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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY NEIL HEGARTY

-v-

DEPARTMENT OF JUSTICE AND PAROLE COMMISSIONERS FOR NORTHERN IRELAND

_____

McCloskey J

The Challenge

[1] The Applicant, who is currently incarcerated, directs this judicial review challenge to the following:

(i) The decision of a single Commissioner of the Parole Commissioners for Northern Ireland (the "PC") dated 06 December 2017, recommending that the licence upon which the Applicant had been released from sentenced custody the previous day be revoked.

(ii) The decision of the Department of Justice ("the Department") of the same date, revoking the Applicant's licence.

The timetabling of these proceedings

[2] I begin with the briefest of summaries of how these proceedings were timetabled. The impugned decision having been made on 06 December 2017, proceedings were initiated on 15 December 2017. On 20 December 2017 the Court promulgated a case management order which, *inter alia*, directed a "rolled up" hearing on 08 January 2018. This was later altered to convenience counsel for the Applicant, on the understanding that this accorded with the client's instructions. The rescheduled hearing date was 22 January 2018.

Regrettably this had to be vacated due to the unexpected advent of a further affidavit on behalf of the Applicant (which was not in accordance with the Court's directions) and a draft amended Order 53 Statement. Permission to make the amendments and file the additional affidavit was granted. Ultimately, it was not possible to proceed with the hearing until 09 February 2018. The reason for the Court's persistent anxiety to process this case with the maximum expedition was that it involves the liberty of the citizen.

Procedural issues

[3] Ultimately, there were three affidavits on behalf of the Applicant. The prolixity of the Applicant's affidavits (147 paragraphs of text spanning 48 pages) tends to obscure the compact and uncomplicated factual and legal frameworks of his challenge. The affidavits contain large swathes of comment, supposition, conjecture, much sworn argument and, in one section, double hearsay. The Applicant's three affidavits were supplemented by three further affidavits, two of them quite substantial, sworn by his solicitors. It is timely to remind practitioners of the requirements enshrined in Order 41 of the Rules of the Court of Judicature and paragraphs [3] – [8] and Appendix 4 of the Judicial Review Practice Note. Disregard of these requirements occurs with alarming frequency in this court. I would urge all practitioners to digest this observation conscientiously. A failure to comply with the procedural requirements regulating affidavits advances no cause. It positively undermines the litigant's case and can generate avoidable additional cost and unnecessary delay.

[5] Practitioners should also be aware of this court's increasing concerns about the formulation of the statements of case under Order 51, Rule 3(2). The format of this pleading is governed by the relevant provisions of Order 53 and Part B of the Judicial Review Practice Note. The rate of failure to comply with the basic requirements in this respect has now reached such worryingly high proportions that it is considered necessary that a model Order 53 Statement be introduced. Practitioners will henceforth have to fit their case into this model. The non-observance of elementary and indispensable requirements, coupled with diffuse and roving prolixity, will hopefully be eradicated in this way.

[6] The grounds of challenge in this Applicant's Order 53 Statement are unnecessarily opaque and prolix. This is illustrated in the use of the language "*unreasonable, unlawful and void*" and kindred terminology. The Court, having embarked upon a necessary – and avoidable – exercise of construction, considers that there are, within the 23 paragraphs and subparagraphs of the Applicant's pleading, two identifiable grounds of challenge namely (a) irrationality viz a breach of the Wednesbury principle and (b) a failure to conduct adequate enquiries, this discrete ground being readily associated

with the familiar public law requirement that a decision maker take into account all material facts and considerations. The formulation of these grounds should have been achieved in the span of a very few compact paragraphs.

[7] There is another matter of good practice to be highlighted. In its preliminary case management order the Court directed that the Applicant's solicitors:

> *"… provide the Court with copies of the relevant PAP correspondence or an explanation of why the PAP requirements were not observed."*

This elicited a twofold response (a) confirming that the requirements had not been observed and (b) providing the underlying explanation. It should not have been necessary for the Court to expend resources in this way as this discrete issue should have been addressed proactively in one of the two affidavits sworn by the Applicant's solicitors and in a discrete paragraph of the Order 53 Statement.

[8] Yet another issue of practice, reflected in the Court's initial order, was a failure to comply with the requirement of the Judicial Review Practice Note that bundles be properly indexed and paginated. This particular failure is now occurring in well over half of all cases in this court. Self-evidently this rate of failure is unacceptable. Once again both judicial and administrative resources were wasted in addressing this breach. I compliment the Applicant's solicitors as regards the excellent bundles which were ultimately compiled.

