Neutral Citation No: [2024] NIKB 61	*Ref:*	**SCO12572**
	ICOS No:	**24/043837/01**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**09/07/2024**

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 JASON MOORE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE PAROLE COMMISSIONERS FOR NOTHERN IRELAND

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Laura McMahon KC and Aislinn Brady (instructed by John J Rice & Co, Solicitors) for the Applicant
Philip Henry KC and Gordon Anthony (instructed by Carson McDowell LLP) for the proposed Respondent

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SCOFFIELD J

Introduction

[1] The applicant is a determinate custodial sentence (DCS) prisoner who has been recalled to prison, after having been released on licence, and who is currently detained in HMP Maghaberry. By these proceedings he seeks to challenge a decision of the Parole Commissioners for Northern Ireland (PCNI) ("the Commissioners"), made on 19 February 2024, by which they declined to direct his release. The applicant also contends that, by this decision, the Commissioners confirmed that the revocation of his licence by the Department of Justice ("the Department") on 19 August 2023 was justified and that this decision should be set aside.

[2] The matter was listed as a rolled-up hearing to address both the question of the grant of leave and, if leave was granted, the substance of the challenge.

[3] Ms McMahon KC appeared for the applicant with Ms Brady; and Mr Henry KC appeared for the proposed respondent, leading Mr Anthony. I am grateful to all counsel for their helpful written and oral submissions.

Factual background

[4] The sentence which the applicant is currently serving was imposed after he pleaded guilty to one count of robbery and one count of theft at arraignment. The trial judge sentenced him on 30 March 2022 in respect of the robbery to a DCS comprising two years in custody and three years to be spent on licence. In respect of the theft, he was sentenced to six months' imprisonment, to run concurrently with the sentence for the robbery. The applicant's release from custody was on 18 August 2023, the custody expiry date for the index offences.

[5] On 18 August 2023, the applicant was released from HMP Magilligan with no fixed abode. He was taken to the local train station around 11:00am with instructions to attend an appointment at 2:30pm with his supervisor at the Probation Board of Northern Ireland (PBNI) ("Probation"). The appointment was scheduled at the PBNI offices on the Ormeau Road in Belfast. It was anticipated that the applicant would also have to attend with the Northern Ireland Housing Executive (NIHE) that same day in order to secure accommodation on an emergency basis. His probation officer was due to attend that appointment with him *after* he had attended the Probation appointment at 2:30pm. The applicant had been spoken to by telephone for 20 minutes the day before his release by the probation officer who was to meet him on 18 August. The respondents emphasise that the applicant had more than adequate time to get from the central train station in Belfast to her office in the Ormeau Road.

[6] As it turned out, the applicant did not make his appointment with Probation. There is some lack of clarity about precisely how or why this occurred but the applicant has himself provided an account in his grounding affidavit in these proceedings. He sets out that he got off the train in Belfast around lunchtime and went into the city centre. It seems that he had no watch and no mobile telephone. Later that night, he went to the PSNI Station at Musgrave Street and indicated that he was concerned that he had missed an appointment or breached what he referred to as "bail conditions." The police informed him there was nothing on their system in relation to his being on bail and they escorted him to his mother's address. The applicant's mother was not aware that the applicant was being released. Nor, it seems, was his sister. In any event, the applicant appears to have stayed at his mother's until his arrest some days later on 21 August 2023. During this time no contact was made with Probation by him or on his behalf.

[7] When the applicant did not arrive at his 2:30pm probation appointment on the day of his release, that set in motion a train of action. PBNI contacted the Police Service of Northern Ireland (PSNI). At around 3:55pm, recall proceedings were initiated by PBNI. In the applicant's submissions, he is critical of this step having

been taken only around one hour and 25 minutes after his scheduled appointment. PBNI say they also contacted NIHE and the applicant's sister in that time. Neither had any idea as to the applicant's whereabouts.

[8] On 19 August 2023 the PCNI made a recommendation to recall the applicant under article 28(2)(a) of the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order"). Further to that recommendation the Department revoked the applicant's DCS licence on 19 August 2023, in accordance with article 28(2) of the 2008 Order. The applicant was then unlawfully at large.

[9] Although there is not complete clarity about the applicant's whereabouts or actions between 18 August and 21 August 2023, he has indicated that he resided at his mother's house since being dropped there by the police on the day of his release. There does not seem to be any suggestion that he committed an offence during this period, otherwise than being unlawfully at large. As a result of the revocation of his licence, he was arrested while walking to a shop on the Malone Road on 21 August 2023 and taken to HMP Maghaberry.

