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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 MICHAEL MCMORAN FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE PAROLE COMMISSIONERS FOR NORTHERN IRELAND AND THE PROBATION BOARD OF NORTHERN IRELAND

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Aaron Fitzsimons (instructed by McCann & McCann, Solicitors) for the Applicant
Lara Smyth (instructed by Carson McDowell LLP) for the first proposed Respondent
Ben Thompson (instructed by the Crown Solicitor's Office) for the second proposed Respondent

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SCOFFIELD J

Introduction

[1] The applicant, a recalled prisoner, seeks leave to apply for judicial review of a decision of the Parole Commissioners for Northern Ireland (PCNI) ("the Commissioners") made on 24 October 2024 by which they declined to direct his release from prison; and of a decision of the Probation Board for Northern Ireland (PBNI) ("the Probation Board") by which it made no referrals in relation to the applicant in advance of his parole hearing, save in order to arrange hostel accommodation.

[2] The Commissioners are also challenged for failure to direct a further review in relation to the applicant's case before the expiry of his licence period. The Commissioners' decisions are challenged on the basis of error of law, irrationality and (in the case of the decision not to have a further review) failure to provide adequate reasons. The Probation Board's actions are challenged on the basis of irrationality only.

[3] Mr Fitzsimons appeared for the applicant; Ms Smyth for the Commissioners; and Mr Thompson for the Probation Board. I am grateful to all counsel for their helpful submissions.

Factual background

[4] The applicant is currently detained in HMP Maghaberry following his recall from release on licence on 14 May 2024. The sentence giving rise to the licence period arose from offending which occurred on 11 June 2022. The applicant was convicted of attempted burglary with intent to steal; three counts of criminal damage; common assault; assault on police; burglary with intent to steal; and carrying an imitation firearm in a public place. The attempted burglary was of an apartment block; and the burglary was of commercial premises. This occurred when the applicant was on something of a substance-induced rampage, during which he damaged a number of motor vehicles and the door of a church, as well as assaulting a member of the public and a police officer. He received an overall determinate custodial sentence (DCS) of 27 months, split equally between custody and licence period, imposed by His Honour Judge McGarrity at Belfast Crown Court on 13 February 2024. His custody expiry date (CED) was 25 April 2024 and his sentence licence expiry date (SLED) is 9 June 2025.

[5] The applicant was released on licence on 25 April 2024 and had accommodation at Innis Centre Hostel. At 12.30 pm on that date a probation officer met with the applicant for the purposes of an induction interview and to explain the requirements of his licence to him. The Recall Report notes that, at this point, the applicant indicated that he was not happy that he would be subject to electronic monitoring and that he did not believe this was necessary. At a later interview, on 1 May 2024, it is noted that the applicant was again "challenging in his approach" in relation to the licence conditions to which he was subject.

[6] Notwithstanding this, the applicant's release appears to have progressed reasonably well and without significant incident for a couple of weeks. However, on 12 May 2024 the hostel staff advised PBNI staff that the applicant had been under the influence of substances on Friday 10 and Saturday 11 May. As a result, he had sustained a significant leg injury but refused to seek medical assistance for this. He had also smashed plates and glasses in the hostel, which staff believed was due to his having consumed substances. He got into a confrontation with another resident and then urinated in the corridor. Staff felt he had breached numerous hostel rules during the hours of 12 midnight to 8.00 am.

[7] Similar behaviour continued over the next days. Staff reported that the applicant had been extremely challenging; had presented under the influence of substances; had fallen from his bed (landing on a mug and cutting his leg as a result) giving rise to concerns about his health and safety; had damaged the door of his room putting it out of use; had broken a CCTV camera; and had failed on a number of occasions to collect his medication. The hostel manager advised PBNI that his

behaviour was no longer manageable as it was placing staff and other residents at risk of harm, with the risk also of further damage to property. This resulted in his bed within the hostel accommodation being withdrawn, leaving him homeless.

[8] Recall was initiated on 13 May 2024. A Commissioner who considered the PBNI request for recall was satisfied that there was evidence that his risk had increased. The applicant's licence was formally revoked on 14 May 2024 by the Department of Justice ("the Department"). While police were returning Mr McMoran into custody a quantity of Class C drugs were found in his possession. (The court was told that he has pleaded 'guilty' of an offence in relation to this. The applicant later told the Commissioners in his evidence to them that he had bought these drugs in the hostel with a view to "selling them on", although he denied that this was for profit.) The case was referred to the Commissioners on 17 May 2004 under Article 28(4) of the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order").

[9] The applicant relies upon a number of matters in his affidavit evidence in these proceedings. He avers that, whilst he was serving the custodial part of his sentence, he received no adverse reports in the prison and his behaviour was exemplary. The applicant has also been critical of the (lack of) support which was provided to him whilst he was released on licence. He refers to the recommendation made in the pre-sentence report considered by the sentencing judge which recommended that, during his period on licence, he be required as a condition of his licence to present himself for alcohol or drug counselling and/or a treatment programme. He also relies upon the Release Plan prepared by PBNI prior to his release. This had indicated that a drug ban would not be beneficial for him in the community (as he is prescribed methadone through the Substitute Treatment Program (STP) in custody and had an assessed dependency on substances); and further indicated that the focus of his time on licence would be on relapse prevention and the completion of a drug/alcohol treatment programme, as well as developing strategies to avoid re-offending. In order to demonstrate his willingness to avail of such a programme, he avers that on the day of his release he asked for a referral to NIACRO to be made to support him in the community. However, PBNI did not make any referrals – except to secure hostel accommodation for the applicant – in advance of his release on licence on 25 April 2024. A theme of his evidence, and of the case he makes generally in these proceedings, is that not enough was put in place from the outset in order to assist in keeping him on the straight and narrow.

