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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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McCann's (Darryl) Application [2016] NIQB 5

IN THE MATTER OF AN APPLICATION BY DARRYL McCANN FOR JUDICIAL REVIEW

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KEEGAN J

Introduction

[1] The applicant brings this judicial review against the Parole Commissioners for Northern Ireland in relation to a decision made on 25 October 2013 whereby the Parole Commissioners did not recommend the release of the applicant from custody. The application was also brought against the Prison Service of Northern Ireland in relation to continued decisions up to 25 October 2013. The Order 53 Statement is dated 3 April 2014. Leave to apply for judicial review was granted by Weir J (as he then was) on 9 May 2014.

[2] After leave was granted the case was adjourned generally pending the decision of the Supreme Court in Haney and others. The Supreme Court gave judgment in those appeals on 10 December 2014 and the cases are reported as [2014] UKSC 66. Thereafter, the applicant sought to amend his Order 53 Statement to include a claim based on the discrimination provisions of Article 14 of the European Convention on Human Rights. That application was contested and ultimately the amendment was refused by Treacy J.

[3] The applicant comes before this court seeking relief as set out in his original Order 53 but in attenuated form. The applicant no longer proceeds against the Parole Commissioners. The relief sought is now in the form of a declaration that the failure of the Northern Ireland Prison Service to provide the applicant with access to offence focused work was unreasonable, unlawful and of no force or effect and was

incompatible with the applicant's rights enshrined within Article 5(1) of the European Convention on Human Rights. The applicant also seeks damages in these proceedings.

[4] The applicant sets out the grounds upon which the said relief is sought at paragraph 3(f) of the Order 53 Statement which reads as follows:

> "The failure on the part of the Northern Ireland Prison Service to provide the applicant with access to the appropriate offending behaviour work such as the Integrated Domestic Abuse Programme or one to one counselling has resulted in his continued detention beyond his parole eligibility date. This is despite the fact that the need for such work was identified internally as early as January 2010 and has been recommended in three previous decisions of the Parole Commissioners. In failing to provide this work the Northern Ireland Prison Service contrary to its obligations under Section 6 of the Human Rights Act 1998, has acted incompatibly with the applicant's rights under Article 5(1) of the Convention. Their decision is Wednesbury unreasonable and is in breach of the Northern Ireland Prison Service's public law duty."

[5] The applicant was represented by Mr Southey QC and Mr McKeown BL and the respondent by Dr McGleenan QC and Mr Robinson BL. I am indebted to all counsel for written and oral arguments which have been of great assistance to the court.

[6] Throughout this judgment reference will be made to a large number of courses undertaken within the prison system. The courses to which particular reference is made and the titles to which may be abbreviated are as follows:

Integrated Domestic Abuse Programme – IDAP
Enhanced Thinking Skills – ETS
Cognitive Self Change Programme – CSCP/CSC
Alcohol and Drugs Empowering People Through Change – ADEPT
Alcohol Related Violence Programme – ARVP/ARV

[7] The applicant is a 30-year-old prisoner. On 22 September 2009, following a trial at Newry Crown Court, he was convicted of a serious assault upon his partner pursuant to Section 18 of the Offences against the Person Act 1861. The applicant was sentenced on 27 November 2009 and 10 December 2009 to an extended custodial sentence of 7 years custody followed by 2 years on licence. As a result of time spent on remand in respect of the offence the applicant had a parole eligibility date of

10 June 2012, a custody expiry date of 10 December 2015, and a sentence licence expiry date of 9 December 2017.

[8] The nature of the applicant's offence and the risks flowing from it are set out in the pre-sentence report which was prepared at his trial. The report was completed by Mary Doran of the Probation Board of Northern Ireland and it is dated 20 October 2009.

[9] The probation report under the section "Offence Analysis" describes the circumstances of this crime. The description is in terms which point to a serious domestic incident whereby the applicant perpetrated violence towards his victim with the result that she is reported to have sustained brain injury. This led to short term memory loss, lack of independence and personal care, weakness in her right leg, ongoing amnesia and recurring distressing dreams. In interview the applicant initially stated that he could not recall the offence as on the day in question he had been drinking and taking cocaine. However, he acknowledged his guilt to the probation officer, having been found guilty at his trial.

[10] The applicant had a prior assault conviction against the victim and a criminal record of some 74 convictions over the previous 6 years. The probation officer noted that "the majority of his offences of violence have been perpetrated against women with whom he had a close relationship".

[11] Under the heading "Risk of Serious Harm" the probation officer refers to the "clear pattern of domestic abuse that characterises his intimate relationships. It is the Probation Board of Northern Ireland's assessment that the defendant poses a risk of serious harm, particularly to females with whom he has a relationship. This risk would be most acute when alcohol or drugs are used as a dis-inhibiter and Mr McCann perceives his status in the relationship to be challenged."

[12] The report in its conclusion section continues by stating that:

> "The likelihood of the defendant re-offending would be lessened if Mr McCann complied with the following stipulations inter alia a domestic abuse programme during any probation period."

The report continues:

> "Should the court consider a period of custody is warranted, these stipulations could be commenced in custody, and continued upon the defendant's release into the community as conditions of community supervision. A 2 year period of community supervision would be required in order to complete these requirements."

[13] The applicant was initially imprisoned at Maghaberry Prison. The Sentence Plan Conference of 11 January 2010 sets out the actions and objectives in relation to his imprisonment at that time. Paragraph 7 of that document refers to a number of actions that the sentence manager is to take. Along with referral to various courses dealing with the applicant's substance misuse, this sentence plan sets out that the case manager/sentence manager is to make referrals to the Northern Ireland Prison psychology service for assessment to identify suitable offence focused programmes or individual work. In paragraph 8 of the same document in the section entitled "What outcomes are required to evidence progress/reduction in risk (SMART objectives)" it is stated that if assessed as suitable he should complete Enhanced Thinking Skills (ETS) and/or Cognitive Self Change Programme (CSCP) to address history of violence and improve possible preparation for taking Alcohol and Drugs Empowering People through Change (ADEPT) course or similar group work in the community on release.

