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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

**QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY DEBORAH McGUINNESS (No. 4)
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

and

DEPARTMENT OF JUSTICE FOR NORTHERN IRELAND

and

THE PAROLE COMMISSIONERS FOR NORTHERN IRELAND

Proposed Respondents

and

MICHAEL STONE

Notice Party

**Mr Ronan Lavery QC with Mr Michael O'Brien (instructed by McIvor Farrell Solicitors)
for the Applicant**

**Ms Neasa Murnaghan QC with Mr Philip McAteer and Mr Terence McCleave (instructed
by the Departmental Solicitor's Office) for the Department of Justice**

**Mr Donal Sayers QC with Ms Denise Kiley (instructed by Carson McDowell Solicitors)
for the Parole Commissioners**

**Mr Hugh Southey QC with Mr Richard McConkey (instructed by McConnell Kelly
Solicitors) for the Notice Party**

COLTON J

Introduction

[1] As is evident from the title this application for leave is the fourth in a series of challenges brought by the applicant challenging various decisions relating to the release from prison of Michael Stone, the Notice Party, a notorious murderer.

[2] This application encompasses a previous application known as McGuinness No. 2 and is in effect a consolidated application.

Background

[3] The applicant is the sister of Thomas McErlean who was murdered on 16 March 1988 at Milltown Cemetery in Belfast. On that day, the funeral was being held for three people who had been killed in controversial circumstances in Gibraltar. Mr McErlean had attended the funeral and was also in attendance at the burial when those present were subject to an attack by Michael Stone with firearms and grenades. Mr McErlean was one of three victims who died during the attack. On 3 March 1989 Mr Stone was subsequently convicted of Mr McErlean's and two other victims' murders. He was also convicted of three other troubles related murders of which he made a voluntary confession to police. He was sentenced to life imprisonment.

[4] Mr Stone was released on 24 July 2000 under licence as part of the Early Release Scheme provided for under the Belfast/Good Friday Agreement in 1998 and the Northern Ireland (Sentences) Act 1998.

[5] Mr Stone was subsequently arrested on 24 November 2006 after an attack at the Parliament Buildings, Stormont, Belfast. On 14 November 2008 he was convicted of attempted murder arising out of this attack and on 8 December 2008 he was sentenced to serve 16 years in custody. On 29 July 2013, the Lord Chief Justice of Northern Ireland determined that the tariff in respect of the life sentence imposed on 3 March 1989 should be 30 years' imprisonment.

[6] From November 2018 onwards the applicant has been involved in a number of legal challenges related to decisions made about the potential release of Michael Stone from prison on licence. Part of that litigation involved a dispute about when he would first become eligible for release. Following hearings at Divisional Court level, Supreme Court level and ultimately by the Court of Appeal in this jurisdiction it was determined that Mr Stone was eligible to apply for release from 21 March 2018. The applicant has sought leave to appeal this decision to the Supreme Court.

[7] Prior to the Court of Appeal decision Mr Stone's case was referred to the Parole Commissioners for Northern Ireland ("the Commissioners") on 18 July 2018 under Article 6 of the Life Sentences (Northern Ireland) Order 2001. The matter was delayed pending the outcome of the applicant's challenge to Mr Stone's release date. Following the decision of the Court of Appeal Mr Stone pursued the application for release from prison before the Commissioners. On 25 January 2021 the Commissioners directed the release of Mr Stone under the provisions of the Life Sentences (Northern Ireland) Order 2001.

Re Applicant's Challenge

[8] The applicant raises three broad issues in this challenge.

[9] The first relates to the Commissioners' decision not to provide the applicant with information about Mr Stone's application for release.

[10] The second relates to the decision by the Commissioners to conduct Mr Stone's hearing in private and not permit her to attend and to participate in the hearing.

[11] The third is a challenge to the actual decision by the Commissioners to release Mr Stone on licence.

The Parole Commissioners' Rules

[12] The first two issues in effect amount to a challenge to rule 22 of the Parole Commissioners (Northern Ireland) Rules 2009. The Rules were made pursuant to the powers conferred by Article 100 and paragraph 4 of Schedule 4 of the Criminal Justice (Northern Ireland) Order 2008.

[13] Paragraph 4(1) and (2) of Schedule 4 provide as follows:

"4. – (1) The Department of Justice may make rules with respect to the proceedings of the Commissioners.

