerations – as to which there will inevitably be an overlap between conditions 3 and 4 – there is no need for their *own assessment* in relation to condition 3 to be put into the balance in their assessment of condition 4. That is not required by the statutory scheme. Nor, since it is only the Commissioners' own view, is it irrational for the Commissioners' to address condition 4 afresh and separately, provided they take into account all relevant factual considerations. In the absence of a statutory requirement to take the conclusions on conditions 2 and 3 into account, it is a matter for the Commissioners to determine whether or not to do so: see, for example, para [35] of *R (Khatun) v Newham LBC* [2004] EWCA Civ 55. Although there may be circumstances where the Commissioners' conclusions on conditions 3 and 4 respectively are expressed in such a way as to be obviously inconsistent, such that the Commissioners' determination can be challenged as illogical and therefore irrational, that is not this case.

[24] I did not find any particular assistance in the applicant's analysis of how fixed term prisoners, who are not life prisoners, are to be treated. The statutory scheme expressly and intentionally treats them differently, with life prisoners required to satisfy a separate and different condition (condition 4) which does not apply to fixed term prisoners who are not subject to a life sentence.

The 'heightened test'

[25] The applicant initially contended that the respondents had wrongly applied a 'heightened test' in considering condition 4. This arose from the reference in para 24 of the Commissioners' decision to the effect that "if the Commissioners have <u>any doubt</u> as to whether the applicant can be released without risk of injury or harm to the public the application must be refused" [underlined emphasis added]. The applicant contrasted this with Lord Bingham's comment in para [29] of his judgment in *McClean* that, "In the last resort, any <u>reasonable</u> doubt which the Commissioners <u>properly</u>

entertain whether, if released immediately, a prisoner would be a danger to the public must be resolved against the prisoner" [underlined emphasis added].

[26] It is clear that the Commissioners have to make a predictive judgment about prospective risk. As such, this is unlikely to often (if ever) be free from any doubt whatever. In the Commissioners' defence, however, the phrase which the applicant initially heavily criticised is to be found in the judgment of Lord Brown in the *McClean* case (at paras [91] and [94]):

> "Certainly nothing is clearer under s 3 than that, were the commissioners to be in any doubt as to whether the prisoner could be released without risk to the public, they would be bound to refuse his application: the benefit of such doubt would to the public, not to him."
>
> "In other words, the commissioners must ask themselves the same question at each stage: are we satisfied that the prisoner can be released without risk to the public. If so, he must be released, otherwise not, and any doubt about the matter must be resolved against him."
>
> [underlined emphasis added]

[27] In approaching this issue, it seems to me that *both* sides may have fallen into the trap of treating judicial commentary on section 3 as itself constituting statutory language to be rigidly applied. So, the applicant focused on Lord Bingham's reference to "reasonable doubt" which is "properly" entertained at para [29] of his opinion; and the Commissioners focus on Lord Brown's use of the phrase "any doubt" at para [91] of his opinion.

[28] A high degree of certainty is plainly required (see Lord Scott at para [44] and Lord Carswell at para [73] of *McClean*). For my part, I accept the respondent's submission that the reference to the phrase "any doubt" in both Lord Brown's judgment and in the Commissioner's own reasoning is shorthand for any reasonable doubt. It does not include a wholly fanciful doubt. One can confidently discern this from Lord Brown's express agreement with Lord Bingham's judgment (at para [87]). Had there been a difference of substance between them as to the level of certainty required, this would have been spelt out. In light of this clear position being advanced in the respondents' skeleton argument, Mr McQuitty did not press this aspect of the applicant's challenge at hearing.

Irrationality and inconsistency

[29] The applicant further contends that the Commissioners' decision was irrational. This is not a straightforward attack on the merits of the respondents' conclusion but, rather, a claim that the decision suffers from that species of irrationality evident from the inconsistent treatment of logically identical cases. The

applicant relied upon the common law principle of equality as expressed by Girvan J in *Re Colgan's Application* [1997] 1 CMLR 53 at 74) and by Treacy J in *Re McGeough's Application* [2021] NIQB 11 (at para [24]). The respondent has also referred to the decision of the Court of the Appeal (elaborating on what Girvan J had said in *Colgan*) in *Re Croft's Application* [1997] NI 457, at 490-491. The applicant compares his case to that of Stephen McClean.

