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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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

IN THE MATTER OF AN APPLICATION BY MARK PATRICK TOAL FOR LEAVE TO APPLY FOR JUDICIAL REVIEW (No 2)

-v-

PAROLE COMMISSIONERS FOR NORTHERN IRELAND

McCloskey J

Introduction

[1] This judicial review challenge is brought by Mark Patrick Toal (the "Applicant"), a sentenced prisoner. The Respondents are the Parole Commissioners for Northern Ireland (the "Commissioners"). The challenge is to a decision of a panel of Commissioners, dated 09 April 2018, expressed in the following conclusion signed by the Panel Chair:

> "*Having considered all of the evidence the Panel concludes that Mr Toal poses a Risk of Serious Harm to the public and that the risk he poses cannot be safely managed in the community at this time. Accordingly we are not satisfied that it is no longer necessary for the protection of the public from serious harm that he should be confined.*"

[2] The thrust of the Applicant's case, in brief compass, is that the Commissioners failed to apply the correct legal test and/or misdirected themselves in law. While the court's initial CMD Order divided this illegality challenge in to two parts, I consider on balance – and without any detriment to the Applicant – that these two elements

overlap and are so closely associated with each other that there is in truth a single ground of challenge, formulated in the terms of the immediately preceding sentence.

[3] Both the Department for Justice ("DOJ") and the Probation Board for Northern Ireland ("PBNI") were considered by the court to have a sufficient interest in these proceedings to be notified. SOSNI in the event, made no active contribution either evidentially or by argument. PBNI, in contrast, responded to a specific invitation of the court to provide specified evidence which the court is grateful to have received.

[4] The Applicant, in consequence of the impugned decision, remains a sentenced prisoner. By virtue of the cyclical arrangements for sentence review, there has been one main development since the initiation of the proceedings in the form of a formal, further decision of a single Commissioner dated 26 October 2018. This has given rise to the scheduling of a further hearing before a panel of Commissioners, to be conducted on 19 December 2018.

[5] I am satisfied that the court's determination of the main issues of law raised by the Applicant's challenge will guide and inform the further proceedings and decision making processes of the Commissioners in both this case and others, irrespective of the outcome. There is, therefore, no question of the Applicant's challenge having been rendered academic and no suggestion to this effect was advanced. The two interested parties, DOJ and PBNI will be similarly guided.

[6] This judgment is being provided with considerable expedition having regard to the underlying timetable noted above, with a view to providing all agencies with a judicial determination of value and utility. While the court's treatment of certain aspects of the evidence may appear a little lean in places, all of the evidence assembled has been fully considered.

Statutory framework

[7] The Applicant was the recipient of an extended custodial sentence, the two components being 8 years detention and 2 years licence, imposed on 24 February 2012. He became eligible for release on parole having served one half of his custodial term, with due allowance for remand custody, on 24 August 2015. In order to understand the full context of the impugned decision of the Commissioners, it is appropriate to reproduce at this juncture Article 14 of the Criminal Justice (Northern Ireland) Order 2008 (the "2008 Order"):

> "14.—(1) This Article applies where—
>
> (a) a person is convicted on indictment of a specified offence committed after [15th May 2008]; 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 or an indeterminate custodial sentence.

(2) The court shall impose on the offender an extended custodial sentence.

(3) Where the offender is aged 21 or over, an extended custodial sentence is a sentence of imprisonment the term of 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.

(4) In paragraph (3)(a) "the appropriate custodial term" means a term (not exceeding the maximum term) which—

(a) is the term that would (apart from this Article) be imposed in compliance with Article 7 (length of custodial sentences); or

(b) where the term that would be so imposed is a term of less than 12 months, is a term of 12 months.

(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 [Department of Justice] may 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.

(7) A person detained pursuant to the directions of the [Department of Justice] under paragraph (5) shall while so detained be in legal custody.

(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."

[8] The assessment of dangerousness is addressed in Article 15(1) of the 2008 Order:

"15.—(1) This Article applies where—

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

(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."