[10] The revocation of the applicant's licence triggered the mandatory reference by Department to the Commissioners under article 28(4) of the 2008 Order. This referral was made on 23 August 2023. It then fell to the Commissioners to consider the applicant's case applying article 28(6), to which I return below. The applicant's solicitors submitted written representations in relation to the review of the recall decision on 3 November 2023. The Single Commissioner duly appointed to consider the case directed on 1 December 2023 that it be considered by a panel of Commissioners ("the Panel"). The Panel hearing was convened on 13 February 2024 in HMP Maghaberry. The witnesses in attendance were Ms A (Community PBNI Officer); Ms O (PBNI Area Manager); the applicant; Ms McB (the applicant's mother); and Ms M (the applicant's sister). It is the decision made after this hearing which is impugned in these proceedings.

Summary of the parties' positions

[11] In his skeleton argument, the applicant indicated that he relies upon two main grounds of challenge, expressed as follows:

> "(i) Illegality: error of law by adding a gloss to the statutory test, also incorporating a challenge based on failure to provide adequate reasons specific to how the Applicant met the statutory test to warrant his continued detention.
>
> (ii) Irrationality: taking into account irrelevant considerations and Wednesbury irrationality."

[12] In the course of submissions, it was clear that there were a number of aspects to these two broad grounds of challenge. First, the applicant contends that the Commissioners have wrongly conflated two separate elements of their powers, namely the assessment of suitability for release under article 28(6)(b) of the 2008 Order on the one hand and their responsibility to promote rehabilitation under article 46(2)(b) on the other. In the applicant's submission, the Commissioners were required to address the article 28(6) consideration first, focusing on the question of risk, and to turn to the issue of rehabilitation only later, if and when it was established that release could not be directed. Second, and relatedly, the applicant contends that the Commissioners failed to give adequate reasons as to what risk was considered to require him to remain in custody and/or what potential harm was at issue in this regard.

[13] As to irrationality, the applicant contends that the Panel wrongly took into account an immaterial consideration in the form of article 53 of the Mental Health (Northern Ireland) Order 1986 ("the Mental Health Order"); and that they reached irrational conclusions both on the risk posed by the applicant now and on the legitimacy of the original justification for recall in August 2023.

[14] The respondents have a number of preliminary objections to the grant of leave in this case. They contend that there is no utility in these proceedings and that they are in fact academic. This is on two bases. First, the applicant has expressed the view that he wants to remain in prison for the remainder of his licence. Second, his case is due for reconsideration by the Commissioners in any event within a short period, such that the grant of the relief which he is seeking in these proceedings would not in fact materially improve his position to any degree.

[15] On the substance, the respondents take issue with each of the applicant's grounds of challenge adumbrated above. They contend that they applied the correct test and have not erred in law; have provided adequate reasons; and have not acted irrationally in any of the manners suggested. In particular, Mr Henry submitted that the applicant's reasons challenge required "an impossibly strained reading of the decision, contrary to the obvious rationale" which it set out.

The utility of the proceedings

[16] I reject the respondents' submissions that the applicant should be refused leave to apply for judicial review simply on the basis that this application lacks all utility and/or is academic as between the parties. As noted above, this submission was made on the basis of two factors, each of which is considered briefly below.

[17] First, the respondents rely upon the fact that the applicant has expressed the view that he wishes to remain in prison for the remainder of his licence period. These proceedings were commenced on 15 May 2024. The respondents filed a brief affidavit sworn by Mr Paul Mageean, the Chief Commissioner of the PCNI, on 18 June 2024. It explained the up-to-date position for the benefit of the court. It also

exhibited an updated PDP Coordinator Report in relation to the applicant dated 10 May 2024. Towards the end of that report, it was noted that, "Mr Moore has further stated on 09/05/2024 that he is not seeking re-release and wishes to complete his license in custody." This affidavit was provided to the applicant's representatives in draft on 13 June 2024. There was then a rejoinder affidavit provided on behalf of the applicant, sworn by his solicitor Mr Dougan, on 21 June 2024. This affidavit did not contradict the averment on the part of Mr Mageean to the above effect. In the circumstances, the respondents contend that the uncontroverted evidential position is that the applicant no longer wishes to be released from prison.

[18] The court has been left in a fairly unsatisfactory position in relation to this matter. Ms McMahon explained from the bar that, having seen Mr Mageean's averment, the applicant's legal team arranged a consultation with him in order to take instructions upon it (and the contents of Mr Mageean's affidavit more generally). Upon attending at the prison, they were told that the applicant did not wish to see his legal representatives and that the consultation had been cancelled. They were therefore unable to consult with him about these matters. However, later that day, the applicant had sought to make contact with his solicitors by telephone on a number of occasions. He had not been able to do so given other professional commitments in the part of the solicitor concerned. In the result, the applicant had not been able to pass on whatever it was about which he wished to speak to the solicitor. I would add that it would have been helpful if further attempts had been made by the applicant's solicitors to make contact with him in advance of the hearing in order to seek to clarify the matter.