(2) In particular rules may include provision –

(a) for the allocation of proceedings to panels of Commissioners;

(b) for the taking of specified decisions by a single Commissioner;

(c) conferring functions on the Chief Commissioner or deputy Chief Commissioner;

(d) about evidence and information, including provision –

(i) requiring the Commissioners to send to the Department of Justice copies of such documents as the rules may specify;

(ii) requiring the Department of Justice to provide specified information to the Commissioners;

- (iii) *for the giving of evidence by or on behalf of the Department of Justice, the Police Service of Northern Ireland and others;*
- (iv) *about the way in which information or evidence is to be given;*
- (v) *for evidence or information about a prisoner not to be disclosed to anyone other than a Commissioner if the Department of Justice certifies that the evidence or information satisfies conditions specified in the rules;*
- (vi) *preventing a person from calling any witness without leave of the Commissioners;*
- (e) *for proceedings to be held in private except where the Commissioners direct otherwise;*
- (f) *preventing a person who is serving a sentence of imprisonment or detention from representing or acting on behalf of a prisoner;*
- (g) *permitting the Commissioners to hold proceedings in specified circumstances in the absence of any person, including the prisoner concerned and any representative appointed by the prisoner."*

[14] Rule 22 of the Parole Commissioners Rules (Northern Ireland) 2009 states:

"Location and privacy of oral hearings

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."*

[15] In relation to these proceedings the factual and legal circumstances have developed since the proceedings were first issued.

[16] On 28 January 2021, the court directed that the Commissioners disclose a summary of reasons for the decision to direct the release of Mr Stone, redacted as appropriate. Pursuant to that direction the Commissioners disclosed the entirety of the reasons for their decision save for redactions sought by Mr Stone in respect of personal information.

[17] More importantly from the public law aspect of the challenge Ms Murnaghan provided the court on the morning of the hearing with a copy of the Parole Commissioners' (Amendments) Rules (Northern Ireland) 2021 made in May 2021 which were to come into operation on 21 June 2021. The 2021 Rules provide for the amendment of the 2009 Rules by inserting the following after rule 22:

"Information about proceedings

22A.-(1) Where a registered victim or other person makes a request for a summary of the reasons for a provisional direction of a single commissioner required under Rule 13(2)(b) that has become final by virtue of Rule 13(6), the single Commissioner must produce a summary of the reasons for that direction, unless the Commissioner considers that there are exceptional circumstances why a summary should not be produced for disclosure.

(2) The single Commissioner is not required to produce a summary under paragraph (1) where the request is made more than six months after the date when the direction under Rule 13(2)(b) become final.

(3) Other than those of the parties, the names of persons concerned in proceedings under Rule 13(2) must not be disclosed under paragraph (1) except insofar as the single Commissioner directs.

(4) Where a registered victim or other person makes a request for a summary of the reasons for a decision recorded after oral proceedings under Rule 24(2), the relevant panel must produce a summary of the reasons for that decision unless the Chairman of that Panel considers that there are exceptional circumstances why a summary should not be produced for disclosure.

(5) *The relevant panel is not required to produce a summary under paragraph (4) where the request is made more than six months after the date of the decision.*

(6) *Other than those of the parties, the names of persons concerned in oral proceedings under these rules must not be disclosed under paragraph (4) except insofar as the Chairman of the relevant panel directs.*

(7) *This rule does not affect the operation of Rule 9 (Non-disclosure of Confidential Information).*

(8) *For the purposes of this rule, "Registered Victim" means a person who is registered or entitled to receive information under any of –*

(a) *The Prisoner Release Victim Information (Northern Ireland) Scheme 2003;*

(b) *The Probation Board for Northern Ireland Victim Information Scheme 2005;*

(c) *The Victims of Mentally Disordered Offenders Information (Northern Ireland) Scheme 2008."*

[18] In light of these developments Mr Lavery agreed that it was not necessary to pursue his arguments in relation to the provision of information.

Right of Attendance/Participation

[19] It will be seen that rule 22(2) provides that oral hearings shall be held in private. Sub-paragraph (4) does however provide the Chairman of the Panel with a discretion to admit to the oral hearing such persons on such terms and conditions as he considers appropriate. In addition, it will be noted that Schedule 4, paragraph 4(2)(e) provides that rules can be made "*for proceedings to be held in private except where the Commissioners direct otherwise.*"

[20] The applicant in her amended Order 53 Statement filed on 8 January 2021 sought an order compelling the Parole Commissioners to permit her full participation rights, not only including attendance at any hearing but also the right to representation, the right to call witnesses, the right to cross-examine witnesses, to consider all relevant evidence, to hear all oral evidence and the right to make oral representations. Mr Lavery argues that the procedural rules for proceedings before the Parole Commissioners violate her rights under the common law principles of open justice and her rights under Article 6, Article 10 and Article 17 of the European Convention on Human Rights (ECHR).