[9] The subject matter of Part 2 of the 2008 Order is "Release on Licence". Article 18, under the rubric "Duty to release prisoners serving indeterminate or extended custodial sentences", provides:

"18.—(1) This Article applies to a prisoner who is serving—

(a) an indeterminate custodial sentence; or

(b) an extended custodial sentence.

(2) In this Article—

"P" means a prisoner to whom this Article applies;

"relevant part of the sentence" means—

(a) in relation to a indeterminate custodial sentence, the period specified by the court under Article 13(3) as the minimum period for the purposes of this Article;

(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.

The key provision is Article 18(4):

(4) The Parole Commissioners 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."

For completeness I reproduce the remaining provisions of Article 18:

"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 2 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) or Article 28(4).

(6) Where the Parole Commissioners do not direct P's release under paragraph (3)(b), the Department of Justice shall refer the case to them again not later than the expiration of the period of 2 years beginning with the disposal of that reference.

(7) In determining for the purpose of this Article whether P has served the relevant part of a sentence, no account shall be taken of any time during which P was unlawfully at large, unless the Department of Justice otherwise directs.

> (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) The Department of Justice may by order provide that the reference in paragraph (b) of the definition of "relevant part of the sentence" in paragraph (2) to a particular proportion of a prisoner's sentence is to be read as a reference to such other proportion of a prisoner's sentence as may be specified in the order."

Evidential Framework

[10] The most important piece of evidence in the matrix is, by some measure, the impugned decision of the Commissioners. While it is trite that every document of this kind must be considered in its entirety, this applies with particular force in the present case. Though I had proposed to reproduce the whole of the decision as an appendix 1 to this judgment, this was opposed by the Commissioners, invoking rule 22 of the Parole Commissioners Rules (Northern Ireland) 2009. This provides:

> "22.—(1) Subject to rule 18(9) oral hearings shall be held at the prison unless the chairman of the panel and the parties agree otherwise.
>
> (2) Oral hearings shall be held in private.
>
> (3) Information about the proceedings and the names of any persons concerned in the proceedings shall not be made public.
>
> (4) The chairman of the panel may admit to the oral hearing such persons on such terms and conditions as the chairman of the panel considers appropriate."

I consider this objection misconceived. This rule of subordinate legislation plainly does not preclude the dissemination of Commissioners' decisions, whether in whole or in part, in judgments of the court. It does not dilute or modify the application of the principle of open justice in these public law proceedings. The rule has an altogether different import and intent. However, as the matter is of no special moment in the present context, I shall, in the body of this judgment, confine myself to the extensive references and quotations which were in the draft when circulated to the parties' representatives and which have generated no objection from any quarter.

[11] At this juncture it is convenient to introduce two acronyms which feature in both the evidence and the parties' arguments:

(i) "ROSH" denotes "risk of serious harm".

(ii) "SROSH" denotes "significant risk of serious harm".

The statutory language is, of course, "*serious harm*" and does not include the word "*risk*", qualified or otherwise.

[12] It would appear from the evidence that the phrase "*significant risk of serious harm*" can be traced to revised PBNI guidance published in May 2017, superseding its 2013 predecessor. There are two key provisions:

> "*The PBNI significant risk of serious harm assessment is an evidence based judgment as to the level of risk of an offender committing a further offence, causing serious harm. PBNI assesses an offender to be a 'significant risk of serious harm' when:*
>
> *There is a high risk that an offender will commit a further offence, causing serious harm ….*"
>
> [Paragraph 1.6.4.]

