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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

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IN THE MATTER OF AN APPLICATION BY BRANDON RAINEY
FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE DEPARTMENT OF JUSTICE
FOR NORTHERN IRELAND MADE ON 1 APRIL 2016

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Before: Deeny LJ, Treacy LJ and O'Hara J

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TREACY LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal from the decision of Maguire J. We have been greatly assisted in the preparation of this judgment by the very careful and detailed reasons given by the Trial Judge in his comprehensive judgment.

[2] The Appellant is Brandon Rainey who was born on 28 August 1996. He is now aged 21 but he was under 21 at the date of sentencing. On 11 March 2015 he was sentenced for offences of (a) rape of a child under 13 (b) attempted rape of a child under 13 and (c) sexual assault of a child under 13.

[3] For these offences he was sentenced by the Crown Court to an Extended Custodial Sentence ("ECS") involving a custodial term of two years followed by an extended period on licence of four years.

[4] As a result of this sentence the Appellant became entitled to release on licence on 1 April 2016. On that day, he was technically released but, later in the day, he was recalled to prison by the Department of Justice ("DOJ"). His period outside the prison seems to have been in the region of five hours.

[5] In these proceedings the Appellant raises two issues: the first is whether his recall as aforesaid was lawful and the second is whether there is an incompatibility between Article 28(6)(a) of the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order") and Article 5(4) of the ECHR.

The Relevant Statutory Provisions

[6] There is no dispute that the Appellant's offences for which he was convicted as set out above are both specified and serious offences for the purpose of Part II of the 2008 Order. At his trial he was found to be a dangerous offender. This meant that his sentencing was to take place within the context of Chapter 3 of Part II aforesaid. The sentence deployed by the trial judge is provided for at Article 14 of the 2008 Order. Article 14 is headed "Extended Custodial Sentence for Certain Violent or Sexual Offences". It provides:

> "(1) This Article applies where –
>
> (a) A person is convicted on indictment of a specified offence committed after the commencement of this Article; and
>
> (b) The court is of the opinion –
>
> (i) that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences; and
>
> (ii) where the specified offence is a serious offence, that the case is not one in which the court is required by Article 13 to impose a life sentence of an indeterminate custodial sentence.
>
> (2) The court shall impose on the offender an extended custodial sentence.
> …
>
> (5) Where the offender is under the age of 21, an extended custodial sentence is a sentence of detention at such place and under such conditions as the Secretary of State my direct for a term which is equal to the aggregate of –
>
> (a) the appropriate custodial term; and
>
> (b) A further period ('the extension period') for which the offender is to be subject to a licence and which is of such length as the court considers necessary for the purpose of protecting members of the public from serious

harm occasioned by the commission by the offender of further specified offences.

(6) In paragraph (5)(a) 'the appropriate custodial term' means such term (not exceeding the maximum term) as the court considers appropriate, not being a term of less than 12 months.
…

(8) The extension period under paragraph (3)(b) or (5)(b) shall not exceed –

(a) Five years in the case of a specified violent offence; and

(b) Eight years in the case of a specified sexual offence.

(9) The term of an extended custodial sentence in respect of an offence shall not exceed the maximum term.

(10) In this Article 'maximum term' means the maximum term of imprisonment that is, apart from Article 13, permitted for the offence where the offender is aged 21 or over."

[7] Article 15 of the 2008 Order deals with the assessment of dangerousness. It provides:

(1) This Article applies where –

(a) A person has been convicted on indictment of a specified offence; and

(b) It falls to a court to assess under Article 13 or 14 whether there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further such offences.

(2) The court in making the assessment referred to in paragraph (1)(b)

(a) Shall take into account all such information as is available to it about the nature and circumstances of the offence;
(b) May take into account any information which is before it about any pattern of behaviour of which the offence forms part; and
(c) May take into account any information about the offender which is before it."

[8] Article 18 of the 2008 Order is of importance to this case as it deals with the duty to release prisoners serving, *inter alia,* extended custodial sentences. It provides:

"(1) This Article applies to a prisoner who is serving-
…
(b) An extended custodial sentence

(2) In this Article –
'P' means a prisoner to whom this Article applies;

'relevant part of the sentence' means –
…
(b) in relation to an extended custodial sentence, one half of the period determined by the court as the appropriate custodial term under Article 14.

(3) As soon as –

(a) P has served the relevant part of the sentence, and
(b) The Parole commissioners have directed P's release under this Article,

the Department of Justice shall release P on licence under this Article.

(4) The Parole Commissioner shall not give a direction under paragraph (3) with respect to P unless -

(a) The Department of Justice has referred P's case to them; and
(b) They are satisfied that it is no longer necessary for the protection of the public from serious harm that P should be confined.

(5) P may require the Department of Justice to refer P's case to the Parole Commissioners at any time –

(a) After P has served the relevant part of the sentence; and
(b) Where there has been a previous reference of P's case to the Parole Commissioners, after the expiration of the period of two years beginning with the disposal of that reference or such shorter period as the Parole Commissioners may on the disposal of that reference determine;

and in this paragraph "previous reference" means a reference under paragraph (4) of Article 28(4).
…

(8) Where P is serving an extended custodial sentence, the Department of Justice shall release P on licence under this Article as soon as the period determined by the court as the appropriate custodial term under Article 14 ends unless P has previously been recalled under Article 28."

[9] Article 28 of the Order deals with the recall of prisoners while on licence. It states:

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

(2) The Department of Justice… may revoke P's licence and recall P to prison –

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

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

(3) P –

(a) Shall, on returning to prison, be informed of the reasons for the recall and of the right conferred by sub-paragraph (b); and
(b) May make representations in writing with respect to the recall.

(4) The Department of Justice… shall refer P's recall under paragraph (2) to the Parole Commissioners.

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

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

(a) Where P is serving an indeterminate custodial sentence or an extended custodial sentence, it is no longer necessary for the protection of the public from serious harm that P should be confined;
…

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

(a) Liable to be detained in pursuance of P's sentence; and
(b) If at large, treated as being unlawfully at large."

Summary

[10] In short summary the key features of these arrangements are:

- What triggers a special sentencing regime is the finding of the court that an offender is a dangerous offender.
- A dangerous offender is one in respect of whom there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.
- In respect of a dangerous offender, he may be sentenced to one of three types of sentence, in descending order of severity. He may be sentenced to (a) a life sentence, or (b) an indeterminate custodial sentence or (c) an extended custodial sentence.

- Where neither (a) nor (b) are appropriate, the offender shall be sentenced to an extended custodial sentence.
- Such a sentence involves the term of imprisonment or detention which is the aggregate of two elements: (a) the appropriate custodial term; and (b) the extension period i.e. the period during which the prisoner will be subject to licence.
- The object of the licence is the protection of members of the public from serious harm occasioned by the commission by the offender of further specified offences.
- In the case of an offender serving an extended custodial sentence he is to be released on licence at the end of the custodial term. The offender, however, can be released on the instruction of the Parole Commissioners ("PCs"), at any date after the half way point of the custodial term.
- However the offender, once released, is subject to the possibility of recall.
- The usual route in respect of recall will be where the Department of Justice decide to revoke the offender's licence and recall him to prison following a recommendation to do so from the PCs.
- It is clear that the Department of Justice have a broad discretion to revoke and recall. This is not confined by any particular statutory criteria.

The Appellant's SOPO

[11] As part of his sentence for the index offences referred to above, the sentencing court imposed on the Appellant a Sexual Offences Prevention Order ("SOPO"). This order is designed to help protect against the commission of further offences of the same type.

[12] The main features of the Order in the Appellant's case were a number of prohibitions on what he could do. Thus he could not contact his victim; or associate with a child under 16 save where this was approved; could not have a child in or on premises where he resides or stays overnight, without permission; could not take up employment which would bring him into contact with a child or children under 16 without written approval; could not be in facilities designed specifically for children's education or play or be in a place which is likely to be frequented by children under 16 without consent; could not enter into any relationship with a female without permission; could not be resident at any address without prior approval; and could not deny police entry to premises where he resided.

The Licence

[13] The arrangements in respect of licences generally are specified in the Criminal Justice (Sentencing) (Licence Conditions) (Northern Ireland) Rules 2009. The licence is a document provided to the offender which enables his release. It is issued by the Department of Justice. It will inaugurate a period of supervision which begins at the time of the commencement of the licence and expires at the end date of the licence. In general terms, the licence will contain standard conditions (found in rule 2),

which derive from the terms of the subordinate legislation *supra,* and conditions specifically aimed at the offender. These are dealt with in rule 3 under the heading "Other conditions of licence". The objectives of supervision are stated in the licence to be (a) to protect the public, (b) to prevent re-offending, and (c) to achieve successful rehabilitation. These objectives derive from the language of Article 24 of the 2008 Order. The offender is under a statutory duty to comply with the conditions of his licence: see Article 27 of the 2008 Order, though it is not a criminal offence to breach those terms *per se*.

