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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**09/12/2025**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

IN THE MATTER OF AN APPLICATION BY THE DEPARTMENT OF JUSTICE FOR JUDICIAL REVIEW

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BETWEEN:

THE DEPARTMENT OF JUSTICE

Applicant/Appellant

and

THE PAROLE COMMISSIONERS FOR NORTHERN IRELAND

Respondent/Respondent

and

MARTIN McALLISTER

First Notice Party

and

NORTHERN HEALTH AND SOCIAL CARE TRUST

Second Notice Party

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Mr McGleenan KC with Mr McAteer and Mr Summers (instructed by the Departmental Solicitor's Office) for the Appellant
Mr Sayers KC with Mr Anthony (instructed by Carson McDowell LLP Solicitors) for the Respondent
Mr Toal KC with Ms McAnaney (instructed by Sheridan and Leonard Solicitors) for the first Notice Party
Mr Corkey (instructed by the Business Services Organisation) for the second Notice Party

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Before: Keegan LCJ, Colton LJ and McLaughlin J

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COLTON LJ (*delivering the judgment of the court*)

Introduction

[1] This appeal raises an important question of law, namely whether the Parole Commissioners for Northern Ireland ("PCNI") can lawfully direct the release of a prisoner under Article 28 of the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order") on a conditional or contingent basis.

[2] The answer to the question involves the statutory construction of the interlinking provisions of the 2008 Order relating to the release of prisoners by the PCNI.

Factual background

[3] On 27 April 2022, Mr McAllister, the first notice party, was convicted of conspiracy to commit arson, being reckless as to the endangerment of life and received an extended custodial sentence ("ECS") with a custodial element of two years and an extended licence term of two years.

[4] Having completed his two-year custodial term (having been in custody since the commission of the offence), he was released on 1 August 2023 to Trust accommodation at Cedar Court, Antrim, which provided 24-hour supervision. Due to behaviours on the first night including "aggressive, destructive and unacceptable behaviour and … leaving without complying with the agreement to be always supervised by staff" the accommodation was withdrawn. No suitable alternative accommodation was available to him and on 2 August 2023, the Probation Board for Northern Ireland ("PBNI") sought his recall which was then recommended by a PCNI single commissioner and authorised by the department's Public Protection Branch ("PPB").

[5] Mr McAllister's case was referred to the PCNI on 8 August 2023. In accordance with Rule 12 of the Parole Commissioners' Rules 2009 ("the 2009 Rules") a single commissioner was appointed to consider the case. On 2 November 2023, the single commissioner provisionally directed that he should not be released under Rule 13 of the 2009 Rules.

[6] Mr McAllister then exercised his right to have an oral hearing before a PCNI panel.

[7] A series of oral hearings then ensued. It is clear that obtaining suitable accommodation for Mr McAllister had been a central feature of the PCNI's consideration of his case. It was this issue which necessitated the number of adjournments while attempts were made to source such accommodation. Thus:

4 December 2023	The hearing was adjourned for further risk assessments to take place which would inform the type of accommodation to be sourced by the Northern Health and Social Care Trust ("the Trust") (the second-named notice party).
4 March 2024	A further risk assessment was conducted. It was noted that Mr McAllister required specialist accommodation and was on the waiting list for Apple Blossom Lodge.
3 May 2024	The Trust witness advised that there was a potential placement available at the Grouse facility in Armagh which would require the Prison Service to forward on risk assessments and that such a place may have been available in June 2024.
21 May 2024	The Trust advised that staff at the Grouse had met Mr McAllister for assessment and needed to confirm insurance was in place for his placement.
4 July 2024	The panel was informed that insurance coverage for Mr McAllister's placement at the Grouse was not approved, but efforts were being made to source other appropriate accommodation. A further hearing was then arranged for 22 August 2024 but was subsequently adjourned to 9 September 2024.
9 September 2024	Final oral hearing.

The PCNI decision

[8] The PCNI Panel addressed the issue of the multiple hearings in the following way:

> "12. The hearing of this case was unusually protracted reflecting the challenges in putting in place arrangements for the safe management of Mr McAllister in the community. These challenges can readily be understood in the context of his offending history and his release and recall to custody which I have discussed above.
>
> 13. … the key issue in the case emerged quite quickly after it was first listed for hearing when counsel for the Department indicated that the Department was not opposed to release if suitable accommodation for Mr McAllister could be found. However, the nature of the accommodation that would be suitable meant that by its nature it would be difficult to identify, and various

> efforts were made by the Department, PBNI and the Trust to source accommodation that would satisfy the need for safe management in the community across the course of 2024. It should be noted that Mr McAllister's legal representatives were content that the Panel not finally deal with the referral and allow those efforts to be pursued. While Mr McAllister and his legal representatives and, indeed, the Panel did become frustrated with the lack of success in finding accommodation all parties recognised the centrality of these efforts to the appropriate disposal of the case."

[9] The dilemma faced by the Panel was that should release not be directed prior to July 2025, Mr McAllister would at that point be released without any supports in place and effectively be homeless, something the Panel described as "an appalling vista" (see below).

[10] On 19 September 2024, the PCNI panel delivered its decision directing Mr McAllister's release. At para [4] of the decision it stated:

> "Following consideration of the case, the panel is satisfied that it is no longer necessary for the protection of the public from serious harm that Mr McAllister be confined and has directed that he be released on licence. This decision is binding on the Department of Justice."

[11] In reaching its decision, the panel concluded that Mr McAllister continued to pose a risk of serious harm, but that that risk could be managed with appropriate licence conditions provided he was placed in suitable accommodation.