The second material provision in the revised guidance is in paragraph 1.6.3, which defines "*significant*":

> "*The likelihood that an act, the impact of which would be serious harm, will occur, ie there is a high probability of an offense causing serious harm recurring.*"

[13] The affidavit of an Assistant Director of PBNI provides the following illumination and elaboration:

> "*The rational for adding a definition of the word 'significant' was to emphasise the importance of that requirement being met in assessing an offender as presenting a SIGNIFICANT RISK OF SERIOUS HARM as well as the requirement of 'serious harm'. The risk of 'serious harm' occurring must be assessed as 'significant' for an assessment of SROSH to be made, that is, there is a high probability of such an offence occurring.*"

The deponent further explains that the Commissioners were alerted to the revised PBNI guidance at a meeting in or subsequent to May 2017. Finally, since May 2017 PBNI, in contrast with its previous practice, no longer reviews "SROSH" assessments at intervals of six months. Rather, under the new guidance (with slight adjustments of the tenses) –

> "… *a SROSH assessment remains relevant for six months after an offender has been committed to custody … after which it expires and a new assessment is carried out at critical points in an offender's sentence, eg prior to a* [Commissioner's] *hearing and prior to an offender being released from custody …*"

[14] The decision impugned by the Applicant was preceded by an impressively composed decision of the Single Commissioner (Mr Phoenix) dated 07 February 2018. From this it is clear (in brief compass) that the central issue in the Applicant's case was that of interventions designed to address the risk of reoffending, the Commissioner's assessment was that the Applicant had made some progress and there were "*… reasonable arguments that the risk presented has decreased and could now be managed in the community.*" This assessment was made in a context of PBNI opposition to the Applicant's release from custody.

[15] There followed the hearing before the panel of Commissioners, conducted on 04 April 2018, giving rise to the impugned decision of 09 April 2018. At that stage the most recent PBNI report was that dated 11 August 2017. This, under the rubric of "Risk Assessment", contains the following material passages:

> "*As detailed in my previous update to PCNI on 16.06.17, Mr. Toal's ACE and Significant Risk of Serious Harm assessment were both reviewed on 13.06.17 in conjunction with a review Risk Management Meeting held on the same date. Mr. Toal's ACE score was subsequently increased to 44 (High likelihood of reoffending), although he was deemed to no longer pose a Significant Risk of Serious Harm. The factors which were explored during these assessments are highlighted in the previous update report.*
>
> *In light of these factors and in the absence of serious harm being inflicted in the index offences (serious harm being defined by PBNI as "death or serious personal injury whether physical or psychological"), Mr. Toal did not meet PBNI's revised criteria to be assessed as Significant Risk of Serious Harm. In essence, Mr. Toal continues to present a risk of serious harm, however he does not meet the threshold for this level of risk to be considered "significant", which is defined by PBNI as "the likelihood that an act, the impact of which would be serious harm, will occur i.e. there is a high probability of an offence causing significant harm recurring."*
>
> *PBNI do not feel that the risks surrounding Mr. Toal's offending have dramatically changed or reduced since the previous Risk Management Meeting on 22.11.16. Indeed, in consideration of the events of the past nine months, it would be*

> *PBNI's view that the risks surrounding Mr. Toal's offending largely remain and that these need to be further addressed before he could be considered suitable for release. Rather, the change regarding his Significant Risk of Serious Harm status solely arises as the result of PBNI's revised Risk of Serious Harm to Others Policy and Procedures. …."*

This is followed by "Recommendation Regarding Release":

> *"PBNI maintain a view that Mr. Toal is not suitable for release at present.*
>
> *PBNI feel that Mr. Toal would benefit from the further planned intervention from NIPS Psychology to address issues of emotional regulation. Mr. Toal's response to such interventions will be crucial in fully evaluating whether he can be managed in the community, and if not, what outstanding pieces of work need to be progressed. NIPS Psychology have agreed to resume working with Mr. Toal following from his Oral Hearing on 18.08.17 if he is not released. Mr. McCracken, Forensic Psychologist has advised me that he is unable to give a precise timescale of how long this intervention is likely to take, in part because the progress of such contact will depend on Mr. Toal's response to the work at the time."*

There follows a series of recommended rehabilitation measures.

[16] As [12] of the impugned decision of the Commissioners makes clear, during the period which followed compilation of the aforementioned PBNI report there were various developments in the Applicant's case which, from his perspective, were positive: attainment of enhanced regime status, drug free testing, pre-release testing, no adverse reports, no disciplinary adjudications and engagement with both psychology and PBNI.