[21] The court accepts that the principle of open justice and the applicant's Article 10 rights are relevant to parole decisions. This principle was confirmed as applicable to Parole Commissioners' proceedings in the well-known case of *Regina (D & Anor) v Parole Board & Anor; Regina (Mayor of London) v Parole Board; Regina (News Groups Newspapers Limited) v Parole Board and another* [2019] QB 285; [2018] EWHC 694 (Admin) (hereinafter "*DSD*"). In that case, relying on the principle of open justice, the Divisional Court in England and Wales held that two victims of the prisoner who had been released by the Parole Commissioners were entitled to information about the release decision. Indeed, the judgment of the court in *DSD* was a trigger for the 2021 amendment to the 2009 Rules.

[22] The applicant contends that the principle also applies to the question of whether the proceedings should be held in private. The court takes the view that it is arguable that a blanket ban on public hearings in relation to Parole Commissioners is unnecessary and that some form of "*public hearings*" should be possible.

[23] **For this reason, as indicated at the hearing, the court grants leave to the applicant to challenge the lawfulness of the 2009 Rules insofar as they prohibit public hearings. Further, the court grants leave to the applicant to challenge the failure of the Parole Commissioners to make provision for the applicant to attend at the hearing.**

[24] However, the contention that the procedural rules should allow for the victims and families of victims to become intervenors and full parties where appropriate is a different issue.

[25] In relation to the applicant's argument for full participation rights based on Articles 6, 10 or 17 of the ECHR the applicant refers to no precedent which would justify such an alleged entitlement.

[26] The applicant has not particularised how either the common law principle to open justice or Articles 6, 10 and 17 ECHR require her to have full participation rights in parole hearings. Nor has she cited any legal authority to support any such claims.

[27] Article 6(1) entitles the applicant to a fair and public hearing "*in the determination of the civil rights and obligations.*" The European Court of Human Rights (ECtHR) authority on the applicability of Article 6(1) is summarised in the ECtHR prosecutors guide to Article 6 as follows:

"3. The applicability of Article 6 paragraph 1 in civil matters firstly depends on the existence of a "dispute" (in French, "contestation"). Secondly, the dispute must relate to a "right" which can be said, at least on arguable grounds to be recognised under domestic law, irrespective of whether it is

protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. Lastly, the result of the proceedings must be directly decisive for the "civil" right in question, mere tenuous connection or remote consequence has not been sufficient to bring Article 6 paragraph 1 into play ..."

[28] There is no basis upon which to conclude that the applicant's Article 6 rights or common law rights are engaged in proceedings before the Commissioners much less violated. The applicant is not a "party" to the proceedings. The statutory function of the Commissioners is to determine whether they 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 of the Life Sentence (Northern Ireland) Order 2001.

[29] It is difficult to see how Article 17 has any applicability to the applicant's case. Article 17 states:

"Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

[30] It is clear from the wording of Article 17 that its focus is on the use of the Convention itself in order to destroy or limit any rights contained therein. In the court's view an Article 17 argument does not even get off the ground in this case.

[31] The court accepts that it is arguable that Article 10 supports an argument requiring the Commissioners to have the power to conduct a public hearing at which the applicant could attend subject to the discretion of the Panel. As has been pointed out in paragraph 19 above the Chairman of the Panel has a discretion in this regard. That however falls well short of an entitlement to the sort of participative rights being sought by the applicant.

[32] Therefore, considering the applicant's arguments at its height on the issue of participation rights the court concludes that there is simply no identifiable legal basis for such an entitlement. Such a ground is unarguable. Therefore, leave to argue this ground is refused.

The Challenge to the Decision of the Parole Commissioners

The Decision of 25 January 2021

[33] The court has been provided with the full reasoning of the Commissioners set out in paragraphs 42-74 of the decision.

[34] It has also been provided with some introductory paragraphs and a summary of the decision (paragraph 75-77). In addition the recommendations of the panel in relation to licence conditions have also been provided.

[35] The full documentation provided is annexed to this judgment. Given that these are public proceedings there is no bar to the publication of any part of the decision annexed hereto.

[36] On behalf of the applicant Mr Lavery challenges the lawfulness of the decision on numerous grounds as follows.

Misdirection as to the Statutory Test

[37] This criticism is based on the submission that the Commissioners appear to have adopted a “two-limb” approach to the statutory test by reason of their reliance on the case of *Re Foden* [2013] NIQB 2.

[38] Thus in paragraph 51 of the decision the Commissioners say:

“The test to be applied by the panel is set out in the judgment in Re Foden Judicial Review [2013] NIQB 2 that the correct approach regarding the assessment of risk is to apply the statutory test after having considered appropriate licence conditions.”