[10] The applicant says that he felt that he was doing well in the community in the first two weeks after his release on licence; and he is aware that there were positive reports. He accepts that the behaviour which led to his recall "was unacceptable" and that his recall to prison was justified. He contends that his behaviour was borne out of frustration and a relapse. However, he complains that he was not given help during his time on release on licence, either through a Relapse Prevention Programme or by his Probation Officer "who was off work during the time as it was

the weekend." He avers that he does not blame his behaviour on anyone but himself but feels that if he had had more help he would have coped better.

[11] The Single Commissioner, Dr Kate Geraghty, considered the applicant's case and declined to direct his release in a decision of 15 August 2024. Para 56 of her decision was in the following terms:

> "I am satisfied that Mr McMoran continues to present a high likelihood of reoffending by virtue of his history of violence, relapse into substances, his recall to prison in a short period of time, and his difficulties with change and maintaining positive progress for significant periods of time. I have reviewed the evidence of risk against the likely effectiveness of available licence conditions, and I am not satisfied the threshold for release has been met at this stage. Because of Mr McMoran's history of breaching court orders, his post-release conduct, his ongoing difficulties with being fully honest and open with Probation, his substance use, possible mental health needs and lack of stable accommodation in the community I do not believe he can be safely managed in the community at this time."

[12] The applicant relies upon para 59 of the Single Commissioner's decision, which is in the following terms:

> "It would be helpful for Mr McMoran to be given an opportunity to be released on licence and have the support of Probation and other services available to him. Mr McMoran's case should be referred back to the Commissioners for further review in time for it to be completed no later than six months from the completion of this reference."

[13] The applicant requested an oral hearing before a panel of Commissioners ("the Panel") and, on 19 September 2024, a further Commissioner directed that there should be an oral hearing.

[14] Prior to the hearing before the Panel, a Suitability for Release Report was prepared in respect of the applicant. He relies heavily on this report as it identified a number of positive factors in his favour, including that he was progressing well; he was an enhanced prisoner; he had had no adverse incidents or guilty adjudications in the prison; he had passed a mandatory drug test and was working with the Substitute Prescribing Team; he had met with CRUSE Bereavement Service due to the loss of his partner; he had engaged with Housing Services to secure his own

accommodation; his engagement with staff was positive; and he had completed four relapse prevention sessions with ADEPT.

[15] A hearing was held on 17 October 2024. The Panel's decision was provided on 24 October 2024. It neither directed the applicant's release nor made a recommendation for a further review in the case. These are the decisions on the part of PCNI which are under challenge in these proceedings. The Panel provided a detailed decision, running to some 44 pages. Its conclusion was that, following consideration of the case, it was not satisfied that it was no longer necessary for the protection of the public that the applicant be confined. It therefore directed that he not be released at this time. Para 134 of the Panel's decision is in the following terms:

> "Taking into account the relevance of substance misuse to Mr McMoran's risk of offending and offending history and the evidence of his persistent offending over many years, the Panel is satisfied that he presents a risk of harm through the commission of further offences."

[16] The Panel went on to determine that the risk which the applicant presented could not be adequately and safely managed in the community at this time. There was little evidence of clear support being available to him in the community if he were to be released; and little evidence that he could self-manage in the community and comply strictly with the restrictions which would inevitably be placed upon him. The Panel noted the strong evidence in the parole dossier, which was not challenged, that the applicant had a considerable history of failing to comply with external controls imposed by the courts. The Panel considered that there was support for the view expressed by the applicant's Community Probation Officer (CPO) that he was "completely unequipped for release", notwithstanding his impeccable conduct in custody. The Panel had considerable concern regarding his level of insight into his risk; and that he did not fully understand the challenges which he was likely to face in the community. Further aspects of the Panel's reasoning are discussed below.

Brief summary of the parties' respective cases

[17] Mr Fitzsimons marshalled his submissions on behalf of the applicant by reference to four basic arguments. First, the Commissioners had erred in law in relation to the meaning of 'harm' for the purposes of the statutory threshold in the 2008 Order. Second, the Commissioners' decision not to direct release was irrational on the facts of the case and on the evidence before the Panel. Third, and in the alternative, the Panel's failure to direct a further review within six months was irrational and/or inadequate reasons had been given for that decision. Fourth, the approach of the PBNI in relation to referrals (save in relation to the issue of housing) was irrational.

[18] For the first proposed respondent, Ms Smyth contended that the Panel was entirely correct in its understanding and application of the relevant statutory provisions. She further submitted that, in light of the content of the Panel's decision, the applicant's first ground was academic (since, even applying the interpretation for which he contended, the Panel had indicated that the threshold for release had still not been met). She argued that the applicant's second ground was simply a merits challenge; that the Panel's decision was perfectly rational in all of the circumstances; and that the decision not to direct a further review, in light of the applicant's imminent SLED, was perfectly rational, unsurprising and adequately explained.

[19] For the second proposed respondent, Mr Thompson argued that the challenge to his client's actions was academic and of no utility at this remove, and certainly in the event that leave to proceed against the PCNI was refused, such that leave should be refused in the case against PBNI on that free-standing basis. He further submitted that, in any event, its actions were perfectly rational and understandable when the practicalities of the situation were taken into consideration.

[20] All counsel involved in this case presented their arguments clearly and ably: Ms Smyth and Mr Thompson succinctly and with commendable economy; and Mr Fitzsimons in a well-structured and comprehensive fashion, with evident diligence in preparation.

Relevant statutory provisions

[21] The key statutory provisions for present purposes are set out in the 2008 Order and were helpfully examined in the recent Supreme Court case of *Re Hilland's Application* [2024] UKSC 4, to which further reference is made below. Article 28(6) of the 2008 Order is in the following terms:

> "The Parole Commissioners shall not give a direction under paragraph (5) with respect to P [directing P's immediate release] unless they are satisfied that—
>
> (a) where P is serving an indeterminate custodial sentence or an extended custodial sentence and was not released under Article 20A, it is no longer necessary for the protection of the public from serious harm that P should be confined;
>
> (b) in any other case, it is no longer necessary for the protection of the public that P should be confined."