[14] The applicant was transferred to Magilligan Prison on 28 January 2010. There is a Sentence Plan dated 8 February 2010 which has been created after the transfer to Magilligan. At paragraph 2 of that document under the heading "What work is required to address and reduce risk factors whilst in custody (Prioritise)" I note the following matters. Alongside referral for drug and alcohol work and the Enhanced Thinking Skills Programme, there is reference to referral for assessment for the Cognitive Self-change Programme on completion of Enhanced Thinking Skills. Further there is reference to a referral for any specific one-to-one work as preparation on domestic violence/abuse as identified. At section 4 of the same document under the heading "What actions are to be taken in the next 6-month period and by whom" there is reference to the case manager/sentence manager making referrals to the Northern Ireland Prison psychology service for assessment to identify suitable offence focused programmes or individual work.

[15] On 3 March 2010 the applicant attended at the Resettlement Board and a resettlement needs profile was agreed. It is noted that the applicant consented to be considered for offending behaviour programmes. There was an outstanding requirement that he be assessed for the CSCP. This requirement appeared to originate from Maghaberry Prison. The programme aims "to reduce the likelihood of future violent re-offending among adult offenders who pose a significant risk of "future violence".

[16] On 23 April 2010 the applicant began the ADEPT assessment. The next sentence plan review was on 23 June 2010. This is a short document which records the work that the applicant has undertaken. Section 2 refers to targets and states that since transfer to HMP Magilligan on 28 January 2010, targets have been met with the exception of the Domestic Violence Programme (not available in Magilligan).

[17] Thereafter, various programmes are referred to as follows. On 21 September 2010 it is noted that the applicant commenced the Victim Impact Programme (VIP) which comprises 30 sessions. On 18 October 2010 the applicant commences the

Motivational Enhancement Group (MEG) of 6 sessions. On 17 November 2010 the applicant commenced the ETS comprising 21 two hour sessions. There is reference in the papers to a revised sentence plan from a review on 24 December 2010. It appears that the next Sentence Plan Review and revised sentence plan is 1 August 2011 and by that stage the various programmes referred to above have been completed. I note that the applicant also undertook a course in relation to parenting and he involved himself in activities within the prison principally in relation to gym instruction. The ACE assessment of risk as of 3 May 2011 was noted to be 39-high.

[18] On 4 October 2011 it is noted that the applicant commenced the Alcohol Management Programme (AMP) which consisted of 8 sessions. On 14 December 2011 a psychology report becomes available. This is a report of Tracey Murray, Senior Psychologist (Acting). At Section 11 of that report under the heading "Progression" it is noted as follows:

> "Mr McCann's case has been referred to Dr Clare Burn, the Cognitive Self-change Programme (CSCP) Treatment Manager to determine if a referral is appropriate given the nature of Mr McCann's index offences. Discussions are currently ongoing in relation to a Cognitive Self-change Programme being facilitated to address offences of domestic violence. A response has not been received to date. Should this programme become available, as outlined above, Mr McCann's placement on such a programme would be dependent on further screening and assessment of suitability.
>
> It is further noted in this report that the report was disclosed to Mr McCann on 19 December 2011. Mr McCann queried the information relating to further assessment for the Cognitive Self-change Programme. It was explained to Mr McCann that this assessment cannot be progressed until such time as a response is received in relation to the availability of the programme. He was advised that when a response is received he will be updated in relation to whether or not a referral was being progressed."

[19] Further programmes were commenced at this time namely on 9 November 2011 it is noted that the applicant commenced the Drugs Education and Awareness Programme (DEAP) comprising 10 sessions. On 31 January 2012 the applicant commenced the Gaining Opportunities and Living Skills (GOLS) comprising 5 sessions. On 29 February 2012 it is noted that the consent of the applicant was sought for the Cognitive Self-change Programme. It appears from the papers that on 5 March 2012 consent was refused "on legal advice".

[20] On 11 April 2012 and in accordance with the Parole Commissioners' Rules 2009, a Single Commissioner issued a decision in relation to the applicant's parole. This decision sets out the applicant's history and refers to the various sentencing reports that I have referenced herein. In particular at paragraph 17 of the Single Commissioner's decision it is stated that:

> "In the sentence manager's report dated 10 January 2012 Mr McCann is further reported to have passed all drug tests in the prison and has attained Enhanced Prisoner Status. Mr McCann has had excellent support from his extended family including his mother. However, the case manager in her report of 18 January 2012 points out that Mr McCann has not undertaken any specific work on domestic violence and has had a past history of relapsing into alcohol abuse despite treatment attempts. This behaviour has then resulted in breaches of community disposals as well as further offending. Paragraph 20 of the decision is also relevant in that it refers to the submissions made by Mr McCann's solicitors, who point out that he has 'engaged as fully as he possibly could and he has behaved impeccably throughout his sentence'."

The Commissioner goes on to comment that the solicitors contend that he has undertaken all that has been asked of him and he has actively participated throughout. In relation to the Cognitive Self-change Programme they state that:

> "We are of the view that it is far from helpful to seek to review this issue at this late stage and so shortly before our client's parole review. We would submit that it is quite clear that the domestic violence programme is a highly relevant programme suited to our client's needs and is also available in the community where we believe he should be given an opportunity to conclude it."

The Commissioner at paragraph 21 states:

> "In conclusion Mr McCann's legal representatives rightly point to the positive indicators identified by various report writers in the various programmes addressing alcohol problems and other relevant issues. They also maintain that a placement in a hostel at this point with the inherent levels of monitoring would facilitate Mr McCann completing an IDAP course in relation to the domestic violence issues."

The Single Commissioner sets out his recommendations at paragraph 27 and the first bullet point of that paragraph states that:

> "Mr McCann should be afforded an opportunity as soon as possible whilst in custody to address his violent offending towards females. If this cannot be delivered on a group programme basis then it should be offered to him in the format of individual sessions."

[21] The next Sentence Plan Conference was on 17 May 2012 and this deals with the decision and recommendations of the Single Commissioner. In particular, at Section 6(2) of the Sentence Plan Conference Report, reference is made to the fact that the conference is being requested to assess the recommendations of the Parole Commissioners' provisional direction not to release and the recommendations of 11 April 2012. The case manager advised that currently there is no domestic violence programme available within the prison system. It was advised that there have been discussions about the Integrated Domestic Abuse Programme (IDAP) commencing in prisons and Mr McCann has been put forward as a potential candidate. The case manager also noted that an individual programme may be developed by probation but this would take some months or longer to develop fully. At Section 7 of this document it states that Mr McCann has been put forward as a potential candidate for the IDAP programme. Should this not be successful CSCP will again be considered for Mr McCann. It seems to me that there may be a mistake in this document in that I understood that the applicant had not consented to the CSCP Programme at this stage. In any event the applicant's parole eligibility date then passed on 10 June 2012. I was not told the exact reasons why the applicant did initially refuse the CSCP work but it seems to have been on legal advice.