[30] McClean was convicted of two counts of murder, two counts of attempted murder and other offences arising from his involvement in an attack at the Railway Bar, Poyntzpass on 3 March 1998. He was arrested shortly after the attack and was convicted on 2 February 2000. The day after his conviction he applied for a declaration as to his eligibility for release under section 3 of the 1998 Act. In April 2000 the SRC gave a preliminary indication that they were minded to grant the application, which the Secretary of State later confirmed he did not wish to challenge. The Commissioners granted Mr McClean a declaration of his eligibility for release on 2 May 2000, just three months from the date of his convictions. He then became eligible for accelerated release under the Act (on 28 July 2000).

[31] The applicant in the present case submits that there could be no question of Mr McClean having been rehabilitated in advance of his release. In particular, in July 2000, during a period of pre-release home leave, Mr McClean was arrested for a number of serious offences which resulted in the Secretary of State applying to the SRC to revoke their earlier declaration in respect of him, pursuant to section 8 of the 1998 Act. The Commissioners did revoke the declaration, which gave rise to the proceedings which culminated in the appeal to the House of Lords. However, the applicant draws attention to the fact that the Commissioners do not appear to have considered it necessary for Mr McClean to have undergone *any* pre-release testing before initially granting him his declaration for release in May 2000. The applicant relies on the McClean case as essentially indicating that the Commissioners were previously prepared to take something of a gamble, contrary to the stricter approach taken in his own case.

[32] The applicant's challenge on this ground must fail for a number of reasons. Firstly, it is impossible to say that Mr McClean's case is entirely on all fours with the applicant's case, such that it is impossible to rationally treat them differently. As the Court of Appeal made clear in *Croft*, "if the decision-maker may tenably consider that there are points of distinction between two classes of person or two situations he is entitled within his margin of appreciation to treat them differently." Indeed, where some element of judgment is required, it may also be open to decision-makers to rationally reach a different judgment even on very similar (or the same) facts.

[33] In this case, the applicant has no first-hand knowledge of the circumstances of the grant of a declaration in McClean's favour. He is relying solely on what can be gleaned about the case from the previous litigation – which was directed to the decision to *revoke* the declaration, rather than the initial grant. Even on that limited basis, however, it is clear that there are some material differences. For instance, the

Commissioners gave a preliminary indication in Mr McClean's case that they were minded to grant the application and that indication was not challenged by the Secretary of State, after which the Commissioners were obliged under the rules to give effect to their preliminary indication. It might well be that the SRC's preliminary indications were more generous in the very first flush of the early release scheme shortly after the Belfast Agreement had been agreed and ratified in referendums in both Northern Ireland and the Republic of Ireland; or that the Secretary of State was less inclined to oppose release for political reasons at that time. In any event, in the present case, the preliminary indication was not to release, which prompted an oral hearing which meant that, unlike in the case of McClean, the Commissioners had the benefit of considering direct evidence from the applicant. The Commissioners considered that evidence to be of some significance, finding, inter alia, that the applicant at times demonstrated "a dismissive attitude to aspects of his past offending and an ongoing lack of insight into his own risk factors." The Commissioners considered that this was particularly evident in his responses to questions about his involvement in offences relating to possession of firearms and ammunition with intent to endanger life and property and possession of articles for use in terrorism, which were committed after Good Friday Agreement. The Commissioners in the present case were likely better informed than they were in the McClean case, given the difference in process which preceded their determination. They were bound to take into account their assessment of the applicant's own evidence.

[34] Secondly, and perhaps more pointedly, the later need to revoke Mr McClean's declaration (which was unsuccessfully challenged by him in the courts) may be thought to be illustrative of a lack of wisdom on the part of the Commissioners granting him release in the first place in the "finely balanced" decision upon which the applicant now relies. Put simply, the Commissioners are entitled (indeed, they may well be bound) to alter their approach if, through experience, they consider they have been insufficiently stringent in their assessment in the past.