[22] A central ground of challenge on the part of the applicant is that the Commissioners erred in law in relation to the meaning of this test. However, the key error alleged by the applicant in this regard does not relate directly to the text of

Article 28(6)(b) but, rather, to the meaning of the word 'harm' in the related provision of Article 8. That article deals with the length of the custodial period in relevant sentences, the duration of which determines when the offender will be released on licence under Article 17. The custodial period cannot exceed one half of the term of the sentence but, subject to that, is simply "the term of the sentence less the licence period." The licence period is then defined in Article 8(5) in the following terms:

> "In paragraph (4) "the licence period" means such period as the court thinks appropriate to take account of the effect of the offender's supervision by a probation officer on release from custody—
>
> (a) in protecting the public from harm from the offender; and
>
> (b) in preventing the commission by the offender of further offences."

[23] Article 8(5) is relevant to the purpose and intended effect of the licence period imposed as part of a DCS. (Similar purposes are evident from Article 24(8), which relates to standard and prescribed licence conditions formulated by the Department, which similarly identifies as purposes of the supervision of offenders while on licence (a) the protection of the public; and (b) the prevention of re-offending; as well as (c) the rehabilitation of the offender.)

[24] Article 29 of the 2008 Order is also relevant to the applicant's case. It provides as follows:

> "(1) This Article applies where —
>
> (a) a fixed-term prisoner, other than a prisoner serving an extended custodial sentence or a prisoner to whom Article 20A applies, ("P") is released on licence under Article 17 or 20; and
>
> (b) on a reference under Article 28(4) the Parole Commissioners do not direct P's immediate release on licence under this Chapter.
>
> (2) Subject to paragraphs (3) and (4), the Parole Commissioners shall either —
>
> (a) recommend a date for P's release on licence; or

(b) fix a date as the date for the next review of P's case by them.

(3) Any date recommended under paragraph (2)(a) or fixed under paragraph (2)(b) must not be later than the second anniversary of the date on which the decision is taken.

(4) The Parole Commissioners need not make a recommendation under paragraph (2)(a) or fix a date under paragraph (2)(b) if P will fall to be released unconditionally at any time within the next 24 months."

Error of law

[25] The contours of the applicant's argument on his first ground of challenge are as follows. The statutory test directs the Panel to assess whether the prisoner's confinement is necessary for the protection of the public. In accordance with the judgement of the Supreme Court in *Hilland*, this means the protection of the public *from harm*. There is no statutory definition of 'harm' for this purpose in the 2008 Order. The term should simply be given its ordinary and natural meaning; and not an extended or enhanced meaning imposed by the court. In context, the word 'harm in Article 8(5) means personal injury, whether physical or psychological, which is neither fleeting nor trivial. That is its ordinary and natural meaning in the Order, the applicant submits. Further, that meaning accords with the following analysis. Article 3 of the 2008 Order defines "serious harm" as "death or serious personal injury, whether physical or psychological." That must entail some injury to the person. Since 'harm' is restricted to injury to the person when serious, there is no reason to consider that it is not so restricted in Article 8(5) simply because it need not be 'serious' in that context. That is the applicant's argument on the first ground.

[26] On the applicant's case, the error of law which he has identified is contained in para 135 of the Commissioners' decision, which is in the following terms:

> "It was submitted to the Panel on behalf of Mr McMoran that the Panel, in applying the threshold in Article 28(6)(b) and taking into consideration whether it is necessary for the protection of the public that Mr McMoran be confined, the Panel should limit itself to consideration of a risk of injury. The Panel rejects that submission. It notes that Parliament in passing this legislation did not exempt from the DCS sentencing regime many offences which do not carry any obvious risk of physical or psychological injury. To confine the definition of harm in the manner contended

> would appear inconsistent with the intention of Parliament and would deprive those sentencing provisions of their effectiveness in relation to a broad range of criminal offences."

[27] I accept Ms Smyth's submission that, strictly speaking, this ground of challenge is academic since, in light of what the Panel said in para 136 of their decision, it did not affect the outcome of hearing. Para 136 is in the following terms:

> "Even if the Panel were wrong in refusing to accept the submission of counsel, the Panel notes that Mr McMoran has a history of burglary of dwellings. In such circumstances there is an inherent risk of confrontation with members of the public. The Panel notes that he has previously been convicted of rape and robbery and was in possession of a BB gun at the time of the index offences. The Panel considers that even if harm were to be construed as confined to a risk of injury, Mr McMoran would present such a risk, particularly when under the influence of substances."

[28] Accordingly, even if the applicant's interpretation of the statutory scheme is correct, the Commissioners would have declined to direct release (and would, I consider, have been acting rationally in doing so). However, this is a point which nonetheless should be grappled with. Applying the *Salem* principle, and more recent guidance which has been given in relation to the exercise of the court's discretion to determine points which are strictly academic as between the parties (see *Re Cahill and Others' Applications* [2024] NIJKB 59, at paras [13]-[22]), there is clearly an important point of statutory construction raised by the applicant's first ground. If the applicant was correct, this could have a potentially significant effect in at least some cases, perhaps many, which are likely to come before the Commissioners in future.

[29] For the sake of completeness, however, I should also make clear that I accept Ms Smyth's submission that the Panel's consideration of the issue in the alternative (*viz* on the assumption that the applicant's contention as to the interpretation of the 2008 Order was correct, even though the Panel had just rejected that submission) does not, of itself, give rise to any arguable ground of challenge. The applicant's written submissions suggested that this course demonstrated that the Panel did not correctly understand the legal provisions governing the exercise of their functions or, alternatively, itself indicated a lack of legal certainty in the provisions. Insofar as those submissions are maintained, I have no hesitation in rejecting them. It is relatively commonplace for a decision-maker to reject a particular submission but indicate that, even had they accepted it, this would have made no difference to the outcome (giving reasons why that is so). In some circumstances, this can be extremely helpful to the affected individual, both in understanding the decision

which has been made and in assessing what further remedies, if any, should be pursued as a result. In this case it is clear that the Panel rejected the core legal submission on behalf of the applicant and considered that it was right to do so, which remains the PCNI's position before this court.