[9] It is also timely to draw attention to certain developing time and cost saving devices and practices in this court. I refer particularly to the deployment of core bundles, schedules of agreed facts, reduced and focused skeleton arguments and lightweight bundles of strictly necessary authorities.

Statutory Framework

[10] All of the events, actions and decisions arising for consideration in these proceedings are to be viewed through the prism of the Criminal Justice (NI) Order 2008 (the "2008 Order"). It is unnecessary to rehearse the cluster of provisions, contained in Articles 23 – 27A, governing the discrete topic of licence conditions. The key provision in this litigation is Article 28 which, under the rubric "Recall of Prisoners while on Licence" provides:

"(1) In this Article "P" means a prisoner who has been released on licence under Article 17, 18 or 20.

(2) The Department of Justice or the Secretary of State may revoke P's licence and recall P to prison –

(a) if recommended to do so by the Parole Commissioners; or

(b) without such a recommendation if it appears to the Department of Justice or (as the case may be) the Secretary of State that it is expedient in the public interest to recall P before such a recommendation is practicable.

(3) P –

(a) shall, on returning to prison, be informed of the reasons for the recall and of the right conferred by sub-paragraph (b); an

(b) may make representations in writing with respect to the recall.

(4) The Department of Justice or (as the case may be) the Secretary of State shall refer P's recall under paragraph (2) to the Parole Commissioners.

(5) Where on a reference under paragraph (4) the Parole Commissioners direct P's immediate release on licence under this Chapter, the Department of Justice shall give effect to the direction.

(6) The Parole Commissioners shall not give a direction under paragraph (5) with respect to P unless they are satisfied that –

(a) where P is serving an indeterminate custodial sentence or an extended custodial sentence, 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.

(7) On the revocation of P's licence, P shall be –

(a) liable to be detained in pursuance of P's sentence; and

(b) if at large, treated as being unlawfully at large. "

In short, in the realm of licence recall action, the PC has an essentially advisory function and the decision maker is the Department.

The Uncontentious Material Facts

[11] The material facts are quintessentially simple. First, as regards the Applicant:

(a) With an effective date of sentence of 06 December 2012, the Applicant was sentenced to 5 years imprisonment and 5 years licence.

(b) He was released, on schedule, on 05 December 2017.

(c) One of the conditions of his licence was the activation of electronic monitoring arrangements.

(d) On 06 December 2017 the police reported to the Commissioner that the previous evening the Applicant had failed to admit G4S

personnel to his home for the purpose of effecting the electronic monitoring arrangements.

(e) On the same date the Commissioner, acting on this report, recommended to the Department that the Applicant's licence be revoked.

(f) On the same date an appropriate officer of the Department revoked the Applicant's licence, giving rise to his arrest and reinstatement to custodial imprisonment.

[12] The Applicant signed his licence on the date of his release, 05 December 2017. The licence, in accordance with Article 23 of the 2008 Order, contained a series of conditions. These included routine conditions relating to interaction with his probation officer, residence at an approved address and restrictions on travel. Under the rubric "Additional Licence Conditions" the Applicant was subjected to the restrictions of curfew and electronic monitoring daily between 22.30 hours and 06.30 hours. In signing the licence he affirmed that "*its requirements have been explained*". The Applicant was also provided with the G4S leaflet "Your Curfew – the first 24 hours". This contains basic information relating to curfew and the mechanics of electronic monitoring, including the following passage:

> "*We will …… visit you at home to fit the tag and set up the box …. visit you on the first day of your curfew or the day after ….*"

This was repeated in another section. The text continues:

> "*You must be in at the start of your curfew. Your curfew starts even if no one has yet fitted the tag.*"

This too was repeated.

[13] The police application to the Commissioner for a recommendation that the Applicant's licence be revoked is contained in a detailed report compiled on 06 December 2017. I have considered this report in full. It contains, in brief compass, an account of the index offence; a brief digest of the supporting forensic evidence; particulars of the charges to which the Applicant pleaded guilty; and a digest of his criminal record. This is supplemented by the police view that the Applicant's offending was based on his affiliation with violent dissident Republican terrorism and his espousal of "*the use of violence for a political, religious, ideological or racial cause*". The report

further expressed the view that the Applicant "*… presents a significant risk to public safety*".