[35] The applicant also submits that the Commissioners did not have regard, or gave adequate weight, to a series of relevant factors set out in his Order 53 statement, including (but not limited to) the extent to which licence conditions could address risk upon release. Additionally, the applicant submits that the Commissioners wrongly took into account, in assessing whether condition 4 was met, an irrelevant factor, that is to say the alleged naïveté of the applicant regarding his work plans upon release. This arises because of the reference, in para 29 of the Commissioners' decision, in the following terms:

> "Additionally, Mr McKeown presented to the panel as being naïve in terms of the challenges of reintegrating into the community following such a long period of imprisonment."

[36] In its decision, the panel listed a variety of matters upon which the applicant relied and noted that these were "all to his credit." However, in relation to his

evidence that he recognised that obtaining employment upon his release would be a challenge but that "he would probably go around people's houses to see if they needed work done", the Commissioners considered that the applicant appeared to have "little awareness of the potentially sensitive and practical issues which this would present for him given his criminal record and profile." In addition, in relation to the applicant finding accommodation and managing his finances, the panel did not accept his evidence as demonstrating that he had "a real understanding of the challenges he is likely to face following his release or that he has carefully considered the risk management strategies he will need to put in place."

[37] The assessment of the applicant's evidence and the weighing up of how that evidence translated into risk (or the absence of risk) are plainly matters for the panel, subject only to *Wednesbury* irrationality, which will be difficult to establish in a setting such as this in which the panel has experience and expertise which the court lacks. It cannot be said that an unduly optimistic or simplistic view on the part of the applicant as to how things will work out for him upon release is irrelevant to the Commissioners' decision making. It is relevant to the prospect of his turning back to crime. In assessing the danger which the applicant may present upon release, the panel was entitled to consider whether the applicant properly understood and appreciated the challenges he would face arising from his previous offending, and how he would cope with challenges which he may have underestimated. Whether viewed as an aspect of the Commissioners' consideration of the applicant's understanding of his past offending or of his risk factors, I do not consider that the applicant has established that, in the reference set out above (at para [35]), the Commissioners took an irrelevant consideration into account.

[38] I also do not consider the applicant to have discharged the evidential burden that other relevant matters favourable to his application were left out of account. Many of these are expressly adverted to within the Commissioners' decision. The Commissioners had before them a comprehensive dossier in relation to the applicant's progress. The applicant was also represented by experienced senior counsel before the Commissioners, who had the opportunity to make all of the submissions which he considered relevant on the applicant's behalf.

The Commissioners' approach to 'danger to the public'

[39] Finally, the applicant alleges that the impugned decision is unlawful because the definition adopted by the Commissioners in respect of the phrase "danger to the public" is too broad. In consequence, the applicant submits, the Commissioners have acted ultra vires section 3 of the 1998 Act and contrary to the relevant statutory purposes. This complaint arises because the applicant alleges that the Commissioners have defined the phrase "danger to the public" in condition 4 as including "any injury or harm, whether physical or psychological in nature." This is set out in para 24 of the impugned decision, which is in the following terms:

> "The fourth condition is that, if the prisoner were released immediately, he would not be a danger to the public (section 3(6)). In considering this condition, the panel has noted that the Act does not provide a definition of the term "danger to the public." In the absence of any such definition, the Commissioners understand this term to include any injury or harm, whether physical or psychological in nature. In considering the level of risk of danger to the public, the Commissioners are guided by the approach adopted in *Re McClean* [2005] UKHL 46, namely, that the primary concern of the Commissioners must be to protect the safety of the public and that if the Commissioners of any doubt as to whether the applicant can be released without risk of injury or harm to the public the application must be refused."

[40] The applicant submitted that the concept of danger does not include the risk of minimal psychological harm; but, rather, it means "something more akin to a release that would create a risk of serious injury or harm (which might include psychological harm that amounts to serious personal injury)." By way of analogy, the applicant draws attention to the statutory test in Article 6(4)(b) of the Life Sentences (Northern Ireland) Order 2001 ("the 2001 Order"), which provides that the Parole Commissioners should not direct a prisoner's release on licence unless "satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined." Although the concept of "serious harm" is not defined in the 2001 Order, it has been defined in Article 3 of the Criminal Justice (Northern Ireland) Order 2008 as "death or serious personal injury, whether physical or psychological." This definition has been approved by the High Court as relevant for consideration under the 2001 Order in the case of *Re Moon's Application* [2021] NIQB 69, at para [17].

