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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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Olchov's (Dimitris) Application [2011] NIQB 70

AN APPLICATION FOR JUDICIAL REVIEW BY

DIMITRIS OLCHOV

_____

TREACY J

[1] The applicant is a recalled determinate custodial sentence prisoner whose case has been referred to the Parole Commissioners for Northern Ireland in accordance with Article 28(4) of the Criminal Justice (Northern Ireland) Order 2008. The applicant applies for judicial review of two decisions namely a decision of 4 February 2011 in which the Parole Commissioners directed that the applicant should not be released and a further decision dated 2 March 2011 by which the Parole Commissioners declined the applicant's request for a hearing before a Panel of three Parole Commissioners.

[2] In an earlier judgment **[2011] NIQB 31** I rejected the applicant's complaint that he had a *right* under the 2009 Rules to "require an oral hearing". That decision has been appealed and the Court of Appeal has indicated that before proceeding, the second limb of his judicial review, with which this judgment is concerned, should be first determined.

[3] The relevant grounds of challenge are set out at paragraph 3(d) and (e) of the Order 53 statement:

> **"(d) The decisions of the Parole Commissioners dated 4 February 2011 and 2 March 2011 to the effect that the applicant not be released were unfair and unreasonable in that:**

(i) The decisions alleged that the applicant represented a risk to the public without signifying the *nature or extent* of that risk.

(ii) The decisions relied upon the applicant's previous non compliance with licence conditions without properly taking into account the *reasons* for such non compliance.

(iii) As a result the decisions unreasonably and unfairly equated the previous non compliance with the licence conditions as the reason for the applicant's continued detention.

(iv) The decision makers failed to consider whether the re-release of the applicant on foot of stricter licence conditions would satisfy the test for release.

(e) The decision of 2 March 2011 wherein the Parole Commissioners deny the applicant an oral hearing was in any event unreasonable and unfair in that the decision unreasonably concluded that:

(i) There was no realistic prospect of release being directed by an oral hearing panel.

(ii) There was no dispute of fact crucial to the determination of the reference that could only be decided after an oral hearing.

(iii) That the assessment of risk did not require oral evidence.

(iv) Or that fairness did not dictate that the applicant's case should be considered at any oral hearing."

Background

[4] On 28 April 2009 the applicant was charged in respect of alleged offences of threats to kill, Section 42 assault and blackmail said to have been committed on 26 April 2009. He was remanded in custody and remained in custody until 24 August 2009 when he was released on bail. Whilst on bail he lived with friends in the Randalstown area.

[5] On 8 March 2010, following the addition of a count of harassment to the indictment, he pleaded guilty and the remaining counts were not proceeded with. The Crown opened the case on the basis that jealousy over a female was the underlying issue. Her Honour Judge Loughran sitting at Omagh Crown Court on 8 March 2010 imposed a determinate custodial sentence of 18 months made up of 121 days custody and 14 months licence. Taking into account the length of time that he had spent in custody prior to his release on 24 August 2009 the applicant was at the time of his sentence time served.

[6] The licence, issued under Article 17 of the 2008 Order provided that whilst on licence the applicant must comply with various conditions as determined under Article 24(3) of the Order and the 2009 Rules which included keeping in touch with the probation officer, permanently residing at an address approved by probation, no travel outside the UK without prior permission, not behaving in a way that undermined the purposes of release on licence and not committing any further offences.

[7] Within less than 3 weeks of having been released on licence the applicant was on 28 March 2010 arrested for motoring offences. On the following day, 29 March, he was convicted of driving offences namely, taking a vehicle without the owner's consent, driving with excess alcohol, no licence, driving whilst unaccompanied. He was disqualified for 12 months, fined £350 and given a conditional discharge for 12 months.