[30] This issue of statutory interpretation can comfortably be determined at the leave stage in light of the full argument which was addressed to me on it. I accept the first proposed respondent's submission that the Panel did not wrongly extend the definition of harm beyond its ordinary meaning in this context; and, instead, correctly declined to adopt an artificially narrow interpretation of Article 28(6)(b) which was urged upon it on behalf of the applicant.

[31] The key passages of the judgment of Lord Stephens in *Hilland* dealing with the Article 28(6)(b) threshold, for present purposes, are those at paras [51]-[52]:

> "51. Tenth, the limitation on the power under article 28(6) to direct the release of prisoners on licence differs as between ICS and ECS prisoners on the one hand and DCS prisoners on the other. In relation to an ICS or ECS prisoner, pursuant to Article 28(6)(a) the Parole Commissioners shall not give a direction to release the prisoner on licence unless they are satisfied that "it is no longer necessary for the protection of the public from *serious harm* that [the ICS or ECS prisoner] should be confined; …" (Emphasis added.) However, pursuant to Article 28(6)(b), the power to direct the release of a DCS prisoner on licence shall not be exercised unless the Parole Commissioners are satisfied that "it is no longer necessary *for the protection of the public* that [the DCS prisoner] should be confined." (Emphasis added.)
>
> 52. Eleventh, "protection of the public" in relation to DCS prisoners is not defined in article 28(6)(b). However, Article 8(5) of the 2008 Order defines "the licence period" in relation to a DCS prisoner as meaning:
>
> > "such period as the court thinks appropriate to take account of the effect of the offender's supervision by a probation officer on release from custody— (a) in *protecting the public from harm from the offender*; and (b) *in preventing the commission by the offender of further offences*." (Emphasis added.)
>
> Moreover, Article 24(8)(b) identifies one of the purposes of the supervision of offenders while on licence as being "the

> prevention of re-offending." Accordingly, reading Article 28(6)(b) with articles 8(5) and 24(8)(b) the "protection of the public" is the protection of the public from harm (not serious harm) from the offender and in particular the protection of the public from harm caused by the commission by the offender of further offences."

[32] The key statutory phrase here is "the protection of the public." That is what the Commissioners must assess. Light is cast upon the meaning of that concept by reference to other provisions of the statutory scheme which were referred to by Lord Stephens. It is obviously the protection of the public from some kind of harm; otherwise protection would not be required. However, there is no warrant for artificially limiting the relevant harm to physical or mental injury for the following brief reasons:

(a) There is nothing in Article 28(6)(b) which indicates that protection of the public relates only to harm caused by way of physical or mental injury to the person. If that had been the intention of Parliament, one would have expected to have seen the limitation plainly expressed.

(b) Nor is that limitation expressed, or implied, in the other two provisions found by Lord Stephens to assist in discerning the meaning and effect of Article 28(6)(b), namely Articles 8(5) and 24(8)(b). They disclose that the requisite protection is from harm caused by the offender and, in particular, by the commission by the offender of further offences.

(c) I reject the submission that the ordinary and natural meaning of the word harm, either generally or in the particular context of this statutory scheme, is limited to physical or mental injury. The applicant relied upon a dictionary definition of 'harm', sourced from the internet, which was provided to the court. One possible meaning of harm was "physical injury, especially that which is deliberately inflicted"; but the same source also suggested "material damage" or "actual or potential ill effects or danger."

(d) Extremely importantly, as the Commissioners' submitted, if the applicant's interpretation was correct, they would be required to ignore harm caused through offending which did not result (or was unlikely to result) in physical or mental injury to another. That would exclude harm caused in a wide variety of dishonesty offences, such as theft and fraud. It would mean that serial scammers and fraudsters, even if likely to reoffend, would be entitled to re-release on licence because the harm they cause was not a relevant type of harm. However, there is no indication whatever that the protection of the public is to be understood and limited in this way, particularly when such offending can regularly attract significant DCS.

(e) Other instances of harm from which the public ought rightly to be protected by the supervision on licence regime, but which do not involve physical or mental injury (or the type of economic harm alluded to above), can readily be imagined. These might include damage to property by means of criminal damage; damage to public finances by cheating the revenue, tax evasion or benefit fraud; damage to public administration by misfeasance in public office; damage to the administration of justice by contempt offences or witness or jury tampering; damage to the environment through environmental offences; impairing the availability of emergency services by wasting police time or making hoax calls; damage to national security by the sharing of official secrets; etc..

(f) Ms Smyth also developed a more nuanced argument to the effect that, if the applicant's submission was correct, it would involve the Commissioners in potentially difficult and esoteric arguments about the causation or remoteness of physical or mental injury undoubtedly caused by certain types of offending but not directly caused by the offender (the example given being an individual convicted of downloading sexual images of children) which could not have been intended by Parliament.

(g) The comparison with, and read across from, the definition of "serious harm" in Article 3 of the 2008 Order is inapt. "Serious harm" is defined for the purposes of the assessment of dangerousness and the administration of indeterminate custodial sentences or extended custodial sentences (ICSs and ECSs respectively): see, inter alia, Articles 15(1)(b) and Article 18(4)(b). The concepts of "serious harm" and "protection of the public" within the 2008 Order are separate and distinct, operating in respect of disparate sentencing regimes which the Supreme Court described (at para [137] of the judgment in *Hilland*) as "whole entities, each with its own particular, different, mix of ingredients, designed for a particular set of circumstances." For this reason, reading the concept of "serious harm" across to the DCS licence and recall regime was inappropriate and would undermine the statutory scheme (see paras [140] and [142]-[146] of the judgment in *Hilland* in relation to lack of analogous situation and justification for differential treatment respectively).