[12] Importantly, for this appeal, the panel determined:

> "47. Unusually, the Department of Justice and all the professional witnesses who gave evidence to the Panel were in agreement that the risk of serious harm posed by Mr McAllister could be managed with appropriate licence conditions as long as he was placed in suitable accommodation with the appropriate supports. It was agreed by everyone we heard from that that aspect of the risk management plan was the critical element and without it release could not be contemplated. We specifically explored with PBNI if other options including PBNI approved hostels would be sufficient to manage risk (even if they could be persuaded to take Mr McAllister) and the answer was a resounding no.

48. Mr McAllister and his counsel also agreed with the general approach that release could only be directed on the basis that suitable accommodation had been located.

49. The Panel did give the Department and the Trust significant time to try to identify accommodation but even by the time the hearing went ahead on 9 September 2024, no such accommodation had been found although there was hope that an assessment due to take place on 19 September 2024 might result in a place being found.

50. Very unusually, the Panel has, therefore, come to the view that it can direct release based on the licence conditions below being in place. These include a recommendation relating to accommodation being approved by both PBNI and the relevant Trust – this was a condition specifically suggested by the Department in correspondence dated 17 September 2024. The Panel was conscious that Mr McAllister's SLED is fast approaching and there would not have been time for a further PCNI referral and, therefore, the prospect of him being released without any licence conditions was quite real. That would be an appalling vista for all involved.

51. We are persuaded that with the licence conditions below being in place, Mr McAllister's risk of serious harm can be managed. On that basis release is directed. **It is our clear understanding (and that of the other parties to the case) that release cannot take place until and unless these conditions are in place.**"

The relevant licence condition for this appeal was expressed as follows:

- "You must permanently reside at an approved address identified by the relevant Health and Social Care Trust and approved by PBNI. You must not leave to reside elsewhere without obtaining the prior approval of your probation officer; and thereafter must reside as directed by your probation officer."

It is this condition which is central to the appellant's application for judicial review.

[13] The PCNI also recommended that, if practicable, any release be a graduated process which might entail a short series of temporary releases before full release.

[14] By the time the application came on for hearing before Mr Justice Humphreys, Mr McAllister had been released from prison into suitable accommodation. On 3 March 2025 he was admitted on a voluntary basis to a ward in Holywell Hospital run by the Trust. Therefore, whilst the practical issue presented by the proceedings had become academic, it was agreed that the application should be determined as it raised an important matter of practice and principle for the DOJ and the PCNI. There was evidence that such a contingent direction was not an isolated one.

The legislative framework – the 2008 Order

[15] Part II of Chapter 3 of the 2008 Order makes provision for the imposition of public protection sentences for dangerous offenders. The Order is similar but not identical to the Criminal Justice Act 2003 ("the 2003 Act") applicable in England and Wales.

[16] Article 14 of the 2008 Order requires a court to impose an ECS for certain violent or sexual offences where, inter alia, the court:

> "is of the opinion … 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 or serious terrorism offences."

[17] An ECS is comprised of "the appropriate custodial term" and "the extension period", the latter being "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 or serious terrorism offences."

[18] Article 18 imposes a duty on the Department to release a prisoner serving an ECS "as soon as" the prisoner has served "the relevant part of the sentence" and the Parole Commissioners have directed his release under that Article. The relevant part of the sentence is one-half of the appropriate custodial term.

[19] Article 28 of the 2008 Order makes provisions for the recall of prisoners after release while on licence:

> "**28.— Recall of prisoners while on licence**
>
> (1) In this Article "P" means a prisoner who has been released on licence under Article 17, 18, 20 or 20A.
>
> (2) The Department of Justice or the Secretary of State may revoke P's licence and recall P to prison—

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

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

(3) P –

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

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

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

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

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

(a) where P is serving an indeterminate custodial sentence or an extended custodial sentence and was not released under Article 20A, it is no longer necessary for the protection of the public from serious harm that P should be confined;

(b) in any other case, it is no longer necessary for the protection of the public that P should be confined.

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

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

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

> (8) The Secretary of State may revoke P's licence and recall P to prison under paragraph (2) only if his decision to revoke P's licence and recall P to prison is arrived at (wholly or partly) on the basis of protected information." [Our emphasis]

The issue for the court – statutory construction – the legal principles

[20] Against this background the court now turns to the exercise in statutory construction identified in para [1] of this judgment.

[21] There is much judicial dicta on the appropriate principles to be applied by a court when interpreting a statute.

[22] The principles have been discussed in two recent Supreme Court cases. In *R(O) v Home Secretary (SC (E))* [2023] AC 255, Lord Hodge identified the relevant principles in paras 29-31 of the judgment. In para 31, he observed:

> "31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme* [2001] 2 AC 349, 396, in an important passage stated:
>
> > 'The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. … Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.'"

[23] More recently in *R (PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] 1 WLR 2594, Lord Sales described the relevant interpretative principles in the following way:

> "40. The basic task for the court in interpreting a statutory provision is clear. As Lord Nicholls put it in *Spath Holme*, at p 396, 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.'
>
> 41. As was pointed out by this court in *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2021] UKSC 16; [2022] AC 690, para 10 (Lord Briggs and Lord Leggatt), there are numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose. The examples given there are *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687 and *Bloomsbury International Ltd v Department for the Environment, Food and Rural Affairs* [2011] UKSC 25, [2011] 1 WLR 1546. In the first, Lord Bingham of Cornhill said (para 8):
>
> > 'Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.'
>
> In the second, Lord Mance said (para 10):
>
> > 'In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance … In this area as in the area of contractual construction, 'the notion of words having a natural meaning' is not always very helpful (*Charter Reinsurance Co Ltd v Fagan*

> [1997] AC 313, 391C, per Lord Hoffmann), and certainly not as a starting point, before identifying the legislative purpose and scheme.'
>
> The purpose and scheme of an Act of Parliament provide the basic frame of orientation for the use of the language employed in it.
>
> 42. It is legitimate to refer to explanatory notes which accompanied a Bill in its passage through Parliament and which, under current practice, are reproduced for ease of reference when the Act is promulgated; but external aids to interpretation such as these play a secondary role, as it is the words of the provision itself read in the context of the section as a whole and in the wider context of a group of sections of which it forms part and of the statute as a whole which are the primary means by which Parliament's meaning is to be ascertained: *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255, paras 29-30 (Lord Hodge). Reference to the explanatory notes may inform the assessment of the overall purpose of the legislation and may also provide assistance to resolve any specific ambiguity in the words used in a provision in that legislation. Whether and to what extent they do so very much depends on the circumstances and the nature of the issue of interpretation which has arisen."