[8] Based on the applicant's instructions his solicitor, David Jones, of McCallion Keown, solicitors, has averred as follows:

> **". . . During March 2010 the applicant had been attempting to get probation ("the PBNI") to approve an address at which he might live. He had intended to live on release with his partner VB in the Dungannon area . . . They would not "approve" this address. The grounds for such non approval are not entirely clear but the applicant believes that PBNI would not approve this address due to their concern that the applicant if living at that address would be sharing a home with VB's son. PBNI at that stage appeared to be of the opinion that the applicant had a criminal record which included the rape of a *minor*. The applicant's recall dossier subsequently received from the authorities makes allusions to this alleged fact i.e. that the rape had involved a minor, but accepts that PBNI have no evidence to substantiate this allegation or rumour.**

> **14. This assertion is totally incorrect. The applicant instructs me . . . that the rape conviction relates to an incident in which he and a number of other men were involved with two prostitutes . . . Neither of these prostitutes were minors . . . The applicant instructs that the prostitutes sought to extort money from him and the other men and complained to police when they would not pay out. The allegations were then contested on the basis of consent. It is reasonable to presume, however, that this account was not accepted by the trial court.**
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> **15. He offered PBNI a number of other possible addresses in the Dungannon area as possible places of residence but PBNI would not approve these addresses either.**
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> **16. As a result of PBNI's refusal to approve any other address the applicant was effectively required to agree to stay at a probation hostel in Belfast. On 30 March 2010 the applicant agreed with PBNI that he would stay at the Dismas House Hostel in Belfast. The hostel imposed a curfew** [700pm -9.30am and 2.00pm-5.00pm]**. By virtue of being required to stay at this address the applicant was thus de facto required to abide by this curfew, even though his licence conditions did not contain any requirement that he abide by any such curfew.**
>
> **17. . . . As a result of his annoyance at the manner at which he had been treated by PBNI he left the hostel on 1 April 2010 and did not return."**

[9] On 2 April 2010 the PBNI initiated the recall procedure providing a recall report for the attention of the PCNI. Under Article 28(2)(a) of the Order the PCNI have the power to recommend the recall of a licensed prisoner. The report stated inter alia that the applicant was then assessed as posing a high likelihood of reoffending. It further indicated that it could not be assumed the applicant presented a risk of *serious* harm. The report included recommendations for further licence conditions to be included in the licence including supervision of relationships, no unsupervised contact with minors, offending work and no alcohol in the event that the applicant had his licence granted again following recall. The report recommended his recall.

[10] Paragraph 3 of the recall report, entitled "offence details," describes the index offence in a way which gives it a somewhat different flavour to that

which appears from the applicant's solicitors transcript of the sentencing hearing. It stated:

> **"Harassment (11/04/09); Victims Marc Ballan and Aleksandra Paspkina. Facts outlined that Mr Olchov had threatened to kill the victim and his wife if he did not pay him money for having a sexual relationship with his girlfriend some years ago. A further offence of "threats to kill" against the same couple was left on the books. This couple have restraining orders against Mr Olchov which are live until 8 March 2013."**

[11] The offence details then go on to record the applicant's offending history including the driving offences, referred to above, and continues:

> **"Mr O has a previous conviction for rape in his country of origin, Lithuania, which was committed in 2000 – PBNI have requested further details about this offence however to date have not received clarification of victim details.** ***It is understood, but not confirmed, that the victim was a 14 year old prostitute. It is believed that Mr O was part of a gang who raped the child."*** **[**emphasis added**]**

[12] Paragraph 4 of the recall report which examines the circumstances and details of the licence breach makes very uncomfortable reading. He was placed in Dismas House the rules of which included a curfew prohibiting residents to leave the hostel before 9.30am. He was also required to return to the hostel and remain between the hours of 2.00pm and 5.00pm and not leave the hostel after 7.00 pm.

[13] It is plain that although he "signed up" to this placement and had explained to him the importance of adhering to the hostel supervision plan and licence requirements he was not "happy" about the curfew times. The recall report also records him expressing his wish to return to the Dungannon area to be close to his family and friends. He also "expressed his disagreement and frustration with the licence requirements and PBNI procedures".

[14] In describing his rape conviction in Lithuania the author of the recall report said that it was "understood" that the victim was a 14 year old prostitute and that it was "believed" that the applicant was part of a gang who raped the child. This theme is picked up in a number of places in the recall report. For example under paragraph 4 it's recorded that the applicant had been in contact with a number of vulnerable families and that "there are concerns regarding the nature of these relationships and risks to children". In the same section of the report it refers to the applicant not having engaged in any meaningful manner

and "[he] has not been transparent regarding associates *or previous offence details*". It also states that "his sexual offence occurred in 2000 and details remain *unclear* . . . At this point no agency has been able to confirm if this offence was committed against a child or adult, either male or female . . . There are some *opinions* that this offence was against a 14 year old female prostitute and was carried out in the company of six other peers . . .".