[22] On 24 August 2012 a letter is sent to the applicant from the Prison Service. This is a letter from Fiona McQuade the Senior Psychologist (Acting) and this letter refers to the issue of the CSCP assessment. In particular it refers to the fact that the Prison Service has been unable to progress Mr McCann's assessment to date due to lack of consent. It also refers to the fact that on 27 April 2012, a multi-disciplinary case conference was held to consider the Single Commissioner's provisional direction and recommendations. The case conference discussed possible interventions for those with a history of domestic violence. The case manager advised that it could take the Probation Board for Northern Ireland some time to develop an individual programme in custody. This letter concludes by saying that Mr McCann remains on the CSCP waiting list for further consideration of his needs and that his case is to be discussed again on 23 October 2012 at an Interventions Panel which aims to identify CSCP assessment priorities going forward.

[23] There is then a hearing before a panel of Parole Commissioners and a decision is issued on 11 October 2012 in relation to the applicant's case. This is a lengthy consideration which deals with the matters that had already been canvassed before the Single Commissioner. The Commissioners decide not to direct release of the

prisoner as they are not satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should continue to be confined. It is notable that at paragraph 32 of the decision that the panel accepts that Mr McCann's behaviour in prison has been exemplary. They say that he has undertaken practical courses – wall and floor tiling; Information Technology and that he has undertaken work as a gym orderly which gained him gym instructor awards. His progress in the Open University Law course underlines his intellectual capability. The panel does go on to comment that it has concerns about Mr McCann's truthfulness, his self-insight into his offending behaviour and his ability to avoid a return to drugs and alcohol abuse in the community. However, the panel in an important passage states:

> "The current crucial and overriding factor in this case is the need for Mr McCann to engage in specific offence focused work, notably domestic violence counselling and therapy. Despite the positive progress made, Mr McCann continues to be assessed as posing both a high risk of re-offending and a risk of serious harm. As the Single Commissioner rightly observed, Mr McCann has an ingrained negative attitude to women and the propensity to use violence against them which has not yet been addressed. Such work must be undertaken before consideration is given to releasing Mr McCann back into the community given the nature of his previous offences and the severity of the injuries perpetrated upon his victim.
>
> It regrets that the specific risk reduction objectives identified in the first sentence plan were not pursued with vigour or focus. They say that Mr McCann's decision in March 2012 about the CSC assessment compounded the situation."

[24] In terms of recommendations, various points are made by the panel which may be summarised as follows:

(i) A full dynamic psychological risk assessment.

(ii) Mr McCann's case should go forward to the Intervention Panel on 23 October 2012 with our recommendation that it should be given priority status in the assessment process.

(iii) Following assessment, offence focus work must be initiated as a matter of priority either through involvement in the CSC programme or through individual therapy/counselling provided by the most appropriate resource,

either internally or externally with particular emphasis on violence within intimate relationships.

(iv) The issue of alcohol/substance misuse should be revisited to determine if additional intervention is required at this juncture.

(v) Mr McCann should continue engagement in his ongoing educational involvement with the Open University along with his work as a gym orderly.

(vi) A revised release plan should be prepared a short time prior to the next review by the Parole Commissioners.

Mr McCann's case should be referred back to the Commissioners for further review in time for it to be completed not later than 12 months from the completion of this reference.

[25] A comprehensive psychology assessment is prepared and a report is filed by Michelle Fletcher, Consultant Forensic Psychologist. This report is dated 12 December 2012. In the conclusion and recommendation section at paragraph 8.1 it states:

> "Although Mr McCann has displayed some insight into past risk factors it is not clear if he has developed a full understanding of his own thoughts, feelings and behaviour that have led to committing violence towards his intimate partners. Although Mr McCann has identified issues concerning jealously and suspicions regarding his partner's fidelity and friendships it is not clear if he fully understands the role of his own beliefs regarding relationships. Therefore, it is important that Mr McCann undertakes treatment aimed at understanding his beliefs about relationships and women including the impact of jealously within a relationship and a link to violence perpetrated by Mr McCann."

Paragraph 8.2 refers:

> "While it is clear that Mr McCann has been able to respond to treatment and apply problem solving strategies to custodial based situations it is important that treatment aimed specifically at his management of relationships with his family as well as within intimate relationships is undertaken with Mr McCann."

[26] The applicant did consent to assessment for the CSC programme after the initial refusal on legal advice and it took place on 22 November 2012. The next Sentence Plan in relation to the applicant is dated 1 February 2013. This sentence

plan review makes clear at Section 3 that from the psychology assessment the applicant is not suitable for cognitive self-change work. It refers to the fact that the Psychology Department will now carry out an assessment to see if the applicant is suitable for the Alcohol Related Violence Programme. Section 2 of the Sentence Plan Review refers to the fact that the Sentence Plan has been followed with the exception of specific offence focused work. It refers to the fact that the applicant will need to complete IDAP when released into the community.

[27] On 23 April 2013 the applicant does begin the Alcohol Related Violence Programme which comprises 30 sessions in the form of 5 modules. This release plan is a comprehensive document which sets out the applicant's history. At Section 2 it sets out the applicant's response to the Sentence Plan and progress made in custody. Reference is made in this section to evaluation reports which outline that Mr McCann's interaction was positive and that he was learning from the programmes he undertook. This section also refers to the fact that the applicant's ACE scoring had lowered. The section further refers to the fact that the applicant has been unable to complete any work designed to challenge his violent offending relating to domestic violence issues as the Integrated Domestic Abuse Programme is currently (un)available in custody.

[28] On 23 May 2013, the Prison Service Senior Psychologist (Acting) Tracey Murray, wrote to the applicant and in this letter reference is made to the fact that the CSC Programme was deemed unsuitable for the applicant at an Interventions Panel on 7 December 2012 as "the assessment revealed that Mr McCann's use of violence occurs almost exclusively in the context of intimate relationships". This letter refers to the fact that the applicant has been assessed as suitable for the Alcohol Related Violence Programme and that he commenced that programme on 24 April. The letter continues in the final paragraphs to say:

> "In addition to the above, Mr McCann has been referred for individual work in relation to his offences of domestic violence. This work is due to commence following completion of the ARV programme, at which time any outstanding needs can be addressed through one to one intervention."