The parties' arguments

[24] In summary, the appellants argue that having regard to the plain meaning of the words in Article 28(5), PCNI has no power to order release of a prisoner other than immediate release. The PCNI cannot be satisfied of the relevant threshold set out in Article 28(6) when it is not prepared to order immediate release. It was argued by the appellant that making release contingent on some future event is contrary to the statutory scheme, contrary to the clear intention of the legislation in using the words that it did, contrary to the aim of public protection and is *ultra vires*.

[25] In reply, the respondent argues for a purposive interpretation of the word "immediate" in Article 28(5). It argues that immediate should be interpreted as meaning immediately on the fulfilment of the licence conditions specified by the PCNI in its decision. The respondent says that this purposive interpretation is consistent with the wider objectives of the 2008 Order which include per Article 24(8):

(a) The protection of the public;

(b) The prevention of reoffending; and

(c) The rehabilitation of the offender.

The decision at first instance

[26] Mr Justice Humphreys agreed with the respondent's argument and determined:

> "[52] I have therefore concluded that the PCNI can lawfully direct the release of a prisoner under Article 28 of the 2008 Order on a conditional or contingent basis. If they do, the DOJ is not obliged to release the prisoner immediately but only when the specified conditions are fulfilled. Once this has been achieved, the release must take place immediately. The conditions are to be fulfilled within a reasonable time, which is to be judged on the individual facts of any given case.
>
> [53] I have reached this conclusion for the following reasons:
>
> (i) It is entirely consistent with the purpose of the legislation which has, as its focus, the protection of the public;
>
> (ii) The use of licence conditions is a key part of the PCNI's consideration of this issue in every case;
>
> (iii) It cannot have been the intention of Parliament that prisoners subject to public protection sentences would be released immediately when licence conditions could not be fulfilled;
>
> (iv) It is consistent with the evidence of the DOJ which is to the effect that, in every case, a reasonable period of time is required to allow for the processing of the prisoner out of custody and for all associated arrangements to be put in place;
>
> (v) The analysis therefore chimes with both legislative purposes and pragmatic reality;

(vi) It also obviates the need for perpetual adjournment of PCNI hearings pending further inquiries as to the availability of, for example, suitable accommodation. Such adjournments can only cause delay and cost to public funds."

[27] He, therefore, concluded that the decision of PCNI dated 19 September 2024 was lawful. It is this conclusion which is the subject matter of this appeal.

The 2008 Order analysed – its context and purpose

[28] There can be no doubt that the 2008 Order was a significant development in the context of sentencing offenders in this jurisdiction. For the purposes of this appeal focus is on the introduction for the first time of public protection sentences. This followed similar provisions in the 2003 Act in England and Wales.

[29] As set out earlier, Article 14 of the 2008 Order introduced the concept of ECS for certain violent or sexual offences.

[30] Article 14 applies where, inter alia, a person is convicted on indictment of a specified offence. The offence for which Mr McAllister was sentenced was a specified offence. That being so, after the introduction of the 2008 Order, the court had to engage in a different type of sentencing exercise. Under Article 14(3) it is obliged to set out "the appropriate custodial term" and under Article 14(3)(b):

> "A further period ("the extension period") for which the offender is to be subject to a licence which is of such length as the court considers necessary for the purposes of protecting members of the public from serious harm occasioned by the commission by the offender of further specified offences…"

[31] It will be seen that this provision introduces an evaluative judgment to be made by the sentencing judge. It introduces the concept of protecting the public from serious harm. As will be seen, this remains a constant theme of this part of the 2008 Order.

[32] Article 15 sets out how the sentencing judge should go about carrying out this evaluative judgment under the heading "Assessment of Dangerousness." It sets out what the court should take into account in making the assessment. This provision has been the subject matter of considerable judicial consideration, however, the authorities on the assessment of dangerousness are not relevant to the issues to be determined in this appeal.

[33] Articles 16 and 17 deal with release on licence, but for the purposes of this application, the relevant Article is Article 18 which deals expressly with ECS. Article 18(3) provides:

> "(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."

[34] Importantly, sub-para (4) goes on to provide:

> "(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."

[35] It will be noted that this provision is expressed in negative terms. It will be seen that the Parole Commissioners must engage in an evaluative exercise in assessing the risk of serious harm.

[36] Sub-para (8) provides:

> "(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 …"

Thus, in this case, Mr McAllister was released from custody on 1 August 2023 having served two years in custody which was the appropriate custodial term imposed.

[37] Article 24 provides for the Department of Justice to prescribe standard licence conditions by rules. It also provides that any licence under the 2008 Order shall include the standard conditions and:

> "(3) …
>
> (b) may include such other conditions of a kind prescribed for the purposes of this paragraph as the Department of Justice may for the time being specify in the licence."

[38] Such licence conditions are to be found in the Criminal Justice (Sentencing) (Licence Conditions) (Northern Ireland) Rules 2009.

[39] As previously set out, the crucial provisions in this appeal can be found in Article 28(5) and (6) as set out in para [19].