[15] On 2 April 2010 a PCNI Commissioner recommended, under Article 28(2)(a) of the 2008 Order, that the applicant should be recalled. The stated reasons for that recommendation were as follows:

> **"He is in breach of condition 6(c) imposed on him on his release from custody on 8 March 2010 under the Criminal Justice (Northern Ireland) Order 2008 that he shall "permanently reside at an address approved by the probation officer and obtain the prior permission of the probation officer for any change of address".**
>
> **Having been approved to reside at Dismas House Hotel, Belfast on/from 30 March 2010, he failed to return there on 1 April 2010 without explanation and his current whereabouts are unknown. He has thus behaved in a way which has undermined the purposes of his release on licence – to protect the public, prevent reoffending and the rehabilitation of the offender. As a consequence of this behaviour, following very soon after his further conviction on 29 March 2010 of offences that included driving with excess alcohol, his supervision on licence cannot currently be considered feasible. The public has thus been placed at unacceptable risk. I thus recommend that [he] should be recalled to custody."**

[16] On 2 April 2010 the Secretary of State then revoked the licence under Article 28(2) of the Order.

[17] The applicant maintains that having left Dismas House Hostel on 1 April he went and stayed with friends in Dublin for approximately one week where he engaged in taking illegal drugs including heroin. He then returned to Lithuania to live with his family for a period. Whilst in Lithuania he made attempts to address substance abuse issues which were relevant in his case by attending for a one month course at the Klaipeda Centre for Addictive Disorders, Klaipeda, Lithuania. It was accepted by the respondent that he had indeed attended such a course. It is noted that although this course only lasted one month he did not return to Northern Ireland until in or about 8 November

2010 when he presented himself to police at Musgrave Street police station when he was recommitted to custody. He maintains that having completed the course at the Klaipeda Centre that he stayed, as he put it, "some further time with his family".

[18] On 9 November 2010 he was convicted at Belfast Magistrates' Court for (1) failing to notify police of a change of address; and (2) failing to notify police of an intention to travel. Both were offences contrary to Section 91(1)(a) of the Sexual Offences Act 2003. He received two two month concurrent sentences.

[19] As a result of being recommitted to custody the process of consideration of his recall was again revived.

[20] On 10 December 2010 the Offender Management Group [OMG] wrote a report to the PCNI on the applicant's performance and behaviour in prison since recall, where relevant to recall. It also advised of any changes proposed by the Department of Justice to the offender's licence should the Parole Commissioners determine that the offender be released under Article 29(2)(a) of the Order. The report dealt with his progress in custody, his risk assessment (high likelihood of reoffending, not assessed as risk of serious harm and LAPP category 2) and his attitude to release. Under the latter section the authors stated:

> **"Mr O perceives that his inability to comply with the requirements of his DCS arose due to his perception that he was being victimised by probation in respect of his previous sexual conviction. Mr O advises that he was shocked by the extent of the rules being placed on him within the hostel setting believing these to be unnecessarily restrictive, consequently choosing to leave. Mr O remains of the opinion that he would not be able to adhere to the boundaries of residing within a hostel on any future release.**
>
> **Mr O states that he would now adhere to any *other* licensed conditions imposed on him, aside from residence in a hostel. However the circumstances resulting in his recall and continued projection of blame on to probation for his current circumstances have demonstrated that his commitment to risk reduction and co-operating with supervision is limited.**
>
> **These factors combined with his lack of personal responsibility and insight into the risk he presents**

make it difficult to be optimistic regarding his potential response to supervision in the future."