[17] At this juncture, brief reference to the PAP correspondence is appropriate. In their PAP letter the Applicant's solicitors contended *inter alia*, that the panel had erred in law with regard to the statutory test for release, in the following terms:

> *"(a) The Panel erred with respect the statutory test for release. In this case, the Panel did not make a finding that the Applicant continues to pose a significant ROSH. The issue before it was whether a person who is no longer a significant ROSH may be further detained. Whilst it is accepted that the language used in articles 14 and 18 differs to some degree, this does not mean that at the parole stage, any level of risk of serious harm will be sufficient to permit*

continued detention. It is submitted that a finding that there is a risk of serious harm which is not significant could not, without more, justify continued detention. The terms of the Panel's ruling demonstrate that its decision is grounded upon such an erroneous interpretation of the legislation. In arriving at its conclusion on the interpretation of articles 14 and 18, the Panel completely misconstrued to legislation to the extent that it proceeded on the erroneous basis that there was a difference as between the two articles with respect to references to the protection of the public.

The release test contended for by the Panel is not contained within the legislation either in express terms or by necessary implication. It is submitted that if the test at the release stage was to be of a different kind which was less favourable to persons such as the Applicant, this would need to be explicitly catered for in the legislation.

(b) As a consequence of the error referred to at 4.(a) above, the decision of the Panel is unlawful and should be quashed.

(c) Adequate and sufficient reasons have been provided for the Panel's finding that it was not satisfied it was no longer necessary for the protection of the public from serious harm that the Applicant be detained in custody."

The solicitors representing the Commissioners replied as follows:

"In respect of the inaccurate statement that Article 14 contains no reference to the "protection of the public", made in the course of an exploration on whether the applicant's counsel was correct in asserting that additional wording should be "read into" Article 18 by reference to Article 14, the Commissioners reject the assertion that this statement constitutes a serious or material error of law which vitiates the Decision. As has been set out in detail above, and as is set out in the Decision at paragraph 23, the Commissioners apply the statutory test set out in Article 18(4)(b) of the 2008 Order in the plain language of that provision, and absent any "reading in" of a term found in another Article of the Order. Finally, the Commissioners note that the argument advanced by the applicant in this pre - action letter on the alleged interpretative relationship between Article 14 and Article 18 form part of the applicant's cross appeal in his case currently before the Court of Appeal.

As a result of the foregoing, the Commissioners reject that the Panel erred with respect to the statutory test for release."

Consideration and Conclusions

[18] In R v Lang [2006] 2 All ER 410, the English Court of Appeal gave consideration to the provisions of the Criminal Justice Act 2003 (the "2003 Act") relating to dangerous offenders and extended sentences. Rose LJ, giving the judgment of the court, said the following at [17]:

> "*In our judgement, the following factors should be borne in mind when a sentencer is assessing significant risk:*
>
> *(i) The risk identified must be significant. This is a higher threshold than mere possibility of occurrence and in our view can be taken to mean (as in the Oxford English Dictionary) 'noteworthy, of considerable amount of importance'.*"

In R v Kubik [2016] NICA 3, where the offender sought leave to appeal against the imposition of an extended sentence, the Lord Chief Justice stated, at [25]:

> "*The 2008 Order provides for the assessment of dangerousness. By virtue of Article 15(2) the court is required to take into account the nature and circumstances of the offence and may take into account any pattern of behaviour of which it forms part and any information about the offender which is before it. The question for the court is whether it is satisfied that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further such offences. It was common case that a further attack of this nature would give rise to serious harm. The issue, therefore, was whether there was a significant risk of such an offence.*"

And at [29]:

> "*We accept, of course, that violence was used in the attack but the issue is whether there is a significant risk of repetition of such violence.*"

[19] In R v EB [2010] NICA 40, the Court of Appeal, at [10], cited in full [17] of Lang, observing:

> "*We consider that this passage constitutes helpful guidance to judges making assessments of dangerousness.*"

In R v McCormick [2015] NICC 15, Colton J, at [23] – [25] in the context of considering the propriety of imposing an extended custodial sentence, emphasised the requirement that the risk of reoffending be significant.