[14] The police report then addresses the Applicant's licence conditions; this is followed by an account of events at the Applicant's home address at around 23.20 hours on 05 December 2017. The key passage is the following:

> "*At approximately 23:20 hours on Tuesday 5th December 2017 two female G45 staff attended the specified address for Mr Hegarty in order to install home monitoring equipment and to place an electronic tag on Mr Hegarty. On arrival they noted the house was a mid-terrace property which had a white PVC door. The lights were on in the ground floor of the property. The blinds were open in the living room at the front of the property and they noted there were a number of males in the living room. They were all sitting down apart from one male who was standing up facing the window, looking out towards the street. G4S staff then knocked on the front door and no one answered. They then rang the doorbell once and still no one answered. G4S staff then proceeded to knock on the living room window where the male was standing, the male then mimicked the staff member knocking with his hand. Staff then gestured to him to come to front door which he did not, the male then went on to ignore staff and engaged in chat with the other males in the living room. G4S staff then decided to leave the property. They would estimate they were at the property a couple of minutes in total. The male in question is described as in his late forties or early fifties with a shaved head, he was of slim to medium build and he was clean shaven. According to police the description provided does match that of Mr Hegarty leaving prison yesterday*"

The report further notes that G4S Management "*…has raised serious concerns about the safety of their staff should they be required to attend the address a second time*".

[15] The report then considers the options of (a) abandoning the electronic licence monitoring condition, (b) writing to the Applicant and (c) a further attempt by G4S to install the necessary equipment. Discounting each of these options, the author states:

> "*The fact that Mr Hegarty was aware staff would be attending last night to fit the equipment and refused them entry shows he took a conscious decision not to co-operate. When we consider his wilful disengagement*

> *with prison authorities during the licence process* ***and his affirmation before leaving prison that he would not be consenting to the fitting of such equipment*** *we have good reason to believe that a second attempt would be met with a similar response.*"

The passage to which I have drawn attention with emphasis is found on the penultimate page of the 13 page police report and has no precursor. Finally, espousing the argument that none of the identified alternatives is reasonable or viable, the report makes the case that the revocation of the Applicant's licence is the only appropriate course.

[16] The task of the single Commissioner was to consider the police report and make a decision. The evidence indicates that this task was accomplished within less than three hours. The single Commissioner compiled a written decision which begins:

> "*… I have relied on the documentary evidence submitted to me on the assumption that the information therein is accurate.*"

Under the rubric "Release on Licence" the Commissioner states:

> "*The PSNI Outline of Case states that* [the Applicant] *displayed 'wilful disengagement with prison authorities during the licence process' and affirmed before leaving prison that he would not be consenting to the fitting of electronic monitoring equipment.*"

This is repeated in a later passage.

[17] Much of what follows in the text entails a recitation of the police report. The Commissioner then formulates the following test:

> "*… whether there is evidence that proves on the balance of probabilities a fact or facts indicating that the risk of the offender causing harm to the public has increased significantly, ie more than minimally since the date of release on licence and that this risk cannot be safely managed in the community.*"

The Commissioner was "*satisfied*" that this test had been met. This evaluative judgement was expressed in the following terms, at [15]:

> "*There is information in the papers before me which I am satisfied establishes, on the balance of probabilities, that Mr Hegarty is not abiding by the measures put in place to manage his risk. I am satisfied that there is evidence that Mr Hegarty has breached the conditions of his licence, namely by refusing to consent to the fitting of his electronic tag and monitoring equipment* ***both immediately before and after his release*** *and by behaving in a manner which undermines the purposes of his release on licence, which are to protect the public, prevent re-offending and the rehabilitation of the offender. I consider that his attitude and behaviour demonstrate that his risk of harm has increased since his release ……. I also take into consideration the serious nature of his index offence and his criminal record.*"

[my emphasis: see [ ] *infra*]

[18] The Commissioner then considered the discrete issue of whether the risk posed by the Applicant "*… can be safely managed in the community*". The text continues:

> "*Given that he has removed himself from the requirements of his licence within one day of his release, I do not consider that Mr Hegarty's increased risk would be manageable even if licence conditions were to be augmented and strengthened.*"

Revocation of the Applicant's licence was recommended accordingly.