(h) Similarly, I consider the applicant's reliance upon the further distinct concept of "danger to the public" in the Northern Ireland (Sentences) Act 1998, addressed in *Re McKeown's Application* [2022] NIKB 23, to be misplaced. The word "danger to the public" connotes a risk of injury (as held at para [42] of *McKeown*). The phrase "protection of the public" is clearly wider in scope, even before one examines the colour which each phrase takes from the different statutory schemes in issue.

(i) The applicant contends that the approach adopted by the Panel, and the PCNI in its submissions, abrades with their approach and that of the Court of Appeal in *Re Mark Toal's Application (No 2)* [2019] NICA 34, at paras [18]-[19],

because, in that case, it was accepted that there need not be a common approach applied at the sentencing stage and the release stage. I do not consider that this argument assists. To impose a DCS, the sentencing court does not need to conduct a threshold assessment as to the risk of harm posed by the offender, as it does when imposing an ICS or ECS. In any event, for the reasons given above I consider that 'the protection of the public' in Article 28(6)(b) is not limited to protection from the harm occasioned only by offences which cause physical or mental injury. There is no reason to confine its meaning in that way. I reach that conclusion without having to read across provisions which apply only at the sentencing stage.

[33] The applicant's argument on the first ground was inventive; but it is bound to fail and has no realistic prospect of success.

Irrationality in the decision not to direct release

[34] The applicant next contended that the Panel had acted irrationally in failing to direct his release. He prayed in aid the statement of Lord Phillips in *R (Brooke) v The Parole Board* [2008] EWCA Civ 29, at para [53], where he said:

> "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 satisfised there is no risk that he will re-offend. What is necessary for the protection of the public is that the risk of re-offending 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."

[35] Mr Fitzsimons accepted that the expertise and experience enjoyed by the Commissioners meant that they should be accorded an element of deference. However, he submitted that, since the subject matter of the challenge relates to the liberty of his client, a high level of scrutiny is nonetheless required. Ms Smyth relied in particular upon the recent summary of the principles governing the approach to challenges to PCNI decisions set out by Colton J in *Re Wright's Application* [2022] NIQB 50, at paras [22]-[23]. This indicates that the court should recognise and give due deference to the expertise of the Commissioners in this specialised field, recognising that their training and experience has given them particular skills and expertise in the complex realm of risk assessment, such that the court should be slow to interfere with the exercise of their judgment.

[36] As to the facts and evidence, the applicant relied upon the matters set out at paras [9], [10] and [13] above. He drew specific attention to the fact that he was not assessed as presenting a significant risk of serious harm. He pointed out that there are only three offences of violence (common assault) on his criminal record in the

last 20 years, observing that there was no evidence that any significant injury had been caused in any of these incidents. He was not recalled over an allegation of physical assault. As to the rape conviction which was relied upon by the Commissioners, this was nearly 30 years ago; and the previous robbery offence was 20 years ago.

[37] On analysis, this aspect of the applicant's case is highly ambitious. A number of the submissions made on his behalf in this regard were allied to the applicant's submission before the Panel – which it rejected, as I have above – that it was only the risk of physical or mental injury to others which was relevant in terms of public protection. Moreover, the applicant has acquired a criminal record with some 31 entries in Northern Ireland; and he has further committed a significant number of offences (including additional offences of assault, robbery and theft by housebreaking) in Scotland where he lived for many years. His record includes a conviction for rape, for which he was sentenced to 11 years' imprisonment. The rape (and other offences arising in the same incident including indecent assault on a female) were committed during the course of a burglary of a dwelling in 1998, with the applicant having later convictions for burglary, attempted burglary or similar offending in this jurisdiction or Scotland in 2006, 2007, 2008, 2016, 2018 and 2023, in addition to the index offences. There are a range of convictions for further offending including matters such as robbery, drugs offences and breach of court-ordered notification requirements.

[38] There were initial signs of concern when the applicant was released in April 2024 when, on a number of occasions, he expressed discontentment with his licence conditions or questioned whether they were necessary. Shortly after this, his behaviour deteriorated to such a degree that (as he accepts) recall was appropriate. He was clearly not complying with the SPT regime designed to assist him to stay free of substance abuse and, indeed, relapsed relatively quickly and was found in possession of illegal drugs. His behaviour was disruptive and dangerous (resulting in injury to himself), as well as being aggressive and threatening to others. Hostel staff required the assistance of the PSNI to physically remove him from the hostel. Once returned to custody, the applicant initially denied having been under the influence of substances in the community, initially claiming that his medication had rendered him drowsy. He subsequently admitted that he had consumed alcohol on a number of occasions due to boredom. He denied a range of the other behaviour which hostel staff had brought to the attention of the authorities. He claimed he had done nothing wrong, plainly showing significant lack of insight into his behaviour and risk factors. He later accepted that his behaviour had been out of order.

[39] The Panel noted all of the positive factors which have been relied upon by the applicant in these proceedings and indeed commended him for these. There can be no suggestion that they were left out of account. Unfortunately, however, no risk reduction work had been undertaken by the applicant at the time of the hearing. The applicant accepted that he would be homeless upon release and had provided consent for a hostel referral to be completed on his behalf (which PBNI was taking

forward). The Probation Board expressed concerns about this, however, given the applicant's "long-standing pattern of non-compliance coupled with his difficult behaviours that he presents within the hostel environment."

[40] At the time of the hearing, the applicant's most recent ACE score was 50, some 20 points above the threshold considered to reflect a high likelihood of general reoffending. A variety of current risk factors were noted, including substance use; attitudes towards offending behaviour and PBNI supervision; an established pattern of offending for his own gain; limited victim awareness; disregard for court-imposed sanctions; unstructured lifestyle; accommodation instability; anger and aggression; and poor consequential thinking ability. Although the applicant was not assessed as meeting the PBNI's definition of significant risk of serious harm, the infliction of 'serious harm' was not the issue in this case in light of the statutory test discussed above.