[39] In paragraph 73 the Commissioners say:

“In considering the application the statutory test as set out in the Foden case, the Commissioners are obliged to consider whether the prisoner can be safely managed in the community with the application of appropriate licence conditions.”

[40] Mr Lavery points out that the case of *Foden* referred to a challenge to a decision to recall a prisoner and revoke his licence and the particular circumstances in which risks should be considered to have increased in such a case where a prisoner is considered to have breached the conditions of his licence. This obviously differs from the factual circumstances here.

[41] In essence Mr Lavery’s criticism is that the Commissioners have fallen into the trap of firstly assessing whether or not the applicant represents a risk to the public. Having determined that the applicant did represent a risk of serious harm to the public they then went on to consider whether or not that risk could be managed

in the community by the imposition of conditions. He submits that when one analyses the approach to the so-called “*second limb*” in fact the Commissioners were addressing issues of risk rather than whether the risk could be managed.

[42] He says that having found that the prisoner presented a risk of serious harm to the public they were bound to refuse to release him. He argues that the finding should have been made in a holistic manner considering all relevant risk factors and protective factors.

Irrationality

[43] Mr Lavery contends that the decision to release the prisoner was unreasonable in a *Wednesbury* sense.

[44] In this regard he sets out five material facts or considerations which he submits were not taken into account by the Parole Commissioners as follows:

- (a) The Parole Commissioners failed to obtain or take into account any evidence in the form of a psychiatric and/or psychological assessment of the prisoner.
- (b) The Parole Commissioners failed to take into account the refusal of the prisoner to engage in a psychiatric and/or psychological assessment.
- (c) The Parole Commissioners failed to obtain or take into account assessments of the current risks associated with the prisoner.
- (d) The Parole Commissioners failed to take into account the decision of the Sentence Review Commissioners that as at 18 September 2019 the prisoner remained a danger to the public.
- (e) The Parole Commissioners failed to take into account the representations made by the applicant as a victim before making the decision.

[45] In addition to these matters Mr Lavery submits that the Commissioners took into account three immaterial facts or considerations in reaching their decision as follows:

- (a) The Parole Commissioners should not have taken into account the change in attitude expressed by the prisoner towards his crimes and towards association with terrorist organisations.
- (b) The Parole Commissioners should not have taken into account the evidence of the prisoner’s medical condition particularly with regard to his likelihood to re-offend, or support or be a member of a paramilitary organisation.

- (c) The Parole Commissioners have relied on the absence of current risk assessments as evidence of a lack of current risk or, in the alternative as mitigation of a current risk.

A Failure to Provide Reasons

[46] The applicant contends that the Commissioners have failed to provide reasons for the decision.

Error of Fact

[47] Mr Lavery on behalf of the applicant contends that the Commissioners erred in concluding that they had no evidence that the prisoner would be likely to become re-involved in paramilitary activity if he was released into the community.

Consideration

[48] The court proposes to deal with each of the points raised in the sequence set out in Mr Lavery's submissions and the Order 53 Statement. In doing so the reader should have regard to the full reasoning provided in the annex attached hereto. The court reaches its conclusions based on the helpful and ably presented written and oral submissions of Mr Lavery on behalf of the applicant and Mr Sayers on behalf of the Commissioners and Mr Southey on behalf of the Notice Party on this particular aspect of the challenge.

[49] In relation to misdirection on the statutory test, on any reading of the decision it is clear that the Commissioners properly directed themselves as to the statutory test. It is referred to in paragraphs [1], [4], [41], [51] and [75]. It is set out fully in paragraph [41]. The case of *Foden* is introduced at paragraph [51] in the following way:

*"[51] In considering the statutory test for release in the case of a life sentence prisoner the panel are obliged to apply the statutory test as set out in para [41]. IBID. It is clear that the role of the Parole Commissioners is limited to the consideration of the test and that the continued protection of the public is paramount. Accordingly the Commissioners have no role in the determination of the retributive or deterrent elements of the sentence for the index offences. Similarly the panel takes no account of the possible media interest in the case. The test to be applied by the panel is set out in the judgment in **Re Foden Judicial Review [2013] NIB 2** that the correct approach regarding the assessment of risk is to apply the statutory test after having considered appropriate licence conditions. For the reasons given below, having taken into account the evidence in the dossier, the panel is satisfied that with the imposition of*

appropriate licence conditions it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined."

[50] Thus, it will be seen that the obligation is to "*apply the statutory test as set out in paragraph [41].*" The point about *Foden* is that the statutory test in relation to the assessment of risk ought to be determined after having considered appropriate licence conditions.