[29] By 13 August 2013 the applicant had completed the ARV programme referred to by the Senior Psychologist in her correspondence.

[30] The case was referred again to the Commissioners on 4 June 2013. The next important step in this history relates to the second set of Parole Commissioners decisions. On 23 August 2013 the Single Commissioner makes a recommendation that the matter is referred to a Panel of Commissioners. At paragraphs 19-23 the Single Commissioner set outs his reasons. At paragraph 20 he states:

> "It was clearly established from the outset of Mr McCann's sentence (including in the pre-sentence report) that how he deals with relationships, his views, thoughts and behaviour towards partners in relationships, as well as to other men he perceives as intruding upon relationships, was a significant risk factor for Mr McCann's offending behaviour. Mr McCann's violence appears to occur within the context of relationships and this area required attention and work. It is unfortunate there appears to have been confusion in how this work could be achieved."

[31] At paragraph 21 of the same decision the Single Commissioner goes on to say that "at the time of writing of this decision there is no evidence to indicate that individual sessions have begun to address this" (meaning the domestic violence), 16 months after the Sentence Plan Conference. The commissioner goes on to say:

> "It is unfortunate and concerning that there has been a further delay in implementing this work. It is indicated that one to one sessions are intended to begin after the Alcohol Related Violence Programme has been completed to address outstanding needs. However, it is unclear exactly how this work will address the identified needs of Mr McCann in the area of violence in intimate relationships."

[32] In terms of recommendations this Single Commissioner at paragraph 24 asks that to assist the deliberations of the Panel of Commissioners a detailed sentence plan outlining the work proposed to be undertaken by Mr McCann to reduce the extant issue of violence within intimate relationships (and any other issues relating to risk) should be provided. This should include a timetable, any relevant milestones, clear explanations of how the work will address the risk(s) posed by Mr McCann and how this progresses his case.

[33] A panel is then convened to deal with the applicant's case and prior to the panel the Chairman of the Panel issues a direction dated 11 September 2013 which compels the Department of Justice to comply with the recommendation contained in the direction of the Single Commissioner regarding the necessity for a detailed sentence plan. It also asks for a post programme report on Mr McCann's participation in the Alcohol Related Violence Programme which he was scheduled to complete to 5 August 2013. Thirdly, it asks that there is provided a written update on the anticipated individual work in relation to Mr McCann's offences of domestic violence, as referred to in the letter from Tracey Murray, Senior Psychologist dated 23 May 2013. The update should indicate when such work started or will start, who such work is with and how long it is intended to continue for.

[34] A Sentence Plan Conference does take place on 12 September 2013 in response to the Chairman of the Parole Commissioners' request. At Section 7 of the Sentence Plan Conference document at point 2 reference is made to the fact that Tracey Murray confirmed that one-to-one intervention work, specific to domestic violence, will begin early October 2013. This will consist of 6-8 sessions which will be weekly. A Sentence Plan Review takes place on 24 September 2013. Then on 25 September 2013 there is a letter sent by Linda Blud, Consultant Psychologist (external) to the Parole Commissioners. This letter in particular refers to the Alcohol Related Violence Programme (ARV). It states that ARV addresses risk factors around alcohol related violence and that Mr McCann has done considerable work on this programme building skills and challenging beliefs around the use of aggression and violence. It says that the programme includes some work around relationships. The work he has completed will form a good foundation on which to build further work. The second part of this letter refers to the fact that in Miss Blud's opinion research has not yet clearly indicated which interventions for domestic violence are most effective in reducing re-offending. She refers to various studies in this regard and opines at the end of this letter that:

> "In my view Mr McCann would benefit from completing this programme on release. The one-to-one intervention we can offer should be seen as a foundation course for this further work. On 15 October 2013 the applicant commences the one-to-one psychology counselling sessions which have been referred to herein. These in fact took place over 18 sessions."

[35] The Parole Commissioners' Panel heard the case and their decision is dated 25 October 2013. The panel decided that it could not be satisfied that the applicant should be released and as such that it was necessary for the protection of the public from serious harm that he should continue to be confined. The reasons given by this panel are set out from paragraph 25 onwards. At paragraph 27 the panel refers to what it describes as "the elephant in the room". This it says is Mr McCann's previous violence within personal relationships which has not been dealt with.

[36] At paragraph 28 the panel refers to the fact that the applicant is only now commencing individual work with a psychologist who will address domestic violence offending and that appears to be the only such targeted offence focused work that is likely to be available to him in prison. Having considered all of the evidence very carefully, the panel found that it was essential for the protection of the public from serious harm that such work should be undertaken before Mr McCann is released into the community where he will then be able to participate in the IDAP. The Panel referred to the oral evidence of the Consultant Forensic Psychologist as particularly persuasive in that regard. The ARVP Report indicates that Mr McCann is just starting to understand his intimate partner violent offending and outlines follow up work that should be of benefit to him. The panel goes on to refer to the

fact that the recent risk management meeting assessed Mr McCann as still posing a risk of serious harm to the public and the panel agrees with that assessment.

[37] At paragraph 30 reference is made to the fact that none of the professionals who gave evidence recommended that it was yet safe to release Mr McCann on licence. In terms of recommendations the panel referred to the psychology report dated 12 December 2012. It recommended that Mr McCann should attend the follow-up work identified in the recent ARVP assessment.

[38] At paragraph 31.2 the panel recommended that Mr McCann should fully apply himself to the one-to-one work that has just started with psychology to address in a comprehensive manner his domestic violence offending and his difficulties within inter-personal relationships. The work should progress at a pace that is helpful to him; it should not be rushed or cut short because resources are scarce or because another review by the Commissioners is pending, nor should the work be delayed further. A comprehensive report on the work undertaken outlining any further work required should be provided a short time prior to the next review by the Commissioners. At paragraph 32 of the decision the panel says that because there has been a delay in Mr McCann's case, because his conduct has been exemplary and because there is a reasonable prospect of him making further good progress, the panel considers that his case should be referred back sooner than the usual one year time frame. Mr McCann's case should therefore be referred back to the Commissioners for further review in time for it to be completed not later than 9 months from the completion of this reference.