[19] In any event, in the above circumstances Ms McMahon urged me not to proceed on the basis that position described in Mageean's affidavit was correct or that the applicant did not wish to respond to it. This sequence of events is reflected in a brief averment in the affidavit of Mr Dougan, which mentions that it had not been possible to engage with the applicant on the issue of whether or not he was seeking re-release and that, therefore, the position as far as the applicant's legal team was concerned was the same as at the time of the swearing of the applicant's grounding affidavit. In that affidavit, sworn by the applicant himself, it is stated that he wishes to be released and desires a "proper and lawful" consideration of his suitability for release.

[20] I do not consider this issue to represent a sufficient basis upon which to dismiss the applicant's case in limine for three reasons. First, I cannot be certain that the position described in Mr Mageean's affidavit is an accurate reflection of the applicant's current wishes. Second, even if it was or is an accurate expression of those wishes, it may also be unwise or unfair for the court to rely upon it in a way which seriously disadvantages the applicant in these proceedings. That is because, in light of the concerns about the applicant's capacity and/or potential learning difficulties which are raised by the evidence in these proceedings, it may not actually represent a properly informed or reliable statement of his views. That view may

also, of course, be liable to change. Third, and perhaps most importantly, the Commissioners are statutorily bound to consider the applicant's case again in any event. They will have to carefully consider whether the threshold for release is met and whether they should direct release in the event that it is. In addressing those matters, as Mr Henry accepted, a prisoner's views are not themselves determinative. Although it may be highly unlikely that a prisoner who does not wish to be released will be able to reassure the Commissioners about the safety of them directing release, it would not be appropriate for the Commissioners to decline to direct release of a recalled prisoner where they considered that that prisoner posed no risk which warranted their ongoing detention, notwithstanding that the prisoner may (for whatever reason) express a preference to remain in custody.

[21] In my view there was considerably more force in Mr Henry's second objection to the grant of leave, that is on the basis of the proceedings being academic as between the parties. In these proceedings, the applicant seeks an order quashing the decision of the Commissioners and a further order remitting the case to a different panel of Commissioners to be reconsidered as soon as practicable. The respondents contend that, even if the applicant was successful to that degree, it would be unlikely to produce any meaningful advantage to him in practical terms. The impugned decision in this case was taken in February 2024. The Panel directed a review of the case to be undertaken within six months, that is to say by August 2024. To this end, a timetable has been set which ought to see a further single commissioner's decision being made on or before 17 July 2024, with a review or hearing before a new panel occurring only "a modest period thereafter" (around five weeks later if simply a review and up to nine weeks later if an oral hearing is required, although these timescales could be shortened in the event that there was a successful request for expedition). Irrespective of the outcome of these proceedings, any Commissioners making a future decision in relation to the applicant's case will have to do so on the basis of up-to-date information, which has already been directed and is in the course of being obtained. In light of this, the respondents submit that even if the applicant is fully successful in these proceedings, it will not in fact improve his position as a matter of practicality. Since the court's judicial review jurisdiction is discretionary and "intensely practical" (see *Re Bryson's Application* [2022] NIQB 4, at para [20], and [2022] NICA 38, at para [14]), this should lead to leave being refused.

[22] Notwithstanding the temptation to dismiss the case as academic on this basis, in the present case I did not consider it appropriate to do so. The respondents were unable to satisfy me completely that there could be no advantage which might accrue to the applicant if he were to be successful (particularly if remitting the matter to a further panel of Commissioners might bypass the usual requirement for the single commissioner assessment stage). I was not therefore convinced that the matter is wholly academic. There is also something concerning about the prospect of the respondents being able to effectively insulate their decision-making from the High Court's supervisory jurisdiction merely by timetabling reconsideration in such a way as to enable them to make the case that consideration by the court would be pointless; although there is no suggestion in the present case that the Commissioners

were acting in any way other than in entirely good faith and on the basis of what they considered to be the proper way forward in the applicant's case. I also wish to emphasise, however, that there may well be cases where the circumstances and timing of an application for judicial review against the Commissioners mean that it is liable to be dismissed simply upon the basis that, as a matter of practicality, the relief sought could not afford any practical advantage over what was likely to occur in any event.

[23] Even if the matter was clearly academic, I would also have been inclined to exercise the court's discretion to deal with case, or at least part of it, in any event. That is because the applicant contends that the Commissioners misunderstood or misapplied their powers in his case, in a manner which is likely to occur again (whether in his own case or others), such that it is appropriate that the court deal with this argument so that, if the Commissioners have fallen into error, they will not do so again. I would also have taken into account that this objection on the part of the respondents was formulated only in their skeleton argument and advanced orally in the course of the rolled-up hearing, which had been fully prepared.