[40] Before focusing on Article 28(5) and (6) it is useful to consider some further provisions to complete the contextual picture. Article 29 of the 2008 Order deals with non-ECS sentences, that is fixed term prisoners. Again, release after recall refers to the Parole Commissioners not directing "P's immediate release" see 29(1)(b) and 29(6)(a).

[41] Sub-para (7) provides, consistently with the other language in the Order, that:

> "The Parole Commissioners shall not give a direction under paragraph (6)(a) with respect to P unless they are satisfied that it is no longer necessary for the protection of the public that P should be confined."

[42] The absence of any reference to serious harm reflects the fact that the prisoner is serving a fixed term sentence rather than a life, indeterminate or ECS sentence.

[43] A similar approach is taken in the legislation dealing with life sentences, namely the Life Sentences (Northern Ireland) Order 2001 ("the 2001 Order"). Article 6 deals with the duty to release life prisoners "as soon as" the prisoner has served the relevant part of his sentence, and the commissioners have directed his release.

[44] In those circumstances, it is the duty of the Department of Justice to release him on licence. Again, no such directions should be given unless "the Commissioners are satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined" see Article 6(4)(b).

[45] Recall of life prisoners while on licence is dealt with in Article 9.

[46] The same language is used as that in Article 28 of the 2008 Order. Thus, Article 9(5) provides:

> "(5) Where on a reference under paragraph (4) the Commissioners direct the immediate release of a life

> prisoner on licence under this Article, the Department of Justice shall give effect to the direction.
>
> (5A) The Commissioners shall not give a direction under paragraph (5) unless they are satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined."

[47] Thus, it will be seen that the same rubric applies throughout the relevant provisions relating to the release and recall of prisoners on licence.

[48] As soon as they have served the relevant or appropriate part of their sentence and directions have been given by the commissioners, it is the duty of the Department of Justice to release them on licence.

[49] In respect of recall, the Commissioners direct the "immediate" release of a prisoner. The Department of Justice shall give effect to the direction.

[50] In all instances, the Commissioners before giving any such direction must be satisfied that it is no longer necessary for the protection of the public from serious harm (harm in the case of fixed term sentences) that the prisoner should be confined.

[51] For completeness, the court notes that the legislation set out above in relation to life sentences mirrors that of legislation in England and Wales, namely the Crime (Sentences) Act 1997. Section 28 deals with the duty to release certain life prisoners. Para (5) provides that:

> "[As soon as] the life prisoner has served the relevant part of his sentence and the Parole Board has directed his release under this section, it shall be the duty of the Secretary of State to release him on licence."

[52] The Board can only do so when "it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined."

[53] Recall is dealt with under section 32. As is the case with the 2008 Order and the 2001 Order, it provides for the Parole Board directing "immediate" release on licence.

[54] Chapter 5 of Part 12 of the 2003 Act contains provisions relating to public protection sentences for dangerous offenders analogous to the 2008 Order. The question of recall after release is addressed in Chapter 6 of Part 12. Section 255C governs prisoners who are subject to extended licences. Prior to 28 June 2022, section 255C(5) stated:

> "Where on a reference under sub-section (4) the Board directs P's immediate release on licence under this Chapter the Secretary of State must give effect to the direction."

Amendment to the legislation in England and Wales

[55] The above provision was amended by section 139(2)(a) of the Police, Crime, Sentencing and Courts Act 2022 ("the 2022 Act") to omit the word "immediate." The same amendment introduced section 256AZC into the 2003 Act which reads:

> "(1) This section applies where the Board directs the release of a person on licence under this Chapter.
>
> (2) The Secretary of State must give effect to the direction of the Parole Board as soon as is reasonably practicable in all the circumstances including, in particular, the need to make arrangements in connection with any conditions that are to be included in the person's licence under this Chapter."

[56] Mr Justice Humphreys referred to this amendment but omitted to refer to the related changes made by the 2022 Act. In particular section 133 introduced a new power to make provision for reconsideration and the setting aside of Parole Board decisions. Section 133 provides:

> **"133 Power to make provision for reconsideration and setting aside of Parole Board decisions**
>
> In section 239 of the Criminal Justice Act 2003 (the Parole Board), after subsection (5) insert -
>
> (5A) Rules under subsection (5) may, in particular, make provision—
>
> (a) requiring or permitting the Board to make provisional decisions;
>
> (b) about the circumstances—
>
> (i) in which the Board must or may reconsider such decisions;
>
> (ii) in which such decisions become final;

(c) conferring power on the Board to set aside a decision or direction that is within subsection (5B),

and any such provision may relate to cases referred to the Board under this Chapter or under Chapter 2 of Part 2 of the 1997 Act.

(5B) The following are within this subsection –

(a) a direction given by the Board for, or a decision made by it not to direct, the release of a prisoner which the Board determines it would not have given or made but for an error of law or fact, or

(b) a direction given by the Board for the release of a prisoner which the Board determines it would not have given if -

(i) information that was not available to the Board when the direction was given had been so available, or

(ii) a change in circumstances relating to the prisoner that occurred after the direction was given had occurred before it was given.

(5C) Provision made by virtue of subsection (5A)(c) -

(a) may not confer power on the Board to set aside a direction for the release of a prisoner at any time when the prisoner has already been released pursuant to that direction, but

(b) may make provision for the suspension of any requirement under this Chapter or under Chapter 2 of Part 2 of the 1997 Act for the Secretary of State to give effect to a direction of the Board to release a prisoner, pending consideration by the Board as to whether to set it aside."

[57] The reference to the 1997 Act refers to releases for prisoners serving life sentences.

[58] Mr McGleenan argues on behalf of the appellant that these amendments are significant, as is their absence in Northern Ireland.