The Appellant's Licence Conditions

[14] The Appellant was granted a licence on 1 April 2016. It contained licence conditions applying to him. The licence is said on its face to have been granted under the provisions of Article 18(3) of the 2008 Order but this appears to be an error, as the Appellant was released under Article (18)(8) at the end of the appropriate custodial term.

[15] The licence required him to keep in touch with his probation officer who had a key role to play. It was for him/her to approve where the Appellant was to live, what work he was to undertake and so on. It is clear in the licence that the Appellant "must not" behave in a way which undermined the purposes of the release *viz* the protection of the public, the prevention of re-offending and his rehabilitation. Moreover, he was not to commit any offence.

[16] Included within the additional licence conditions were: conditions dealing with obtaining an approved address; a prohibition on him residing elsewhere without prior approval; conditions dealing with contact with any child under 16 years of age or the victim of his offences; and conditions prohibiting the consumption of alcohol or illegal substances or drugs, backed up by a requirement that he submits as required to drugs or alcohol testing. Condition 8 made clear that if he failed to comply with any requirement of his licence or if he otherwise poses a risk of serious harm to the public, he would "be liable to have his licence revoked and be recalled to custody until the date on which [his] licence would otherwise have expired". There is a clear emphasis in the conditions on the Appellant keeping probation staff aware of his whereabouts and on controls being placed on his ability to make contact with other persons. A specific condition envisaged the Appellant, if living otherwise than in hostel accommodation, being subject to a curfew during certain hours. He was also to attend appointments with his GP and other medical professionals, such as a psychiatrist.

The Background to the Revocation of his Licence

[17] The essential chronology of events is as follows:

Appellant sentenced	11 March 2015
His case referred to PCs by DOJ	12 March 2015

A single Commissioner recommended that the Appellant not be released	15 July 2015
The Appellant was to be released under Article 18(8)	1 April 2016
On that morning the Probation Board for Northern Ireland ("PBNI") decide to make a recall request	1 April 2016
The recall request was notified to DOJ and provided to PCs	1 April 2016
A single Commissioner recommended recall to DOJ	1 April 2016
DOJ decide to revoke the Appellant's licence	1 April 2016
Offender's recall referred by DOJ to PCs under Article 28(4)	4 April 2016

[18] As can be seen from the above, the decision to recall the Appellant was by the DOJ. That decision was made on two principal sources of information. These were the recall request made by the PBNI and the PCs recommendation provided by a single Commissioner.

The Recall Request

[19] The recall request was made by an Area Manager of the Probation Service. It sets out, by way of background, basic information about the Appellant's sentence; the terms of the "SOPO" imposed on the Appellant as part of the sentencing exercise; and the key features of the licence conditions which applied to him.

[20] This document also contains reference to the circumstances of the Appellant's offending, his substantial criminal record and reference to an offence of exposure committed by the Appellant after his sentencing for the index offences, at a time when he was, in fact, in custody.

[21] As regards the risk the Appellant represented, it is recorded that he had been assessed as a high likelihood of re-offending. It is recorded that in recent times he has been managed under the Public Protection Arrangements for Northern Ireland and that, as of 7 January 2016, he had been assessed as a Category 3 offender. Such an offender, it is explained, is "someone whose previous offending and/or current behaviour and/or current circumstances present clear and identifiable evidence that they are highly likely to cause serious harm through carrying out a contact sexual or violent offence". There are only 20 such offenders in this category in Northern Ireland, with only 3 of them being at liberty.

[22] A substantial history is recorded in the recall request about the range of options for dealing with the Appellant's case which had been considered in the run-up to his release on licence. These options included the following:

> "1. Possible referral to a secure Personality Disorder facility in Doncaster to be paid for by one of the Trusts. This option, however, required the Appellant's consent which was not forthcoming.
>
> 2. Possible housing of him in a hostel. This option was not viewed as suitable as the Appellant had in the near past had difficulty when residing at children's homes in England and Northern Ireland. Indeed there had been serious incidents involving him at such homes. When the Appellant had visited a hostel in the recent past, moreover, with a view to a possible placement, he had accessed illicit substances and become incapable. The Appellant appears to have maintained a position that if sent to a hostel he would slash other residents or staff. This led to the view that it would be too risky to place the Appellant in a hostel.
>
> 3. Possible placement of him in approved accommodation. The Appellant had for a time resided in the Juvenile Justice Centre but he was there assessed as being a significant risk to others and there had been violent incidents involving his control, as he had threatened to store and throw blood at staff and others.
>
> 4. Possible housing of him with his father in Lurgan or with his father and his partner in Bangor. As to the Lurgan property, it was viewed as unsuitable as his father as a taxi driver was not going to be at the address for long periods at night and his grandmother and uncle, who lived at the premises, were identified as vulnerable people, both being well into their 70s. As to the Bangor property, it was viewed as too close to where the Appellant's victim lived.
>
> 5. Possible accommodation living with family members in Ballymena. The proposed accommodation was in very poor condition when inspected by probation. His mother, moreover, a recovering heroin addict was present there.

6. Possible housing in a caravan in Millisle."

[23] In short, while the options above were all considered, for various reasons, none of them was judged as suitable for a person in the Appellant's position.

[24] In these circumstances, consistent with his conditions of licence, the recall request refers to a plan which was developed which involved the Appellant, upon release on licence, being taken to an office of the Northern Ireland Housing Executive to see if any appropriate accommodation could be found for him. It is noted that this was to occur at 11am on 1 April 2016 but it is recorded that, before it was to occur, the prison had advised that "he had accessed substances and had been under the influence overnight" and that he "had also failed to take his anti-anxiety medication for 3 days and had refused an appointment with his GP and his psychiatrist".

[25] The document then refers to other information provided to PBNI by the prison. This was that, when told he would be drug tested, the Appellant stated that he would fail on cannabis and that when presented with a drug test he refused to take it.

[26] The recall request then goes on:

> "Mr Rainey has been interviewed by Probation and Police and is assessed as being under the influence of substances.
>
> It is now the position of PBNI that we have arrived at a situation where, because of Mr Rainey's behaviour and the very real threats he has made and the risk he poses to others and himself, it is concluded that his failure to comply with his risk management plan has created a situation where he cannot be safely managed in the community. In these circumstances, given the imminence of the risk to himself and others, a request for his recall is necessary to protect the public and police.
> …
>
> The perceived risk in relation to Mr Rainey's current attitudes and activities are that he:
>
> 30. Has stated that it is [his] intention to 'Get off his head and have sex on the day of his release'. Mr Rainey has already achieved the first of these.
>
> 31. Continues to reject supervision as previously.

> 32. Behaviours that indicate continued use of illegal substances.
>
> 33. Behaviours that are indicating a level of threat towards himself and others.
>
> 34. Behaviours which are unpredictable and cannot be managed safely in the community.
>
> It is clear that Mr Rainey has breached the following licence conditions:
>
> 1. You must not behave in a way which undermines the purpose of the release on licence, which is the protection of the public, the prevention of re-offending and the rehabilitation of the offender.
>
> 2. You must not consume any illegal drugs or misuse substances including prescription drugs."

[27] The document ends with the recommendation that the Appellant be recalled.

The Recommendation of the Commissioner

[28] The recall request went, *inter alia*, to the PCs and a single Commissioner considered the case with a view to deciding whether or not to make a recommendation to the DOJ.

[29] It seems clear that the Commissioner who dealt with the case did so with little advance notice. However, he was able to consider the papers and make a recommendation which is contained within a report produced later on 1 April 2016.

[30] The report runs to 7 or so pages. It is clear from this that the writer had considered the recall request, the PBNI's pre-sentence report relating to the Appellant in respect of his index offences, the terms of the Appellant's licence and the Appellant's previous convictions.

[31] At paragraph 19 of the document the author refers to the test which he had to apply. He said:

> "In considering whether or not an offender released on an ECS licence should be recalled, a Parole Commissioner should determine whether there is evidence that proves on the balance of probabilities a fact or facts indicating that the risk of that offender

causing serious harm to the public has increased significantly, that is more than minimally since the date of release on licence and that the risk cannot be safely managed in the community."