[24] For the reasons given above, I considered it appropriate to proceed to deal with the substance of the applicant's case.

Error of law

[25] Addressing the applicant's first ground of challenge, I do not consider that the Commissioners misapplied the relevant statutory test or inappropriately added any gloss to it. The relevant test is set out in article 28(6)(b) of the 2008 Order. (Although in the *Hilland* case, discussed below, article 28(6)(b) is said to set out a 'threshold' before release which can be directed, rather than a 'test' for the giving of such a direction, for convenience in this judgment I refer to the statutory test being set out in that provision, since that is the terminology which was used in argument in relation to this first ground). In a situation such as the present, the Commissioners "shall not give a direction" for the recalled prisoner's release "unless they are satisfied that... it is no longer necessary for the protection of the public that [the prisoner] should be confined."

[26] The correct approach to such an assessment has recently been considered by the UK Supreme Court in the case of *Re Hilland*'s *Application* [2024] UKSC 4. In relation to the revocation of a DCS prisoner's licence such as in the case of the applicant, it is inappropriate to consider whether the risk of harm posed by the prisoner after their release has increased significantly: see paras [37] and [56]. (The suggestion to this effect in *Re Foden's Application* [2013] NIQB 2 should therefore not be followed.) The focus should simply be on the question whether post-release conduct indicates that there is a risk of harm which cannot be safely managed in the community (and the wording in the legislation to risk "no longer" being safely managed should not mislead one into thinking that there had to have been a material increase in the harm posed by the prisoner post-release). Para [50] of the

Supreme Court judgment suggests that article 28(6)(a) and (b) contain thresholds which must be passed before a recommendation can be made for release but are not tests as to the circumstances in which a direction will be given. At para [52] the court reiterated that the protection of the public referred to in article 28(6)(b) is concerned with the protection of the public from the risk of any harm and/or further offending, and not merely the risk of *serious* harm.

[27] The applicant's case that the Commissioners conflated their risk-assessment and rehabilitation-promotion functions is grounded primarily upon a reference in para 29 of the written decision, where the Panel commences giving its reasons, in these terms:

> "The panel emphasises in these reasons that it has applied Article 28(6)(b) of the 2008 Order and has also applied Article 46(2)(b) of the 2008 Order, which latter provision requires the Parole Commissioners in the discharge of their functions to have regard to the desirability of (a) securing the rehabilitation of prisoners, and (b) preventing the commission of further offending by prisoners."

[28] Article 46(2) itself is in the following terms:

> "In discharging their functions the Parole Commissioners shall—
>
> (a) have due regard to the need to protect the public from serious harm; and
>
> (b) have regard to the desirability of
>
> (i) securing the rehabilitation of prisoners; and
> (ii) preventing the commission of further offences by prisoners.

[29] Article 46(2)(b) is also mentioned later in the Commissioners' decision, at para 35, where, having applied its mind to article 28(6)(b), the Panel goes on to say:

> "Applying Article 46(2)(b) of the 2008 Order, if Mr Moore is to rehabilitate then it is clear to the panel that the issues of capacity and potential learning disability have to be clinically assessed before bespoke intervention programmes are devised to address his particular circumstances and requirements. That process has not yet begun. That it has not begun explains Mr Moore's very limited progress in custody as set out… above."

[30] Notwithstanding the two references to article 46(2)(b), it is in my view clear that the Panel had the correct statutory test in article 28(6)(b) in mind when making their decision about the prospect of the applicant's release. The respondents' decision is stated at para 3 of their written decision in terms which appropriately reflects the statutory wording of article 28(6)(b). Having gone on in the decision to summarise the evidence and the submissions of the parties, there is a section headed "Test" which then goes on to refer to article 28(6)(b) and to replicate its terms. The Panel expressed itself as not being satisfied in the terms required by that provision and as therefore directing that the applicant should not be released. It then went on to give more detailed reasons for this conclusion. In the course of that section of its decision, the Panel again turned its mind expressly to the application of article 28(6)(b).

