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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF APPLICATION BY DECLAN DUFFY
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Ms L McMahon KC with Ms B Herdman (instructed by John J Rice & Co, Solicitors) for the Applicant
Mr P McAteer (instructed by Carson McDowell Solicitors) for the Respondent

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McALINDEN J ***(ex tempore)***

Introduction

[1] The applicant, Declan Duffy, is a serving prisoner in His Majesty's Prison, Maghaberry. He is 49 years of age and he is seeking leave to judicially review the decision of the Sentence Review Commissioners dated 20 December 2023 under which they refused to make a declaration that the applicant was eligible for release in accordance with the provisions of the Northern Ireland (Sentences) Act 1998. The relevant history of this application is as follows.

[2] On 14 April 1992 in Derby, England, Mr Duffy murdered a British soldier, Sergeant Michael Newman, who was working in an army recruitment office at that time. On 22 July 2010, Mr Duffy was convicted at Stafford Crown Court for the murder of Sergeant Newman and was sentenced to life in prison with the tariff set at 24 years by Madam Justice McKerr. Prior to this sentencing exercise, he had served lengthy periods of imprisonment in the Republic of Ireland for firearms and false imprisonment offences and membership of the INLA.

[3] Following his sentencing in England for the murder of Sergeant Newman, he made an application for release under the Northern Ireland (Sentences) Act 1998 in November 2010 and was released pursuant to a majority decision of the Sentence Review Commissioners dated 8 March 2013. He subsequently went to reside in the Republic of Ireland in Dublin and on 5 December 2015 he was arrested in connection

with the false imprisonment of a number of individuals in the Republic. He was part of a group involving or including Mr Desmond O'Hare that was involved in this offending. As a result of his arrest in the Republic of Ireland, his licence in Northern Ireland was suspended in February 2016 and on 5 October 2017 he was convicted and sentenced in the Republic of Ireland to concurrent sentences of six and two years for false imprisonment and assault with time on remand taken into account.

[4] Following serving his sentences in the Republic, the applicant was extradited to Northern Ireland to serve out his sentence for the murder of Sergeant Newman. His tariff sentence will expire on 21 July 2034. The Sentence Review Commissioners considered an application for a declaration under the Northern Ireland (Sentences) Act 1998 in 2021 and a decision refusing this application was made on 15 April 2021. A further application was made in the autumn of 2022 and this resulted in a substantive hearing taking place on 4 and 5 December 2023 with a detailed, reasoned decision being issued on 20 December 2023 in which the Commissioners refused to make a declaration that the applicant was eligible for release and it is this decision that is the subject of this application for leave to apply for judicial review.

[5] A docket for ex parte motion and Order 53 Statement in this matter are dated 19 March 2024. These are supported by affidavits from the applicant dated 14 March 2024 and Mr Paul Dougan, the applicant's solicitor, dated 19 March 2024. I have also been provided with helpful submissions on behalf of the applicant drafted by Laura McMahon KC and Bobbie-Leigh Herdman, dated 3 May 2024 and equally helpful submissions on behalf of the proposed respondent drafted by Mr McAteer dated 10 May 2024. I have had the benefit of oral submissions from Ms McMahon KC and Mr McAteer. I am grateful to all counsel for their written and oral submissions in this case. I have also benefitted greatly from the comprehensive trial bundles and the bundle of authorities from which I have garnered all the information I require to enable me to determine this matter at this stage.

[6] The first document I will refer to is the Order 53 Statement. The impugned decision, as I have stated, is the decision of the proposed respondent dated 20 December 2023 to refuse his application for a declaration that he is eligible for release pursuant to section 3 of the Northern Ireland (Sentences) Act 1998. The relief sought is a quashing of the decision of the Sentence Review Commissioners on the basis that the decision is unlawful, ultra vires, with no effect or force, procedurally unfair and in breach of article 6 of the European Convention on Human Rights. section 6 of the Human Rights Act 1998 is also called in support of the application as is breach of article 5 of the European Convention of Human rights. The decision is said to be *Wednesbury* unreasonable.

[7] The grounds of challenge include illegality. It is argued that the impugned decision which was made under section 3 of the relevant legislation, interpreted the same by requiring certainty that the applicant would not pose a danger to the public, if immediately released, thereby applying an unlawfully high and unachievable

standard. It is also stated that the decision was made as a result of significant procedural unfairness and in pursuit of this application it is stated that it was procedurally unfair in the following respects:

(a) When reaching their decision regarding potential for release, the decision makers failed to properly consider and weigh in the balance the fact that the efforts made by the applicant towards rehabilitation were, in each and every respect, made solely on foot of the applicant's own initiative towards rehabilitation without any assistance from the prison service or any state authority, the applicant is, in effect, left to fend entirely for himself to establish eligibility for release.

(b) The decision makers failed to give any or adequate consideration to the significant passage of time, namely, eight years since the applicant was recalled to prison, during which time he has shown exemplary progress. This exemplary progress was minimised by the panel in their decision making resulting in the applicant's continued detention.

(c) The decision makers failed to properly interrogate and forensically examine all the relevant facts and relied on errors of fact which operated to the disadvantage of the applicant. By way of example, it is alleged that the view of the panel was that steps taken by the applicant to place his money in his son's bank account was in some way to be held against the applicant. Deeper interrogation of the facts would have revealed that the absence of any pre-released testing for the applicant operates to deny him the opportunity to open his own bank account, a right afforded to other prisoners who benefit from pre-release testing. The panel did not interrogate this fact, but instead, relied on it to the overall detriment of the applicant.