[39] The Sentence Plan Conference then takes place on 5 November 2013. At paragraph 31.2 of this Sentence Plan Conference reference is made to the fact that Fiona McQuade started the one-to-one work in late October 2013. Two sessions had already been completed and was anticipated that 6 sessions would be covered by early December 2013. At this point the situation would be reviewed and a decision made as to what further work is required.

[40] On 3 March 2014 the applicant commenced Building Skills for Recovery. The next Sentence Plan Review is 19 March 2014. This review reflects the recommendations of the Parole Commissioners. I note that the ACE risk score was reviewed on 6 February 2014 and increased to 36. The review refers to the applicant completing the one-to-one work. It also refers to an application for placement in Foyleview to be considered by the Foyleview Panel in the next two weeks and the possibility of accompanied temporary release. A comprehensive release plan is then formulated dated 24 March 2014 and this makes various recommendations for the applicant's supervision should he be released. On 6 April 2014 the applicant is transferred to Foyleview which is the equivalent of an open prison setting.

[41] On 6 June 2014 a psychology report becomes available signed by Fiona McQuade, Forensic Psychologist in training and Linda Blud, Registered Forensic Psychologist. This report comments on the 18 one-to-one sessions that

Mr McCann completed from 23 October 2013 to 17 April 2014 and these are stated as sessions to address outstanding needs in relation to domestic violence. The report states that the work focused on exploring his interpretation of several relevant convictions, in order to develop his understanding of thoughts, feelings and attitudes/beliefs that led him to commit these offences. Mr McCann's participation during the course of the work was positive and demonstrated an openness to understand his own behaviour. The report therefore concludes that this work should form a good foundation for future participation in the community based IDAP.

[42] The applicant's case is then considered by a Single Commissioner who issues a decision dated 9 June 2014. In that decision the Single Commissioner states that Mr McCann clearly continues to pose some degree of risk. However, the Commissioner was satisfied that there is sufficient evidence of cognitive and attitudinal change to demonstrate that the risk could be safely managed in the community and that it is therefore no longer necessary for the protection of the public from serious harm that he be confined. The Single Commissioner goes on to say that:

> "I also agree with his solicitors that in order to make further progress, it would be more reasonable to allow Mr McCann to enrol in the IDAP in the community. Mr McCann has served a considerable period in custody and in my opinion the time has come to test Mr McCann for a sustained period under strict supervision in the community."

[43] Various recommendations are made in relation to release upon licence and these include a recommendation to complete the IDAP programme in the community. A panel of Parole Commissioners then meets and issues a decision on 4 August 2014. This decision also recommends release upon licence for the applicant. This decision at paragraph 37 states:

> "In light of all the evidence provided the panel recommends his release subject to stringent licence conditions. The panel note that Mr McCann's attitudes and beliefs in relation to the use of violence and inter-personal relations are engrained and drug and alcohol abuse have been involved in most of his offending. He has not yet been fully tested in the community but will now have that opportunity. He is fully aware that he will not be afforded any second chance if he breaches any of the licence conditions set out below and the panel consider that a policy of zero tolerance has to be adopted by the Probation Board of Northern Ireland in relation to ensuring he is safely

> managed in the community. The panel highlight that if a new relationship with a female develops that this will be a time and risk is likely to increase and additional support to apply skills learned will be essential. So the panel recommends release upon licence with particular conditions including attendance at the IDAP programme in the community."

[44] The applicant was released from HMP Magilligan on 5 August 2014 and his licence was due to expire on 9 December 2017. There is a decision of a Parole Commissioner on 12 March 2015 in relation to recall. That decision recommends that the applicant's licence should be revoked on the grounds that the post release conduct of this prisoner indicates that he poses a risk of serious harm to the public which can no longer be safely managed in the community. Paragraph 9 of that decision refers to the recall report that Mr McCann failed to return to the MUST Hostel on 11 March 2015 and failed to report to the Probation Board of Northern Ireland on that date. It refers to his current whereabouts being unknown as well as his association with known drug users suggests that he may be abusing substances such as legal highs. It states that Mr McCann was withdrawn from the IDAP between November 2014 and January 2015 because of his failure to attend. A full panel of Parole Commissioners issued a decision dated 1 September 2015 whereby the panel decided that the applicant should not be released and the panel reiterated the points made in the Single Commissioner's decision in this regard. At paragraph 23 of the panel decision it is stated that the panel considered at length what recommendations could usefully be made in order to assist Mr McCann in making progress in custody:

> "It is unfortunate that Mr McCann's behaviour has resulted in him not being able to avail of the outstanding offence focused work, in the form of the IDAP programme, given that it is only available in the community."

[45] Following from this sequence of events, it is clear that a number of themes emerge as follows. Firstly, this applicant was subject to comprehensive and regular sentence plan reviews. Secondly, it seems clear to me that the applicant was offered and completed many programmes of work in prison aimed at addressing his offending. These included programmes to deal with behaviour and also alcohol and substance misuse. It also appears from the papers that the applicant did comply with all programmes and the outcomes were good. At certain stages the applicant's ACE score was reduced. I note that the applicant had enhanced prisoner status. He also did engage with educational and leisure programmes and so he could not be considered to be anything other than a good prisoner. The one area where the applicant did not comply was that he did not initially consent to the CSC programme when first offered and that appears to me to have delayed the process for a period from in or about March 2012 to November 2012 whenever the

assessment for CSCP finally took place. The third point to note is that the applicant effectively had to go through three sets of Parole Commissioner determinations before he was released on licence. This is significant in the context of the applicant's parole eligibility date which was 10 June 2012. It is clear that the applicant could never have met that date given the findings of the Parole Commissioners' hearings in 2012. The applicant again had difficulties in establishing his suitability for release in the 2013 Parole Commissioners' hearings and it was only whenever the applicant had completed the full programme of interventions, in particular the one-to-one counselling aimed at dealing with domestic violence, that he ultimately achieved his release on licence in August 2014. Finally, in relation to this applicant, it is noted that having satisfied the Parole Commissioners that the risk he posed could be managed in the community upon conditions following the panel decision on 4 August 2014, the applicant was recalled in March 2015 as a result of breaches of the licence including the condition whereby the applicant was to attend at the IDAP Domestic Violence Course within the community. I consider that all of these matters are relevant to my consideration of this case.

[46] The issues seem to me to be as follows:

(i) On the facts of this case has the applicant been afforded a reasonable opportunity to rehabilitate himself?