[31] A further important conclusory passage in the Panel's decision is at para 44, in the following terms:

> "Synthesising all this evidence and these concerns, the panel has before it no independent professional evidence that Mr Moore is suitable for release at this time on DCS licence. Self-evidently, the issue of capacity as the first issue to be approached and resolved. Then, the issue of the PSST assessment, alongside the rapport building that L and Ms O spoke to the panel about in highly convincing terms. *Overall, the weight of the evidence is that Mr Moore continues to present an unacceptable risk of harm to the public*. There is insufficient probative evidence that that risk is capable of safe management in the community at this time. Given the fact that the two pivotal assessments regarding capacity and learning disability haven't been done, given Mr Moore's clear lack of understanding of licence conditions, given the total lack of risk-reduction and offence-focused work since recall, when the panel applied *Wright* it found it had no confidence in Mr Murray's ability to adhere to any licence condition suggested, or however fortified, at this time." [italicised emphasis added]

[32] Having carefully considered the Panel's written decision and its reasoning, I am satisfied that the panel correctly understood and applied the relevant statutory test in article 28(6)(b). It then, additionally, went on to consider, in light of its conclusion that the applicant was not suitable for release, what recommendations it should make in view of the desirability of the applicant's further rehabilitation. I accept Mr Henry's submission that the decision as to release (or otherwise) focused upon the relevant statutory test. Put another way, I reject the core of the applicant's case that the Panel recommended his further detention simply in order to pursue further rehabilitation which was desirable. It concluded that it could not

recommend release because the threshold in article 28(6)(b) was not met. (That judgment may be subject to criticism but it was nonetheless how the Panel reached their decision, in my view.) The Panel then went on to consider what to recommend in terms of rehabilitation to increase the applicant's prospects of release when the PCNI next considered his case.

[33] As a matter of good practice, it would be helpful for panels of Commissioners considering release decisions such as this to focus upon the question of the risk posed by the prisoner first (which will be determinative of the question of release) before turning their minds to what steps should be taken to further the prisoner's rehabilitation in the event that their release is not directed. In this way, any confusion or criticism such as arose in this case might best be avoided. At the same time, it is clear that the questions of risk and rehabilitation are interlinked and cannot be hermetically sealed off from each other. Broadly speaking, the level of risk posed by a prisoner should decrease as the extent of their rehabilitation increases. By the same token, the absence of any meaningful rehabilitation is obviously relevant to the risk posed by an offender, particularly a recidivist. Some rehabilitation can also, of course, be pursued in the community and made the subject of relevant licence conditions. Trying to isolate the two issues is therefore somewhat artificial. Nonetheless, the primary consideration in relation to the question of release should be whether the applicant's risk of harm to the public permits release or not. I am satisfied that the Panel clearly and properly directed themselves on this issue; and that they did not somehow misunderstand or misapply the statutory scheme by prioritising the desirability of further rehabilitation in a way which caused them to lose focus upon the fact that it was the need for public protection which was the central issue in relation to potential release.

Adequacy of reasons

[34] The applicant also contended that, as a consequence of the way in which the Commissioners approached their decision-making, the reasons provided do not adequately address the issues of harm to the public or further offending which resulted in them not considering that a direction for release could be given. This ground is linked with the previous ground, since the applicant suggested that the risk was not adequately spelt out because of the focus on rehabilitation. I reject this ground of challenge also.

[35] Although arising in a different field, the decision of the House of Lords in *South Bucks District Council v Porter* [2004] UKHL 33 is frequently cited as a touchstone of what is required of public-law decision-makers when it comes to the giving of reasons:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal

important controversial issues", disclosing how any issue of law or fact was resolved."

[36] In advancing this ground, the applicant has referred to certain passages of the respondents' written decision – such as references to the difficulties of the applicant living independently, his lack of stability and further rehabilitative work which ought to be completed by him – and contends that these fail to deal with the key issue of the risk to the public which his release would pose. It is clear that the Commissioners considered this: see paras [30]-[33] above and the conclusion, at para 44 of the decision, that, "Overall the weight of the evidence is that Mr Moore continues to present an unacceptable risk of harm to the public." The applicant's case is that the elements of risk and harm had to be specified in more detail for meaningful reasons to have been provided in accordance with the requirements of fairness.

[37] In my view, however, this objection only arises if one reads the decision in a somewhat myopic fashion, contrary to the well-recognised requirement to read such decisions fairly and as a whole, bearing in mind also that they are addressed to parties who are familiar with the issues. In a variety of contexts, of which Parole Commissioners' decisions is one, a court examining a reasons challenge must avoid cherry-picking certain expressions, or reading certain paragraphs or sentences in isolation, in discerning how the decision has been reached and whether adequate reasons have been provided (see, for example, *FR and Another (Albania) v Secretary of State for the Home Department v Secretary of State for the Home Department* [2016] EWCA Civ 605, at para [125], generally; and *Re Moon's Application* [2021] NIQB 69, at para [39], as an example in this particular context).