(d) The impugned decision was arrived at following a procedurally unfair process which deprived the applicant of advance notice of the objections to his release in order that he could prepare to meet the same.

(e) The impugned decision was infected by apparent bias by virtue of the fact that one of the panellists, Dr Grounds, sat on the 2013 panel which declared the applicant eligible for release following which he was recalled following further offending in December 2015. The impugned decision places considerable weight on the belief that the 2013 panel had been mislaid and that the applicant had achieved release when he ought not to have done so. Dr Grounds' presence on the panel rendered a fair hearing by the applicant impossible and/or infected the panel's decision making to the extent that the decision reached was infected by bias.

[8] As a catch-all submission, it is argued that, in all the circumstances, the panel failed to weigh in the balance and give due effect to the fact that this application for release by the applicant, in effect, represented the only opportunity he had for

release given that rule 9 of the relevant rules provides that the Commissioners may only determine a further application if they are of the view that there has been a change in circumstances or that material information that was not previously provided is now being placed before the Commission.

[9] In terms of breach of statutory duty, in the Order 53 Statement at least reliance is placed upon breaches of article 5 and article 6 of the Convention and section 6 of the Human Rights Act 1998. In terms of the irrationality challenge, it is argued that the decision to refuse the applicant's application was so unreasonable that no reasonable decision maker could have arrived at it in all the circumstances of the case taking into proper account the evidence before it. It is, therefore, a challenge on the basis of *Wednesbury* unreasonableness. In support of this claim it is stated that the unreasonableness of the decision is evidenced by the following conclusions and findings, which on proper analysis are not grounded in the evidence. It is alleged that the following conclusions and findings are not grounded in the evidence presented to the panel:

(a) That Mr Duffy has not developed sufficient internal protective mechanisms to mitigate against risk.

(b) That Mr Duffy has not presented adequate evidence of external support systems available in the community to mitigate such risk and Mr Duffy has not adequately reflected on his own criminal actions. Mr Duffy minimised his role in the 2015 offending which is deemed to amount to a significant risk factor and that there is no certainty that Mr Duffy would find employment or maintain his medication in the community. It is also alleged that there is no basis for the finding that Mr Duffy's future residence plans are not adequately clear or robust. It is also alleged that it is wrong to conclude that there was insufficient evidence of Mr Duffy's ability to achieve employment and to financially support himself and his family.

[10] That is the trust of the claim that is made out in this case. In summary, it is alleged that the proposed respondent imposed an unlawful and impossibly high standard for release which would be contrary to the ethos and legislative intent. It is alleged that the proposed respondent failed to make sufficient enquiries, failed to take relevant matters into account, including a failure to weigh in the balance the legislative constraints on any further application by the applicant. It is also alleged that the proposed respondent failed to make recommendations and that the panel were biased.

[11] In relation, to the test that the Sentence Review Commissioners have to comply with, it is quite clear from the provisions of section 3 of the 1998 Act that a prisoner may apply to the Commission for a declaration that he is eligible for release in accordance with the provisions of the 1998 Act and the Commissioners must grant the application if, and only if, the prisoner or the applicant is able to satisfy a number of conditions, only one of which is relevant in this case, there being no issue with the

applicant's ability to fulfil the other conditions. The condition that is relevant in this case that must be satisfied is that if the prisoner were released immediately, he would not be a danger to the public. In essence, the test that the Commissioners have to apply in this case and the decision that they have to make is as follows. They must grant the application if, and only if, they are satisfied that the prisoner, if released would not immediately be a danger to the public.

[12] The 1998 Act, and the scheme that is set up under the 1998 Act, has been the subject of high-level judicial scrutiny both in the case of *McClean* which was a House of Lords case and also the case of *McGuinness* in Northern Ireland. It is quite clear that one of the primary issues for the Sentence Review Commissioners to look at is the issue of immediate risk to the public. The judgment of Lord Bingham in *McClean* made it clear that condition 3 which relates to what a prisoner would or would not be likely to do in future if released immediately, calls for an exercise of predictive judgment in relation to whether the applicant would engage in some further acts of terrorism or would become a supporter of a specified organisation. A similar exercise is required to be performed in respect of the fourth condition, which is the crucial condition in this case, in that, at para [25] of *McClean*, Lord Bingham states:

> "So does the fourth condition: the Commissioners are called upon to make the best judgment they can on the material available."

[13] In para [26] he goes on to caution against the dangers of an unduly legalistic approach being adopted when scrutinising what is a very difficult exercise of predictive judgment. In para [27] he goes on to state that:

> "27. It is, however, possible in my opinion to advance certain general propositions concerning the correct approach to the fourth statutory condition. … there can be no presumption that he would not be a danger to the public if released immediately. Significantly, the fourth condition is one that only life sentence prisoners, and not those serving determinate sentences, are required to meet. The Commissioners would rightly wish to honour the spirit of the Belfast Agreement, as would the Secretary of State. But the facts giving rise to Mr McClean's convictions show clearly how unsound any presumption in his favour would be."