Consideration of the competing arguments

[59] Self-evidently the use of the word "immediate" must be of significance. Parliament has chosen not to use a term such as "as soon as is reasonably practicable." In our view, this arises from the fact that if the Commissioners conclude that it is no longer necessary for the protection of the public from serious harm that a prisoner should be confined then there is no lawful basis for his detention. He must be released.

[60] It will also be plain from the legislation that there is a temporal element to the Parole Commissioners' decision – "it is no longer necessary." (Our underlining). If they make a direction under Article 28(5) they must do so based on their assessment of risk at that time.

[61] The use of the word immediate together with the temporal requirement clearly convey a sense of urgency. This is entirely consistent with the wording of the statute, the purpose of the statute and the context of the statute. The only basis upon which a prisoner in these circumstances can be retained in custody is if confinement is necessary for the protection of the public from serious harm. Importantly the Department of Justice "shall *give effect to the direction*." The mandatory language is clear.

[62] What then is meant by immediate? Mr McGleenan sensibly submits that immediate does not mean instantaneous. The affidavit filed by Alison Redmond, the Head of the Public Protection Branch in the Safer Communities Directorate in the DOJ avers that prisoners who are subject to a direction under Article 28(5) are "in effect released immediately." She qualifies this by saying:

> "There has to be a reasonable period of time to allow for the processing of the prisoner out of custody and for all associated arrangements to be put in place … There may be some delays in releasing a prisoner over a weekend or on a public holiday. However, release is given effect as soon as possible, and generally, within a matter of hours of the Parole Commissioners' determination."

[63] She further acknowledges that where a particular address is specified by virtue of the licence conditions, release may be deferred for a short period until this is secured. Thus, she says:

> "Whilst this can sometimes take 1 to 2 days to arrange, it is the Department's view that this falls within what is considered reasonable in the context of an Article 28(4)(sic) direction for immediate release."

[64] It is this acknowledgement that opens the door for Mr Sayers' submission. Mr Sayers argues, therefore, that in accepting that a prisoner release cannot be effected immediately following a direction the DOJ accepts that there will always be a period of delay whilst administrative steps are taken and arrangements put in place to effect the release. Whilst he accepts this is usually a period of hours, he argues that as a matter of principle those steps may require a longer period before release can be effected. In support of his argument, he relies upon the decision both at first instance and on appeal in the case of *R (Bowen) v Justice Secretary* [2017] EWCA Civ 2181, [2018] 1 WLR 2170.

[65] *Bowen* had been sentenced to life imprisonment with a minimal custodial term of 14 years. After his minimum term had expired his case was reviewed by the Parole Board which directed his release on the basis that a number of conditions would be imposed by the Secretary of State on his release licence, one of which was that he should for a period reside at a named approved facility. Mr Bowen had to wait 69 days before a place in the approved facility became available. The approximate date of availability was known to the Board at the time of its decision. *Bowen's* case was heard together with the case of *Staunton*, who had to wait 118 days before a place became available for him.

[66] *Bowen* sought judicial review of the lawfulness of his detention after the Parole Board's decision and before release, alleging breach of, inter alia, section 28 of the Crime (Sentences) Act 1997 and the right to liberty protected by article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It was contended on his behalf that once the Parole Board had directed his release subject to residence at an approved premises, if that condition could not be achieved immediately, he had to be released without any such condition.

[67] At first instance Whipple J dismissed the application. Mr Sayers refers to the following passage of the judgment of Whipple J:

> "The starting point must be an analysis of the statute. The Secretary of State is under a duty to release any life prisoner in relation to whom the Parole Board has made a direction, but that release is to be on licence: s28(5). The Parole Board can recommend conditions to be imposed on that licence: s31(3). These two provisions work together. Release is subject to any conditions imposed on the licence. As a matter of statutory construction, I conclude that the Secretary of State is not under any obligation to release a life prisoner from custody the moment the Parole Board directs release or whether he/she is obliged to implement direction as soon as he/she is able to do so. Where residence at an [approved premises] is a condition of release, that moment comes when the condition is capable of being fulfilled."

[68] The Court of Appeal dismissed *Bowen's* appeal.

[69] In construing section 28 McCombe LJ said:

> "[27] For the claimants, Mr Rule argues that section 28(6) requires that the Board shall not direct release of a life prisoner unless it '*is* satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.' However, as section 28(5) otherwise provides, '*as soon as* … (b) the Parole Board has directed [a life prisoner's release] under this section *it shall be the duty of the Secretary of State to release him on licence*' …
>
> [28] As he did before the judge, Mr Rule accepts realistically that the release did not have to be at the moment of issue of the Board's decision, but contends that release should have followed within a very short time and should not have been delayed for anything like the 69 days and 118 days that followed the decisions in these cases."

[70] Turning to the question of the construction of the statute he went on to say:

> "[42] Notwithstanding these submissions, Mr Rule accepts, I think, that there is no specific authority resolving the present issue of construction and, in my view, the materials and authorities, dealing with other circumstances in other cases, to which he has referred us, can only assist to a very limited extent. It is necessary, it seems to me to return to the specific words of the statute and to look to what the Parole Board's decision in these two cases actually directed.
>
> [43] In my judgment it is clear from section 28(6) that the Board cannot give a direction for release under section 28(5) unless it is satisfied that it is no longer necessary to confine the prisoner for the protection of the public. While there is no express provision empowering the Board to compel particular licence conditions, it is clear from section 31(3) that the scheme envisages that the Board will in fact make recommendations as to the conditions that are desirable in order to achieve the protection of the public and it would be entitled to

determine that is not "safe" to release the prisoner without such conditions being in place.

[44] It is common ground that in making a direction with recommended conditions, the Secretary of State can only have a reasonable time in which to put the conditions in place. Thus, for example, as here where it is envisaged that release might be directed, inquiries are made (with regard to availability of Approved Premises), before the hearing takes place before the Board. The panel is then informed when a place will be available.