[51] The effectiveness of licence conditions was plainly a relevant consideration in the Commissioners' task in applying the statutory test. Thus, at paragraph [73] of the decision the Commissioners say:

"In considering the application of the statutory test as set out in the Foden case the Commissioners are obliged to consider whether a prisoner can be safely managed in the community with the application of appropriate licence conditions."

[52] On the issue of how the Commissioners should apply the relevant test Mr Lavery referred me to various dicta from the jurisprudence on this issue which predates the legislation being considered here. I refer to cases such as *R v Parole Board of England and Wales ex parte Bradley* [1991] 1 WLR 134 cited with approval in *Re (On the application of Sturnham) v Parole Board of England and Wales* [2013] UKSC 47; *R v Parole Board ex parte Watson* [1996] 1 WLR 906.

[53] In the latter case Sir Thomas Bingham MR, as he then was, says at 916H-917A:

"In exercising this practical judgment [sc. whether or not to direct release] the Board is bound to approach its task under the two sections in the same way, balancing the hardship and injustice of continuing to imprison a man who is unlikely to cause serious harm to the public against the need to protect the public against a man who is not unlikely to cause such injury. In other than a clear case this is bound to be a difficult and very anxious judgment. But in the final balance the Board is bound to give preponderant weight to the need to protect innocent members of the public against any significant risk of serious injury. This is the test which Section 34(4)(b) proscribes, and I think it is equally appropriate under Section 39(4)."

[54] It is clear from the *Sturnham* case and the case of *R (on the application of King) v Parole Board of England and Wales* [2014] EWHC 564 (*Admin*) at paragraph [66] that the courts are reluctant to paraphrase the statutory language in any way.

[55] The court agrees with Mr Lavery's submission that in applying the statutory test the Commissioners should approach their task in a holistic manner considering

all relevant risk factors and protective factors, which will include potential licence conditions.

[56] In the court's view any fair analysis of their reasoning should conclude that this is exactly what the Commissioners did. The relevance of *Foden* was that the Commissioners correctly took into account licence conditions as a factor in the assessment of the risk in applying the statutory test. Whether any risk of serious harm posed by Mr Stone could be safely managed in the community by licence conditions was clearly a proper matter for the Commissioners to consider. Such an approach is clear from the language of the statutory test itself which focusses on the protection of the public from serious harm.

[57] For these reasons the court considers that it is not arguable that the Commissioners misdirected themselves in law as to the statutory test. They identified the test and their consideration of *Foden* has not led them into any error.

[58] Leave to apply for judicial review on this ground is therefore refused.

Irrationality/Material Considerations/Immaterial Considerations

[59] In analysing the panel's reasoning the court bears in mind the comments of Sir Brian Leveson in *DSD* at paragraph 117 when he said:

"117. The evaluation of risk, central to the Parole Board's judicial function, is in part inquisitorial. It is fully entitled, indeed obliged, to undertake a proactive role in examining all the available evidence and the submissions advanced, and it is not bound to accept the Secretary of State's approach. The individual members of a panel, through their training and experience, possess or have acquired particular skills and expertise in the complex realm of risk assessment.

118. The courts have emphasised on numerous occasions the importance and complexity of this role, and how slow they should be to interfere with the exercise of judgment in this specialist domain. In R (Alvey) v Parole Board [2008] EWHC 311 (Admin), at [26] Stanley Burnton J, neatly encapsulated the position as follows:

'The law relating to judicial review of this kind may be shortly stated. It is not for this court to substitute its own decision, however, strong its view, for that of the Parole Board. It is for the Parole Board, not for the court, to weigh the various considerations it must take into account in deciding whether or not early release is appropriate. The

weight it gives to relevant considerations is a matter for the Board, as is, in particular, its assessment of risk, that is to say the risk of re-offending and the risk of harm to the public if an offender is released early, and the extent to which that risk outweighs benefits which otherwise may result from early release, such as a long period of support in the community, and in some cases damages and pressures caused by a custodial environment.'

119. Further, as Lord Phillips of Worth Matravers CJ observed in *R (Brooke) v Parole Board* [2008] 1 WLR 1950, at [53]:

'Judging whether it is necessary for the protection of the public that a prisoner be confined is often no easy matter. The test is not black and white. It does not require that a prisoner be detained until the board is satisfied that there is no risk that he will re-offend. What is necessary for the protection of the public is that the risk of re-offending is at a level that does not outweigh the hardship of keeping a prisoner detained after he has served the term commensurate with his fault. Deciding whether this is the case is the board's judicial function.'