[32] The Commissioner then gave his reasons for recommending recall. He stated:

> "… I am satisfied that Mr Rainey's behaviour … is such that the risk of serious harm to the public has increased significantly (i.e. more than minimally) since his release and that this risk can be no longer safely managed in the community.
>
> I accept that the information from the PBNI in the papers before me establishes on the balance of probabilities that Mr Rainey has behaved in the following ways:
>
> 31. On the day of his release he was found to have been using illicit substances that altered his mood and in the context of his behaviour increases the risk of serious harm to himself and others.
>
> 32. On the day of his release he refused to undergo a drugs test as required under his licence conditions.
>
> 33. His behaviour both prior to and on the day of his release shows continuing attempts by him to manipulate the circumstances of his release so as to frustrate PBNI oversight and control."

The Commissioner went on:

> "The behaviour outlined above is in my judgment a clear breach of Mr Rainey's standard licence condition that specifies he must not behave in a way which undermines the purpose of the release on licence, i.e. the protection of the public, the prevention of reoffending and his own rehabilitation.
>
> In addition, evidence establishes that on the day of his release he informed the prison authorities that he would fail a drugs test because he had consumed cannabis, that he refused to take a drugs test and was assessed during interview by Probation and Police to have been under the influence of substances. I conclude therefore that he also

breached his licence conditions which prohibited the consumption by him of illegal drugs.

All of the aforementioned licence conditions were imposed because they were deemed necessary to manage Mr Rainey's risk in the community. There is also clear evidence from which I can infer that Mr Rainey agreed to abide by these licence conditions and was informed about their nature. The fact that Mr Rainey has breached these conditions in the way outlined above means self-evidently that his risk of serious harm has increased and that the risk cannot be safely managed in the community under such licence conditions. Indeed PBNI have initiated these recall proceedings because in their professional opinion they are unable to manage his risk under licence any longer.

The circumstances as outlined above (when taken in the context of all the evidence before me, including the fact that he is assessed as having a high likelihood of reoffending and posing a risk of serious harm, his behaviour in general and his use of illegal drugs and his lack of self-control in particular, as well as the way in which Mr Rainey has breached his licence conditions) in my judgment provide strong evidence that establishes on the balance of probabilities that the risk of him causing serious harm to the public has increased significantly, that is more than minimally since the date of his release on licence and that the risk cannot be safely managed in the community.

Accordingly, I recommend that Mr Rainey's licence be revoked."

The DOJ's Response to the Recommendation

[33] The decision maker on behalf of the DOJ decided, having considered the PC's recommendation, to accept it. He, therefore, recalled the Appellant.

[34] In these proceedings the decision maker has sworn an affidavit which provides a commentary as to the circumstances which led to his decision. The matter is dealt with between paragraphs 22-37 of his affidavit. From these paragraphs it is clear that the person who was to become the decision maker had been aware of the Appellant's case from at least the week leading up to 1 April 2016. Indeed he records having spoken with a member of the PBNI staff in the run-up to the release. There appears to have been concern about the risks posed by the Appellant and he was informed, in particular, about the difficulty of securing a suitable address on release.

On 1 April 2016 he was alerted to the fact that PBNI was going to submit a recall request. His affidavit makes clear that he was aware of the Appellant's status as a Category 3 offender.

[35] Matters developed swiftly on 1 April 2016. The decision maker first saw the PBNI recall request around lunch time. At or around the same time he spoke with an official of PBNI on the telephone. Shortly after that he was told that the Commissioner was minded to recommend a recall. The decision maker then had a further conversation with the official within PBNI dealing with the case. He was told that the Appellant had said to PBNI staff on the ground that he was hearing voices (but they were not telling him to do anything at the moment). He was also told that the Police Service of Northern Ireland response team which had been present with the Appellant had indicated that they would have to leave to deal with other matters at 2.30pm.

[36] The Commissioner's decision recommending recall was provided to the decision maker close to 2.52pm. At 2.53pm the decision maker was told by PBNI that the Appellant and his father had been abusive to police and their staff and that there might be a public disorder incident. The decision maker made his decision at 3.06pm.

[37] In his affidavit he has outlined how he went about making his decision. He said:

> "In order to reach a decision on recall, I asked myself two questions. Firstly, is there evidence that the risk had increased? On the basis of the reported drug misuse, I concluded the risk of serious harm posed by the applicant post-release had increased more than minimally. Secondly, could the increased risk be safely managed in the community? Based on the evidence available to me, particularly the absence of approved accommodation, coupled with the reduction in PSNI staffing levels, I concluded the risk could not be safely managed."

[38] The decision to recall was communicated orally to those dealing with the Appellant.

[39] At paragraph 37 of his affidavit the decision maker avers that at the time when he made his decision the risk of serious harm had increased significantly.

[40] By letter from the DOJ, dated 1 April 2016, the Appellant was told as follows:

> "From the information provided the Department of Justice is satisfied that the risk of serious harm you pose to the public has increased more than

> minimally since you were released on licence on 1 April 2016. The Department concludes from the information provided that the increased risk can no longer be safely managed in the community."

The Appellant's Evidence

[41] The Appellant has filed several affidavits in these proceedings which have been fully considered by the Trial Judge and this Court. The main points were accurately summarised by Maguire J as follows:

> 1. He viewed himself as being entitled to automatic release on licence.
>
> 2. He accepts that on 1 April 2016 he was released from prison, albeit in somewhat attenuated circumstances.
>
> 3. He accepts that prior to his release he was asked to submit to a drugs test and that his response was that he would fail it as he had used cannabis. He says he told the authorities that his use of cannabis had been 'the week before' and that it would still be within his system. This response on his part is denied by the prison authorities. In any event, he acknowledges that when asked to take the test he refused to do so. This was prior to release.
>
> 4. He accepts that on his release he was told that the intention was to try and find secure accommodation for him.
>
> 5. He accepts that it was a requirement of his licence that, accompanied by a Public Protection Team, he was to be taken to the offices of NIHE after his release.
>
> 6. While at the offices of the NIHE he says that he contacted his father. This was because his name appeared on an application for housing made by his father.
>
> 7. After a time at the NIHE office, he was taken to a local 'Subway' where he had lunch.

8. After lunch he returned to the NIHE office. He says that there was no chance that he was going to be provided with his own accommodation.

9. Around 4pm he was told that he was going to be recalled.

10. He denies that he had accessed substances and had been under the influence of them from the night before.

11. He is adamant that he was not using illicit substances on the day of his release.

12. He avers that he was taking his normal medication for the three previous days, although he had missed doses of it.

13. He accepts that he had refused to make an appointment with his GP.

14. He did not dispute that on an occasion he had told a Forensic Psychologist that on his first day of release he would get drunk and have sex. However, he said that he made this remark because he had been asked a direct question as to how ideally he would spend his first day outside prison.

15. He denies that after his release he had rejected supervision. On the contrary he says he complied with all requests made of him.

16. He denies that while on release he made threats to anyone.

17. He points out that at the time of release he did not have an approved address.

18. He accepted that on a visit to a hostel in the run-up to his release (within a matter of weeks before) he had consumed cannabis and subsequently failed a drugs test.

19. He said he thought that he may have been viewed as being under the influence of substances on the day of

release because of the effects of his medication which he had taken that morning.

20. During the period of his release he said he did not see any Armed Support Unit Officers.

21. He avers that no address was offered to him while he was at the office of the NIHE."

[42] It can be seen from the above that there are points of fact which appear to be in issue as between the official version of events and the Appellant's version.

The Decision

Was the Recall Lawful?

[43] The Trial Judge considered the following in reaching his conclusion that the recall was lawful:

> *"As to the decision as to evidence of increased risk*
>
> - The broad discretion of the decision maker;
>
> - That it was for the decision maker to determine what factors were relevant to his decision;
>
> - That the weight to be attached to the factors was for the decision maker;
>
> - That the manner in which the decision maker approached his task (i.e. to answer two questions being (a) whether there was evidence of increased risk and (b) whether the risk could be managed in the community) was a lawful approach;
>
> - That the decision maker had to make his decision on the material available and that material that later became available could not be considered as regards the lawfulness of the recall decision;
>
> - That the available material was substantial;
>
> - The remarks of Kerr LCJ (as he then was) in Re Mullan's Application [2007] NICA 47 at paragraph [32] of his judgment where the LCJ stated:

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

and at paragraph [34] where he added:

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

- As between the Applicant's case – that behaviour prior to release should not be considered in relation to risk and that, that being the case, at the point of assessment of risk there was not sufficient evidence of an increase of risk arising from post-release conduct – and the Respondent's case – that the concept of risk demanded a global view including assessment of behaviour irrespective of the point in time at which it occurred – the Trial Judge preferred the Respondent's case.