(ii) If not, for what period have the Northern Ireland Prison Service failed in their duty?

(iii) Should a declaration be granted?

(iv) Should damages be awarded in these proceedings, and if so at what level?

[47] Before dealing with these issues it is necessary to set out the legal principles which have now been established by the Supreme Court decision in Haney and others [2014] UKSC 66. Both counsel agree that this decision settles the legal principles in this area and that this court must then undertake a fact based analysis to establish whether or not there has been a breach of public duty.

[48] Both counsel accepted that the law equally applies to the extended custodial sentence scheme (ECS) because of the provisions of the Criminal Justice (Northern Ireland) Order 2008 particularly Article 18(2) and 18(3) whereby a prisoner sentenced to an ECS may be released by the Parole Commissioners after they have served half of the custodial terms. In Tadas Lapas' Application [2013] NIQB 118 Treacy J accepted that extended sentences are analogous to Imprisonment for Public Protection sentence (IPPs) in this context. The analogy is essentially that in each case the prisoner is given a reasonable opportunity to demonstrate that he is no longer a danger.

[49] Of course the Haney case must be seen in context because after the implementation of IPPs in England and Wales in April 2005 it is known that the prison administration was put under a strain due to the increase in numbers of prisoners with indeterminate sentences because a much wider class of offences were covered. The Haney case essentially follows a decision of the European Court of Human Rights in a case of James v the United Kingdom [2012] 56 EHRR 399 whereby it was determined that there was a breach of Article 5 of the European Convention on Human Rights in the context of prisoners subject to these regimes who were not provided with the means by which they could establish they were no longer a risk whilst in prison and thereby be eligible for release.

[50] In the James case the European Court did identify that the absence of provision of interventions within the prison system to assist a prisoner in establishing release amounted to a breach of Article 5. The Supreme Court in the case of Haney did not follow the reasoning of the European Court of Human Rights in full and this is set out in the joint judgment of Lord Mance and Lord Hughes JJSC at paragraph 35. In essence the Supreme Court could not countenance a situation whereby a breach of Article 5 would lead to release given the regime whereby release is a matter for the Parole Commissioners to determine in accordance with an assessment of risk.

[51] The Supreme Court did however at paragraph 36 proceed to articulate the duty in these types of cases which rests with the State. It says at paragraph 36:

> "We also consider that the Supreme Court can and should accept as implicit in the scheme of article 5 that the state is under a duty to provide an opportunity reasonable in all the circumstances for such a prisoner to rehabilitate himself and to demonstrate that he no longer presents an unacceptable danger to the public. But we do not consider that this duty can be found in the express language of article 5(1)."

At paragraph 38 the Justices go on to say that:

> "We consider that a duty to facilitate release can and should therefore be implied as an ancillary duty - a duty not affecting the lawfulness of the detention, but sounding in damages if breached. Such a duty can readily be implied as part of the overall scheme of article 5, read as a whole, as suggested in In re Corey [2014] AC 516."
>
> [39] The appropriate remedy for breach of such duty is, for the reasons explained, not release of the prisoner, for his detention remains the direct causal consequence of his indefinite sentence until his risk is judged by the

> independent Parole Board to be such as to permit his release on licence. The appropriate remedy is an award of damages for legitimate frustration and anxiety, where such can properly be inferred to have been occasioned. Except in the rarest cases it will not be possible to say what might have been the outcome of an opportunity by way of a prison programme which was not provided or was provided late. It will thus not, except in the rarest cases, be possible to establish any prolongation of detention."

[52] I must also bear in mind paragraph 42 of the decision whereby the court states that:

> "The ECtHR does not however insist at the international level on standards of perfection that would be unrealistic, bearing in mind the numbers of prisoners involved and the limits on courses, facilities and resources in the prison system. Nor should domestic courts do so."

[53] It seems to me that the overall effect of this dicta is that the court must analyse the facts of each individual case. In this case the issue is whether the failure to provide specific domestic violence work breaches the public law duty ancillary to Article 5 in the sense that the failure did not allow the applicant a reasonable opportunity to establish that he was no longer such a risk that he needed to be confined.

[54] Mr Southey QC argues that there is a clear breach of the public law duty in that domestic violence was obviously a treatment need for this applicant from the outset as articulated in the Pre-sentence Report. It was then clearly flagged in the original sentence plan and in the plans thereafter. He says that the Parole Commissioners could not have been clearer and that the applicant had no chance of achieving parole without this work. He was denied release post his parole date which was June 2012 until August 2014, a period of over 2 years. Mr Southey argued that the applicant's case was similar to that of Haney and Massey before the Supreme Court. He argued that I could infer frustration and anxiety on the part of applicant for the actions of the Prison Service and as such that the applicant was entitled to an award of damages.

[55] Dr McGleenan QC argued that the applicant was offered many programmes whilst in prison which were essential to deal with a myriad of issues particularly alcohol and drug misuse. He says that the IDAP programme is simply not available in custody. He says that when a different line was taken by the prison authorities, namely the CSCP programme, the applicant refused to undertake assessment. He says that the prison authorities did react to the applicant's particular circumstances in the forms of other courses which were offered to him. Dr McGleenan QC says

that account should be taken of the applicant's recall which clearly points to the inherent failings on the part of the applicant. He says that a declaration is a pointless remedy and if considering damages it is the modest level set by the Supreme Court for anxiety and frustration which is relevant. Dr McGleenan thought this applicant's case was analogous to that of Kaiyam in the Supreme Court. He also raised the fact that this type of case would be best dealt with in an alternative forum given that the law is settled and this is effectively an analysis of individual circumstances against established principles.

[56] I have considered the oral submissions made by both counsel. I have also considered their written arguments. I have considered the case made upon affidavit by the applicant who has filed a number of affidavits in these proceedings. They are the affidavits sworn on 21 March 2014 and 28 October 2015. I have considered the respondent's case made out in the affidavit of Fiona McQuade, Psychologist, sworn on 27 August 2014. I have also considered the affidavits of Andrew Tosh sworn on 27 August 2014 and his second affidavit of April 2015. Mr Tosh is the Governor within the Offender Management Unit based at HMP Magilligan. I have read the affidavit of Jackie Bates-Gaston which was sworn on 12 August 2014. Ms Gaston avers that she has over 22 years working as the Chief Psychologist within the Northern Ireland Prison Service.