[20] In R (Brooks) v The Parole Board [2004] EWCA Civ 80, Kennedy LJ stated at [28]:

> "[The Parole Board] *is concerned with the assessment of risk, a* ***more than minimal risk*** *of further grave offences being committed in the future ….*"
>
> [my emphasis]

The remainder of this passage draws attention to the consideration that the Parole Board, in common with the Commissioners in this jurisdiction, is engaged in an exercise of predictive evaluative judgment in which the burden of proof has no real function.

[21] At the request of the court the parties' counsel reduced their core submissions to the following formulations. On behalf of the Applicant Mr Heraghty (of counsel) submitted that the critical passage in the determination of the Commissioners, namely [38] recites an assessment of risk of serious harm *simpliciter* viz at most a mere possibility of risk of serious harm to the public and thereby erred in law in concluding that the statutory release test was not satisfied. On behalf of the Commissioners, Mr Sayers (of counsel) characterised [38] of his client's determination as an "*express and orthodox*" application of the statutory test and emphasised the full breadth of the wording of Article 18(4)(b) of the 2008 Order.

[22] Ultimately the task for this court is one of construing the Commissioner's determination in its entirety. It is trite that [38], undoubtedly a critical passage in the text, must be evaluated in the context of the determination as a whole. To isolate and detach certain passages, neglecting what both precedes and follows them in the text, is an impermissible approach. I observe that the Commissioners were manifestly assiduous and conscientious in their approach to their task. I turn to the exercise of analysing their determination.

[23] At [1] – [10] the Commissioners outlined various aspects of the background generally, referring to previous Commissioner's decisions, the index offence, an earlier pre-sentence report and the first judicial review challenge of this Applicant (see [2017] NIQB 114). At [11] – [13] consideration was given to the evidence relating to the Applicant's progress since his last review. One of the longest discrete chapters within the determination is found at [14] – [20], which contains a digest of the hearing conducted on 04 April 2018, in particular the oral evidence of the PDP Co-ordinator, the PBNI Area Manager and the Applicant. As regards the latter one finds within these passages a mixture of recitation of evidence given and

Commissioners' commentary. The emphasis on significant risk in counsel's submissions was expressly noted, as were related submissions touching upon the issue of the "*new PBNI policy*" and asserted inconsistencies in the evidence of the PBNI witness.

[24] At [21] the Commissioners rehearsed the statutory test, without error. The remainder of the determination is arranged under the heading "Reasons". This begins with a reference to a discrete submission of the Applicant's counsel relating to the nexus between Article 18(4)(b) and Article 14(1)(b) of the 2008 Order. These provisions are reproduced in full. Next is a passage of some importance, at [23]:

> "*23. In oral and written submissions Counsel submitted that the word 'significant' could not be inserted into Article 18 for grammatical reasons but that the test in Article 18 (4)(b) refers back to the test at sentencing contained in Article 14 (1)(b)(i). This argument relies on the phrase 'no longer'. However we do not accept that we can read into the wording of Article 18 anything other than the plain language of the provision. The word 'significant' is not in Article 18 and we do not agree that the word can be read into Article 18 by reference to Article 14. The entire phrasing of the provisions are different in that, whilst Article 18 specifically refers to protection of the public, no such explicit reference is made in Article 14. No adequate reason was advanced as to why the test at sentencing should be identical to that at the release stage. In any event, it is clear from reading Article 15 that the role of the court at the sentencing stage is to consider all information and evidence about the nature of the offence, the pattern of offending and the offender himself. That, too, is the role of Commissioners. We must consider all of the evidence in order to assess the risks posed by the prisoner and whether or not he needs to be confined to protect the public from serious harm*."