[44] In relation to this first limb of the test the Trial Judge concluded that behaviour prior to release could be relevant. He also found that an inability to comply with the conditions of the licence in practice (specifically in relation to Mr Rainey's housing needs) was also relevant.

[45] The judge concluded at paragraph [56]:

> "On the facts of this case, the court is unable to conclude that the finding of the Department's decision maker that there had been more than minimal increase in the risk the offender represented was wrong never mind outside the discretionary area of judgment available to him."

As Regards the Second Question

[46] The Judge concluded:

"[57] The second question which the decision maker posed was whether in the circumstances which had transpired it could be said that the applicant could be safely managed in the community. To this, he answered that it could not. This was, it seems to the court, a response which was well within the ambit of a rational and proportionate conclusion in the circumstances which have already been explained. This was because not only had the applicant no approved accommodation to go to but he had evinced an apparent absence of commitment to adherence to his licence conditions, which, as already discussed, were central to the management of the offender as a person who was viewed as a category 3 prisoner with a high likelihood of re-offending.

[58]… [The Court]… does not consider that the conclusion it has reached is in conflict with the terms of the decision maker's statutory discretion and it does not consider that the approach the court has taken is inconsistent with the range of authorities in this area. This is especially so in the context of Horner J's judgment in the case of Re Foden's Application [2013] NIQB 2, which was strongly supported by Mr Lavery as the acid test for a recall. In Foden, at paragraph [18] Horner J did not view the issue of recall as being determined by whether or not a licence condition had been breached. Rather he put the matter into a broader context which involved whether there had been an increase (or a perceived increase) in the risk of harm to the public. The increase in the risk had to be significant but he noted that the decision of the department will always be fact sensitive and be based on the facts and circumstances then known (not what may become known at some later date). The court does not believe that its approach in this case is at odds with what was said by the learned judge in Foden. Moreover, in this court's view, another aspect of Foden is very much in line with the court's approach in this case. At paragraph [20], Horner J acknowledged the role of licence conditions, both general conditions and bespoke ones. He notes that their role was to manage the risk of harm to the public which the prisoner may represent on licence. Consequently: "…if [the prisoner] breaches those conditions or refuses to engage with those conditions, so as to give rise to a significant increased

> risk of harm to the public, he should be recalled." This court believes that the underlined words in the passage just quoted have an obvious application to a case like that of Mr Rainey. Finally, the learned judge also unequivocally stated that the increase in risk in a recall case is to be considered in the presence of the conditions imposed by the licence – both standard and bespoke conditions. This has a direct resonance for a case of this type where the prospective level of risk is based on assumption that generally the conditions will be adhered to with the consequence that if they are not adhered to the likely outcome will be that the risk will rise."

[47] The judge then considered the second issue: Is there an incompatibility between Article 28(6)(a) of the 2008 Order and Article 5(4)?

[48] Article 28(6)(a) of the 2008 Order provides:

> "(6) The Parole Commissioners shall not give a direction under paragraph (5) with respect to P unless they are satisfied that –
>
> (a) Where P is serving an indeterminate custodial sentence or an extended custodial sentence, it is no longer necessary for the protection of the public from serious harm that P should be confined…"

[49] Article 5 provides:

> "(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) The lawful detention of a person after conviction by a competent court;
> …
>
> (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

[50] The judge recalled the relevant facts in the instant case as follows:

"[64] It will be remembered that following recall there is an obligation, in accordance with Article 28(4) of the 2008 Order, on the Department of Justice to refer the prisoner's recall to the Parole Commissioners.

[65] This is what occurred in this case on 4 April 2016.

[66] Under the scheme of the legislation, it is for the Parole Commissioners on such a reference to decide whether or not to direct the prisoner's immediate release on licence. Where the Parole Commissioners decide on this course and issue a direction, the Department of Justice is obliged to give effect to it (see Article 28(5)). However, Article 28(6) provides that the Parole Commissioners:

> 'Shall not give a direction… unless they are satisfied that:
>
> > (a) Where P is serving… an extended custodial sentence, it is no longer necessary for the protection of the public from serious harm that P should be confined'."

[51] The Judge then set out the respective arguments as to incompatibility:

"**The Applicant's submission on incompatibility**

[67] ….

(i) Article 5(4) applies to the case of a prisoner who is serving an ECS and who is recalled. His detention post recall has no sufficient nexus or connection to this original conviction. Consequently, it is a fresh detention which is not based on the sentence of the original sentencing court and so cannot be justified by reference along to Article 5(1).

(ii) Where there is "a new deprivation of liberty", as here, the prisoner under Article 5(4) of the Convention is entitled to take proceedings by which the lawfulness of the detention can be decided speedily by a court.

(iii) In respect of such a review, the reviewer, here the PCs, must be entitled to deal with the issue of the lawfulness of

the recall and order release where the recall has not been lawful.

(iv) Article 28(6)(a), however, prevents the reviewer from releasing the applicant in circumstances where the recall was unlawful as the reviewer is bound to order release only where it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined.

(v) Consequently there is an incompatibility between Article 28(6)(a) and Article 5(4).

The respondent's submission on incompatibility

[68] …

(i) If the court holds that the recall in this case was lawful, the issue of incompatibility simply does not arise.

(ii) This is not a case of a new deprivation of liberty. Rather it is a case where there is a nexus or connection between the original sentence of the court and the recall. The modus operandi of the sentencing judge's sentence is well known and defined by law. The sentence pre-ordains a release on licence and the potential for recall. The requirements of Article 5(4), therefore, are subsumed into the sentencing process and cannot be relied on in a case of this type.

(iii) The present process in which the Parole Commissioners are charged with reviewing the whole of the applicant's case is sufficient, in any event, to comply with Article 5(4).

(iv) If the proposition at (iii) is wrong, the availability of judicial review or habeas corpus to test the lawfulness of the applicant's detention is sufficient to meet the requirements of Article 5(4)."

[52] The Court reached a succinct judgment at paragraph [69] of its judgment:

"[69] The court considers that it can deal with the issue of compatibility by determining whether or not Article 5(4) of the Convention applies to the recall situation in this case. On this point, the court is clear that Article

> 5(4) does not apply to the applicant's detention following recall. In this case, an ECS was the sentenced imposed by the trial judge. It was the most lenient of the options available to him in the light of the finding that the applicant was a dangerous offender. The constituent elements of an ECS are well known, have been prescribed by law and are evident from the statutory provisions the court has already cited in this judgment. By way of simple resume, the sentencing judge must determine (in accordance with Article 7 of the Order) the appropriate custodial term and, in addition, must determine the period known in the legislation as the extension period i.e. the period in respect of which the offender is subject to licence. It is these elements together which make up the sentence of the court. Consequently, in this court's opinion, an ECS, properly analysed, is to be viewed as a determinate sentence in the sense that its temporal application is fixed by the court of sentence in advance and, under the terms of the statute, the sentence ends at a finite and definite point. Its character is to be contrasted with an indeterminate sentence in which no release date is identifiable and release depends on a decision about the risk the prisoner represents. The question of release on licence is explicitly dealt with in the Order, as is the issue of recall. The architecture of the statutory scheme, it seems to the court, is such that where there is a recall decision this is not properly to be viewed as inaugurating a fresh detention or a new deprivation of liberty, which attracts Article 5(4) in its own right.
>
> [70] Rather, the true position, in the court's judgment, is that any deprivation of liberty following recall forms part of the lawful sentence of the court consistently with the terms of Article 5(1)(a) of the convention."

[53] The Court then set out the various authorities upon which it relied. First it considered R (Whitson) v Secretary of State for Justice [2015] AC 176 and set out the relevant paragraphs of Lord Neuberger's judgment as follows:

> "38. If one limits oneself to the decisions of the Strasbourg Court… and the reasoning in Giles… the law appears to me to be clear. Where a person is lawfully sentenced to a determinate term of imprisonment by a competent court, there is (at least in

the absence of unusual circumstances) no question of his being able to challenge his loss of liberty during that term on the ground that it infringes Article 5.4. This is because, for the duration of the sentence period, "the lawfulness of the detention" has been "decided… by a court", namely the court which sentenced him to the term of imprisonment.