120. Brooke's case was heard in the Court of Appeal alongside other appeals; those went before the House of Lords and were affirmed on different grounds: see *R (Walker) v Secretary of State for Justice (Parole Board intervening)* [2010] 1 AC 553. Lord Phillips CJ's general statement of principle was not undermined. At the conclusion of his speech in the House of Lords, Lord Judge CJ stated at [134]:

'In expressing myself in this way, I am not to be taken to being encouraging applications by prisoners for judicial review on the basis that the prisoner may somehow direct the process by which the Parole Board should decide to approach its section 28(6) responsibilities either generally, or in any individual case. These are questions pre-eminently for the Parole Board itself. Although possessed of an ultimate supervisory jurisdiction to ensure that the Parole Board complies with its duties, the Administrative Court cannot be invited to second guess the decision of the Parole Board, or the way it chooses to exercise its responsibilities.'

Your Lordships were told that the Board is frequently threatened with article 5(4) challenges unless it requires the Secretary of State to provide additional material. Yet it can only be in an extreme case that the Administrative Court would be justified in interfering with the decision of what, for present purposes, is the 'court' vested with the decision whether to direct release, and therefore exclusively responsible for the procedures by which it will arrive at its decision.'"

[60] The difficulty faced by the applicant on this issue is clear from the general principles set out in the judgment in *DSD*.

[61] The legislative scheme itself does not identify relevant considerations for the Commissioners in undertaking the task required of them by Article 6 of the 2001 Order. In such circumstances the identification of material considerations is a matter for the decision-maker, subject only to *Wednesbury* review.

[62] In *DSD* at paragraph [141] the court said the following about the approach to complaints about failures to take account of relevant factors in the context of challenges to decisions of the Parole Board:

*"[141] The distinction between relevant considerations, properly so-called, and matters which may be so obviously material in any particular case so they cannot be ignored, is not merely one of legal classification; but has important consequences. If a consideration arises as a matter of necessary implication because it is compelled by the wording of the statute itself the decision-maker must take it into account, and any failure to do so is, without more, justiciable in judicial review proceedings. If, on the other hand, the logic of the statute does not compel that conclusion or, in the language of Laws LJ, there is no implied lexicon of the matters to be treated as relevant, then it is for the decision-maker not for the court to make the primary judgment as to what should be considered in the circumstances of any given case. The court exercises a secondary judgment, framed and brought on *Wednesbury* terms, if a matter is so obviously material that it would be irrational to ignore it."*

[63] Applying these principles the court now turns to the specific issues raised on behalf of the applicant in respect of material/immaterial considerations.

- (a) **The failure to obtain or take into account any evidence in the form of psychiatric and/or psychological assessment of the prisoner**

[64] As set out in paragraph 72 of the Commissioner's decision, the panel considered that there was no evidence that the prisoner was suffering from an underlying mental illness which would be relevant to the risk of further offending. The Commissioners had before them a health care report which did not indicate mental illness and a governor's letter confirming that NAP Psychology Services had "nothing to offer" the prisoner.

[65] Mr Lavery points out that the fact that the prisoner has been sentenced for terrorist offences and has remained in separate conditions in prison means that no psychology assessment would be available in any event. The Panel acknowledged such an assessment may have been helpful but referred to the lack of any evidence that the prisoner was suffering from an underlying illness or psychiatric condition which would be relevant to the risk of further offending in this case. This is linked to the second point made by the applicant.

(b) The Parole Commissioners' failure to take into account the refusal of the prisoner to engage in a psychiatric and/or psychological assessment

[66] This is factually unsustainable. The Commissioners expressly noted that it appeared the prisoner would not have consented to or co-operated with such an assessment – see paragraph [72]. The Commissioners plainly took this matter into consideration and came to their conclusion for the reasons set out in paragraph [72]. In these circumstances the approach of the Commissioners is not even arguably irrational and their decision was well within the range of reasonable decisions open to them.

(c) The Parole Commissioners failed to take into account assessments of the current risks associated with the prisoner

[67] Returning to the basic principles set out above, the level of enquiry is a matter for the Commissioners. The Commissioners plainly had a significant amount of material regarding risk before them. It is clear that the Commissioners were focused on the issue of the risk associated with the prisoner and were cognisant of the nature and severity of the original offences. It was acknowledged that the task was made more difficult by the absence of professional assessments in the form of PBNI reports concerning terrorist offenders. The absence of PBNI engagement with terrorist offenders is a well-established factor which confronts parole commissioners in Northern Ireland. If the absence of such reports were to be determinative in the many applications dealt with by parole commissioners over many years in relation to such prisoners then they, or indeed Mr Stone, would never be released from prison.