[21] Under Section 4 entitled "requirements and objectives of supervision if to be re-released" the author has stated:

> **"Until more detailed offence and background history has been obtained regarding Mr O's history and his sexual offence it is difficult to identify the *nature* of any potential risk, *who* might be at risk from him and *in what circumstances* the risk is greatest. *Only* when this is completed can an appropriate supervision plan be agreed by the agencies involved and put in place to manage risk. This should be a prerequisite of any future release plan should release on licence be considered. Undoubtedly approved, stable accommodation and a candid working relationship with all the agencies involved in risk management and public protection will be elements of such a plan**
>
> **In addition to the standard licence conditions the following additional non standard conditions are recommended should future release on licence be being considered:**
>
> **1. You must permanently reside at an approved address (to be confirmed) and must not leave to reside elsewhere without obtaining the prior approval of your probation officer; and thereafter must reside as directed by your probation officer.**
>
> **2. You must not reside (not even to stay one night) in the same household as *any child* under the age of 18 without the prior approval of your probation officer.**
>
> **3. You must not have unsupervised contact either directly or indirectly with *children* under the age of 18 without the prior approval of your probation officer and/or social services."**

[22] On 30 December 2010 the DoJ Offender Recall Unit wrote to the applicant's solicitors confirming that, as per the 2009 Rules, the dossier to review the decision to recall the applicant had been presented to the PCNI, that a copy of the dossier is also served on the applicant and that a copy of the dossier could be collected as indicated.

[23] On 21 January 2011 the applicant's solicitors filed written representations with the PCNI. At paragraph 2(a) the applicant complained that important information relation to his 2000 conviction had not been obtained and that this was despite the matter having been previously raised by his solicitor with the Probation Board. It also recorded the following:

> **"The various references to his past conviction in 2000 and references to this involving a 14 year old victim are strenuously contested, and the material and source upon which, as the prison instructs, these groundless allegations are based, has not been disclosed. Issue is taken, and concerns are raised by the prisoner in relation to various statements within the parole dossier, for example:**
>
> > **"It is understood but not confirmed,**
> >
> > **"At his point no agency has bee able to confirm that this offence was committed against a child or adult, either male or female,**
> >
> > **"There are some opinions that his offence was against at 14 year old female prostitute . . ."**
>
> **The prisoner must not be placed in the position whereby he is unable to effectively challenge or address material contained within the parole dossier.**
>
> **The prisoner wishes to stress that he disputes the various references within the dossier to the alleged and unconfirmed reports that the conviction in 2000 involved a 14 year old girl. The prisoner submits that he has consistently provided an account when asked by the relevant agencies in respect of this matter, and has continually protested that these unsubstantiated reports are incorrect. The prisoner further understands that such offences would be charged under a different article of the criminal code of the Republic of Lithuania."**

[24] The written representations maintained that despite his conviction for rape in 2000 he had not been suspected, arrested, charged or convicted of any sexual offence thereafter, that he had resided with friends and family including children without incident and that he had complied with his bail conditions since his release in August 2009 until his sentence on 8 March 2010. He further

pointed out that whilst on bail he had resided with a friend *and his family* in Randalstown and that no issue was ever taken with this address and indeed that the police had checked and approved this address for the purposes of bail.

[25] He made the case that following the disposal of his case on 8 March he primarily intended to reside with his partner VB who had a 10 year old son. He contended that probation refused to approve this and a number of other addresses as a result of which he was required to relocate from the Dungannon area to Belfast and resided at Dismas House. He complained that this move resulted in additional conditions being imposed which were not required when he was living in private accommodation, that this caused him significant concern and resulted in him leaving Northern Ireland and returning to Lithuania with the effect that this licence was revoked and he was in violation of a sexual offender notification order. He expressly acknowledged that this was not advanced as an excuse but to explain the decision he made at the time. During the period of his absence in Lithuania from 1 April 2010 to 8 November 2010 he received treatment at the Klaipeda Centre for Addictive Disorders. It was maintained that this was an important consideration submitting that this displayed motivation to address his problems. They pointed out that the prisoner voluntarily returned to Northern Ireland and presented himself, by arrangement, at Musgrave Street police station on 8 November 2010 with full knowledge that he would be returned to custody and face these proceedings. In the event of his release being directed he proposed to reside with his current partner VB at an address in Dungannon where she resides with her son. VB and her son attended with the prisoner's solicitor together with an interpreter and VB, who is currently in employment, confirmed that she wishes the applicant to live with her and her son. She advised that she has known the applicant for approximately 3½ years and has been in a relationship with him for approximately 2½ years. She confirms that she is aware of his rape conviction in 2000 and that the applicant voluntarily disclosed this to her. VB and her son had confirmed that they both wished the applicant to return to live with them as a family and she has indicated that she and the applicant intend to marry and live together and that the applicant acts as a father to her son.