[41] However, the legislature did not choose to use the language of "serious harm" in the 1998 Act. It could have done so; but has not. There is also a difference between the two statutory regimes. Whereas a life prisoner released under the 2001 Order will be released on licence having served the full tariff period of their life sentence, prisoners released under the 1998 Act early release scheme will not have served the full portion of their sentence representing what is appropriate to satisfy the requirements of retribution and deterrence. They are benefitting from a more exceptional form of early release. Nor can the behaviour and actions of a prisoner released under the 1998 scheme be carefully controlled by way of elaborate licence conditions. A life licence under the 2001 Order may contain a variety of conditions: see Article 8(2) of that Order. In contrast, the conditions applicable to a licence under the 1998 Act are extremely limited and simply reflect the eligibility conditions for release: see section 9(1). (For this reason, the applicant's claim that the Commissioners wrongly left out of account the possibility of imposing wide-ranging control conditions upon the applicant must also fail.) I therefore consider the comparison

with the 2001 Order to be of little assistance. The legislature has not incorporated the concept of 'protection from *serious harm*' into the scheme of the 1998 Act.

[42] The key issue is what is meant by the phrase "danger to the public." I reject the applicant's contention that the relevant concept within the 1998 Act is not directed towards *risk*, since "a danger" includes risk and not merely actual physical harm. The Commissioners need not be sure that injury will result. However, I accept the submission that the word "danger" connotes a degree of heightened risk and not merely *any* risk. The likelihood of momentary upset, distress or anxiety is indeed insufficient. The phrase "danger to the public" also clearly relates to the risk of injury to people. That may either be physical harm or psychological harm (amounting to psychiatric injury). Fleeting or trivial harm is too little; but neither is there a need for the harm to be serious, as the applicant suggested.

[43] The respondents submitted that the applicant's suggestion that they had approached the question of danger to the public as including minor psychological harm such as upset or anxiety was an unfair reading of the portion of their decision quoted above and indeed of their decision as a whole. The Commissioners submitted that it is uncontroversial that de minimis risks of the kind mentioned would not be sufficient to constitute a level of danger to the public which would result in refusal of a declaration. They further submit that there is no evidence, when their decision is read fairly and in the round, to suggest that they proceeded on this basis.

[44] I am not persuaded that the applicant's reliance on the *Padfield* principle in support of this ground of challenge adds anything, since it ultimately resolves to a question of error of law (that is to say, whether the Commissioners have correctly construed and applied the statute governing their functions).

[45] In the applicant's case he has a very significant criminal record including convictions for burglary, common assault, criminal damage, firearms offences, hijacking, intimidation, riotous or disorderly behaviour, robbery and serious assault. The Commissioners recounted in their decision that Mr McKeown accepted that "he had a significant criminal record from a young age which included a diverse range of offending." Only some of the applicant's offending appears to have been terrorist-related. I accept the respondents' submission that there is no warrant for reading their decision as having been based on mere upset, offence or distress being caused by the applicant's release on licence or his actions once released. Rather, it is plain that they considered Mr McKeown in the past to have been a dangerous and prolific offender and were simply not persuaded, to the requisite degree of confidence required, that he would not reoffend in future (notwithstanding that they formed the view that he was unlikely to become involved in *terrorist* offending) in circumstances which posed a danger to members of the public. In my judgment, it was rationally open to the Commissioners to reach this view notwithstanding the conclusions they had reached in respect of conditions 2 and 3. The reference to "*any* injury *or harm*, whether physical or psychological in nature" was infelicitously phrased. The focus should remain on the straightforward statutory wording of "danger to the public",

which the panel was seeking to unpack. However, I am entirely satisfied, on the basis explained above, that the Commissioners' concern was not about minor psychological harm but, rather, the danger presented by the applicant's previous history of offending. Any error of law was not a material error, such as to warrant the intervention of the court (see, for example, the cases cited in Fordham, *Judicial Review Handbook* (7th edition, 2020, Hart) at para 48.1.16).

Conclusion

[46] For the reasons given above, I have not been persuaded that any aspects of the applicant's case have highlighted a legal error on the part of the Commissioners such as would justify the quashing of their decision and a remittal of the matter back to another panel to reconsider the applicant's case. The application for judicial review is therefore dismissed.