[38] Although the phrase "further offending" is absent from the decision, it is abundantly clear that the Commissioners had further offending in mind when referring to the risk of harm posed by the applicant. Moreover, the type of harm is also abundantly clear when one has regard to the applicant's criminal record: that which is habitually caused by offences of burglary, robbery and theft. At para 6 of their written decision, the Commissioners reproduce a significant body of the text of the Single Commissioner's decision, which addresses the applicant's background and index offending. It notes that the applicant has 130 convictions and describes his criminal record as "an extensive and almost unbroken record", noting also that "his offending is largely of an acquisitive nature." The Panel later address the applicant's ACE score, which indicates his risk of re-offending, and which rose from 30 to 35 after his recall. In each case this was in the high category. In a key passage of their reasoning at para 35, where they are expressly addressing article 28(6)(b) of the 2008 Order, the Panel refer back to the applicant's "appalling criminal record" which had been outlined earlier in the decision and say that "that criminal record speaks for itself."

[39] As Mr Henry submitted, there is no common law or statutory obligation on the Parole Commissioners to specify precisely the offence or offences which they

expect a recalled prisoner might commit if released, nor the precise harm which would arise as a consequence (bearing in mind the broad nature of harms which are relevant in this context). As a matter of fairness, the applicant is plainly entitled to know broadly why the Commissioners have considered that his risk prevents his further release. I am satisfied, however that that onus was discharged by the Commissioners in this case upon a fair reading of their decision.

Consideration of the Mental Health Order

[40] The applicant next contends that the Commissioners took into account immaterial considerations in reaching the decision, namely by their consideration of the provisions of article 53(1) of the Mental Health Order. It is accepted that, in the absence of the statutory scheme specifying relevant considerations for the Commissioners to take into account in undertaking the task required of them, the identification of such considerations is a matter for the Commissioners themselves, subject simply to rationality review (see *Re McGuinness' Application* [2021] NIQB 102, at para [61]). The applicant also accepts that it was perfectly rational for the Panel, considering the evidence in the parole dossier, to consider evidence in relation to his mental health history and prior Prisoner Safety and Support Team (PSST) referral with regard to any potential learning disabilities he may have. However, he maintains that a debate which occurred before the Commissioners as to the applicability or otherwise of the provisions of article 53 of the Mental Health Order was irrelevant and a blind alley apt to lead the Commissioners into error.

[41] The provision at issue is in the following terms:

> "If in the case of a person serving a sentence of imprisonment, the Secretary of State is satisfied by written reports from at least two medical practitioners, one of whom is a medical practitioner appointed for the purposes of Part II by RQIA—
>
> (a) that the person is suffering from mental illness or severe mental impairment; and
>
> (b) that the mental disorder from which the person is suffering is of a nature or degree which warrants his detention in hospital for medical treatment;
>
> the Secretary of State may, if he is of opinion, having regard to the public interest and all the circumstances, that it is expedient to do so, by warrant direct that that person be admitted to hospital."

[42] The Secretary of State's functions in this regard have now been transferred to the Department of Justice: see article 4(1) of, and para 11 of Schedule 1 to, the

Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 (SR 2010/976).

[43] This provision was considered relevant in the present case in the following way. On 2 November 2023, the Public Protection Branch (PPB) of the Department provided further information, upon direction from the Single Commissioner, relating to the applicant's mental health history. This arose partly because the applicant had previously been detained at Knockbracken hospital for a period and the Single Commissioner was interested to know whether the applicant had a diagnosis of a specified mental health condition. The response provided indicated that there had been no conclusive diagnosis made, notwithstanding a period of particularly low mental health in the applicant's past. After his period in Knockbracken he had had no further specialist intervention from mental health professionals, engaging instead to be with his GP.

[44] The Panel invited position papers from counsel on behalf of the applicant and the Department on the potential application of article 53 to this case. The respondents have explained that the applicant is suspected to suffer from a learning disability which may hamper his ability to appreciate the value of rehabilitative work (and that he may also have suffered a brain injury because of a particularly serious assault which occurred in his earlier years in custody). In contrast, the applicant did not appreciate any mental health issues or limitations and did not consider that he needed to undertake any further work to address the risks that a variety of independent experts had concluded he posed. There were a variety of concerns about his mental health both from various professionals, prison staff, the Parole Commissioners themselves, and indeed some of his own family. All of this was against a background of the applicant not undertaking constructive activity or risk-reduction work whilst in custody, because he did not consider he needed to. Concerns about the applicant's capacity and understanding came to a head in the hearing, after the applicant himself had given evidence, when the PBNI Area Manager invited the panel to consider these issues further in view of his "obvious lack of insight." Further to this, the Panel invited brief position papers on the potential application of article 53. In brief terms, the Department supported a recommendation encouraging prison healthcare to consider this; and the applicant disputed the propriety of that.