[26] Attached to the written representations was a certificate translated into English from the Klaipeda Centre for Addictive Disorders which showed that between 19 April and 17 May 2010 the applicant finished a full course of the psychotherapeutic programme based on the Minnesota model. According to the applicant's solicitor's affidavit at paragraph 30 the "Minnesota model" is effectively the "12 steps" programme deployed by Alcoholics Anonymous.

[27] On 4 February 2011 the PCNI informed the applicant that the Commissioner directed he should not be released. He was further informed he could request a panel of three Commissioners [ie an oral hearing] to consider his case but that a panel would *not* be appointed *unless* <u>*he demonstrates*</u> to the satisfaction of the Commissioner that:

(i) there is a realistic prospect of release being directed by a panel; or

(ii) there is a dispute of act crucial to the determination of the reference that can only be decided after an oral hearing; or

(iii) the assessment of risk requires oral evidence from you and/or a witness or witnesses; or

(iv) fairness indicates that your case be so considered.

[It is noted that in light of the decision of the Court of Appeal in **Reilly [2011] NICA 6** the criteria for granting an oral hearing have been significantly relaxed].

[28] It also pointed out that if his case was not to be considered by a panel the Commissioners direction would be the final decision of the Commissioners.

[29] Enclosed with the letter of 4 February 2011 was a Commissioners Direction of the same date which stated, *inter alia*:

> **"[3] Following consideration of the evidence and information before me, including written representations on behalf of Mr O . . . for the reasons set out below, I direct that Mr O should not be released at this time.**
>
> **...**
>
> **[6] Mr O has a significant criminal record stretching back to 1997. This record has involved four offences for which Mr O was convicted in Klaipeda Regional Court, Lithuania – these offences being: malicious damage (for which a 2 year suspended prison sentence of 2 years was received), rape; (for which the initial imprisonment period was to be 7 years but this was ultimately reduced to some 4 years) and 2 offences of theft.**
>
> **In relation to the recall Mr O was assessed in the recall report as posing a high likelihood of reoffending and the report added, "based on the current information it cannot be assumed that Mr O presents a risk of serious harm (ROSH) as per PBNI's definition. His sexual offence in 2000 and**

> **the details remain *unclear*. There has been no evidence of further sexual offending since this time. Furthermore, he has not committed a violent offence which could result in the conclusion of ROSH. Mr O has been assessed at category level 1 by LAPP in August 2009 when he was subject to bail conditions for the index offence. This assessment appears to have been arrived at without full consideration of all the *potential* evidence".** [My emphasis]

[30] The recall report also highlighted that there was evidence of substance abuse and increased offending on the part of Mr Olchov and that,

> **"Mr O's current behaviour and presentation are significant contributory factors towards a further offence of serious harm being committed against another person. There is current evidence of *victim access*, rejection of supervision, further offending, substance abuse, emotional collapse and hostility. These are acute risk factors for any rapist".**

[31] Paragraph 7 of the direction summarised in part the OMG progress report and paragraph 8 summarised the written representations provided by the applicant's solicitors including the disputed references within the dossier to "alleged and unconfirmed reports" that the rape conviction in 2000 had involved a 14 year old girl. Under the section entitled "the statutory test and conclusions" the Commissioner, Mr Brian Garrett, stated as follows:

> **"9. The relevant test that must be applied in determining whether Mr O should be released at this time is set down in Article 28(6)(b) of the Criminal Justice (Northern Ireland) Order 2008 which obliges the Commissioners not to release unless satisfied that "it is no longer necessary for the protection of the public" that Mr O should be confined. Accordingly I have considered whether the risk to the public currently presented by Mr O can be safely managed within the community at this time and have concluded that it cannot. Mr O's *offending history*, his *flagrant* breach of his licence conditions, his offending behaviour occurring so soon after his release on licence, his apparent disregard of authority and the absence of any effective sustained significant risk reduction evidence are such that, whilst it is accepted that Mr O does not pose a risk of *serious* harm to the public,**

I do not consider that the risk which exists in relation to Mr O can be safely managed in the community at this time." (Emphasis added)