[68] In the case of *Re Nash's Application* [2015] NICA 18 the Court of Appeal considered the obligations of the Probation Service in respect of providing reports to Parole Commissioners. The Probation Board was defending its position of refusing

to provide such risk assessments on grounds that their risk assessment tools were not fit for terrorist offences. At paragraph [21] of the judgment the court said:

"[21] The core of this application lies, therefore, in the proposition that PBNI have failed to develop such an accurate and defensible tool. It is common case that PBNI is authorised to carry out research with a view to devising such a tool but it is asserted by the proposed respondent that those who have examined the assessment of such cases have been unable to devise an answer. Essentially two reasons are advanced for this. The first is that PBNI does not have access to intelligence material both in relation to the offender himself and his relationship with any terrorist or politically motivated grouping or in relation to the terrorist or politically motivated organisation which might assist in explaining how he got involved and what protective factors might be put in place to prevent further involvement. The second reason is that even where no intelligence material is available background factors in relation to the offender himself, his upbringing, his family and his place in the community give little or no assistance in relation to the risk of reoffending. In those circumstances it is submitted that no accurate or defensible assessment of an expert nature could be offered but the decision maker will still be provided with a social history and a record of the activities of the offender during this period in prison to enable the decision maker, having heard the offender, to make a judgement about risk."

[69] It will be seen that the Commissioners were provided with a social history and a record of the activities of the offender during his period in prison to assist in making their judgment about risk.

[70] Returning to *Nash* the Court of Appeal agreed with the PBNI's position and at paragraph [26] concluded that:

"[26] For the reasons given we conclude that there are no accurate or defensible assessment mechanisms available to PBNI which would enable it to carry out an assessment of risk in relation to the applicant."

[71] The challenge against the PBNI was dismissed on the grounds that the applicant had not demonstrated an arguable case with a reasonable prospect of success.

[72] The Commissioners took into account a MARA Report received on 13 January 2021 and the previous position of the Department of Justice to the effect that "*we have*

no reason not to support release.” The Panel referred to the fact that Mr Stone had availed of pre-release testing and had adhered to all conditions set. They also took into account the evidence provided by Mr Stone at the hearing and the medical evidence submitted on his behalf.

[73] The Commissioners plainly had a significant amount of material regarding risk before them. The court concludes that this ground is unarguable and has no reasonable prospect of success.

(d) The Parole Commissioners failed to take into account the decision of the Sentence Review Commission dated 18 December 2019

[74] This is a reference to the fact that the Sentence Review Commissioners determined that on 18 December 2019 Mr Stone remained a danger to the public. This decision was not before the Commissioners. However, the Sentence Review Commissioners were carrying out a different assessment of the prisoner under a different statutory test. They were considering the matter under section 3 of the Northern Ireland (Sentences) Act 1998, and the limited provision made for licence conditions by section 9. Section 9 makes it clear that the licence conditions that can be imposed by the Sentence Review Commissioners are significantly more limited and therefore it is more difficult for risk to be managed when release is ordered by the Sentence Review Commissioners.

[75] In these circumstances the Commissioners are perfectly entitled to come to a different conclusion than the one reached by the Sentence Review Commissioners.

(e) The Parole Commissioners failed to take into account the representations made by the applicant as a victim before making the decision

[76] It was accepted in the course of the hearing that representations dated 28 September 2018 made on behalf of the applicant were not included in the updated parole dossier provided to the Commissioners by the Department of Justice in December 2020. This should not have occurred, particularly in circumstances where the applicant was engaged in litigation with the Commissioners throughout this process. However, the court has considered the representations of 28 September 2018 and it is clear that nothing in those representations speaks to the risk posed by Mr Stone of which the Commissioners were not already aware. The absence of the representations could not be said to even arguably vitiate the decision of the Commissioners as to the risk posed by Mr Stone which was properly made on the materials before them. In any event at paragraph [47] the Panel made clear that it was *“mindful of the extreme gravity of the offences and the number of victims involved in this case and the deeply held sentiments of their grieving relatives.”*

[77] Turning to the three immaterial facts or considerations identified by the applicant:

- (a) **That the Parole Commissioners should not have taken into account the change in attitude expressed by the prisoner towards his crimes and towards his association with terrorism**

[78] Mr Stone's change in attitude was manifestly relevant. It was for the Commissioners to assess the weight attached to the expressed change in attitude. The applicant's attitude was a proper matter for consideration and the Commissioners were entitled to take the view that it constituted a protective factor in terms of risk, notwithstanding the difficulties in assessing the genuineness of the change of attitude.