He stated at para [29]:

> "29. Thirdly, the primary concern of the Commissioners as with the Parole Board in England and Wales, must be to protect the safety of the public, with which neither body is entitled to gamble: … Thus, the

> Commissioners must recognise that Parliament has conferred a right of accelerated release on a qualifying life sentence prisoner satisfying the four statutory conditions. That is an important right, not to be belittled or discounted or lightly taken away. But it is not a right which can override the important interest of public safety. In the last resort, any reasonable doubt which the Commissioners properly entertain whether, if released immediately, a prisoner would be a danger to the public must be resolved against the prisoner…"

[14] Lord Scott advocated a similar approach in para [44] of the judgment. He stated:

> "44. The importance of the "need to protect the community" permeates the review procedures prescribed by the 1998 Act and its Rules. Section 3 of the Act does not allow the Sentence Review Commissioners to declare a prisoner to be eligible for early release unless a number of specified conditions are satisfied. All, bar one (the first condition), are concerned directly or indirectly with the protection of the community. … And the final condition is that a life-sentence prisoner must, if he is to be eligible for release, be someone who, if released immediately, would not be a danger to the public. … Each of these conditions must be satisfied if there is to be an early release under the Act. The fourth condition, although looking into an inherently uncertain future, is expressed in stark and absolute terms: "… would not be a danger …" This language can be contrasted with the more flexible language of the third condition, which is similarly looking into the future: "… would not be likely to become a supporter." The fourth condition is requiring a high degree of certainty on the Commissioners' part before they can conclude that the condition is satisfied."

[15] Lord Carswell then at para [73] of the decision stated:

> "73. Under section 3 of the Act the Commissioners are to grant the application for a release declaration of a prisoner sentenced to life if four conditions are satisfied. … The fourth condition requires a pure exercise of judgment, the issue being whether the prisoner, if released immediately, would not be a danger to the public. … The Commissioners will seek the information on which to make their decision from whatever source it

> may be obtained. That will include the prisoner, who will be concerned to show in relation to the fourth condition that his future behaviour is likely to constitute no danger to the public. It may also include information from the prison and security services about his past and present activities and associations, which will not necessarily be unfavourable to him. When they have assembled the information which they deem necessary the Commissioners determine whether the four conditions have been satisfied."

[16] Lord Browne at para [88] said:

> "… Section 3, provides that in the case of a life sentence prisoner convicted of terrorist offences, the Commissioners shall grant his application for a declaration that he is eligible for early release 'if (and only if) … the following four conditions are satisfied …'"

Para [91]:

> "91. It will readily be seen that under section 3 the Commissioners cannot grant a declaration of eligibility unless, were the prisoner to be released, he would not be a danger to the public. … it is implicit in section 3 that it is for the Commissioners to form their own opinion as to whether, using shorthand, the prisoner can safely be released and, if satisfied that he can, they must declare his eligibility for early release but otherwise refuse it. Certainly nothing is clearer under section 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 go to the public, not to him."

Para [94]:

> "94. 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."

[17] That is the test to be applied in this case. It is argued on behalf of the applicant in this case that because there is no mechanism by which the applicant in

this case can apply to the Parole Commissioners for release, the Sentence Review Commissioners under their Rules of Procedure, which allow them to regulate their own procedure, must involve themselves in a determination of issues relating to rehabilitation. Not only must they look at the statutory condition of the safety of the public, but, in the absence of any other mechanism available to the applicant, the Sentence Review Commissioners must also look at the issue of rehabilitation and must conduct their investigations and structure their decision making with a view to promoting the applicant's rehabilitation.

[18] There really is nothing to support this submission in the statutory framework under which the Sentence Review Commissioners operate. In brief summary, the 1998 legislation arose out of and reflected a political accord, part of which dealt with individuals who had been convicted or who were to be convicted of offences which were committed during a specific period of time, where those offences were of a terrorist related nature. Those so convicted could apply under the provisions of the 1998 legislation for release following the service of two years' imprisonment. There is nothing about rehabilitation in the Act, there is nothing about rehabilitation in the conditions that can be imposed in respect of the licence granted to an applicant if given release under the Act and it is clear that the primary purpose of the legislation is to give effect to a political agreement entered into between the various parties in Northern Ireland and beyond in respect of a global political settlement following the cessation of violence in 1998. The issue of rehabilitation is not one that is addressed in the 1998 Act and the issue rehabilitation is not one that can be injected into the statutory framework of the 1998 legislation.

[19] If this killing had been a "non-political" murder for which the applicant had received a 24-year tariff in 2010, he would not have been eligible for any involvement with the Parole Commissioners until his tariff period had finished. Therefore, what the applicant is seeking in this case is to import the requirements which are contained in the legislation relating to the involvement of the Parole Commissioners long before any issue of rehabilitation would be addressed under Article 46(2) of the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 legislation" by the Parole Commissioners. That has really no part or no role to play in the decisions relating to the release of the applicant until such times as he can avail of the provisions of Article 46(2) of the 2008 legislation. He can avail of the provisions of the 1998 legislation before his tariff period has expired but those provisions are geared solely and directly to addressing the issue of public safety. As I have stated, the 1998 legislation was enacted to give voice to a political agreement which was, in a sense, a reward for those organisations that were previously involved in terrorist activity giving up terrorist activity, the reward being that those were previously convicted or to be convicted in relation to offences occurring within a certain timescale, being able to avail of the provisions of the 1998 Act with a view to getting early release from prison.

[20] The emphasis in the application in respect of rehabilitation and the criticisms of the decision-making process and the decision itself in respect of the absence of reference to rehabilitation is completely without foundation in the sense that the core central issue that the Commissioners have to determine is the issue of public safety, as is plainly set out in section 3 of the relevant legislation.