[45] It is against this background that the applicant contends that the panel's consideration of the Mental Health Order was inappropriate, because there was simply no evidence to suggest that the applicant had a condition which would warrant hospitalisation and, moreover, the Commissioners have no role in relation to the application or outworking of the provisions of the Mental Health Order which were considered.

[46] Ultimately, the Panel (at the Department's suggestion) recommended that prison healthcare should urgently carry out a comprehensive assessment of the application to determine whether the conditions in article 53 were satisfied (so

warranting a transfer direction for him to receive treatment for any mental disorder diagnosed). This was also in conjunction with other recommendations that he should be urgently assessed to determine whether he had an acquired brain injury or other injury affecting his cognitive functioning; and that he have a further health or PSST assessment to determine whether he had a learning disability or learning needs. All of these steps seem designed to assist in the applicant's rehabilitation by seeking to understand the reason for his unwillingness to participate in, or incapacity to appreciate the necessity and benefits of, risk-reduction work. The respondents submit that the concern was that the applicant's case is at real risk of stagnating, owing to his persistent refusal to engage with the supports being offered to him. However, they also contend that their consideration of article 53 was entirely incidental to their assessment of risk in the applicant's case.

[47] In relation to this issue, I accept the respondents' case that this is a ground of challenge which goes nowhere. The Panel was clearly interested in the applicant's mental health, for a range of understandable reasons, and wondered whether there was an issue which required more intensive exploration or treatment than had theretofore been the case. However, in the event, this did not play any material role in the outcome of the case. The Panel did not make any findings as to the applicant's capacity (albeit they were plainly concerned about this issue) nor about any particular consequences of his previous injury or as to learning disabilities. In effect, all the Commissioners did was raise the issue that, in the event that the applicant was further incarcerated, further consideration or exploration of these issues was plainly warranted and should be addressed as soon as possible. Significantly, the applicant was not detained *in order to* have his mental health assessed. However, once the Commissioners had resolved that his continued detention was appropriate, they simply went on to express the view that some further investigation in relation to his mental health (in light of concerns which had been raised in the course of the hearing before them) was appropriate. I do not consider this to have been an immaterial consideration.

Irrational conclusion in assessment of risk

[48] The applicant also mounts a four-square challenge to the rationality of the respondents' conclusion that it was necessary for the protection of the public that he should be confined. He contends that there is an unexplained evidential gap or a leap in reasoning which fails to justify this conclusion. This is the real nub of the case, in my view, because the overarching theme of the applicant's case is that his behaviour upon release did not justify his recall and does not justify his continuing detention. In turn, this is linked to the lack of support and assistance made available to him at that time.

[49] To some degree this element of the challenge overlaps with the applicant's ground contending that the Panel erred in failing to provide adequate reasons. This is clear from the way in which the claim was advanced, including that there was no reference in the impugned decision to further offending and that any reference to

harm did not go on to articulate what precise harm to the public the Panel considered to be at issue. As I have already held, I consider the answer to these queries to be plain from a full and fair reading of the Commissioners written decision (see paras [37]-[39] above).

[50] I do not propose to recount many of the dicta set out in previous case law relating to the fulfilment of the Commissioners' task (or, in England and Wales, that of the Parole Board). For present purposes, two will suffice. In *R (Brooke) v Parole Board* [2008] 1 WLR 1950, upon which the applicant relied, Lord Phillips of Worth Matravers CJ said this at para [53]:

> "Judging whether it is necessary for the protection of the public that a prisoner be confined is often no easy matter. The test is not black and white. It does not require that a prisoner be detained until the board is satisfied that there is no risk that he will reoffend. What is necessary for the protection of the public is that the risk of reoffending is at a level that does not outweigh the hardship of keeping a prisoner detained after he has served the term commensurate with his fault. Deciding whether this is the case is the board's judicial function."

[51] In *R (Alvey) v Parole Board* [2008] EWHC 311 (Admin), at para [26], Stanley Burnton J said:

> "The law relating to judicial review of this kind may be shortly stated. It is not for this court to substitute its own decision, however, strong its view, for that of the Parole Board. It is for the Parole Board, not for the court, to weigh the various considerations it must take into account in deciding whether or not early release is appropriate. The weight it gives to relevant considerations is a matter for the Board, as is, in particular, its assessment of risk, that is to say the risk of re-offending and the risk of harm to the public if an offender is released…"

[52] By the time of their decision which is at issue in this case, the Commissioners had before them a range of additional information which post-dated the events of 19 August 2023. This included the applicant's refusal to attend a learning needs assessment in August 2023; that he had not engaged in any work which would address his risk factors associated with substance misuse and mental health; that he had stated that his previous offending had just been "for fun"; and concerns which PBNI had in relation to lack of accommodation for him in the community and generally in relation to lack of stability. The Panel also had the benefit of the applicant's own evidence, which tended to minimise his prior offending and stressed that he was not prepared to engage with PBNI to undertake intervention

programmes, nor to engage with recommended work with mental health services. PBNI's concerns also found some support in the evidence of the applicant's mother and sister. In particular, the latter raised the question of the applicant's lack of insight into his problems, which was described as "a red flag."