39. This does not appear to me to be a surprising result. Once a person has been lawfully sentenced by a competent court for a determinate term, he has been "deprived of his liberty" in a way permitted by Article 5.1(a), for the sentence term, and one can see how it follows that there can be no need for "the lawfulness of his detention" during the sentence period to be "decided speedily by the court", as it has already been decided by the sentencing court…

40. On this approach, Article 5.4 could not normally be invoked in a case where domestic discretionary early release provisions are operated by the executive in relation to those serving determinate sentences…

41. However, the issue is complicated by the decision of the House of Lords that Article 5.4 was engaged in West because if the legal analysis just summarised were correct, Article 5.4 would not have been engaged in West. I am bound to say that the decision in West appears to be unsatisfactory in relation to Article 5.4…

43. … Ms Natalie Lieven QC, for the Secretary of State argues that we should follow the Strasbourg jurisprudence, as explained and applied in the Giles case… and hold that Mr Whitson cannot invoke Article 5.4, as, so long as his sentence period was running, it has been satisfied by the sentence which was imposed at his trial.

44. I have reached the clear conclusion… that we should reach the conclusion advocated by Ms Lieven…

46. It would be wrong not to confront squarely the decision in West on Article 5.4 and Lord Brown's obiter dictum in Black's case, para 74. As Elias LJ said… there is "a growing number of cases which have bedevilled the appellate courts on the question whether and when

> decisions affecting prison detention engage"Article 5.4 … I believe that this makes it particularly important we grasp the nettle and hold (i) the decision in West was per incuriam so far as it involved holding (or assuming) that Article 5.4. was engaged, and (ii) the obiter dictum of Lord Brown in Black's case… is wrong in so far as it suggests that the law of the United Kingdom in relation to Article 5.4 differs from the Strasbourg jurisprudence, as summarised by Lord Hope in Giles…"

[54] The Court then considered the judgment of the Scottish appellate court in Brown v Parole Board for Scotland [2015] CSIH 59. The relevant portion of Lady Clark of Calton was reproduced:

> "36. The first question we consider is how an extended sentence under and in terms sec 210A of the 1995 Act should be classified. We note that in terms of sec 210A(2), an extended sentence is defined as the aggregate of 'the custodial term' and a further period 'the extension period' for which the offender is to be subject to a licence. The extension period is selected by the court but the maximum period is limited to 10 years… A person subject to an extended sentence is liable to be detained until the date, on which the extended sentence imposed by the sentencing court expires. Such a prisoner may in fact be released, for example, on mandatory release or at the end of the custodial term but if he is in breach of his licence, he is liable to be returned to custody until the end of the sentence.
>
> 37. We have no hesitation in concluding that, on a proper analysis of the legislation, an extended sentence is a determinate sentence. We accept that as in many sentences which are not extended sentences, the judge in imposing the extended sentence has regard to public protection in the sentencing process along with other sentencing considerations. It is an essential element however of an extended sentence that the court specifies both the custodial element and the period of extension. Under current statutory provisions, the person serving an extended sentence will be eligible for consideration both for discretionary release and as happened in this case, will be released on mandatory release after serving two-thirds of the custodial term. That is a statutory privilege (or in the case of a

> mandatory release a statutory right) given to the prisoner subject to licence conditions. Where the sentence includes an extension period, the sentence will continue for longer than the period of custody until the period of extension has expired. Where an extended sentence is imposed, the court in sentencing has made a specific determination of what public protection requires in relation to both custody and the sentencing period. In our opinion, a critical difference, in comparison to various forms of indefinite sentences for the purpose of public protection is that at the end of the period of the extended sentence, the prisoner must be released. That applies even if the prisoner is considered to be a serious threat to public safety at the end date of the sentence."

[55] The Trial Judge opined that:

> "The elements described above also apply to the present case and so buttresses the conclusion that an ECS in Northern Ireland is to be viewed as a determinate sentence. The only significant difference which the court can see between the Scottish regime… and the Northern Irish extended sentence regime seems to be that in the context of the Northern Ireland legislation there will be circumstances where, because the criterion of dangerousness is fulfilled, an ECS will be mandatory when neither a life sentence nor an indeterminate sentence is required. The court is unconvinced that this factor per se would alter the nature of an ECS as a determinate sentence."

[56] Finally, the court referred to the decision in R (Youngsam) v Parole Board [2017] EWHC 729 Admin in which Turner J rejected the argument that Whiston should be viewed narrowly and applied only to facts similar to those before the Supreme Court. Turner J concluded:

> "Where a person is lawfully sentenced to a determinate term of imprisonment by a competent court, there is (at least in the absence of unusual circumstances) no question of his being able to challenge his loss of liberty during that term on the ground that infringes Article 5.4. The conclusion of the majority in Whiston's case… to this effect should be regarded as binding on all inferior courts notwithstanding the fact that, strictly speaking, it was obiter to the extent that it was more

broadly stated than was necessary for the determination for the central issue in that case."

[57] In view of the above, the Court did not consider other aspects of the compatibility issue.

The Grounds of Appeal

[58] The judgment has been appealed on the following grounds:

1. The Learned Judge erred in law in determining that the Appellant's recall was lawful.

2. The Learned Judge erred in law in determining that Article 5(4) of the European Convention on Human Rights does not apply to the Appellant's detention following his recall to custody.

3. The Learned Judge erred in law in determining that any deprivation of liberty following recall to custody, after the expiration of the custodial element of the sentence, forms part of the lawful sentence of the court consistently with the terms of Article 5(1)(a) of the European Convention on Human Rights.

4. The Learned Judge erred in law in determining that the subsequent decision of the Parole Commissioners for Northern Ireland, dated 1st December 2016, which questioned the lawfulness of the recall after hearing significant oral evidence relating to the recall, was not relevant to the question of the lawfulness of the Appellant's recall or to the question of incompatibility between Article 28(6)(a) of the Criminal Justice (NI) Order 2008 and Article 5(4) of the European Convention on Human Rights.

5. The Learned Judge erred in law in failing to determine on the basis of the grounds as set out in the Order 53 Statement and as relied upon at the hearing, that the Appellant's recall was unlawful.

6. The Learned Judge erred in law in failing to determine on the basis of the grounds as set out in the Order 53 Statement and as relied upon at the hearing, that Article 28(6)(a) of the Criminal Justice (Northern Ireland) Order

2008 is incompatible with Article 5(4) of the European Convention on Human Rights.

Appellant's Arguments

[59] The Appellant made arguments under three headings:

A. The lawfulness of the decision leading to the recall;

B. The Applicability of Article 5(4) to the Appellant's detention following recall;

C. The incompatibility of Article 28(6)(a) of the Order with Article 5(4) of the ECHR.

The Lawfulness of the Decision leading to the Appellant's recall

[60] The essence of the Appellant's argument under this heading is that the recall decision cannot be considered lawful because there was no point at which the Appellant had the opportunity to challenge the facts and allegations relied upon to arrive at that decision.

[61] In arriving at this argument the Appellant relies upon a number of sources.

[62] First the Appellant relies on the remarks by Kerr LCJ in Re Mullan's Application [2007] NICA 47 which were relied upon by the Trial Judge:

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

[63] From the above, the Appellant submits that it is clear that the Judge had assumed that there would be a later review stage and that that review stage - involving a higher standard of decision making and appraisal of the facts - is required to render the initial recall decision lawful.

[64] The Appellant makes similar arguments in relation to the test in *Re Foden* (which refers to whether there is an explanation for a breach of the licence conditions

which excludes fault on the part of the prisoner) and Article 28(3)(b) of the 2008 Order (which provides that the prisoner can make representations in writing in relation to the recall). The Appellant submits that both of these sources support the notion that there must be an opportunity to contest the facts upon which the recall decision is based.

[65] The Appellant notes that the decision is first reviewed by the Parole Commissioners (which may take several months) and that in that review the Parole Commissioners do not consider the recall in isolation but additionally consider the test at Article 28(6)(a). The Appellant submits that if the facts underpinning the recall are successfully challenged and the basis for the recall therefore no longer exists, the Commissioners are nonetheless precluded from directing release unless they consider the prisoner suitable under the statutory test.

[66] The Commissioner making the recall decision in this case did not have the opportunity to hear any challenge to the facts and allegations upon which that decision was made. The Appellant accepts that the decision-maker could only act on the information that was available to him at the time of his decision. However, the Appellant argues that the fact that the facts and allegations grounding the recall decision were successfully challenged on the balance of probabilities before the review panel is relevant to the lawfulness of the initial decision. The Appellant refers specifically to the following facts which were found by the panel of Commissioners:

- Paragraph 34 - The entire episode, as described by every witness who was present, appeared very anodyne, and did not lead the panel to conclude that Mr Rainey was conducting himself in a way so as to cause immediate concern. The panel accepts that it may very well have been the case that Mr Rainey was intoxicated to some degree, but were not satisfied that he did anything of significance marking an escalation in risk, during these few hours.