[21] When one comes to the crux of the application in this case; to suggest that the wrong legal test was used is entirely without foundation, it is unarguable and it has no reasonable prospect of success because the decision itself, which I will come to, clearly sets out the relevant statutory test and then, clearly follows that relevant statutory test in coming to the decision made in this case. The Sentence Review Commissioners in this case look at all the evidence and then they come to a decision in relation to whether the immediate release would give rise to a risk of harm to the public and they come to the conclusion that they are not satisfied that the immediate release of the applicant would not give rise to a risk of harm to the public and they set out their reasons for doing so. The statutory test that they have had to apply has been rigorously applied by them and to argue, as was argued in the Order 53 Statement, that they imposed an unlawful and impossibly high standard for release is simply without foundation.

[22] What appears to be the main thrust of the application in this case is the alleged failure of the proposed respondent: (a) to make appropriate and necessary enquiries; (b) to call for other evidence; and (c) to carry out further investigations in relation to a number of issues which it is alleged had they done so, they would have uncovered information or been provided with information which would have been to the assistance of the applicant.

[23] In essence, the issues that are raised in respect of this particular aspect of the challenge are the issues of the placing of compensation funds from the Historical Institutional Abuse Scheme into the applicant's son's account. It stated that the fact that the money has been paid into the applicant's son's account is somehow held against him and that further enquiries, if made by the Commissioners would have immediately revealed or easily revealed that the compensation had to go somewhere and that as the applicant is a serving prisoner he cannot have a bank account and, therefore, it had to be paid into the son's account, so that no adverse inference could or should have been drawn in respect of the payment of compensation into the son's account.

[24] The second issue which is raised by the applicant in respect of the failure to make reasonable investigations relates to the applicant's family circumstances, both in respect of the amount of support that is available or would be available to him from family members based in Armagh and, secondly, in relation to the likelihood or otherwise of his partner and an adult child of the partner moving from Dublin to Northern Ireland. It is argued that the panel has come to a determination that there is insufficient evidence of supportive mechanisms being provided by other individuals such as the partner, such as the partner's family circle and such as the

applicant's family circle, and the absence of those supportive mechanisms being relevant in relation to the determination of risk, it is argued that with further enquiry by the panel, the information that the panel has said is deficient could have been provided to the panel and any doubts they had in respect of external support mechanisms could have been put to bed.

[25] The case being argued by the applicant, and this seems to be the central tenant of the case, is that: (a) the panel did not raise these issues with the applicant's representatives during the hearing so that these issues could be addressed; and (b) they went on to make determinations adverse to the applicant without making any investigations or requiring any further information to be provided to the panel and, hence, the panel fell into error and were guilty of procedural unfairness.

[26] In respect of that particular head of challenge, it is important to lay out the groundwork in respect of the legal test that must be applied when making such a challenge. The original public law duty to make enquiries is set out in the *Thameside* case which is quite an old case in terms of the development of this aspect of public law. The most authoritative summary of the *Thameside* duty is found in a more recent case of *Plantagenet* [2015] and in that case the Court of Appeal emphasised the following statements of principle at para [3] in respect of the adequacy of investigation:

> "The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision."

[27] That is the test to be applied in this case and it is quite a high threshold test to meet.

[28] In support of the applicant's challenge, he also raises the issue of the absence of recommendations in the decision issued by the panel in this case. It is argued that, again, and it feeds into the whole issue of rehabilitation, how can an applicant know what he or she has to do in order to avail of the provisions of section 3 unless specific detailed recommendations are set out in the decision of the panel. Again, the rules do not specifically require recommendations to be provided to the applicant and, indeed, the scheme is not about rehabilitation, as I have said earlier and, therefore, one would not expect recommendations to be provided to the applicant. But in this particular case, bearing in mind the detailed nature of the decision that was given in this case, it is quite clear that anyone reading that decision, especially someone who has the benefit of legal representation which has been paid for by the Commissioners first of all and then in respect of this judicial review by legal aid, anyone reading it that would be able to garner from the decision the areas of concern raised by the panel and the areas where the applicant will need

to adduce further evidence in respect of the issue of risk to the public. They are blatantly obvious, and I will deal with those when I come to deal with the decision itself. The argument, the challenge in respect of recommendations, again, is entirely without foundation because of the detailed nature of the decision given and the issues of concern raised clearly and eloquently by the panel.

[29] In relation to the issue of bias, I can address that quite quickly. It is quite clear that the thrust of the decision in this case related to the applicant's lack of insight into his reoffending in Dublin in 2015, and in a sense, his lack of candour with the panel in respect of the nature and extent of his involvement in that offending in 2015. The questions posed by Dr Grounds that are challenged in this case as giving rise to evidence of bias in this case were entirely justified, in fact, were necessary to drill down into the very issue that is at the heart of this case. In essence, it is about what went wrong the last time and why did the applicant re-engaged in criminal activity with former cohorts, such as those with which he was convicted in Dublin in 2015.