[57] In terms of the public law duty at issue in this case both counsel referred to the fact that a convention right is engaged and as such there is a point about the intensity of the review - see Pham v Secretary of State [2015] 1 WLR 1591. Having considered this both counsel agreed that there is unlikely to be any difference between the standard of review imposed by Article 5 and common law in this case. This seems correct to me given the clear exposition of the duty set out by the Supreme Court at paragraph 41 of the Haney judgment.

[58] Counsel referred me to R(Weddle) v Secretary of State [2013] EWHC where the domestic law was recently reviewed as follows:

(a) there is a public law duty to provide prisoners with the means to demonstrate risk reduction at the end of the minimum period of custody. A breach of this duty occurs when there has been a failure to provide appropriate systems and resources; and

(b) there is a separate duty to act rationally, it would be a breach of the principle to make release dependent upon a prisoner undertaking a course without making reasonable provision for such courses.

[59] I do however bear in mind that this case concerns a potential breach of Article 5 of the European Convention on Human Rights which is the right to liberty. I also bear in mind that the James case involved the complete failure to adequately provide interventions for prisoners sentenced to IPPs. That is not the case here. However, the individual cases that went before the Supreme Court in Haney make it

clear that a breach can occur by reason of the failure to provide appropriate courses notwithstanding the provision of other services and as a result of delay. It seems to me that this issue can therefore arise in an individual prisoner's circumstances and does not require the systemic failures that were apparent in the James case.

[60] I must however consider the inevitable imperfections within systems such as the Prison Service. In that regard I take into account the Supreme Court analysis at paragraph 60 of the Haney decision where the Court states:

> "It is no doubt the case that the prison system could have achieved what would have been, for Kaiyam, a more extensive provision of courses, for example if the possibility of an SCP course had been identified sooner than it was. However, to say that more extensive coursework could have been made available to him is a very long way from saying that he has not been provided with a reasonable opportunity to rehabilitate himself and to demonstrate that he no longer presented an unacceptable risk of serious harm to the public, and thus that there has occurred a breach of the implied ancillary obligation in article 5. Article 5 does not create an obligation to maximise the coursework or other provision made to the prisoner, nor does it entitle the court to substitute, with hindsight, its own view of the quality of the management of a single prisoner and to characterise as arbitrary detention (in the particular sense of James v UK) any case which it concludes might have been better managed. It requires that an opportunity must be afforded to the prisoner which is reasonable in all the circumstances, taking into account, among all those circumstances, his history and prognosis, the risks he presents, the competing needs of other prisoners, the resources available and the use which has been made of such rehabilitative opportunity as there has been."

[61] Paragraph 91 of the decision also refers to the fact that there is no positive duty upon the Prison Service to provide a particular course, in the Robinson case the ESOTP course.

[62] The cases in my view in this area will all be fact sensitive but as counsel have referred to individual cases I will offer some brief comment upon them. In Haney's case it seems to me that the critical factor was the Secretary of State's letter stating that he was to be transferred to an open prison, that was a clear identification of the reasonable opportunity that he should have been able to avail of to demonstrate that he was no longer a danger and given that his transfer was delayed for a year he was able to establish legitimate frustration and an award of damages of £500.

[63] In Kaiyam's case he did receive courses in prison but complained that there were delays in providing the correct courses for him. The court found that even with the benefit of hindsight there had been some mismanagement it was understandable. In particular the court found the applicant's conduct was relevant, his poor response to courses, and his personal preference for a transfer to a prison near his home. Kaiyam's case was dismissed.

[64] Massey's case did succeed in that he needed a specialist course to deal with his sex offending namely the ESOTP course. A timetable was set for that but not honoured and as a result an unacceptable delay of about one year occasioned a finding of legitimate frustration and award of £600.

[65] In Robinson's case, in which Lord Mance dissented, there was also a delay in providing the ESOTP course. However, in that case it seems clear that completion of the course was not a condition of future release and no timetable was set for it as in Massey's case. It seems in Robinson's case there was a considerable period pre-tariff where other work could be done and ESOTP was not the "acid test" by which alone he could demonstrate his safety for release. In Robinson's case his denial of the significant sexual offences appeared to be a considerable bar to any therapeutic intervention for him.

[66] Following from the above my findings on the four issues I have identified are as follows:

(i) In relation to the first issue I have to decide whether the applicant was afforded a reasonable opportunity to satisfy the Parole Commissioners that he should be released. He essentially had to satisfy them that it was no longer necessary for the protection of the public from serious harm that he should be confined. It is clear that the applicant should have been allowed to demonstrate that pre-tariff expiry, that is pre-10 June 2012 and thereafter post tariff the duty does remain upon the State.

(ii) In deciding this question I keep in mind that the systems within the Prison Service are not perfect and delays will be apparent in systems.

(iii) I accept that the applicant demonstrated that he posed a risk as a result of various issues pertaining to his offending behaviour. In particular I am conscious that given the very serious nature of his offending and presentation that he had obvious issues with anger management and substance misuse. It inevitably follows that he would have to address these issues in the prison setting and as such it does seem to me that he was offered a myriad of courses which did reduce his ACE score incrementally. I consider that it is significant that he was compliant in relation to these courses and that he did well. At various points in the papers his behaviour is referred to as exemplary. As regards issues such as alcohol misuse the applicant had got to a point where

the Parole Commissioners were saying that the risk was at a stage where the applicant simply needed to be tested in the community.

(iv) I understand the case made in the affidavit of Mr Tosh that the applicant had the benefit of many courses, more than other prisoners, however the work he needed to satisfy the Parole Commissioners was overlooked.

(v) It is clear that domestic violence was a specific issue which was identified from an early stage and which remained unaddressed for a considerable period. I understand that the IDAP course was identified but that this was clearly a community based course as the applicant's own lawyers asserted at various Parole Commissioner hearings. The prison authorities are under no obligation to provide a specific course in any event as reiterated by the legal authorities in this area. However, there is a duty upon the authorities to deal with the core treatment need. In April 2012 it became apparent that prior to completing IDAP in the community the Parole Commissioners would require preparatory work regarding domestic violence. This is clear from the Parole Commissioners consideration in April 2012 and October 2012 when the Commissioners dealt with this applicant's case. In particular at paragraph 32 of the October 2012 Parole Commissioner's decision reference is made to the fact that the current crucial and overriding factor is the completion of this specific work and the Parole Commissioners in my view make it clear that such work is essential prior to any consideration of release.