[19] The Department, the third of the public authorities involved in this decision making process, acceded to this recommendation. Its decision was expressed in formulaic terms in a notice and accompanying letter both dated 06 December 2017. While the perfunctory nature of the letter was short of best practice by some distance, it is evident that the Department accepted the whole of the Commissioner's recommendation and the evidence underpinning same viz the police report.

The Respondent's Affidavit Evidence

[20] The Court has considered the affidavits sworn by the Head of the Offender Recall Unit ("ORU") of the Department. Having emphasised that the licence revocation recommendation of a single Parole Commissioner is not binding on the Department, which makes its independent decision upon receipt, the deponent provides the interesting statistic that since 2010 there has been a total of 1266 licence recall requests, giving rise to 1162 licence

revocation decisions with resulting loss of liberty. Two of these decisions have been made under Article 28(2)(b) of the 2008 Order.

[21] The test which is applied by the single Commissioner or, as the case may be, the Department or the Secretary of State acting under Article 28(2)(b) involves posing two questions and answering both affirmatively:

(i) Has the risk of harm that the offender poses to the public increased more than minimally since his release from custody?

(ii) Can the increased risk be safely managed within the community?

In the small minority of cases where the Department has declined to accept the single Commissioner's recommendation, the Department, typically, acts on updated information not available to the Commissioner – relating to, for example, the offender's re-engagement with an important aspect of the risk management plan or disagrees with the Commissioner's assessment.

[22] The contractor which deals with electronic monitoring of ("EM"), G4S, does not make advance arrangements with the person concerned for the purpose of installing the equipment. Nor is there any "G4S" branding on the vehicles or clothing of the employees. This, it is said, enhances the personal safety and security of the employees and promotes the subject privacy. There is a real and serious threat to G4S employees. As a result they have the facility of contacting the ORU or the police at any time. As of September 2017 the threat level assessment was "*substantial*", which denotes a "*strong possibility*" of attack. Continuing, the deponent discloses that the Applicant and his co-accused were the first persons considered to have been involved in terrorist related offending released on licence subsequent to this threat level assessment. The EM condition was imposed as an integral aspect of the Applicant's risk management plan. So too was a residence condition

[23] At 12.14 on the same date, the ORU was informed by electronic communication from the prison that the Applicant had challenged the EM condition and had been advised that any representations about this should be made through his solicitor. The text of this communication is of some importance:

> "*…… the three individuals were presented with their licences and have now left Maghaberry. Hegarty challenged the tagging condition and asked when it was added. He was advised to make any representations through his solicitor ….*

> *All three signed their licences confirming that the licences had been given to them and their requirements had been explained."*

I shall address *infra* the content of this communication juxtaposed with the police report to the single Commissioner.

Next, at 23.17 hours that day, G4S informed the deponent by text that while the installation had been successful as regards two of the three persons released:

> "*One refused, he was having some sort of house party. Team assessing situation but expect we will have to stand down and breach him.*"

This was supplemented by a further communication at 10.02 hours on 06 December 2017 that G4S staff upon attending the Applicant's place of residence encountered:

> "*A very challenging situation and obvious and deliberate refusal to allow them to engage and complete the task.*"

[24] Attached to this communication was a written statement of the Operations Director. There followed an exchange of communications between the deponent and the police culminating in a formal police application to a single commissioner for a revocation recommendation. The ensuing events are set forth at [16] – [19] above.

[25] This triggered a further stage in the process entailing consideration of whether to accept the Commissioner's recommendation. In an averment of some importance he continues:

> "*…. the Deputy director called me to advise that PSNI had informed one of his colleagues that dissident republican organisations had reinstated the threat against PBNI earlier that evening on the basis that electronic tagging requirements had been introduced on individual's licences. The Deputy director asked that I request PSNI to take all reasonable steps to consider the safety of PBNI staff residing and working in the North West when planning and effecting the arrest of the Applicant if I determined his licence should be revoked ….*"

The deponent avers that he proceeded to apply the two aforementioned tests and, having done so, determined to accede to the Commissioner's recommendation. Elaborating he explains that the EM requirement was "*an integral component within the risk management plan for the Applicant*" and he (the deponent):

> "*…was satisfied the Applicant would have been fully aware he was subject to electronic monitoring as a condition of his licence.*"