In the two paragraphs which follow, [24] – [25], the determination turns again to the evidence of the PBNI witness, *inter alia*:

> "*… The change in PBNI policy in May 2017 creates an elevated benchmark so that PBNI have fewer cases assessed as significant risk of serious harm, so that they can concentrate resources on more serious cases … The area manager said …. that the main change in the policy is to look at 'very serious and significant harm' ….*
>
> *She later clarified that the only test considered by PBNI is whether a prisoner poses a significant risk of serious harm and there is no lower test of risk of serious harm, as far as PBNI is concerned.*"

[25] Next, at [27] the panel states that it has taken account of all the evidence. From [27] – [35] it highlights various features of the evidence: the Applicant's "ACE" score, aspects of his recent conduct in prison, assessments of his future aspirations and expectations, outstanding "*work with NIPS Psychology*", the desirability of "*pre-release testing*", the "*main risk factors*" identified by the PDP Co-ordinator and the Principal Forensic Psychologist's assessment of the risk of the Applicant reoffending. At [34] – [36] the panel reflects on certain aspects of the Applicant's oral evidence, identifying the issues of the continuing uncertainty about whether the Applicant has ADHD, his unrealistic post-release plans, the minimisation and "*externalisation*" of personal responsibility disclosed in his evidence and poor insight into his "*offending behaviours and factors influencing his risk*", repeating the term "*poverty of insight*". All of the foregoing is the prelude to the conclusion expressed at [37]:

> "*Looking at all of the evidence the panel concludes that there is little evidence of a reduction in Mr Toal's risks.*"

[26] This is followed at once by the assessment that the "*significant risk of serious harm*" factors identified in the pre-sentence report "*remain live and there is insufficient evidence that these have been substantively addressed*", noting simultaneously (in terms) that there had been no material progress in addressing and reducing the factors specified in the PBNI assessment in November 2016. In [37] one finds another umbrella conclusion:

> "*.. looking at the evidence as a whole, there has been no qualitative reduction in his risk factors.*"

At [38] is the passage which occupied centre stage in the parties' arguments before the court:

> "*Having considered all of the evidence the panel concludes that Mr Toal poses a Risk of Serious Harm to the public and that the risk he poses cannot be safely managed in the community at this time. Accordingly we are not satisfied that it is no longer necessary for the protection of the public from serious harm that he should be confined.*"

[27] Finally, at [39], the panel formulates its recommendations: continued engagement with psychology, consideration to be given to a programme of temporary releases at a later stage, the Applicant to undertake post-release planning and, finally, the need for a "*detailed and structured release plan*" in advance of the next review which is to be completed "*not later than eight months from the completion of this reference*".

[28] In those passages in its determination where the panel employs the terminology "*significant Risk of Serious Harm*" it is usually referring to professional

reports in which this language is used: in summary, the pre-sentence report and subsequent PBNI reports. This phraseology is not the panel's. I identify this as the first of a series of inter-connected factors.

[29] The second such factor is the manner in which the panel expressed itself at [23]. In this passage the panel, strongly and unequivocally, espoused the stance that the risk of serious harm with which Article 18(4)(a) is concerned does not have to be significant. In thus expressing itself, the panel robustly and unambiguously rejected the oral and written submissions of the Applicant's counsel to the contrary. I consider that this passage cannot be construed in any other way and no contrary argument was advanced by Mr Sayers on behalf of the Commissioners. Indeed, Mr Sayers acknowledged realistically that the panel was in error in this paragraph. I would add that this issue was raised clearly in the PAP letter of the Applicant's solicitors and the following passage in the response is striking:

> "*In respect of the inaccurate statement*** *that Article 14 contains no reference to the 'protection of the public', made in the course of an exploration of whether the Applicant's counsel was correct in asserting that additional wording should be 'read into' Article 18 by reference to Article 14,* ***the Commissioners reject the assertion that this statement constitutes a serious or material error of law which vitiates the Decision***."
>
> [My emphasis - this statement is at [23] of the determination].

There was, accordingly, an acknowledgement, properly made, that the Commissioners had erred in law: their rejection of the Applicant's intimated judicial review challenge hung by the slender thread that their error of law was not serious or material.

[30] The third factor which I would highlight is that at a preliminary hearing in these proceedings Mr Sayers expressed unambiguously the Commissioner's acceptance that the risk of serious harm to which Article 18(4)(b) of the 2008 Order is directed must be significant. The absence of a similarly unambiguous recognition in the PAP response letter is striking.