[45] In the present cases, the panels knew when places were to be available at MH for these claimants and on that basis were prepared to direct release, compatible with public protection, with the recommendation that the claimant should reside at those premises when first released. It can safely be assumed, I think, that if that accommodation had not been available as part of the risk management plan, the panels would not have directed release at all. (Our underlining).

[46] The working of the Act is that the Board will direct a release in a manner that is consistent with the protection of the public. It may do so absolutely, or it may do so, with the knowledge that certain safeguards can be put in place to achieve that result. The prisoner can have his release on that basis or not at all. In these cases, the claimants were released from custody in accordance with the release arrangements, which the Board considered to be consistent with the protection of the public.

[47] If, as I see it, the claimants would not have been released at all if Approved Premises could not be made available, they can hardly complain if they are released in accordance with the direction that release will occur on a defined date when the premises are known to be available. (Our underlining)."

[71] The Court of Appeal also referred to a decision of Langstaff J in *R (Elson) v Greater Manchester Probation Trust* [2011] EWCA 3692 (Admin). This was a decision refusing permission to apply for judicial review in which he also construed section 28 of the 1997 Act. The relevant passage was:

> "Section 28 of the 1997 Act cannot sensibly be interpreted to provide that as soon as a Parole Board takes a decision in which it directs release, albeit under conditions or at some future time, the Secretary of State is under a duty there and then and thereby to ensure that that release takes place forthwith. That would give no effect to the provisions of s31; it would not recognise the difference in language between s28 and s32; it would in my view simply have been beyond the contemplation of Parliament that the alternative, which would need to have been in place (for) immediate release to be effected, would operate in an impractical way."

[72] The Court of Appeal ultimately concluded:

> "[52] I agree with Langstaff J and the judge that Parliament cannot have intended the section to work in a way that would have the impracticable results that flow from the construction which Mr Rule would have us adopt. Of course, prior planning is made by the offender manager to see when a place at Approved Premises would be available, as happened here. It enables the panel to know that, if it directs release to Approved Premises, the release can be safely achieved with the relevant risk management precautions in place. However, to my mind, an intention to require immediate release at a time before such precautions are known to be available is not something that one should readily attribute to Parliament. As Langstaff J also pointed out, if a person is released on condition of residence at a place which is not available to him it would have the result that he would have to be brought back to prison immediately if the condition was broken on the first day out of custody. Such a result can hardly have been intended."

[73] Mr McGleenan argues that *Bowen* has been wrongly decided. Bearing in mind the recent Supreme Court decision in *R(on the application of Jwanczuk) (Respondent) v Secretary of State for Work and Pensions (Appellant)* [2025] UKSC 42, whilst we have some reservations about the correctness of the decision, the court considers that it is not necessary to determine that issue. We say so for three reasons.

[74] Firstly *Bowen* was interpreting the phrase "as soon as" as opposed to "immediate." In his judgment Mr Justice Humphreys felt that any such distinction was semantic and applied the interpretation in *Bowen* to the interpretation of the phrase "immediate" in the 2008 Order. It will be noted that in the passage of

Langstaff J's judgment in *Elson* he expressly drew attention to the difference in the language between section 28 and section 32 of the 1997 Act. The former using the term "as soon as" and the latter using the term "immediate."

[75] Secondly, the facts in *Bowen* and *Elson* are fundamentally different in an important respect from the facts in this case. In *Bowen* and *Elson* the Parole Board had an identified place of residence and knew that it would be available on an identified date. The significance of this is clear from the decisions of the courts in each case.

[76] As McCombe LJ said in *Bowen:*

> "I think, that if that accommodation had not been available as part of the risk management plan the panels would not have directed release at all."

[77] Similarly in *Elson* at para [11] of his judgment Langstaff J says:

> "11. It follows that the Parole Board thought that it could only be satisfied that the risk had reduced to an extent which empowered it to order release upon the basis that there was a place in that hostel available for the claimant. It would follow that it would have been **unlawful** for the Parole Board to have ordered release having come to that conclusion if the hostel had been unavailable." (Our emphasis)

[78] Thus *Bowen* and *Elson* do not assist the respondent given the absence of an identified residence and a date when any residence might become available.

[79] Thirdly, the statutory context for the release of prisoners after recall is on an entirely different footing in England and Wales than in this jurisdiction.

[80] Specifically, in England and Wales as a result of the amendments referred to above, the word "immediate" has been deleted from the relevant legislation.

[81] The relevant amendments have introduced the concept of giving effect to a direction "as soon as is reasonably practicable in all the circumstances." Finally, and importantly in England and Wales the Commissioners have the power to review or reconsider a direction if circumstances relating to risk change before the direction is effected.

[82] Turning again to the decision of the Commissioners under challenge we note that when setting out the statutory test the panel conspicuously use the word "release" rather than "immediate release."

[83] We have no doubt that the decision under challenge was well-intentioned. The objective was to provide for the release of Mr McAllister with some form of supervision before the two-year extended period expired. The Commissioners were clearly alive to the fact that this was an exceptional and unusual decision. It is apparent that they were also frustrated by the delays in identifying suitable accommodation for Mr McAllister by the Trust.

[84] Every effort had been made to put in place licence conditions which would permit Mr McAllister's release consistent with the obligation to protect the public.

[85] In this regard the Commissioners were undoubtedly emboldened by the correspondence from the DOJ dated 17 September 2024 in the following terms:

> "Dear Sirs
>
> **C760 Martin McAllister – Response to Direction Direction**
>
> **The Department's view regarding the proposed licence condition, that if the panel issued a direction to release, that it would be subject to Mr McAllister residing at a PBNI approved accommodation.**
>
> If the panel issued a direction to release DOJ would agree to the following licence condition:
>
> - **Release subject to Mr McAllister residing in accommodation identified by the relevant Health and Social Care Trust and approved by PBNI.**
>
> I am copying this correspondence to Mr McAllister and his legal representative."