[26] The deponent further took into account "*the reported refusal by the Applicant to permit G4S to install the monitoring equipment ….*". His assessment was that the risk of harm had increased. He continues:

> "*I gave no weight to the Applicant's reported attitude to the additional licence condition ….*
>
> *I considered the Applicant was entitled to query the relevance or otherwise of the additional licence conditions and could make the relevant representations on this issue …*"

The deponent further avers:

> "*I considered his actions on the evening of 05 December 2017 displayed a wilful disregard of this licence condition at the earliest opportunity on his release from custody …..* [and] *….. the options to manage the increased risk which were considered and discounted on the basis that further attempts to install the equipment would place G4S and police staff at risk.*"

The deponent's decision was immediately notified to the police, giving rise to the Applicant's arrest and return to custody.

Next Steps

[27] In accordance with the relevant statutory requirements the Parole Commissioners then formulated a timetable for the review and further processing of the Applicant's case. The Court having encouraged expedition

of this process, a single Commissioner will, by 20 February 2018, make one of the following decisions:

(i) A direction that the Applicant be released.

(ii) A direction that the Applicant is not to be released.

(iii) A referral of the Applicant's case to a panel of Commissioners.

In the event of (ii) the Applicant has a right to request referral as per (iii).

Legal Framework

[28] The nature of the test which both the single Commissioner and the Departmental decision maker were applying entailed the formation of an evaluative judgment on the part of persons with presumptive relevant credentials and expertise. This starting point, therefore, inclines towards a high threshold for judicial intervention in an irrationality based challenge. On the other hand, as the liberty of the citizen is involved and the effect of deprivation of liberty in a case of this kind is, automatically, imprisonment for a minimum period of 3 months, the intensity of the Court's review must surely lie towards the upper end of the notional scale. This, in my view is not in disharmony with the approach adopted in Re Mullan's Application [2007] NICA 47 at [33] – [34], a decision which is of course binding on this court.

[29] This doctrinal approach is also consistent with high authority. This is perhaps best expressed by Laws LJ in R v Department for Education and Employment, ex parte Begbie [2000] 1 WLR 1115 at 1130B, describing reasonableness as "*a spectrum, not a single point*" and continuing:

> "*The Wednesbury principle itself constitutes a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake.*"

This was stated even more succinctly by the English Court of Appeal in Sheffield City Council v Smart [2002] EWCA Civ 4, at [42]:

> "*The intensity of judicial review varies with the subject matter.*"

[30] At the heart of the broader framework of legal principle in play lies the axiom that the common law has always been zealous in protecting the liberty of the citizen. Sir Thomas Bingham MR in Re S-C [1996] 1 All ER 532, at 534G/H:

> "*As we are all well aware, no adult citizen of the United Kingdom is liable to be confined in any institution against his will, save by the authority of law. That is a fundamental constitutional principle, traceable back to chapter 29 of Magna Carta 1297 ….*"

Per Robert Goff LJ in Collins v Wilcock [1984] 1 WLR 1172 at 1177:

> "*The fundamental principle, plain and incontestable, is that every person's body is inviolate.*"

Further, Lord Atkins stated memorably in Eleko v Government of Nigeria [1931] AC 662, at page 670:

> "*In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive.*"

[31] I consider that the "Tameside" principle must also have some purchase in the context of executive decisions entailing deprivation of liberty. In a passage familiar to all judicial review practitioners, Lord Diplock stated:

> "*The question for the Court is did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?*"

(Secretary of State for Education and Science v Tameside MBC [1977] AC 104 at 1065B.) Similarly, in R v Secretary of State for the Home Department, Ex parte Venables [1998] AC 407, the Court of Appeal, having emphasised the "*essential*" requirement that the decision maker be "*fully informed of all the material facts and circumstances*", at 455G, considered that he "*… did not adequately inform himself of the full facts and circumstances of the case*" (at 456E). And in Naraynsingh v Commissioner of Police [2004] UKPC 20, the Privy Council highlighted, at [21], that:

> "*Substantially more in the way of investigation was required than was undertaken here.*"

[32] The context of this statement was a successful challenge to a police decision revoking the claimant's firearms licence. Interestingly, the Commissioners formulated this requirement through the lens of a procedurally fair decision making process, holding that a fair procedure demanded that further inquiries be made by the decision making agency in circumstances where a series of questions arose and further information was obviously available. The failure to acquit this discrete duty had the consequence that the Doody requirement of giving the subject a fair opportunity to respond to the case against him could not be fulfilled. If ever there is an example of how principles of public law overlap and interlock, this must surely be it.