[30] In essence, it was an effort by Dr Grounds to test the level of insight and the level of acceptance of wrongdoing by the applicant in respect of the offending in Dublin. The drilling down into the detail revealed that the applicant was putting his reoffending down to the fact that he had hidden his drug addiction from the previous panel, that he had failed to reveal that to the previous panel, that they were unaware of that and that when he hit the streets again his drug addiction which was unaddressed meant that he was vulnerable and meant that he was susceptible to re-engage with criminal elements again. That was the purpose of the questioning by Dr Grounds and I will go on to address how that fed into the decision making of the panel. The applicant alleges that the raising by Dr Grounds of the issue of what went wrong on the last occasion when the applicant was deemed suitable for release is evidence of bias on his part. When properly examined, there is in the mind of the Court no legitimate basis on which to make such a serious allegation of bias having regard to the line of questioning that was followed by Dr Grounds. There certainly is no actual bias and no appearance of bias in the manner in which he posed those questions or in the manner in which he addressed the crucial and central issue at the heart of this case.

[31] We come then to the decision itself. In relation to the grounds of challenge, I have stated that the correct test was used in this case and the panel set out the correct test at the very early stage of their determination. The panel, in dealing with the application, provided a 103 paragraph determination following a hearing on 4 and 5 December 2023. The panel took time to consider the evidence and provided a detailed written decision on 20 December 2023. The first part of the decision sets out the background. Para [11] onwards then sets out the history of the last panel hearing, that was the substantive hearing which took place on 31 March 2021 and details the evidence that was given at that time. That history of the previous hearing progresses from paras [11] through to [22]. Then the history of the present application commences at para [23]. The first substantive reference to the test to be applied is set out in para [24], referring to the test set out in section 3(6). The

preliminary indication was given on 7 July 2023 where they stated they were minded to make a substantive determination to the effect that Mr Duffy's application should be refused on the ground that they were unable to conclude that if released immediately Mr Duffy would not be a danger to the public. That is a clear statement of the correct test.

[32] The panel then, in subsequent paragraphs, refers to a report from a Dr Philip Pollock, a Consultant Forensic Clinical Psychologist, dated 18 April 2023 which was submitted by Mr Duffy as part of this application. It is accepted by the proposed respondent that initially Mr Duffy had to retain the services of Dr Pollock to carry out his assessment but the cost of that report was subsequently met by the Commissioners as was the cost of legal representation. There is then a detailed summary of Dr Pollock's report. This summary continues until para [46] and is followed in para [47] by a description of the course of the panel hearing which took place thereafter. Mr Duffy notified the Commissioners on 4 July 2023 in accordance with rule 14(6) that he wished to challenge the preliminary indication. Accordingly, as required by rule 15(3), the parties were notified that the preliminary indication was set aside and that arrangements would be made for a substantive hearing of the issues.

[33] The matter then came on before the panel for substantive hearing on 4 and 5 December 2023. It was conducted face-to-face at the prison. Mr Duffy was represented by Ms Bobbie-Leigh Herdman, the Secretary of State was represented by David Reid, who informed the panel that he was instructed to take a neutral stance. He confirmed that in reaching the decision to take a neutral stance there had not been any consultation with authorities in the Irish Republic where Mr Duffy reoffended. Mr Reid asked no questions of any of the witnesses called to give evidence. The first witness heard by the panel was Mr Duffy and paras [59] onwards then deal with the evidence given by Mr Duffy. The bank account evidence is referred to in para [55] in which it is noted that the applicant said that he had access to about €15,000 that was deposited in his son Shane's bank account in Dublin. The money had come from compensation payment made to him. The panel took into account the following documents: (a) documents recording that Mr Duffy was awarded £20,000 via the Historical Institutional Abuse Redress Board on 20 June 2022; (b) bank statements recording money lodged to Shane Duffy's bank account in August 2022; and (c) Shane Duffy's bank statement showing a balance of €15,005.58 on 26 May 2023 and a balance of €14,460.45 on 4 December 2023.

[34] It is quite clear that the panel were interested in and had access to documentation and information in respect of the compensation payment made to the applicant which was then lodged in his son's account.

[35] Subsequent paragraphs deal with the issue of medication, para [57] deals with the prescribed medication which the applicant is still taking. It states he was hoping to reduce his intake of Pregabalin. He is no longer taking Tramadol but instead was receiving a Buvidal injection which he also wanted to reduce. Buvidal is an opiate

substitute for addiction to opiates. He stated that he had been taking Buvidal for the last 18 months. He stated he was not aware of the exact procedures needed to continue his course of medication in the community. He thought he would obtain it from his GP and the prison nurse. He would rely on the support of his family as well as the Quakers and the Community Restorative Justice ("CRJ") workers who he knew from his time in custody. He was asked if he had similar hopes when last released on licence and he replied "Yes, but no confidence. Things were different now as I have my confidence back and I can say no to people." He said that he no mental health problems and did not need community mental health support. He would rely on the Quakers and CRJ.

[36] The panel then heard evidence from Ms Sandra Commerford, Reverend McAllister, Mr Shane Wheelan, the Chief Executive of the Quakers' Service, a Ms Landa, a Restorative Practitioner with CRJ, and Barry Rooney, Health Engagement Lead of the South Eastern Trust. It should be noted that the South Eastern Trust is not the Trust with responsibility for the area where Mr Duffy would intend to live in Armagh, but it was a health care body where it would seem that Mr Duffy had a good chance of obtaining some employment. The panel later received a positive character reference from Dr Ruth Gray, Assistant Director in Quality and Improvement and Innovation at the South Eastern Health and Social Care Trust and the panel also took into account later correspondence from Mr Duffy's solicitors to the effect that Mr Barry Rooney had spoken to the health care team who had recorded on 18 June 2020 that from all the information then available there is no indication that the applicant needed a mental health assessment at that time, and that if needed in the future, he could follow the mental health pathway.