[32] On 17 February 2011 the applicant's solicitors filed further representations requesting that a panel of three Commissioners consider his case. The reasons advanced were stated as follows:

"(a) It is important that the Parole dossier contents accurately reflect the case position. Mr O submits that the content of the dossier which includes a prosecution outline of case and disputed witness statements in respect of the index offence, creates an impression of unfairness as they do not accurately reflect and set out the circumstances of the offence as established in court, and with respect, have the potential to unfairly prejudice Mr O and mislead the Parole Commissioners. Furthermore, the disputed allegations in respect of his conviction in 2000, referred to within the dossier and the single Commissioner's decision (see paragraph 6) have the potential to influence the mind of the decision maker at first instance. Mr O has disputed the opinions and allegations within the dossier, and he must be afforded the opportunity to address same. In addition, no disclosure has been provided of the basis for these strenuously contested assertions. It is essential that Mr O be afforded the opportunity to seek to rectify this potential for injustice and prejudice.

(b) Mr O refers to a factual inaccuracy within the decision, at paragraph 4, under the subheading 'background' which refers to the conviction harassment relating to two males.

(c) Mr O has a real concern when considering risk, that the single Commissioner has taken into account the prejudicial and disputed material contained within the dossier. The Commissioner refers to Mr O's offending history (see paragraph 9 under the subheading 'the statutory test and conclusions') when considering the question of risk, and it is unclear what this is referring to. The Commissioner also refers to a flagrant breach of licence conditions and apparent disregard of authority. This is based on Mr O's failure to comply with probation requirements which were

imposed without proper evidence. Mr O refers to his original submissions lodged in January 2011 and in particular para 2(a).

(d) Mr O respectfully submits that there is a realistic prospect of his release being directed by a panel following an oral hearing, and that the assessment of risk requires oral evidence to be heard by Mr O and supporting witnesses. The single Commissioner's decision refers to his flagrant breach of his licence conditions, his offending behaviour and his apparent disregard of authority. Mr O wishes to address the Commissioners on these matters. Furthermore, based on the submissions noted above, Mr O robustly asserts that there is a central dispute of fact crucial to the determination that can only be decided after an oral hearing, and that fairness, justice and due process dictate in all the circumstances of his case, that his case be considered by a panel."

[33] On 2 March 2011 the PCNI wrote to the applicant's solicitors enclosing a further decision which stated:

"1. On 8 November 2010 Mr O's case was referred to the Commissioners under Article 28(4) of the Criminal Justice Order. In accordance with the Commissioners' policy the reference was dealt with by a single Commissioner ("the Commissioner") who, in a reasoned decision dated 4 February 2011, decided that the risk to the public presented by Mr O could not be safely managed in the community and he did not direct his release.

2. Under cover of a letter dated 17 February 2011 Mr O's solicitors . . . submitted a reasoned request for a hearing by a panel of three Commissioners as provided for in the Commissioners' policy, which was supported by a statement of reasons. [I interpose here to observe that since the date of this decision the Commissioners' policy in respect of oral hearings has been significantly amended in light of the recent decision of the Northern Ireland Court of Appeal in Reilly]. The Department of Justice has not made any submissions in response to this request.

3. Reason (a) criticises the dossier content in respect of the index offence and the inclusion of prejudicial material relating to Mr O's conviction for rape in Lithuania in 2000.

4. The Commissioner, as I am, was bound by Mr O's conviction for the index offence and it is not permissible to look behind it. Beyond this, there is no reason to believe that the Commissioner attached any significance to either the prosecution outline of the case or disputed witness statements.

5. ***As to the prejudicial material, it is made clear in the dossier that considerable doubt exists as to the circumstances surrounding the rape offence. Commissioners are trained to disregard potentially prejudicial material with no probative value. There is nothing in the Commissioner's decision to indicate that the failed to comply with this requirement and, in making this decision, I too have disregarded the material in question.***

6. Reason (b) refers to a factual inaccuracy in the Commissioner's decision where he deals with Mr O's conviction for harassment. Although it appears that the victims were a man and a woman and not two men this inaccuracy does not appear to me to have any significance.