[33] It may be said that the Tameside principle has been restrictedly construed and applied in practice. It seems uncontroversial to suggest that it is inextricably linked with the entrenched principle of public law that every decision maker take into account all material facts and considerations. In R (Khatun) v Newham LBC [2004] EWCA Civ 55, which involved a challenge to a Council's homelessness policy, Laws LJ formulated a specific question to be addressed in that litigation context, at [33]:

"Even though there is no free-standing right to be heard, does the decision-maker's duty to have regard to relevant considerations nevertheless require him to ascertain and take into account ****55*** *the affected person's views about the subject matter? More pointedly in the present context, does the policy, by denying the applicant the opportunity to view the property and comment, disable the council from the process of accurate decision-making – from an appreciation of all the factors relevant to its decision as to the suitability of the offered property?"*

Having considered the familiar jurisprudential sources, namely Re Findlay [1985] AC 318, 3333 – 354 and Creednz – v – Governor General [1981] 1 NZLR 172, Laws LJ stated, at [35]:

"*In my judgment the* CREEDNZ Inc *case (via the decision in* In re Findlay *) does not only support the proposition that where a statute conferring discretionary power provides no lexicon of the matters to be treated as relevant by the decision-maker, then it is for the decision-maker and not the court to conclude what is relevant subject only to* Wednesbury *review. By extension it gives authority also for a different but closely related proposition, namely that it is for the decision-maker and not the court, subject again to* Wednesbury *review, to decide upon the manner and intensity of inquiry to be undertaken into any relevant factor accepted or demonstrated as such."*

His Lordship found support for this doctrinal approach in another familiar passage in the decided cases, that of Neill LJ in R v Kensington and Chelsea LBC, ex parte Bayani [1990] 22 HLR 406, at 415.

[34] This restrictive approach, as I have termed it, finds expression in more recent jurisprudence, in particular the decision of the Divisional Court in R (Plantagenet Alliance) v Secretary of State for Justice [2014] EWHC 1662 (Admin), at [100]. The effect of these two decisions is to erect a relatively high cross bar for litigants who seek to establish that a decision involving the exercise of public law powers is vitiated by a failure on the part of the decision making agency to undertake certain enquiries.

[35] I consider that there is clear scope for further examination of this doctrinal approach at a higher level, stimulated by at least three juridical considerations. The first is whether the Tameside principle which, after all, emanates from the highest court in the legal system, has been inappropriately emasculated. The second is whether the restrictive approach which I have described is compatible with the entrenched requirement of public law that a decision maker take into account all material facts and considerations. The third is whether this approach is compatible with the calibration of the Wednesbury principle which has been one of the hallmarks of the evolution of public law in recent years. The fourth is whether the broad and intrinsically flexible public law doctrine of procedural irregularity, most frequently (but not invariably) exposed in cases involving complaints of procedural unfairness, is adequately accommodated in the restrictive approach. The common law being nothing if not organic and resourceful it remains to be seen whether the superior courts take up this gauntlet in an appropriate future case.

[36] At this juncture in the evolution of the law I acknowledge the position of this court in the hierarchy of our legal system, also taking into account that the principle to be applied to decisions of the English Court of Appeal in the jurisdiction of Northern Ireland is one of persuasiveness rather than binding force. I am, therefore, slow to venture further in the present case, not least because the decision which I propose to reach does not entail the application of the Tameside principle.

[37] I accept the submission of Mr McGleenan QC (with Ms McMahon, of counsel) representing the Department that the legal framework has two further ingredients. The first is that every licence revocation decision pursues the purpose of protecting the public. The second is that, as Maguire J held in Re Raineys Application [2017] NIQB 98, at [9] and [42], the discretion which the Department exercises in making such decisions is a broad one. One element of this, as the Judge further acknowledged, is that the decision maker's assessment of what facts and factors are relevant and irrelevant is open to challenge only on an irrationality basis and:

> "*The weight he or she gives to such factors will ordinarily be a matter for the judgment of the decision maker.*"

[38] I add only that this decision does not purport to dilute the fundamental principle of public law, binding on both the single Commissioner and the Department, that all material facts and considerations be taken into account. I accept that one must graft onto this framework the important factor of context and, in this respect, the actions of the single Commissioner and the Department in cases of this kind are undertaken in a context wherein the dominant consideration is that of protecting the public. This, self-evidently, imports the requirement of expeditious action and, perhaps in some cases, urgency. These factors will serve to calibrate how established public law principles, especially the duty of enquiry where this is said to be engaged, fall to be applied in any given case.