[37] That is all the evidence that was received and detailed as being received in the first day of hearing on 4 December, and it is quite clear that not only did the panel receive detailed positive evidence in respect of the applicant but they have recorded that in the decision that was produced on 20 December. The second day of evidence consisted of hearing the evidence of Dr Pollock who gave evidence via videolink. In addition to that there were submissions made at the end of Dr Pollock's evidence.

[38] In relation to Dr Pollock's evidence there is a very detailed note of exchanges between the panel and Dr Pollock where all the relevant matters are properly addressed with Dr Pollock by the panel. Following Dr Pollock's evidence, the panel has recorded that it took account of a significant amount of documentation amounting to 12 separate categories of documentation, with those categories being listed in para [81] of the decision. Para [82] of the decision then goes on to consider the legal test to be applied and I have already stated that there is no doubt in my mind that the panel had in mind the correct legal test and set about applying that legal test with rigour. The decision and reasons set out at para [87] and in the subsequent para and it is important that I do detail the decision and reasons given by the panel. Para [87] proceeds as follows:

> "87. After considering all the evidence in Mr Duffy's case, the Commissioners have a reasonable doubt as to whether, if released immediately, Mr Duffy would be a danger to the public. For reasons given below, notwithstanding its conclusion that he was unlikely to become involved in terrorist offending, the panel is not satisfied to the requisite standard that if released immediately Mr Duffy would not reoffend or behave in such a way as to be a danger to the public.
>
> 88. The panel has taken into account that Mr Duffy has committed serious violent offences in the past and has been a dangerous and prolific offender. That is obviously a relevant consideration. He has also been released on licence only to reoffend in a serious and violent way resulting in his return to custody and the revocation of his licence. Again, a very material consideration to take into account. The panel is not satisfied that he has developed adequate internal protective mechanisms or has presented adequate evidence of external support systems available in the community to obviate the reasonable doubt that the panel has that he remains a danger to the public."

[39] So there are two aspects. The development of adequate protection mechanisms and the inadequacy of the evidence of external support mechanisms. At para [89] the panel went on to acknowledge the considerable amount of educational and rehabilitative work engaged in by the applicant since his return to prison. There was a great deal of evidence from witnesses who have worked with him in custody and speak to his skills delivering counselling and programmes. However, at para [90]:

> "The panel concludes that there is inadequate evidence to establish that he has built up the necessary internal controls to obviate the reasonable doubt that the panel has concerning his danger to the public. There are glowing character references and positive oral evidence given to the panel about his work in prison providing counselling services to other prisoners and the help he has given to various bodies in the prison which provide support and counselling to others. He is to be commended for this work but there is little reliable evidence that Mr Duffy has used these opportunities to adequately reflect on his own criminal actions in the past and make a real change about his own future behaviour. In coming to this conclusion, the panel takes into account the written evidence of Dr Pollock that there appears to be

> a number of variations within Mr Duffy's narrative about his exact contribution and actions during the index offence of July 2015. There is inference by Mr Duffy that he might have been entirely naïve about what was likely to develop during the incident and hint on his part that he only acted to placate Mr O'Hare by assaulting Mr Roach. The panel do not accept the explanation that Mr Duffy, a man who has a history of being able to plan and execute serious and organised criminal activities in the past and who appears to take a leadership role in his counselling activities in custody, was naïve. Dr Pollock described him as a clever and skilful man.
>
> The panel also takes into account the oral evidence of Dr Pollock that Mr Duffy's account of the violent offending in Dublin had a vagueness about it and concluded that Mr Duffy emphasised his naivety and lack of planning which constituted minimisation about what violence was used and by whom. Dr Pollock agreed with the suggestion that there was a dramatic difference between the version of himself put forward by Mr Duffy that emphasised his naivety and lack of agency with the other version of himself as being a leader and mentor of others who in the past planned and carried out paramilitary operations. Dr Pollock said that 'the two do not correlate, he has the wherewith all to be a thug in any situation, I did challenge him on this, it's minimisation on his part.'"

Those are direct quotes from Dr Pollock.

[40] Para [93] states:

> "The panel also take into account that Dr Pollock opined he has agency to do all sorts of things and that Mr Duffy's continued minimisation of his role in the Dublin offending could be seen as a risk factor, but it may also be just an indication of his shame at the mistake that he has made that ended with him being recalled. It is also relevant that Dr Pollock stated that insight is an important internal protective factor. He also stated 'insight is important and his minimisation bothers me, but I do not give it too much weight.' The panel, however, does give it weight and concludes that this continued minimisation is a significant risk factor which leads to the panel having a reasonable doubt that if

> released immediately Mr Duffy would not be a danger to the public."

[41] That is the key paragraph in this whole decision. The key issues are the absence of internal protective factors; the absence of insight; and the positive minimisation of the applicant's role in the 2015 offending. The panel clearly give these issues weight and conclude that the continued minimisation is a significant risk factor which leads to the panel having a reasonable doubt.

[42] Para [94] emphasises that the panel does give credit for the progress that Mr Duffy has made in prison since his recall but also takes into account the evidence of Dr Pollock (who it must be remembered was a witness called on behalf of the applicant) that stability in prison is not a great predictor of risk and that the concept of the model prisoner is not helpful. The panel also considered Dr Pollock's evidence about the problems of adjusting to life in the community that Mr Duffy encountered last time and Dr Pollock's statement that: "I cannot assume protective factors will be there…there was no certainty that he would find employment and maintain his medication."