[41] Ms Smyth's written submissions highlighted the following factors militating against the applicant's release, which were considered and reflected in the Commissioners' decision:

(i) The applicant's licence had been revoked only two weeks and four days after he had been released from custody, after he had acted in such a manner that the hostel had withdrawn his placement;

(ii) In his evidence to the Panel, the applicant significantly minimised the extent of his behaviours during this period of time;

(iii) As noted above, his ACE score was 50;

(iv) PBNI did not support his release;

(v) The applicant's behaviour in the hostel environment which led to his recall was not considered by PBNI to be a one-off but, rather, to be "a recurring theme" over a considerable period;

(vi) There was strong evidence in the parole dossier, which was not challenged, that the applicant had a considerable history of failing to comply with external controls imposed by courts (in particular, persistent convictions for failure to comply with notification requirements imposed as a consequence of his conviction for rape, with the applicant having been sentenced as recently as September 2023 for such an offence);

(vii) There had been no risk reduction work done;

(viii) The yellow tablets of which he was found in possession on 14 May 2024 had been confirmed to be a Class C controlled drug, representing further offending;

(ix) Whilst the applicant does not have a recent record for serious personal violence, he has been convicted of rape (which took place in the context of a burglary);

(x) Whilst the applicant's situation in custody was positive, it was similar to the situation which had pertained prior to his release initially on licence, yet the applicant was recalled within weeks, indicating that compliance within the prison environment was not a reliable indicator of post-release risk; and

(xi) If released, the applicant would be homeless, as he had been at the time of the index offences.

[42] Mr Fitzsimons challenged the Commissioners' reference to the applicant being homeless as flawed. In this regard, he referred to the decision of Gillen J in *Re X* [2008] NIQB 22, at para [23], as authority for the proposition that a lack of community accommodation cannot be used to justify continued detention. I do not consider that any material assistance can be gained from the applicant's reliance on that case – which concerned the legality of ongoing detention under Article 77 of the Mental Health (Northern Ireland) Order 1986 – in the present context, which concerns the assessment of risk on the part of a DCS prisoner if released without stable and supportive housing arrangements. Lack of accommodation alone will not justify ongoing detention; but it is, or may be, highly relevant to the Commissioners' assessment of risk in any particular case. The PBNI evidence before the Panel was to the effect that the applicant's accommodation was a key risk factor. The index offences had occurred whilst he was homeless, resulting in poor well-being and the abuse of substances to cope with instability. Although PBNI had made a referral for hostel accommodation, it indicated to the Commissioners that the waiting list was "atrocious." It considered that it was necessary for Mr McMoran to stay in a hostel if released but had significant concern that, on his release at this time, he would be presenting as homeless which was likely to lead to a rapid deterioration. This was addressed in some detail in the evidence before the Panel and in its written decision.

[43] In light of the above factors and the light-touch review which is appropriate in respect of the Commissioners' consideration of the questions of risk and public protection, I do not consider the applicant to have raised an arguable case with a reasonable prospect of success that the Commissioners' decision not to direct release his release at this time was irrational. There was clearly a high risk of reoffending and little to provide the Commissioners with comfort that the previous difficulties upon release would not be repeated.

The failure to schedule a further review

[44] The third aspect of the applicant's challenge is directed towards the Commissioners' failure to schedule a further review of his case in advance of his SLED. It was accepted on behalf of the applicant that the Commissioners were not

statutorily required to fix a further date for review in this case: see Article 29(4) (set out at para [24] above). Nonetheless, it was submitted that, in the particular circumstances of this case, it was irrational not to do so; and, in the alternative, that inadequate reasons had been given for the Panel's failure to do so.

[45] As noted above (see para [12]), the Single Commissioner had considered that a further review should be held in relation to the applicant's case within six months of the conclusion of the Commissioners' then current review. The Panel, however, did not follow that approach. The issue is dealt with in brief terms at the very end of the Panel's decision, at paras 147-148:

> "147. Where, on a reference such as this, the Parole Commissioners do not direct the immediate release of a prisoner and licence, they are required under Article 29(2) of the Order either (a) to recommend a date for the prisoner's release on licence or, (b) to fix a date for further review of the prisoner's case.
>
> 148. As Mr McMoran will be released unconditionally on 9 June 2025, the Panel makes no recommendation for a further review under Article 29(2)(b)."

[46] The mere fact that the Single Commissioner considered that a review would be appropriate does not in any way tie the hands of the full Panel when they come to consider the case, particularly whenever the Panel has had the benefit of much fuller argument and evidence than the Single Commissioner would have had. The other strand to the applicant's argument on this ground relied upon the positive factors (particularly within the prison environment) upon which he laid emphasis. In summary, he contended that if he was progressing well in prison and undertaking any risk reduction work available to him there, he should be put in the position where he was able to seek to persuade the Commissioners, in advance of his ultimate date of release, that the threshold for release was thereby met.

[47] I do not consider there to be an arguable case that it was irrational for the Panel in the circumstances of this case to decline to direct a further review. The reasons for this approach are touched upon below. However, this aspect of the applicant's proposed application is clearly an unvarnished merits challenge to the manner in which the Panel disposed of the case. For the reasons discussed below, it was plainly not irrational or outside the range of reasonable responses open to the Panel to determine that in a review was unnecessary or inappropriate in the circumstances of this case.

[48] I assume, without deciding, that there is an obligation upon the Commissioners to explain why they are not fixing a further review of a prisoner's case in circumstances where they decline to direct release. Mr Fitzsimons submitted that para 148 of the Panel's decision did not contain any reason whatsoever for its

failure to direct a review. Ms Smyth submitted, in terms, that the reason is obvious from even the short sentence in that paragraph dealing with this matter. It would be only 7½ months from the Panel's decision (on 24 October 2024) to the applicant's SLED, entitling him to be released unconditionally (on 9 June 2025).

[49] In the response to pre-action correspondence sent on behalf of the Commissioners, the reasoning is supplemented as follows:

> "At the time of the Decision, the prisoner's SLED was a little over seven months, a point the prisoner's pre-action letter expressly refers to.
>
> Self-evidently, in circumstances where a Panel "need not" make a recommendation if the prisoner's SLED arises within the following 24 months, it was open to the Panel to determine not to make a recommendation where the relevant period is a little over a quarter of the 24 month period."