[39] This court must also take cognisance of the reasoning of the Court of Appeal in Mullan [2007] NICA 47 (*ante*) at [32]:

> "…. *The decision to recommend a recall should not be regarded as one that requires the deployment of the full adjudicative panoply.*"

And further, at [34]:

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

Two observations seem to me apposite. First, the Lord Chief Justice in the passages at [32] – [34] twice emphasised the important nature of the decision being made at the recall stage. Second, there is nothing in these passages in clear disharmony with the more extended analysis of certain public law principles which I have undertaken in above.

[40] I accept the submission of Mr Sayers on behalf of the Commissioners that the information upon which a single Commissioner (and, by logical extension, the Departmental decision making official) acts, need not be imbued with the qualities of evidence admissible before a court. Mr Sayers further reminded the Court that in Hirst v Secretary of State for the Home Department and Parole Board [2006] EWCA Civ 945, the English Court of Appeal acknowledged an "*assumption*" that those compiling a report or application to the relevant decision maker "*will act in good faith*": see [10].

[41] There can be no sustainable suggestion, in my view, that a want of good faith at the initial stage of the process, when the triggering report is compiled (usually by the police), is the only legal basis upon which such a report may be called into question. To instance but two obvious examples, I consider that material omission and material error of fact would also rank as contaminating factors which, at the later stage of judicial review challenge, could be formulated in appropriate public law terms. This analysis is reinforced by the stark reality that bad faith is notoriously difficult to establish and, day to day, is barely visible in the world of judicial review.

[42] Finally, I take cognisance of the decision in R (Gulliver) v Parole Board [2008] 1 WLR 1116. There, the English Court of Appeal, considering the equivalent licence recall regime in that jurisdiction, adopted the approach that the legality of a recall decision did not depend upon proof that the prisoner had breached a licence condition. Rather, the barometer was whether the decision maker "*.. could reasonably think that the claimant was in breach of his licence conditions*": see [5]. In passing, this finds clear support in the opinion of Lord Bingham in R (West) v Parole Board [2005] 1 WLR 350 that it is sufficient, from the decision maker's perspective, that the prisoner "***appears*** *not to comply with the conditions to which his release was subject …*": at [25], emphasis added.

[43] The decision in Gulliver is also notable for the following passage in the concurring judgment of Sir Igor Judge P at [45]:

> "*There may, of course, be exceptional cases where the revocation decision process is so subverted that the prisoner may seek a different or separate remedy, by way of judicial review, or indeed, habeas corpus. In such cases the Court may be satisfied that the Parole Board may not be able to provide an adequate or sufficient remedy. If so, it will deal with the application accordingly.*"

I do not overlook the President's statement in [43] that the decisions of the Secretary of State and the Parole Board are made on the basis of the information available to them. However, I can identify nothing in this passage which suggests that a decision of either of these agencies could not be pursued on the ground of legal deficiencies in either the said information or the process whereby it was compiled. Once again the public law overlay looms large.

Conclusions

[44] I begin with my principal conclusion. I consider that the Applicant's case must be dismissed because the operative, final decision in the legal process generating his loss of liberty, namely that of the Departmental official

concerned is not vitiated by irrationality. Nor, if and to the extent that a duty to enquire further constitutes a freestanding ground of challenge, has a public law misdemeanour of this *genre* been demonstrated. As regards the first limb of my primary conclusion, the self-evidently elevated threshold for intervention, giving effect to the approach which I have devised in [27] – [29] above, is not overcome. The recall determination of the official concerned plainly lay within the range of reasonable decisions available to him.

[45] I do not overlook what was ultimately the centrepiece of the Applicant's case, namely the statement in the grounding police report referring to the Applicant's –

> "*… wilful disengagement with prison authorities during the licence process and his affirmation before leaving prison that he would not be consenting to the fitting of such equipment …..*"

It is beyond plausible argument that this aspect of the police report was fully adopted by the single Commissioner who, as noted above, assumed that the police information was "*accurate*" and, in making her recall recommendation, was motivated by two factors, the first being that rehearsed in the passage just quoted and the second being the events reported to have unfolded at the Applicant's home when the G4S employees attended for the purpose of installing the monitoring mechanisms.