[43] In para [95], the panel stated:

> "In coming to the conclusion that there is a reasonable doubt that if released immediately Mr Duffy would not be a danger to the public, the panel also takes into account Mr Duffy's own oral evidence in which he was unable to provide a clear and coherent account of his motivation in committing serious violent offending whilst on licence in Dublin."

[44] Further on down that paragraph, the panel stated: "His account remains at variance with the description of his offending and its context given the Special Criminal Court transcripts." That is important. The panel took the time to read the Special Criminal Court transcripts in this case and to compare the contents of those transcripts with the applicant's evidence before the panel and the panel identified a difference in those accounts, a difference in emphasis, and the panel reached an adverse conclusion following on from that comparison. The panel concluded that the applicant continues to minimise his role in the violent offending that led to the revocation of his licence and has failed to adequately reflect on his offending behaviour and his involvement with his associates. In the panel's judgment, he did not convey a deep seated understanding of why he reoffended with full acknowledgment of and concern about what motivated him. Therefore, the panel cannot be confident that he has sufficient insight or motivation to be able to resist becoming involved again in future violent offending if released immediately.

[45] The panel then goes on to talk about a lack of adequate external protective factors. The panel took into account the written evidence of Dr Pollock that

Mr Duffy's vulnerability to low mood, post-trauma symptoms and anxiety are likely to require monitoring if release is granted to prevent deterioration in psychological status and his opinion that it will be necessary to monitor any mental health symptoms and addiction issues going forward. The panel noted that Mr Duffy continues to be prescribed psychotropic and opiate substitution medication and his need for these may indicate vulnerability to future stress. The panel also took into account Dr Pollock's oral evidence that when asked about any risk factors arising from Mr Duffy's mental health and medication, it is recorded in the decision that Dr Pollock stated that how Mr Duffy adjusts to life in the community must be monitored and there must be mental health workers on call, if necessary. He added that it is only sensible that something must be in place rather than just relying upon Mr Duffy to contact his GP.

[46] The panel also concluded that there was no adequate evidence that arrangements were in place to provide such necessary monitoring and support. In the judgment of the panel too much reliance is placed by Mr Duffy on him having to proactively engage with mental health services and his GP and no plan for this appears to be in place. The panel heard about Mr Duffy's involvement in custody with the Quakers and the South Eastern Trust and CRJ, but very little about these organisations being able to provide support upon his immediate release. Moreover, it was apparent that any engagement that Mr Duffy would have with these organisations following his release from prison would be wholly dependent on his own assessment as to whether he required such support.

[47] At para [98] the panel analysed other planks of possible external support and protective control. The issue of the plan to live in Armagh was addressed. The panel took into account the written evidence of Dr Pollock that how Mr Duffy intends to negotiate the transition to relocate to Armagh will be critical. The panel also took into account that when asked in oral evidence about the plan to live in Armagh, Dr Pollock stated that the plan had not been fleshed out when he spoke to Mr Duffy. He understood that the plan was that Sandra and Kevin would move from Dublin and live with Mr Duffy in Armagh, but he was of the view that the plan needed to be expanded. He added that a plan that is not well-planned is not a plan. He also said that Mr Duffy should not just be let out the door with a view to seeing what happens, especially with his particular vulnerabilities. He added that the risk management strategy about the move to Armagh was very important. He was asked how risky it would be for Mr Duffy if there was no proper plan for Armagh, and Dr Pollock replied that "Mr Duffy would not be on his own but when I saw him his wife was still living in Dublin." He added that there were lots of steps that needed to be in place and this will cause Dr Duffy stress. He also stated that "I would have preferred if the Armagh plan was an intact plan."

[48] The panel then went on to discuss the evidence given by Mr Duffy's partner and also the evidence in relation to the son, Kevin. The crucial issue in respect of this evidence is whether the panel under a duty to make further enquiries or to request further evidence to be adduced in respect of that. In the Court's view, the

answer simply is, having regard to the test that I have referred to earlier (the *Plantagenet* test) absolutely not. What jumps out from Dr Pollock's report is the telling comment he made that a plan that is not well-planned is not a plan. The issue of planning was crying out to be addressed by more cogent, coherent, definitive evidence in respect of the move to Armagh. What was presented to this panel was basically aspirational. Certainly nothing concrete was presented to the panel and the same applies in relation to support mechanisms in place. All the red flags or the warning flags were contained in Dr Pollock's report and if those flags had been observed and heeded, it would have been readily apparent that further evidence was required to address the lacunae that were patently and obviously present in the plan to relocate to Armagh. In essence, what the panel has done in reasonably kind and gentle language, is to highlight that there were clear deficiencies in this plan to relocate to Armagh.

[49] At para [99] of the decision, it is stated:

> "The evidence before the panel was that Mr Duffy's partner and children still live in Dublin and in the judgment of the panel, the future residence plan is still not adequately clear or robust so as to establish what family support Mr Duffy is likely to have as one of the potential necessary external protective factors. It is, of course, right to say that the two children are now both adults and entitled to make their own choices, but there is an absence of reliable evidence from Kevin that he intends to move to Armagh or visit. There is no witness statements or letters from him or his brother about any aspect of this plan or their claimed support for it. The panel was told that Kevin is now under the care of mental health services, but no written evidence has been submitted concerning their views on the practicalities of the plan."