[31] Fourthly, there is an unmistakable failure in the text of the Commissioner's determination to engage with the jurisprudence which the court has considered in [18] – [20] above. Nor are there any indications of any awareness of the significance of this jurisprudence, in a context where its influence is fully accepted by Mr Sayers on their behalf.

[32] The final tool of assessment of the Commissioner's determination to which I turn is the following. The Commissioner's determination is the reserved, written

and reasoned decision of a judicialised tribunal. In the context of, fundamentally, forming a predictive evaluative judgement, the ultimate touchstone by which the Commissioners' determination falls to be assessed is whether it is in accordance with the law. Being a decision of a judicialised tribunal it must be capable of withstanding penetrating scrutiny. The core issue of law raised by this challenge leaves no room for the "*fairly and in bonam partem*" principle which can sometimes be invoked in other quite different contexts, for example the reports of planning case officers and decision letters written by immigration case workers. The more so because decisions of this *genre* are concerned with the liberty of the citizen. This consideration, of self-evidently contextual importance, was emphasised in the judgment of this court in Re Hegarty's Application [2017] NIQB 20 at [30].

[33] Weighing all of the foregoing factors together, I am impelled to the clear conclusion that the Commissioner's decision is vitiated by error of law. There has been a failure, readily demonstrated, to formulate and apply the correct legal test. A misdirection in law has occurred in consequence.

[34] There is one further limb of the Order 53 pleading and Mr Heraghty's submissions, which I address briefly. Insofar as this is based on the contention that the impugned decision of the Commissioners fails to spell out adequate and intelligible reasons for the conclusion ultimately expressed, I consider that it fails. The sustainability of this complaint falls to be examined by undertaking the same exercise as that performed above, namely reading and scrutinising the determination as a whole. In my judgment there can be no tenable doubts or uncertainties as to why the Commissioners concluded that the Applicant's release from prison would be premature. The reasons underpinning this conclusion are to be found in the impugned determination as a whole and particularly in [25] – [27] above, in this court's detailed analysis of the impugned determination.

[35] I do not overlook how this court formulated its understanding of the Applicant's challenge in its initial case management directions order, at [2]. However, this has at all times been presented as a reasons challenge and, on reflection, I consider that my initial characterisation of the second limb as effectively merging with the legality challenge was incorrect.

Omnibus Conclusion

[36] On the grounds and for the reasons elaborated above, I conclude that the Applicant's challenge succeeds.

Remedy and Costs

[37] I have considered counsels' written submissions on remedy, for which I am grateful. Much of the doctrinal framework engaged is discussed in my publication in [2018] JR … Family Reunification and Judicial Review Remedies in UTIAC. There being no suggestion that the exercise of the court's

discretion should refuse a remedy to the successful Applicant, the contest lies between a Certiorari quashing order and a declaratory order. I take into account that by virtue of their statutory decision making arrangements, the Commissioners will be making a fresh decision in any event and, indeed, are about to conduct a hearing to this end. A quashing order is not required for this purpose. However the making of such an order is not subject to any such condition. Furthermore, contrary to the Commissioners' contention, a quashing order is not "coercive". It is, rather, constitutive (*op cit*). Both forms of remedy will have essentially the same practical and legal effect in this particular context, with one exception: to quash the Commissioners' determination of 09 April 2018 would eliminate its legal validity *ab initio*. In a finely balanced exercise, the factor which tips the balance in favour of certiorari is Mr Heraghty's submission that, excepting the Single Commissioner's provisional decision of 07 February 2018, there has been a substantial elapse of time since the last lawful parole decision in the Applicant's case. A quashing order will reflect this more fully and, further, will carry with it a little more gravitas than its declaratory cousin.

[38] The remedy will therefore be an order of certiorari quashing the impugned decision. The parties are agreed that the Respondent shall pay the Applicant's costs, to be taxed in default of agreement. This will be coupled with a legal aid taxation order. And there shall be liberty to apply.