(vi) From this point I consider that there were delays in implementing the offence based domestic violence work which seemed to me to then be identified as either the CSCP or one-to-one counselling. The first programme was tried but unsuitable and it is clear that the applicant did not help himself by initially refusing to engage with that assessment leading to a delay. The assessment of him and the ruling out of the CSCP programme occurs in November 2012 and it is at that stage that the alternative one-to-one counselling which was already identified is actioned. As far as I can see there is a delay in referring the applicant to that counselling because he appears to only be referred in May 2013 and the work begins in October 2013. I cannot uncover any reason for this. I think that is a failing on the part of the prison authorities and it led to a situation where yet again the Parole Commissioners were unable to recommend release upon licence in October 2013.

(vii) The Parole Commissioners in October 2013 are clear in my view as to what is required. Again they do not underestimate the other issues that the applicant presents with but they refer to these being ready to be tested in the community. The Parole Commissioners refer to the domestic violence issue at one point as "the elephant in the room" and a number of witnesses refer to the applicant as having been failed by the system. The work that remains outstanding before they could look at release on licence is the specific

domestic violence directed work. In that sense I think that completion of this particular type of work was the "acid test" prior to release upon licence.

(viii) It is significant that when the specific domestic violence work in the form of 1:1 counselling was completed, the applicant was able to convince the Parole Commissioners that he should be released on licence.

(ix) I consider that the affidavit of Ms Blud does not answer the case made against the Prison Service because if there was an issue regarding specific domestic violence work in prison it should have been stated from the outset and removed from sentence plans and the Parole Commissioners' consideration.

[67] So in relation to the first issue, I consider that there has been a breach of the public law duty to afford the applicant a reasonable opportunity to rehabilitate himself, including the provision of rehabilitative courses and facilities in prison, and thereby to demonstrate to the Parole Commissioners that he no longer presented an unacceptable danger to the public. I consider that this breach of duty occurred for a period of approximately 11 months from November 2012 to October 2013. It seems to me that these findings deal with the issue of declaratory relief and so the remaining issue for determination is the claim for damages.

[68] In relation to this final issue I was referred to the case of R (Sturnham) v Parole Board (Nos: 1 and 2) [2013] 2 AC 254. This decision pre-dates Haney and it is based on the European Court's analysis in James. However, I was referred to the judgment of Lord Reid in that case in relation to the appropriate award of damages. I say at the outset that I consider that in the case of this applicant I am simply looking at just satisfaction for anxiety and frustration for a period of 11 months. I am not prepared to consider any further compensatory award which would take into account consideration of earlier release. In that respect the Sturnham case does differ from this case but I note the points made by Lord Reid particularly at paragraph 13 and also paragraphs 83-87.

[69] Before I deal with that issue I should say that I consider that the Haney case gives appropriate guidance in relation to damages for anxiety and frustration in this type of case. It seems to me that I can infer anxiety and frustration on the facts. It also seems to me that the appropriate award for this type of breach is one of £500 damages following from the decision in Haney. I do not consider that this case falls into a category described as rare by Lord Mance and Lord Hughes in the Haney case where it is possible to say what might have been the outcome of an opportunity by way of a prison programme which was not provided or was provided late. Mr Southey QC did tentatively try to argue that I might have considered this a case where he could establish prolongation of detention but I am not prepared to find for the applicant on that basis.

[70] I have considered the submissions of Dr McGleenan QC in relation to the effects of recall upon an award or a potential award of damages. I consider that it is

entirely appropriate to make the point that the applicant should not be compensated in damages given that he was recalled to prison fairly soon after his release on licence for breach of a licence including a failure to attend to the specific domestic violence programme namely the IDAP programme. This issue has troubled me and I have considered it in the context of the comments of Lord Reed in the Sturnham case to which I have just referred. At paragraph 83 of that case Lord Reed refers to this issue where he says:

> "Hooper LJ also rejected a submission that events following Mr Faulkner's release were relevant to the issue of quantum. He observed that it would be speculation to say that, if Mr Faulkner had been released earlier, he might have been back in prison a few months later for breach of his licence; and, furthermore, that taking into account that Mr Faulkner spent a further six months in prison following his recall, for conduct of which he was ultimately acquitted, there was no reason why his damages award should be reduced. I agree. The court cannot reduce the damages it would otherwise have awarded on the basis of speculation. It is possible to conceive of circumstances in which a different conclusion might be appropriate: for example, where the claimant was recalled after committing an offence which he had been planning prior to his release and which would probably have been committed earlier if he had been released earlier. This is not however a case of that kind. On the facts of Mr Faulkner's case, including his acquittal of any criminal responsibility in respect of the circumstances leading to his recall, the court is not in a position to say that, if he had been released earlier, he would simply have behaved that much sooner in the manner which led to the revocation of his licence."

[71] In the summary of conclusions of Lord Reed at paragraph 13 to which I have already referred at sub-paragraph 9 he says:

> "It will not be appropriate as a matter of course to take into account, as a factor mitigating the harm suffered, that the claimant was recalled to prison following his eventual release. There may however be circumstances in which the claimant's recall to prison is relevant to the assessment of damages."

[72] The Sturnham case as I have said is in a different context where prolongation of detention was established and subsequent to that an issue of reduction or disallowance of damages was considered. In the case of the applicant I have already

said that my consideration is to look at whether or not I can infer anxiety and frustration over a limited period of 11 months and thereafter whether or not that then justifies an award of some £500. Having considered this matter I have concluded that the damages award flows from the breach of the public duty and in these circumstances I can infer anxiety and frustration on the part of the applicant and so I should award him £500 in damages to reflect that. I do not think that I can either reduce or remove the award of damages on the basis of his subsequent reprehensible behaviour.

[73] As will be apparent from this judgment this decision is based upon a fact based analysis of the individual circumstances of this prisoner, applying settled law as to the ancillary duty under Article 5 imposed upon public authorities in this type of case. It seems to me that in future cases, if these issues arise, they may be better dealt with in an alternative forum which is more suited to undertaking fact finding exercises. In this case I have concluded that I should deal with the issue as leave had been granted and the case was prepared for hearing and it would not be cost effective to postpone decision making to another court. That does not mean that this type of case may not be better heard in an alternative forum in the future.