[50] This goes to illustrate exactly what Dr Pollock had stated that a plan had not been fleshed out and that a plan that has not been fleshed out is not a plan as such.

[51] At para [100] of the decision, it is stated:

> "In addition, although Sandra Commerford gave oral evidence that she would definitely move from Dublin to live with Mr Duffy in Armagh with or without Kevin, the panel cannot overlook and they could not overlook the fact that she made the same promise in front of a different panel on the last occasion and did not carry out the plan then. Moreover, there is no adequate evidence of any planning as to how Kevin would be able to transfer his

state benefits from the Republic of Ireland to Northern Ireland or how Sandra Commerford would obtain work in Armagh."

[52] There was also a lack of evidence as to what kind of support Mr Duffy would receive from family and friends in Armagh and no witness statements or letters were submitted from family or friends in Armagh. Moreover, as is mentioned above, there is a lack of evidence concerning Mr Duffy's ability to obtain employment in Armagh. The panel took into account that Mr Duffy gave as an explanation of one of his motives for involving himself with Mr O'Hare and the violent offending was because he had money problems and wanted to go on Mr O'Hare's payroll. The panel had a reasonable doubt about Mr Duffy's present and short-term financial position, if released immediately. The panel noted that he and his partner had no immediate job prospects and although the panel was told that Mr Duffy had access to about €15,000, the panel had a reasonable doubt as to when and how Mr Duffy can access the money.

[53] There was a clearly articulated reasonable doubt in the panel's collective mind about when and how the applicant could access this money. The evidence established that Mr Duffy was awarded €20,000 in June 2022 and this money was paid into Shane Duffy's bank account in August 2022. There is also the evidence in relation to the balance of the account on the two dates in May 2023 and December 2023. However, crucially, as is made clear in the decision, there is a lack of evidence as to why this money was paid into Shane Duffy's account and a lack of evidence from Shane Duffy that he is able and willing to release this money to Mr Duffy and this was considered to be all the more concerning in light of Mr Duffy's oral evidence that he still owed members of his family thousands of pounds.

[54] This was the clearly articulated concern about the applicant's financial status and this formed part of the basis of the reasonable doubt held by the panel: on the one hand the applicant was saying that he owed thousands of pounds to family members and on the other hand he was saying he had access to compensation money that was in a relative's account.

[55] As set out in para [102] of the decision, the panel concluded, having taken into account all the evidence, that Mr Duffy lacked necessary insight and had not appreciated the challenges he would face arising from his previous offending and how he would cope in the circumstances where the panel concluded there were simply inadequate external protective factors in place and where there is a real risk that the Armagh plan would fail as it had in the past.

[56] Having gone through the panel's decision with a fine tooth comb in order to deal with the various grounds of challenge here, it is quite clear that the panel gave the matter very detailed consideration in which all the evidence that has been adduced by and on behalf of the applicant has been the subject of very close scrutiny and careful analysis. The question that the court has to answer in respect of the

"duty to investigate" point raised by the applicant in this case is the question that was posed in the *Plantagenet* case, and the guidance that was set out in that case, namely, that "a court should intervene only if no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed the information necessary for the decision." That is the test.

[57] Well it is quite clear to this court that the panel in this case possessed an abundance of information, a surfeit of information, upon which it could make a decision and a just, fair and appropriate decision. The key issue in this case is the issue of the minimisation of the applicant's involvement in the previous offending, his lack of insight in respect of that and that is the central thrust, that is what gives rise primarily to the risk that cannot be ignored by the panel. The risk could be obviated if there was strong cogent evidence of external support mechanisms readily in place, ready to embrace the applicant to help him on his journey after release from custody. The evidence in respect of that was simply lacking, it is not the duty or responsibility of the panel to go out and positively track down or trace evidence that will be supportive of the applicant. It is not that these issues were not flagged in the report of Dr Pollock, they clearly were, and it is just the case that no further evidence was adduced in respect of those particular issues.

[58] The key issue here is the court should only intervene or only interfere if no reasonable authority could have been satisfied on the basis of the enquiries made or the information before it that it possessed sufficient information necessary for its decision. In my view, it was quite clear that the degree of care taken in this case by the panel, the amount of information they had before them and the way in which they have analysed that information clearly establishes that there is really no possible rational argument that the panel did not possess the information necessary for its decision. That central plank, that ground of challenge, is without any foundation.

[59] So, in essence, the challenge in respect of the wrong test being applied fails. It is an unarguable point. There is no realistic prospect of success. The challenge in respect of the failure to carry out adequate investigations or to signpost further material that should be provided to the panel fails in limine because the panel had more than enough information necessary for its decision. The issue of bias does not get off the ground. The issue of recommendations, again, does not get off the ground because the decision is so thorough in terms of setting out its reasoning that anyone reading that would be able to ascertain where the applicant needs to look to for additional evidence and what the applicant needs to demonstrate to the panel in future. The ancillary challenges in relation to article 5 and article 6 of the Convention really do not get of the ground on the basis that they are just make weights in respect of the substantive challenge in this case which comes down to the central issue of the failure of the panel to make its own enquiries or to request further information to be provided (the procedural fairness point) which, as I have stated, is without foundation.

[60] On that basis, I have no hesitation in refusing leave in the case. As this is an application for leave there will be no order as to costs and I direct that the applicant's costs be taxed as an assisted person.