- Paragraph 36 - As far as Mr Rainey's recall is concerned, the panel feels that the extent and impact of the alleged drug taking or intoxication has been exaggerated and that the difficulties in finding approved accommodation were allowed to persist when they should have been proactively solved.

[67] The Appellant submits that the review by the panel of Commissioners must constitute the review stage envisaged by Kerr LCJ in *Re Mullan's Application* and that to ignore the findings of fact made by that forum in relation to the lawfulness of the recall makes the review stage immaterial and pointless in so far as the recall decision is concerned.

[68] The Appellant submits that the availability of Judicial Review is only effective if the Appellant has the opportunity to challenge the facts relied upon within the recall decision. The Appellant submits that the Judicial Review Court should not be the venue for such disputes of fact or hearings requiring two days of oral evidence. The Appellant submits that the existence of such evidence subsequent to the recall is however relevant to the question of the lawfulness of the recall.

Applicability of Article 5(4) to the Appellant's Detention following Recall

[69] The Appellant submits that detention post-recall is a new deprivation of liberty and he is therefore entitled to a review of the lawfulness of that detention pursuant to Article 5(4) ECHR.

[70] The Appellant submits that R (Whiston) v Secretary of State for Justice [2015] AC 176, which was the leading case when the Trial Judge made his decision, is to be distinguished. The Appellant argues that Whiston concerned a prisoner who had been discretionally released rather than mandatorily released. It is argued that the Appellant in this case had reached the point in his sentence whereby he was no longer being detained under the custodial term, intended wholly as punishment for the index offence. The justification for any recall subsequent to the expiry of the custodial term is solely by reference to the risk of re-offending rather than the original order of the court.

[71] The Appellant relies in this regard on paras 54-55 of the judgement of Lord Slynn of Hadley in R (Smith and West) v Parole Board [2005] UKHL1, the minority judgment of Baroness Hale in Whiston (in particular from paragraphs 52 onwards) and most significantly on the recent Supreme Court decision in Brown v Parole Board for Scotland [2015] CSIH 59:

> "[58] Prisoners who are detained during the custodial term, or during a period ordered to be served under section 16 of the 1993 Act (as explained in para 55 above), are during that period in an analogous position to prisoners serving determinate sentences. They are serving a period of imprisonment of a term of years which the court has stipulated as appropriate for the offence committed. If they are released on licence and then recalled during that period, they continue to serve the period of imprisonment imposed by the court. It follows, according to the Strasbourg jurisprudence relating to determinate sentences, and the majority view in Whitson, that the order of the court imposing that period of imprisonment is sufficient to render their detention during the custodial term "lawful" for the

purposes of Article 5(1)(a), and the judicial supervision required by Article 5(4) is incorporated in the original sentence.

[59] Prisoners who are detained during the extension period, other than by virtue of an order made under section 16 or another sentence, are in a different position in three closely related respects. First, no court has ordered that the prisoner should be detained during that period. Rather, the court has ordered that he should be subject to compulsory supervision in the community during that period. The court has therefore taken the view that, prima facie, the risk to the public can be satisfactorily managed in the community by means of that supervision (otherwise another type of sentence would have been imposed). But in the event that the supervision arrangements break down or fail to achieve their objective, the order has the consequence, under the relevant statutory provisions, that the person is subject to detention if (1) his licence is revoked by the Scottish Ministers and (2) the Board is not satisfied that it is no longer necessary for the protection of the public from serious harm that he should be confined. It follows that if the licence is revoked, the prisoner is not being recalled to serve a period of imprisonment imposed by the court. Whether he is detained, and the duration of any such detention, are determined by the Scottish Ministers and the Board. The fact that the court has set a limit to the extension period does not alter that analysis (see, for example, Van Droogenbroeck v Belgium (1982) 4 EHRR 443, and the discussion of that case in R (Giles) v Parole Board, para 37).

[60] Secondly, the purpose of detention during the extension period is materially different from that of a determinate sentence. In terms of section 210A(2)(b) of the 1995 Act, the extension period is 'of such length as the court considers necessary for the purpose mentioned in subsection (1)(b)', namely 'protecting the public from serious harm from the offender': see para 48 above. The punitive aspect of the sentence has already been dealt with by the custodial term, which is 'the term of imprisonment… which the court would have passed on the offender otherwise than by virtue

> of this section': section 210A(2)(a) where a prisoner serving an extended sentence is detained during the extension period, other than by virtue of an order made under section 16 or another sentence, his continued detention is therefore justified solely by the need to protect the public from serious harm. In terms of section 3A(4) of the 1993 Act, he will be released, following his recall by the Scottish Ministers, only if the Board is satisfied that 'it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined'.
>
> [61] Thirdly, the fact that the prisoner's detention during the extension period has not been ordered by a court, but depends on recall by the Scottish Ministers, means that it must be supervised by a judicial body. That consequence also flows from the fact that the lawfulness of detention during the extension period, for the purposes of Article 5(1)(a) of the Convention, depends on whether or not the prisoner ceases to present a risk to the public of serious harm. That is not a matter which was determined by the original sentence of the court. It depends on factors which are 'susceptible to change with the passage of time, namely mental instability and dangerousness': Mansell v United Kingdom (Application No 32072/96) given 2 July 1997 and Thynne, Wilson and Gunnell v United Kingdom (1990) 13 EHRR 666, para 70. Judicial supervision of detention during the extension period is therefore necessary under article 5(4) of the Convention: see the principles set out in R(Giles) v Parole Board, paras 40-41, which were applied to extended sentences in R(Sim) v Parole Board [2003] EWCA Civ 1845; [2004] QB 1288. The requirement of judicial supervision is met by the provision made by sections 3A(2) and 17(3) of the 1993 Act for reviews by the Board (explained in para 54 above). Since that system of periodical reviews is predicated on the possibility that prisoners may be reformed, the provision of a real opportunity for rehabilitation forms a necessary element of detention during that period."

[72] While acknowledging that the Court did not specifically refer to a departure from Whiston, the Appellant argues that the court did refer to that decision at paragraph [58] when referencing prisoners detained during the custodial period. In

the following paragraph the Court notes that prisoners detained during the extension period are in a different position and that judicial supervision is required of the fresh detention during that period. The Appellant submits that the effect of the decision is therefore that Article 5(4) is applicable to prisoners recalled during the extension period of their sentence.

[73] The Appellant submits that Brown is now the binding authority in relation to cases of a like type to the instant case.

Incompatibility of Article 28(6)(a) of the Order with Article 5(4) of the ECHR

[74] It is argued that the Appellant has not had the opportunity to make representations in respect of the recall decision or to have an effective review of that decision. It is submitted that this is an infringement of his Article 5(4) rights. It is further argued that the review before the Parole Commissioners provided for at Article 28(6)(a) of the 2008 Order is not compliant with Article (5)(4) because of the restriction in that article.

[75] The Appellant relies upon the judgment of Lord Bingham of Cornhill in R (Smith and West) in which the judge noted the quality of review which would satisfy Article 5(4), specifically that the review of the lawfulness of detention *'must be wide enough to bear on those conditions which, under the Convention, are essential for the lawful detention of a person in the situation of the particular detainee.'* Lord Bingham opined that, in the circumstances that pertained in that case, that meant that:

> "…the Parole Board should be empowered (a) to examine whether circumstances have arisen sufficient in law to justify further detention of a determinate sentence prisoner released on licence and, if so, (b) to decide whether the protection of the public calls for the further detention of the individual detainee."

[76] The Judge concluded that the Parole Board was empowered to discharge those functions and therefore Article 5(4) was satisfied.

[77] The Appellant submits that the above reasoning envisages a two stage test: first, whether circumstances have arisen to justify further detention and, if so, whether continued detention is necessary for the further detention of the prisoner. The Appellant argues that the inclusion of the words *'if so'* suggests that the Commissioners should only move to the second test if the first has been satisfied.

[78] The Appellant noted that in Re CL's application for Judicial Review [2017] NIQB 2, Colton J specifically referred to the fact that the Commissioners had examined the recall and found it was justified after hearing and that, having done so, the panel's review satisfied Article 5(4) if it was engaged. The Appellant drew particular attention to the fact that, in Re CL, the panel of Commissioners

considering the case came to the conclusion that the recall was justified and therefore the applicant in that case was in a different position to the Appellant in this case (in circumstances where the panel have suggested that the recall decision was unjust).