[86] On reviewing the papers it does not appear that this was a response to any written direction by the Parole Commissioners. It appears to be a response to what took place at the oral hearing on 9 September 2024. It seems to us that this provided the "green light" from the DOJ, the appellant in this case, to the Commissioners to release Mr McAllister on the conditions which are now being challenged.

[87] At the hearing, Mr McGleenan with the benefit of hindsight, frankly, accepted that this was an unfortunate, unhelpful letter from the Department.

[88] Notwithstanding that, it falls to this court to properly construe the provision under consideration.

[89] By definition any direction under Article 28 will contain a degree of contingency or conditionality. As Mr McGleenan says immediate does not mean instantaneous.

[90] No prisoner who is released under Article 28(5) will be released without some conditions. Although it is for the DOJ to set licence conditions the Parole Commissioners must when they are considering whether to give a direction under Article 28(5) take into account potential licence conditions. Article 24(3) of the 2008 Order provides that an ECS prisoner will be subject not only to standard prescribed licence conditions but also any other condition which is prescribed and which the DOJ sees fit to specify. The mandatory standard conditions and the other discretionary conditions are prescribed by the Criminal Justice (Sentencing) (Licence Conditions) (Northern Ireland) Rules 2009. For the purposes of this appeal, two conditions which relate to the proposed residence of the prisoner are relevant.

[91] Rule 2(2)(c) requires that all licences contain a standard condition that the prisoner: "permanently reside at an address approved by the [supervising officer] and obtain the prior permission of the [supervising officer] for any change of address."

[92] Rule 3(1)(a) empowers the Department to include a "requirement that the prisoner reside at a certain place." The Department can therefore specify the precise address at which a prisoner must reside.

[93] Pursuant to Article 28(5), the Department may not include any discretionary condition or exercise its power to add, vary or cancel conditions, without prior consultation with the PCNI.

[94] The relevance of these provisions is that the Department is required by the 2009 Regulations to include a condition requiring that the prisoner reside at an address approved by the supervising officer. Accordingly, unless the address is specified in the licence, the problem which arose in this case is capable of arising in every case unless the address at which the prisoner will reside is known at the time of the hearing or sufficient information is known about the availability of suitable accommodation. Where, like this case, the prisoner's accommodation arrangements are material to the public protection risk, in the absence of sufficient information about the availability of suitable accommodation it will be difficult, if not impossible, for the PCNI to discharge its functions. This is why the Department, PBNI, and other accommodation providers such as a Health Trust regularly contribute to or participate in PCNI hearings. By ensuring that sufficient information about the proposed accommodation arrangements is available to the Commissioners they will know whether the licence conditions proposed by the Department are capable of being fulfilled in order to facilitate an immediate release. The Commissioners will then be in an informed position when assessing the likely effectiveness of the proposed release conditions and hence whether it is appropriate to give a direction for immediate release.

[95] We consider that to give proper effect to the use of the word "immediate" and the purpose and context of the legislation it should be construed in such a way that any licence conditions attached to the direction are capable of being put in place in the immediate future as opposed to an indefinite time in the future. Where it is considered by the Commissioners that a risk posed by the prisoner could be sufficiently mitigated by the use of a condition, they must therefore know the nature of the proposed condition. If the proposed condition is itself to be subject to future contingencies, assessments or decisions, the Commissioners must therefore have sufficient information and evidence to be able to satisfy themselves that the implementation of those conditions is either within the control of the Department or that any third parties which may have a role to play will be able to ensure performance within a sufficiently short period of time to enable the Department to facilitate immediate release of the prisoner, without further delay or uncertainty and consistently with the requirements of public protection.

[96] In a case where the proposed address proves problematic, what must be known is that at least one identified option in terms of address will be acceptable and be available to facilitate an immediate release.

[97] It is acknowledged that administrative steps will be required to put the necessary arrangements for release in place, and that "immediate" release does not mean "instantaneous" release. The Department must be afforded a short period of time to take the necessary administrative steps to ensure release without delay. It is impossible to prescribe a precise timescale, and the facts of any particular case will guide whether any delay in release is excessive. What is not lawful or permitted by the statute is that release depends on further contingencies, assessments or decisions by third parties, if their outcome or delivery is material to the risk posed by the prisoner. In such a case, there is an impermissible conflict between the duty of the Department to effect an immediate release of the prisoner and ensuring that the conditions necessary to mitigate the risks to the public are all in place.

[98] The fundamental flaw in such an approach is that it means that at the time the direction is given the Commissioners cannot say, as required by the statute, that "it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined." Equally it cannot be said that it can be so satisfied at some unknown point in the future. The risk in such an approach is that a decision made at an indefinite period of time in advance of actual release is unable to take any account of changes to risk profile which may affect public protection considerations in the intervening period. It is simply impossible to make the necessary evaluative judgment on risk at an indefinite period of time in advance of actual release.

[99] In our view, a direction for "immediate release" under Article 28(5) of the 2008 Order cannot leave open a condition whose fulfilment is uncertain until such times as further assessments and/or decisions need to be taken to implement the

condition if they are material to the risks posed by the prisoner. If, like in this case, a decision is made to release a prisoner subject to a condition which requires further assessment, decision making or the expenditure of resources by a third party, the result is that the actual release of the prisoner may become unduly dependent upon the discretion or conduct of a body which is not subject to the statutory duties under the 2008 Order. Prisoners could therefore experience both delay and uncertainty in achieving release, with limited scope for legal redress against those parties, particularly if the Department lacks the power to direct and control their actions. We note that in this case judicial review proceedings were threatened against both the Department and the Trust before Mr McAllister was released. We do not accept that the legislature could have intended the potential for uncertainty or even arbitrariness of this nature to undermine a decision of the Commissioners to release a prisoner and we do not consider that it is consistent with the statutory requirement for immediate release.