[50] The pre-action response went on to quote from paras 70-72 of the Panel's decision. These paragraphs, inter alia, highlighted the CPO's evidence that custody was the "best place" for the applicant at this time; that there had been no risk reduction work to date; the variety of programmes and interventions which could be availed of if the applicant remained in custody; and the helpful preparation this could provide for his eventual release on 9 June. They further referred to the CPO's view that, if the applicant was released at this juncture, "there would be a gap" because it would take time to access services, whereas more could be done in preparation if the date that he was being released from prison was known sometime in advance.

[51] The legislature has made an intentional distinction between, on the one hand, cases where unconditional release will occur within 24 months of the Commissioners' decision and, on the other, cases where unconditional release will only arise after that timeframe. It is open to the Commissioners, in accordance with Article 29(4), to decline to fix a date for a further review where unconditional release will follow within two years. It stands to reason, as a matter of common sense, that, at least generally speaking, the requirement for a further review lessens the closer falls the prisoner's date for unconditional release. Each case must obviously be considered on its own merits, taking account of the length of time until the prisoner will be released in any event; the Commissioners' view of the prisoner's potential prospects for release at the stage of the next review; and the risk reduction and other work which needs to be addressed in the meantime (as well as the length of time which that is likely to take).

[52] In the present case, the Panel had heard evidence that no risk reduction work had yet been undertaken with the applicant and that PBNI considered that more

could be done to support the applicant if his release date was fixed and known in advance. (This would militate against a direction for immediate release at a further review.) Ms Smith submitted that these were highly relevant factors in circumstances where the applicant had rapidly destabilised when released on licence on the previous occasion.

[53] I consider it clear that the Commissioners considered it neither necessary nor proportionate to schedule in another full review process which would likely only conclude some six weeks or so before the applicant's planned and definite release, bearing in mind the time required for the work which would require to be done for the applicant to have materially increased his prospects for release. Even then, the lack of pre-planning to a clear and definite release date, in light of the evidence the Panel had heard about the benefits of that, was such as to reduce the applicant's prospects of release at that time. It was plainly rational for the Panel to conclude that a further review such a short time before unconditional release was not warranted. Nor do I consider there was any material unfairness in the Panel failing to spell this out more clearly, particularly in circumstances where (as Ms Smyth highlighted) the applicant had not specifically requested a further review of his case; or any real (as opposed to forensic) doubt about the basic reason for the Panel's approach.

[54] Mr Fitzsimons submitted that no prisoner should be required to spend a day more in prison than necessary. However, this submission fails to adequately reflect the facts that Mr McMoran's present incarceration arises from the lawful order of the sentencing court; that he was justifiably recalled and is therefore continuing to serve that sentence; that the Commissioners (rationally) do not consider him presently to be suitable for re-release; and that it is simply impossible for every recalled prisoner's case to be kept under constant, rolling review. By the statutory scheme approved by Parliament in the 2008 Order, it has recognised that recalled prisoners' cases will be reviewed by the Commissioners only periodically, reflecting both the practical realities of the time and effort required for such reviews to be meaningful and the proportionality of reviewing cases only at appropriate junctures. It has also left it to the Commissioners to determine when a review is appropriate (within a window of two years from the conclusion of their current review: see Article 29(2)(b) and (3); and whether, and if so when, a review is required at all in any case where unconditional release is to follow within two years.

[55] In the circumstances of this case, there was no legal obligation upon the Commissioners to require a review before the applicant's SLED; it was not irrational for them to decline to do so; and there was no material unfairness in their expressing the reasoning for that in pithy terms, namely that it was not worth doing so in light of the imminence of the applicant's unconditional release at that point and the unlikelihood of his being released significantly sooner in the event that a review was directed. I do not consider this aspect of the applicant's case to be arguable.

The challenge to the Probation Board

[56] Finally, the applicant challenges the decision of the Probation Board not to make any referral for him except for the Hostel Panel application. In his Order 53 statement this is characterised as a decision and/or a policy. However, I accept Mr Thompson's submission that there is no evidence that the PBNI operates a policy in this regard or has a consistent approach of solely making referrals in relation to accommodation in respect of prisoners seeking a direction for release from the Commissioners. The height of the evidence in this regard appears to be that the Probation Board took the same approach before the applicant's release on 25 April as was evident in the evidence before the Commissioners in October 2024. I do not consider there is sufficient evidence to suggest there is any standard policy in relation to this issue; and this was denied by PBNI which says that it deals with the issue on a case-by-case basis. The better view is that this issue simply concerns the decision-making in the particular circumstances of the applicant's case. Indeed, Mr Fitzsimons candidly accepted that there was limited, if any, evidence of a policy in this regard and characterised his "main" point in relation to the second proposed respondent as relating to its decision in Mr McMoran's case.

[57] In the applicant's Release Plan of 11 March 2024, it was noted that a drugs ban would not be beneficial for the applicant and that the focus of his supervision would be on relapse prevention and the completion of an alcohol and/or drug treatment programme. The applicant is critical of the fact that, at the time of his initial release, no referrals had been made despite an awareness on the probation officer's part with such treatment was required.

[58] At the time of a parole hearing, the Commissioners are generally made aware of any referrals for accommodation (in this case, hostels) which have been made and whether the prisoner has been accepted and if a bed is available. At the time of the relevant hearing this case, no other relevant referrals had been made in respect of the applicant. This has caused him significant concern because, as recorded in para 62 of the Panel's decision, counsel for the Department submitted in the course of their opening statement that if the applicant was to remain in custody longer-term support could be put in place; contrasted with a situation where, if released, the applicant "would be likely to be on a temporary B&B placement with no opportunity to identify local support in advance." The probation officer who gave evidence at the hearing made a similar point (recorded at para 72 of the Panel's decision), namely that if the applicant was released then there would be "a gap" representing the time taken for him to access services. More could be done in advance if the date upon which he was being released was known sometime before his release. No further referrals had been made, apart from exploring the position in respect of accommodation, notwithstanding that PBNI had known since mid-September that an oral hearing in the case had been directed.