7. Reason (c) expresses concern that when considering risk the Commissioner may have taken into account prejudicial and disputed material in the dossier and argues that it is unclear to what the single Commissioner was referring in his mention of Mr O's offending history. ***As to the first of these points I repeat what I said in paragraph 5 above.*** **As to the second, I consider that the Commissioner was referring to Mr O's record of criminal convictions** ***and nothing more.***

8. Also in this reason there is criticism of the Commissioner's references to Mr O's flagrant breach of his licence conditions and apparent disregard of authority and it asserts that the "probation requirements" were imposed without proper evidence. Reliance is placed on the submission made to the Commissioners on Mr O's behalf dated 21 January 2011.

> **9. It seems to me that the references complained of are fully justified. The standard licence conditions, to which Mr O's licence was subject, are imposed by law. If he had issues with what was being demanded of him by way of compliance he ought to have pursued these with PBNI, if necessary with the assistance of his solicitors. Instead, having already committed motoring offences, including driving with excess alcohol, he choose to put himself beyond the reach of supervision by leaving the country.**
>
> **10. Reason (d) submits that there is a realistic prospect of Mr O's release being directed by a panel of Commissioners following an oral hearing. In my opinion, there is no such prospect. It is clear that there has been post release conduct on Mr O's part indicating that he poses a significant risk of harm to the public and that it cannot be safely managed in the community. Mr O has had a full opportunity to respond to the case made by the DoJ and detailed written submissions have been made on his behalf. I have no reason to believe that their reiteration before a panel of Commissioners might result in his release being directed. No significant dispute of fact has been identified and, in my opinion, fairness however it is defined or elaborated, does not dictate that his case should be considered by a panel.**
>
> **11. Accordingly, Mr O's request is refused."**

Relevant statutory provisions

[34] For prisoners serving determinate custodial sentences of more than 12 months rules on remission granted under the Prison Rules have been abolished. The provisions of the Criminal Justice (NI) Order 2008 apply in their stead.

[35] In particular, it is necessary to note the purposes of the licence period imposed as a component of a DCS which are set out in article 8(5):

> **"... 'the licence period' means such period as the court thinks appropriate to take account of the effect of the offender's supervision by a probation officer on release from custody –**

(a) in protecting the public from harm from the offender; and
(b) in preventing the commission by the offender of further offences".

[36] By virtue of Art 17(1) a prisoner subject to a DCS is automatically entitled to release on licence on expiry of the custody period of the sentence.

[37] Art 28(2) provides for the revocation of a DCS prisoner's licence and his recall to prison; in such circumstances the prisoner's recall will be referred to the PCNI under Art 28(4).

[38] The PCNI may direct the prisoner's immediate release on licence under Art 28(5), but Art 28(6)(b) provides that they shall not do so unless they are satisfied (in the case of a recalled DCS prisoner) that *it is no longer necessary for the protection of the public that the prisoner should be confined.* This test is to be contrasted with that set out in Art 28(6)(a) in respect of recalled ICS/ECS prisoners: that *it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined.*

[39] Although *protection of the public* is not defined, reading Art 28(b)(b) together with the purposes of the licence period described in Art 8(5), the PCNI is here to be concerned with the protection of the public from the risk of any (not simply serious) harm and/or of further offending.

[40] Furthermore there is no dispute that the single Commissioner accurately summarised the relevant test to be applied – see para.31 above.

Parties Submissions

[41] The applicant's principal submissions on the second limb of his challenge are neatly encapsulated in para 3(d) and (e) of the Order 53 Statement set out above. The applicant contended that the failure to hold an oral hearing was unfair and unreasonable. In light of the decision of the Court of Appeal in **Reilly** it was also submitted that the application of the erroneously restrictive policy on oral hearings required on that account alone that the refusal of an oral hearing be quashed. It was further contended that the Feb decision was infected because it appeared to have been influenced by prejudicial matters to which no weight should have been assigned namely the unproven and disputed allegation that the 2000 rape involved a minor. It was also contended that the March decision was in error in concluding that there was no indication that the Feb decision had been so influenced.