[46] As the passage from the affidavit reproduced in [25] above demonstrates, the decision making official has averred, in terms, that he took no account of the first of these factors. Given that this case involves the liberty of the citizen, I have considered it incumbent on the Court to scrutinise this claim with particular care. This has involved a consideration of the officials' two affidavits as a whole and all of the surrounding documentary evidence. The document which, for me, stands out particularly, is the email exchange generated at the time of the Applicant's release from prison. Significantly, the official concerned was actively involved in these communications. Clearly he had a particularly knowledgeable insight into the stance on EM attributed to the Applicant when the release formalities were being finalised. This in my view lends added weight to the material averments in his main affidavit. I further take into account that there was no application to cross examine this official. Nor was there any frontal challenge to his averments in the presentation of the Applicant's case. Accordingly, while there was clear potential for contamination of the departmental licence recall decision, this was avoided in the event.

[47] There is, however, a lesson to be learned. As Mr Hutton pointed out, the evidence establishes beyond peradventure that the single Commissioner who, I accept, acted with appropriate expedition, had direct and immediate access to the author of the police report. Taking into account what the Court of Appeal said in Mullan about high quality decision making and this court's emphasis on the liberty factor, the minimal delay which contact with the police officer for the purpose of seeking desirable clarification and elaboration of the relevant passages of his report which would have been generated cannot, in my estimation, justify the failure to do so. Moreover this has not been put forward on affidavit as a justification. The relevant passages in the police report were opaque and unparticularised, crying out for explanation and illumination. Given that they ultimately had the status of the second of the two factors stimulating the single Commissioner's recall recommendation, I consider that they should have been probed further by the simple mechanism of calling the mobile telephone number which the officer had made available to the Commissioner.

[48] The question of whether the single Commissioner's licence recall recommendation was vitiated in law on account of the above does not require to be decided since the final decision having the legal effects and consequences which the Applicant now challenges was that of the Department. Indeed it must be doubtful whether the single Commissioner's recommendation is justiciable. Correctly analysed it is but an intermediate step in the process, having no final or binding legal effects or consequences. The Department is the decision maker. I have noted the tangential reference to this issue by Keegan J in Re Edgar's Application [2017] NIQB 85, at [27] and, subject to fuller argument, would not dissent from it. Beyond these observations I do not venture since this issue was not the subject of detailed argument in this case and arose only *ad hoc* when I canvassed it with Mr Sayers on behalf of the PC. It will have to be addressed properly and determined in a suitable future case.

[49] Finally I draw attention to one discrete aspect of the single Commissioner's report, at [15]. The Commissioner appears to suggest that one specific aspect of the Applicant's conduct prior to his release (the alleged EM "stance") had the effect of increasing significantly post-release the risk of harm posed by him to the public. This, with respect, seems a little confused. As Mr McGleenan emphasised, the only "risk relevant" post-release behaviour attributed to the Applicant was that which allegedly occurred when G4S attended his home for the purpose of installing the EM equipment. I consider that the single Commissioner could, in evaluating this conduct, take into account the alleged pre-release incident (subject to what I have stated in above) as this could be relevant to evaluating the increased risk of harm engendered by the post-release conduct. However the Commissioner did not express herself in these terms. I add only that the Parole Commissioners are a judicialised body, with the result that they must expect

their decisions, impinging as they do on the liberty of the citizen, to be scrutinised in detail in legal challenges of this kind.

[50] As for the police, the lesson to be learned is that scrupulous care must be taken in the compilation of every report to a single Commissioner inviting the making of a licence recall recommendation. The gloss in this report relating to "*wilful disengagement*" and "*affirmation*" was opaque, unparticularised and, having regard to the totality of the evidence, misleading. Having regard to the authorities considered at [28] – [30] above, glossing and inaccuracies of this kind are unacceptable. They also fall measurably short of the high standard of decision making demanded by Mullan.

Order

[51] For the reasons given the application for judicial review is dismissed. Having considered the parties' submissions, I make a single order for costs [50/50] in favour of the two Respondents, not to be enforced without further order of the Court. I further order taxation of the Applicant's costs as an assisted person.