[59] The applicant complains that this was a four-week gap during which PBNI could and should have been making arrangements which may have assisted him in

his case for release before the Panel. In his submission, this resulted in an imbalanced focus upon treatment programmes and support within the prison, set against an absence of information about treatment programmes and support which may have been available to him in the community had PBNI done more to explore this.

[60] For the Probation Board, Mr Thompson emphasised that it was important to be clear about what was in issue when the applicant made reference to "referrals." This was simply making contact with a third-party services provider to ascertain whether they may be in a position to assist a prospective releasee; and, if so, to make an appointment or to have the prisoner's name 'added to the queue' in the (likely) event that a place was not available. This would frequently not guarantee that the relevant service or programme would be available, or available at a particular time. Mr Thompson emphasised that such services, whilst they could be important, were merely one aspect of the supports which were significant for prisoners when released, other such supports including stable accommodation, supportive family engagement and PBNI supervision.

[61] Significantly, this issue – the applicant's complaint about the lack of such enquiries on his behalf – was explored in the course of the hearing before the Panel. In particular, it was the subject of questioning by counsel for Mr McMoran which was put to the CPO. Her evidence was that it was just not practical to have all referrals in place for the date of release. If appointments were made in advance of the Panel hearing, and if the Panel chose not to release the prisoner, those appointments would be cancelled with a knock-on effect for other service users in the community.

[62] The same point was made in the response to pre-action correspondence sent on behalf of the Probation Board in the following terms:

> "It was entirely appropriate for PBNI not to make referrals for other community-based services until the outcome of the PCNI hearing was known. In the absence of a PCNI direction to release, it was not known whether, or from when, the applicant may be able to access community-based services. The assessment of both PBNI and the Single Commissioner was that he was not suitable for release. Moreover, in the absence of approved accommodation, it was not known in which part of the jurisdiction the applicant may reside and, consequently, to which specific services referrals may be appropriate."

[63] I have some doubt about whether the PBNI's actions in terms of making, or not making, referrals is properly the subject of judicial review proceedings, that is to say whether this issue is justiciable at all given the informal nature of the process and the lack of any effects arising from a referral (as explained at para [60] above).

For present purposes, I assume this in the applicant's favour without having to decide the matter. In any event, I am satisfied that this is a practical area involving the application of professional judgment and a variety of competing considerations, including the use and potential allocation of scarce resources, where PBNI should be afforded a very significant degree of latitude.

[64] I do not consider there to be an arguable case that the Probation Board, or its officers, acted irrationally in only exploring the issue of accommodation for the applicant in advance of the Panel hearing in this case. That is for a variety of reasons. First, as explained above, the question of the stability and suitability of the applicant's accommodation arrangements if he was to be released was a significant factor in relation to his risk of relapse and the risks he posed to others. It made sense to address this in the first instance given its likely impact on his prospects for release. As the evidence showed, this was difficult given the shortage of hostel places and the applicant's previous behaviour which had seen offers of accommodation withdrawn from a number of hostels in the past. Second, as a matter of practicality, it was only possible to make meaningful enquiries in relation to other services once it was known where the applicant would be living, if released. PBNI was not even aware at the time of the hearing what part of Northern Ireland the applicant may be living in if he secured release. Third, the evidence from the CPO in this case was that it was important to have some "bedding in time" in the community with the basic building blocks (suitable accommodation and ongoing SPT, which would continue automatically) put in place before moving on to other supports.

[65] Most importantly, fourth, and in any event, PBNI is in my view correct to assert that it need not make arrangements for the provision of scarce services or supports in the community for a prisoner who has not yet been considered suitable for release or re-release. It may, of course, choose to do so. Whether or not it will do so is likely to depend, to a significant degree, upon PBNI's own professional assessment of the prisoner's suitability for release and whether it is supporting release at that time. PBNI cannot be expected to arrange for the provision of all possible services in the community which may be required for all prisoners seeking release, no matter how unlikely it is that their release will be directed by the Commissioners. To do so would be disproportionate and inimical to the efficient, effective and equitable allocation of scarce resources in this field.

[66] I do not consider that there is an arguable case that the second proposed respondent acted irrationally in this regard in the applicant's case. In light of my conclusions in relation to the arguability of the grounds against the PCNI, it also appears to me that this ground (even if arguable) is now academic as between the applicant and PBNI, since the Commissioners will not be considering his case again before he is eligible for unconditional release.

[67] I would add, however, that Mr Fitzsimon's submissions have raised an issue which may bear further reflection on the part of PBNI and the Commissioners. There is an element of circularity to the way in which referrals are handled by the

Probation Board. On the one hand, it makes sense that the most strenuous efforts will be made to arrange support, treatment and relevant programmes once PBNI is aware that a prisoner is going to be released upon direction of the Commissioners. On the other hand, the support, treatment and programmes which will be available to a prisoner in the community may well influence the Commissioners' consideration of whether any risk to the public they pose can be adequately mitigated and managed to permit release. Absence of pre-planning in cases where the Commissioners may be minded to direct release could lead to a situation where a temporary absence of appropriate services thwarts or delays release. This is why judgment is called for on the part of probation officers as to what referrals can or should be made in advance of hearings before the Commissioners. It is also why it is important that the Commissioners themselves should exercise a degree of scrutiny over this issue. As noted above, the matter was discussed before the Commissioners in this case and was the subject of questioning in the course of the hearing. Commissioners should bear in mind that, where appropriate, they may adjourn a hearing and give directions to PBNI about further steps to be taken or may recommend release at some point in the future (under Article 29(2)(a)) to allow arrangements to be made in the meantime.

Conclusion

[68] For the detailed reasons given above, I do not consider any of the applicant's proposed grounds to be arguable in the sense of having a realistic prospect of success. I, accordingly, refuse leave to apply for judicial review.