[79] The Appellant relies on the following comments from Sir Igor Judge in (R) Gulliver v The Parole Board [2007] EWCA Civ 1386:

> "44. The supervisory responsibility provides a valuable check on the original decision-making process. The recall order is examined by an independent body, the Parole Board. This provides a discouragement for the slovenly or the cavalier or the corrupt. It may very well be that in such cases, if they arise, the very fact that the process has been so characterised may lead the Parole Board to conclude that the risk to public safety is not established. Nevertheless, in the end the decision required of the Parole Board must depend on its assessment of public safety. I doubt whether it is possible to envisage any circumstances in which the Parole Board can recommend release, where it would otherwise refuse to recommend release on public safety grounds, merely because of deficiencies in the revocation and recall process.
>
> 45. There may, of course, be exceptional cases where the revocation decision process is so subverted that the prisoner may seek a difference or separate remedy, by way of judicial review or, indeed, habeas corpus. In such cases the court may be satisfied that the Parole Board may not be able to provide an adequate or sufficient remedy. If so, it will deal with the application accordingly."

[80] In R (Calder) v Secretary of State for Justice [2015] EWCA Civ 1050 Thomas CJ stated at para [45]:

> "In my view therefore the Parole Board has both a power and a duty to consider the decision on recall. For the reasons given by Sir Igor Judge that duty is an important and necessary duty."

[81] The Appellant also relies on A v UK [2006] 26 BHRC 1 as to the nature of the review provided for at Article 5(4), in particular that the review must have the competence to decide upon the lawfulness of detention and order release if the detention is unlawful, it must be more than merely advisory.

[82] The Appellant argues that the present application satisfies the 'exceptional' grounds to which the court referred in Gulliver because the Parole Commissioners described the recall as 'unjust' and 'irregular' and commented that there was 'no justification for the recall'. The panel, referring to the initial recall decision of the single Commissioner noted as follows:

> "The Commissioner applying the test under Art 28(2) did not have the benefit of the oral hearing and the testing of evidence. In paragraph 21 of his decision he relied on the three planks of evidence which were considered in detail at the oral hearing and which did not stand up to scrutiny. Firstly there was no cogent evidence that Mr Rainey took drugs on the day of his release. Secondly he was not offered a drug test on the day of release "as required under his licence", so did not refuse it. Thirdly, some doubt exists over the extent of his "manipulation of the circumstances". The single commissioner under Article 28(2) has to make a quick decision within time constraints on edited and limited information. There is no counterbalancing input from the prisoner. For that very reason one aspect of Article 28(4) is to allow for a "full review of the circumstances of the recall". Given the limited information available to the single Commissioner, the initial recall decision was of little surprise. The recall report he relied upon was not particularly clear in key respects, particularly on the issue of taking drugs post release, and allegedly refusing a drugs test, and these were the key issues upon which the 28(2)(a) recall decision were based. The DOJ could have utilised Article 28(2)(b) in a case like this (and this may have been more appropriate) but that is now academic and irrelevant."

[83] The Appellant argues that the fact that the panel, after hearing oral evidence, found the recall to be 'unjust' is evidence that, had there been an opportunity to make representations prior to the recall decision having been made, the Appellant's position would have been different. The later challenge to the recall decision has resulted in a decision that the original reasons relied upon did not meet the relevant test to recall the Appellant. Despite this, the panel was prevented from directing the release of the Appellant.

[84] The Appellant submits that the only point at which a review before the Panel Commissioners was capable of refusing the recall request or overturning the recall decision was on 1 April when the single Commissioner considered the request for recall report.

[85] The Appellant argues that, as the evidence upon which the single Commissioner relied did not stand up to scrutiny, the oversight of the single Commissioner was heavily weighted in favour of the Department.

[86] The Appellant again notes that the initial decision did not permit the Appellant to have any involvement in or to dispute any matters to be relied upon.

[87] For the reasons above, the Appellant submits that this initial review is not compliant with the Appellant's Article 5(4) rights.

[88] In relation to the later review before the panel, the Appellant submits that the test at Article 28(6)(a) binds the Parole Commissioners to a more onerous test and precludes any successful challenge to the lawfulness of the original decision which caused the deprivation of liberty in the first instance. The Appellant submits that the panel is therefore limited to an advisory function. The Appellant submits that, without any power to release a prisoner in the event the Commissioners decide that the recall was unlawful, their review cannot be an effective one. This more onerous test, it is therefore argued, renders Article 28(6)(a) non-compliant with the Appellant's Article 5(4) rights. In this regard, the Appellant relies on paragraph 44 of the panel decision which states:

> "(ii) The panel has considered the wording provided in the template devised by the ex Chief Commissioner… which appears in the Parole Commissioners handbook. Many parole commissioners are not lawyers and the handbook and templates undoubtedly assist in the provision of uniformity of decision making however the wording in the template stating:
>
> > 'This requires the Commissioners to ask if there is evidence that proves on the balance of probabilities a fact or facts indicating that the risk of P causing serious harm to the public has increased significantly (i.e. more than minimally) since the date of his release on licence and that it cannot be safely managed in the community.'
>
> Does not appear anywhere in the legislation. If we had such a requirement the panel would struggle to justify detention. The difficulty is that there is no mention of this 'requirement' in Article 28…"

Respondent's Arguments

[89] The Respondent's fundamental response to the Grounds of Appeal is as follows:

> "(a) The recall was lawful.
>
> (b) Article 5(4) does not apply to the Appellant's detention following his recall to custody.
>
> (c) Any deprivation of liberty following recall to custody, after the expiration of the custodial element of the sentence, forms part of the lawful sentence of the court consistently with the terms of Article 5(1)(a) ECHR.
>
> (d) Article 28(6)(a) of the 2008 is compatible with Article 5(4) ECHR.
>
> (e) The subsequent decision of the Parole Commissioners for Northern Ireland, dated 1 December 2016, which questioned the lawfulness of the recall after hearing significant oral evidence relating to the recall, was not relevant to the question of the lawfulness of the Appellant's recall or to the question of incompatibility between Article 28(6)(a) of the 2008 Order and Article 5(4) of the ECHR."

Lawfulness of the Recall

[90] In relation to the factual disputes relied upon by the Appellant in relation to the lawfulness of his recall, the Respondent notes that the Appellant - rather than seeking to persuade the court that this recall was unnecessary from a risk perspective (being the statutory test) - is seeking to persuade the Court that only post-release conduct is relevant to risk and that anything that occurred prior to release which impacts on risk should be disregarded. The Respondent rejects this and submits that to approach the matter in that way would run counter to the legislative intention of the 2008 Order, the aim of which is the maintenance of public safety and offender management. The Respondent also notes that the Trial Judge also resolutely rejected this argument and held that all behaviour relevant to the adherence of licence conditions can form part of the decision making process around licence revocation and recall.

[91] As to the lawfulness of the recall, the Respondent notes that the recall decision-maker has a very broad discretion as to the factors that are relevant to that

decision and the weight that he attaches to those factors. The Respondent submits that the decision taken in this case did not fall foul of the principles elucidated in Foden and relies on the Trial Judge's decision at paragraph [58] in that regard.

[92] Ultimately, the Respondent notes that the reliance placed by the Appellant on the later decision of the Parole Commissioners is misplaced because the panel hearing and everything flowing from it is *ex post facto* the decision subject to challenge. The Respondent submits that what the Appellant is in fact seeking to challenge is the lawfulness of the recall having regard to the requirements of Article 5(4) ECHR.

Article 5(4)

[93] The Respondent does not accept that Article 5(4) is engaged in the Appellant's recall and relies on the authorities cited by the Trial Judge in this regard.

[94] In relation to the paragraphs of the UKSC decision in Brown relied upon by the Appellant (particularly paragraphs [58]-[61]) (and which judgment was not available to the Trial Judge), these are relevant to the consideration of the aspects of extended sentences within the context of whether such sentences should attract "a real opportunity for rehabilitation" which was the basis of the appeal, not on how such sentences should be considered for the purposes of Article 5(4).

[95] The Respondent notes that the UKSC did reference Whiston in its judgment without adverse comment on its ratio and without taking the opportunity to import into the decision the minority decision of Lady Hale. The Respondent drew the court's attention in particular to paragraphs [46], [58] and [61]. The Respondent concludes that there is nothing in the decision in Brown which undermines Maguire J's analysis that Whiston should apply to the instant facts and the reasoning therein should therefore be applied.

Incompatibility

[96] The Respondent submits that, once recall is deemed lawful, the issue of compatibility does not arise.