[53] One discrete criticism made in the applicant's skeleton argument was that the Panel had not provided an explanation as to why recommended assessments, such as the PSST learning disability assessment, could not be made a condition of the applicant's licence and then be carried out in the community. The respondents' response to this particular complaint was convincing. The assessment is a Prisoner Safety and Support Team assessment. It is conducted in prison by the prison team which determines what work needs to be undertaken in prison to assist the prisoner's rehabilitation and proper safety. It is not a community-based assessment and the work undertaken is not in the community.

[54] I could not conclude that the Panel's approach was beyond the range of reasonable decisions on the information before them, particularly bearing in mind their expertise and experience and the limited role of the court in reviewing their assessments on the merits. Although the applicant's behaviour immediately prior to his recall may not itself have given rise to any particular harm, and although there might well be legitimate criticisms to be made of the level of preparation and support provided to the applicant at and immediately before the time of his release (upon which many of Ms McMahon's submissions focused), the Panel was entitled in law to reach the view it did as to the question of release.

Irrational conclusion on initial recall decision

[55] Finally, the applicant also submitted that the Panel had erred and acted irrationally in finding that the original recall decision made on 19 August 2023 was justifiable. I do not consider that I need to address this ground of challenge, since it is plain from the judgment of the Court of Appeal in *Rainey* [2019] NICA 76, at paras [107]-[111], that what is important is the Commissioners' assessment as to the level of risk posed by the applicant at the time they consider his case, *not* at the earlier point of recall. The initial recall decision will frequently be made under conditions of some urgency and at a time at which the facts known to decision-maker are limited. In this case, there was no challenge by way of judicial review (or an application for habeas corpus) to the initial recall decision or the revocation of the applicant's licence. Mr Henry, therefore submitted that, provided the Commissioners' decision as to the present application of the article 28(6)(b) test was lawful (as I have held that it was), the position as at August 2023 was water under the bridge.

[56] Ms McMahon invited the court to assess the rationality of the Panel's view because it happened to express the view that the original recall decision was justifiable. In particular, in para 34 of its decision, the Panel observed that, whilst there was no suggestion of the applicant having committed any criminal offences

whilst on licence in August 2023, his whereabouts were unknown to PBNI for a number of hours and "by a very finely balanced decision" the Panel was "satisfied that the revocation of his licence on 19 August 2023 was justified in all of the circumstances of his case because by that time his risk of harm had escalated to a significant degree inasmuch as his whereabouts were unknown."

[57] As noted in *Re Olchov's Application* [2011] NIQB 70 at paras [45]-[46], breach of a licence condition is not of itself grounds for revocation of a licence; but it is plain that such a breach may evidence risk which justifies revocation. The context, background and possible an explanation for the breach are all important matters to be considered. When a breach of licence clearly indicates that the individual is unwilling or unable to avail of support in the community which is designed to minimise or reduce their risk of offending, this will be highly pertinent. In the present case it is of course easy to suggest that the Department jumped the gun, rushed to a conclusion or failed to give the applicant a sufficient chance or enough support to succeed in his period in licence. However, it is not the court's role to reach its own view on this matter, much less to substitute that view for those of the Panel.

[58] Strictly speaking, this aspect of the Panel's reasoning may have been otiose. In any event, applying the approach described in the *Hilland* case – namely, asking whether there had been post-release conduct which, if it happened, indicated that there was a risk of harm posed by the prison which could not be safely managed in the community – I would not consider the view which the Panel took in relation to this to be irrational. It seems to have been borne out by later evidence which the Panel heard as to the applicant's likelihood of non-compliance and unwillingness or ability to avail of support and abide by conditions.

[59] I therefore do not consider there to be anything in this last ground of challenge. Even if the Panel had reached an irrational view in relation to what happened in August 2023, that would not affect the legality of their decision provided their undertaking of the statutory risk assessment required of them by article 28(6) as at February 2024 was legally sound.

Conclusion

[60] For the reasons given above, I consider the appropriate disposal in this case is to dismiss the application for leave to apply for judicial review on the merits since, notwithstanding the skill with which they were formulated and advanced by the applicant's counsel, when properly analysed none of the proposed grounds of challenge is arguable in the sense of having a realistic prospect of success.

[61] I will hear the parties on the issue of costs but provisionally consider that there should be no order in relation to costs, save for an order that the applicant's costs be taxed as that of a legally assisted person.