[100] In response to the potential for a material change in risk to have occurred between the date of a direction by the Commissioners and actual release, it was contended on behalf of the Commissioners that this could be addressed by means of releasing the prisoner on the original conditions but then making a recall decision. We do not accept that the legislature could have intended this to be the correct response to a material change in risk. In the first instance, it would appear to run entirely contrary to the statutory scheme, since it would involve the release of a prisoner in circumstances in which the risks posed by the prisoner had not been properly assessed. The Department, which is charged with releasing the prisoner, would also be required to work to achieve the opposite result, namely an immediate recall. Second, it is not clear if or when the grounds for a recall might be established. If the recently emerged risk would have required additional conditions, which are not included, the prisoner may not actually be in breach once they pass out the prison gate and immediate recall may not be possible. Where, as here, mitigation of the original understanding of the prisoner's risks required conditions which involve decision making or the expenditure of resources by third parties, there could be an entirely artificial process of attempting to progress the fulfilment of those conditions, notwithstanding the knowledge that the Department will be actively seeking to bring them to an end. In a complex case such as the present where fulfilment of the conditions may require the expenditure of significant resources, the undesirability of this potential should not be discounted. For all of these reasons, we do not accept that the release and recall of a prisoner is a mechanism which the legislature intended for addressing the potential of a material change in risk while a prisoner is awaiting implementation of a direction for release. It is of note that the Court of Appeal in *Bowen* (at [52]) also concluded that the legislature was unlikely to have intended release and recall to be used as a mechanism to resolve the inability of the Department to fulfil the conditions determined to be necessary for the release of a prisoner.

[101] The court is of course alive to the practical outworkings of statutory interpretation. The court in *Bowen* and the Commissioners in this case were

influenced by pragmatic concerns. However, there are obvious parallel and pragmatic concerns arising from the concept of release on a contingent or conditional basis. As discussed above, any delay in implementing licence conditions leaves open the possibility that the risk presented by the prisoner will change in circumstances where the Commissioners do not have the power to review or revisit their decision pending his release. This has the effect of preventing consideration of the prevailing risk factors at the point of release. It runs the risk of a prisoner being released at a time when the statutory threshold in relation to the risk of serious harm has not been met.

[102] We consider there is considerable force in Mr McGleenan's submission that the significant ancillary legislative changes introduced in England & Wales support the construction for which he argues. Some of the thinking behind the changes can be seen in the explanatory notes to the Police, Crime, Sentencing and Courts Bill which preceded the changes. Under the heading "Release at Direction of Parole Board: Timing", the note states:

> "134. Clause 114 amends existing legislation regarding the timing of a prisoner's release following a direction by the Parole Board. In all cases, when the Parole Board directs release, the Secretary of State must give effect to the direction 'as soon as is reasonably practicable' to do so. In recall cases, the Parole Board will no longer be able to direct 'immediate' release. The reason for these changes is that in practice, decisions described as requiring 'immediate release' are unhelpful and unnecessary, they create false expectations because a release of a prisoner can never take place immediately following a direction by the Parole Board due to the need to make necessary arrangements for the licence conditions the Parole Board stipulates the prisoner must be subject to on release (for example, a requirement to reside in an approved premises). They may create an expectation that release will take immediately after the Parole Board decision is made, which may not be possible due to the ned to make necessary arrangements for the licence conditions the Parole Board stipulates that the prisoner must be subject to on release (for example, a requirement to reside in an approved premises)."

In our view, the absence of similar powers in this jurisdiction is significant and supports the interpretation argued for by the appellant.

[103] The matter, of course, can be resolved should the legislature decide to introduce the amendments that were made in England and Wales to cover this very

scenario. That is a matter for the Department to consider. However, we must apply the law as it stands.

[104] Finally, we note that the panel made a "recommendation" that release be on a "graduated" basis. Plainly, no such option is available as a direction under the 2008 Order. Since this was merely a recommendation and did not form part of the direction it is not amenable to judicial review. However, again whilst well-intentioned, it suggests that the panel was contemplating an approach which was ultra vires the 2008 Order.

Conclusion

[105] For the reasons set out above we therefore conclude that the decision of the PCNI to direct the release of Mr McAllister in this case was unlawful.

[106] We conclude that the PCNI cannot lawfully direct the release of a prisoner under Article 28 of the Criminal Justice (Northern Ireland) Order 2008 on a conditional or contingent basis.

[107] This does not mean that a prisoner should be released instantaneously with a direction for immediate release. The order permits some time for administrative or logistical arrangements to be put in place to comply with conditions of release.

[108] Article 28 of the 2008 Order does not permit the release of a prisoner on conditions which require future assessments, decisions or contingencies which are unknown at the time of the direction for immediate release, if these are material to the risks posed by the prisoner. Fulfilment of any condition which is necessary to mitigate the risks must either be within the control of the Department or the Commissioners must have sufficient information to be satisfied that the relevant condition can and will be fulfilled within sufficient time to facilitate the immediate release of the prisoner, in the sense explained above.

[109] We repeat our view that the PCNI panel acted with best intentions and in a solution focused manner, frustrated by delay, and mindful of the need to provide support to Mr McAllister before the ECS term expired. We also recognise the Department's correspondence referred to above, appeared to support this approach. However, such a step was fraught with difficulty given the statutory provisions we have discussed. That is why this appeal must succeed.

[110] We will hear the parties on costs.