[97] The Respondent argues that Article 28 provides an Article 5(4) compliant process. The Respondent also notes that the instant proceedings provide a stark illustration of how alleged unlawfulness regarding recall may be challenged by way of judicial review, which may be considered by the Court on an urgent basis and involve immediate remedial action, including quashing the licence revocation and recall decision resulting in the release of the prisoner. The Respondent submits that the combination of Article 28 and the availability of judicial review permits for independent oversight of decisions around risk and lawfulness when an offender is recalled.

[98] The Respondent notes that in this case, the Parole Commissioners, following a two day hearing, found the Appellant's continued detention necessary when applying the statutory test, despite having been critical of aspects of the recall process. It further notes that the first instance judge deemed the recall lawful. The Respondent submits that, should the court consider Article 5(4) applicable to the recall, these available systems of redress satisfy Article 5(4).

Discussion

Applicability of Article 5(4) to the Appellant's Detention post-recall

[99] The Appellant seeks to rely on the UKSC decision in Brown v Parole Board for Scotland [2015] CSIH 59. This authority was not available to the Trial Judge and the Appellant argues that this decision has now supplanted R(Whiston) v Secretary of State for Justice [2015] AC 176 as the leading judgment that applies to the within facts.

[100] The Respondent seeks to argue that the paragraphs in the Supreme Court decision in Brown relied upon by the Appellant *'are relevant to the consideration of the aspects of extended sentences within the context of whether such sentences should attract "a real opportunity for rehabilitation" … not on how such sentences should be considered for the purposes of Article 5(4).'* The Respondent further seeks to rely on certain other paragraphs of that decision in which the Supreme Court referred to Whiston without passing judgment on the ratio in that case.

[101] Brown was serving an Extended Custodial Sentence and was detained during the extension period. The recall and review aspects of the Scottish legislation are on all fours with the legislation that pertains in the instant case. However, where a prisoner on licence under that system commits another offence while on licence, the court which imposed the extended sentence may order him to be returned to prison for a stipulated portion of the remainder of the extension period.

[102] In drawing out the similarities and differences between determinate sentences and the sentence being considered in that case, the case drew a distinction between those serving the custodial term or detained on a second determined period pursuant to committing an offence on licence and those otherwise detained while on licence. In doing so, despite the purpose of the analysis being to consider the question whether extended sentences attract a 'real opportunity for rehabilitation', the Supreme Court nonetheless found that detention during the licence period (other than for a new offence) was not the prisoner *'being recalled to serve a period of imprisonment imposed by the* [original] *court'*. That is, the Court found that imprisonment post-release was a fresh detention. It necessarily follows from this that the fresh detention requires the judicial supervision provided for in Article 5(4).

[103] While it is the case that Brown did not comment adversely on the findings in Whiston, it did find that the consequences which flow from a recall of a

discretionally released prisoner (as in Whiston) and a mandatorily released prisoner (as in Brown and in the instant case) are different. It found that where a prisoner was recalled following mandatory release on the basis of a decision as to risk, Article 5(4) applied. It appears that Brown is on all fours with the facts of the instant case and therefore the court is bound to follow it.

The Lawfulness of the Recall

[104] The Appellant first argues that the recall decision was unlawful because he did not have an opportunity to challenge the facts and allegations relied upon to arrive at that decision. That is manifestly not the case. The Appellant had the benefit of a two day oral hearing within which those material facts were challenged.

[105] The Appellant argues that the authorities proceed on the basis that the prisoner will have the opportunity to challenge the facts grounding the recall decision. In this case, the Appellant *did* have the opportunity to challenge those facts and allegations and indeed the parole board found in favour of the Appellant in relation to those facts and allegations.

[106] The gravamen of the Appellant's complaint under this heading is in fact that, having successfully challenged the facts and allegations upon which the recall was based, the panel was not empowered to release the prisoner on this basis alone. The Parole Board, despite its findings that the recall was 'unjust' and 'irregular' could not release Mr Rainey because, having applied the test at Article 28(6)(a), it was of the view that it was necessary for the protection of the public that Mr Rainey continue to be detained. In essence, therefore, the complaint is that the test at Article 28(6)(a) deprives the Appellant of an opportunity to test the basis for the recall decision and, in the absence of such an opportunity, the recall (the basis for which was successfully challenged) cannot have been lawful. The complaint is about the effect of Article 28(6)(a) and is largely the same complaint as is made under the incompatibility head.

[107] The Appellant argues that the fact that the facts and allegations grounding the recall decision were later successfully challenged has a bearing on the lawfulness of the original decision. This cannot be so. The authorities are clear that the initial decision is made on the basis of the facts known to the decision-maker at that time and no challenge is made to actual quality of that decision. That decision was therefore lawfully made on the basis of the facts then known.

[108] Perhaps in an ideal world no recall decision would be made without a full oral hearing on whether or not the test for recall was made out. However, that decision is often, and certainly was in this case, an urgent matter and it is made in the context of the over-arching aim of the sentencing regime which is to protect members of the public from further offences by persons who have been adjudged to be dangerous offenders. The decision is therefore *'a more peremptory'* one which does not require *'the full panoply of adjudicative capacity'*.

[109] The prisoner continues to be lawfully detained until either a) a Judicial Review court quashes the recall decision or b) the Parole Board decides that it is no longer necessary for the protection of the public that the prisoner be detained. In appropriate cases the Judicial Review court can act urgently. In appropriate (though necessarily rare and exceptional) cases, a remedy may be available in *habeas corpus* or by injunction.

[110] It seems to us there are a number of possible outcomes in those exceptional cases where a recall is found to be unlawful (bearing in mind the very extensive discretion of the decision-maker and the very high standard of review that will be applied).

a. The Judicial Review is concluded before the Parole Board hearing and finds that the recall was unlawful. The Judicial Review court can quash the order and either remit the decision to be re-taken or immediately release the prisoner.

b. The Judicial Review is concluded after the Parole Board hearing and finds that the recall was unlawful but the Parole Board has found that the test at Article 28(6)(a) is not met and the prisoner has been released. The remedy for the unlawful detention will be damages.

c. The Judicial Review is concluded after the Parole Board hearing and finds that the recall was unlawful in circumstances where the Parole Board has found that the test at Article 28(6)(a) has been met and the prisoner has not been released. The decision of the Parole Board will have rendered the continued detention of the Prisoner lawful and again, the remedy for the unlawful detention will be damages.

[111] It is worth repeating that, given the very broad discretion of the initial decision-maker, the necessary urgency of that decision, the weight to be attached to the protection of the public, and the fact that that decision can only be made on the facts then known (which will likely be sparse), a prisoner challenging the lawfulness of that decision will have a very high hurdle to surmount before a court can find a recall decision unlawful. Unlawfulness is unlikely to arise in the absence of bad faith, actual and demonstrable factual error or irrationality. None of these features are present in the instant recall decision (or are argued for) and therefore that decision is lawful.

Incompatibility

[112] As to the argument that Article 28(6)(a) is incompatible with Article 5(4) ECHR because the review provided for at that Article does not amount to *'proceedings by which the lawfulness of … detention shall be decided speedily'*, it is the court's view that this argument is misconceived. It is clear from the terms of Article 28(6)(a) that it is not intended to determine the lawfulness of detention. Indeed, as was correctly pointed out in a letter from the Chief Commissioner to the Department of Justice dated 22 July 2015 in relation to another case, the PCNI does not have jurisdiction to release prisoners referred to it on the basis of shortcomings in a recall decision. That letter notes:

> "It is… accepted that, whatever its view of the revocation decision or the circumstances in which it was reached… it is with protection of the public in mind that the PCNI must address and decide whether to recommend the release of the prisoner. The PCNI are not divested of that responsibility merely because of reservations about the original decision by the DOJ…
>
> The PCNI also recognises that, where the lawfulness of a decision to recall a prisoner is impugned, a remedy may, where appropriate, be sought by the prisoner from the High Court, by way of an application for judicial review or habeas corpus."

[113] While the Parole Board does have *'a power and a duty'* to consider and to make findings in relation to the recall decision (and did so in this case), it does not have the power required by Article 5(4) to release the prisoner solely on the basis that it finds flaws in that decision.

[114] The judicial supervision in relation to the detention of the Appellant required by Article 5(4) is provided for by the High Court through judicial review or, in appropriate cases, *habeas corpus*. Due to the availability of these other means to challenge the lawfulness of detention, Article 28(6)(a) is not incompatible with Article 5(4).

Conclusion

[115] For the above reasons the appeal is denied.