[42] The Respondent challenged these submissions. So far as the refusal of an oral hearing was concerned they submitted that there was no material dispute which required to be resolved in the applicant's case. They questioned the

utility of an oral hearing contending that procedural fairness did not require an oral hearing in the circumstances of this case and that the decision maker was able to fairly conclude ,having regard to the material before him and the issues in play, that an oral hearing could realistically have made no difference. In support of this argument the Court was referred to the decision of the Court of Appeal in ***Reilly*** **[2011] NICA 6** at para38 and to the authorities cited therein.

[43] The Respondent rejected the submission that the Feb decision was infected as alleged and relied on the terms of the decision itself. For similar reasons they submitted that the March decision was unimpeachable and that the Chief Commissioner was correct in concluding that there was no indication that the Single Commissioner had taken into account or been influenced by unproven but prejudicial matters.

Discussion

[44] The Dismas House residence requirement imposed by the PBNI appears to have centred around unproven allegations that the applicant's rape conviction involved a minor. Reliance on this unproven and strenuously disputed allegation may therefore have underpinned the requirement to reside in Belfast at Dismas House with the resultant onerous curfew. According to the applicant this was the context in which he breached his licence conditions and fled initially to Dublin and thence to Lithuania returning voluntarily in November 2010. Paragraph 43 of the applicant's written submissions state as follows:

> **"It was this dispute that led to the applicant's breaching conditions of the licence itself. A hearing before the PCNI that resolved this and other factual disputes in the case would have allowed a logical and reasonable decision as to risk in the case. Furthermore resolution of this issue had potential to resolve the applicant's dispute with PBNI and avoid a repeat of circumstances that led him to breach in the first place.**

[45] On the applicant's argument the underlying and unresolved problem at the heart of this case was the imposition by the Probation Board of an onerous residence requirement at Dismas House resulting in a de facto curfew not imposed as a special license condition. A requirement which may well have been imposed because of the suggestion robustly disputed by the applicant and otherwise unsupported that his rape conviction in Lithuania in 2000 involved a minor. The applicant in effect contends that the licensing structure, specifically the requirement to reside in Dismas House was unjustified, unfair and explained (but did not justify) the breach of his licence conditions. It is only risk which justifies revocation of licence and breach of licence is not of itself grounds for revocation of a licence. Plainly, however,

such breach may evidence the risk justifying the revocation. However the context, background and possible explanation for the breach are important. In the particular circumstances of this case exploration of these considerations might expose the prospect of sufficiently managing any identified risk by devising, if possible, an alternative licensing architecture *following an oral hearing* which could resolve or displace the dispute between the applicant and the Probation Board underpinning the residence requirement which *may* have triggered his absconding. Common law fairness does not require an oral hearing in every case in which a DCS prisoner resists recall. Whether such a hearing is required depends on the circumstances of the particular case. I consider however that fairness dictated such a hearing in this case to explore the considerations just adumbrated.

[46] The applicant complains that both impugned decisions fail to address the reasons for the undisputed breach of conditions and what those reasons might mean in the future if the dispute between the applicant and the Probation Board were resolved or displaced. Identifying the reasons for the breach assist in determining whether the breach is likely to be repeated and whether further or other conditions or supports might reduce risk to an appropriate level. Neither impugned decision approaches the case in this manner as I hold they ought to have done and the applicant was not afforded an oral hearing, as fairness required, to address these matters. Accordingly the decisions must be quashed.

[47] Furthermore in respect of the 4 February 2011 decision the Single Commissioner at paragraph 6 refers to and appears to attribute some weight to a passage from the recall report suggesting that there was *potential* evidence that indicated that previous assessments were too low. This gives rise to the concern that the disputed and unproven allegations may have influenced the outcome. The further decision of 2 March 2011, rejecting the applicant's request for an oral hearing, stated that there was *nothing* in the Commissioner's decision to indicate that he failed to comply with the requirement to disregard potentially prejudicial material with no probative value. I disagree. In the passage from the impugned February 2011 decision referred to above at para.29 above the single Commissioner has expressly referred to and apparently given some weight to such evidence. Nor did the single Commissioner expressly or impliedly disavow having taken such matters into account. Whilst the Chief Commissioner expressly disregarded the disputed assertions in respect of the 2000 rape this was not to the point since his decision was directed to whether this potentially prejudicial material had been taken into account *by the single Commissioner.* For the reasons given his conclusion that there was nothing to so indicate was erroneous. And the decisions must be quashed on this ground also.