- (b) **The Parole Commissions should not have taken into account the evidence of the prisoner's medical condition, particularly with regard to his likelihood to reoffend, support or be a member of a paramilitary organisation**

[79] It seems to the court that Mr Stone's medical conditions were potentially relevant. It was a matter for the Commissioners to assess what weight they would pay to those conditions. It could not be said to be irrational to conclude that it may be less likely that a prisoner will offend or that it would be easier to control the prisoner depending on his medical condition. The focus of the Commissioners was on the impact on his mobility and capacity. This was not a determinative factor but clearly one they were entitled to take into account.

- (c) **The Parole Commissioners have relied on the absence of current risk assessments as evidence of a lack of current risk or, in the alternative, as mitigation of a current risk**

[80] As discussed above the Commissioners were plainly aware of the state of the risk assessments and took appropriate account of all the information before them. Specifically, there is no basis for the suggestion that any absence of risk assessments was relied upon as a factor that positively established a lack of risk or was relevant to the mitigation of risk.

[81] Overall, in terms of material/immaterial consideration the court concludes that there is no basis for an irrationality challenge. The applicant's real challenge is an attack on the weight which the Commissioners attached to those factors identified. The court has already referred extensively to the judgment in *DSD*. Two further passages illustrate the proper approach the court should take to an irrationality challenge in this context. At paragraph [116] when considering irrationality Sir Brian Leveson said:

"Irrationality

116. The issue is whether the release decision was 'so outrageous in its defiance of logic or of accepted moral

standards that no sensible person [here, the Parole Board] who had applied his mind to the question to be decided could have arrived at it': ... This issue must be addressed, ... upon an examination of the material that was before the Parole Board rather than ought to have been."

At paragraph [133] the court said:

"133. A risk assessment in a complex case such as this is multi-factorial, multi-dimensional and at the end of the day quintessentially a matter of judgment for the panel itself. This panel's reasons were detailed and comprehensive. We are not operating in an appellate jurisdiction and the decision is not ours to make."

In light of the passages set out above the court's view is that the applicant has failed to make an arguable case that the court should interfere with the exercise of judgment in the specialist domain being carried out by the Commissioners.

The failure to provide reasons

[82] The Commissioners have provided the applicant with the entirety of the reasons for their decision. The applicant's complaint is now about the sufficiency of those reasons. The proper test for the court is that set out in *South Bucks District Council v Porter* [2004] UKHL 33. The reasons must enable a reader to understand the basis for the decision and that:

"A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

[83] The court is cognisant of the fact that neither the applicant or the court have been provided with the full dossier available to the Commissioners and that some of the reasoning has been redacted when referring to Mr Stone's health conditions. However, on any fair analysis the reasons are clear, detailed and substantial. They enable a clear understanding of why the Commissioners came to their decision. Much of the material upon which they relied is referred to in the reasoning. Any complaint about inconsistency in the reasons is in essence a repeat of the applicant's complaints about the irrationality of the decision.

[84] Therefore, leave to apply for judicial review on this ground is refused.

Error of Fact

[85] The applicant contends that the Commissioners erred in concluding that they had no evidence that the prisoner would be likely to become re-involved in paramilitary activity if he was released into the community. In *DSD* at paragraph [16] this was described as a “rare sub-category of judicial review.” It was pointed out that it only applies to situations where the relevant fact is or has been *established*.

[86] In *E v Secretary of State for the Home Department* [2004] EWCA Civ 49 the tests for judicial review under this heading were set out. It must be established:

- (i) That there was a mistake to an existing fact;
- (ii) That fact must be “established” and “objective” and not “contentious”;
- (iii) The applicant must have been responsible for the mistake; and
- (iv) The mistake must have played a material part in the reasoning for the decision.

[87] Whether Mr Stone is likely to become re-involved in paramilitary activity is not a purely factual question. It involves the very evaluative judgment that the Commissioners are tasked to carry out. It could not possibly be argued that the fact alleged by the applicant is either “established”, “objective” or “not contentious.” This ground is simply not arguable.

[88] Therefore, leave to apply for judicial review on this ground is refused.

Conclusion

[89] The court fully understands the strongly held views of the applicant and the relatives of those who have been murdered by Mr Stone that he is not someone who should be released into society. That view is understandable and indeed may well be widely held.

[90] The difficulty faced by applicants in this context is apparent from the decision in **R(On the application of McCourt v the Parole Board for England and Wales and the Secretary of State for Justice, Ian Simms** [2020] EWHC 2320 (Admin). In that case the Divisional Court in England and Wales refused leave to the applicant who was the mother of Helen McCourt who had been murdered by Ian Simms when she was 22 years old. Forensic evidence suggested that he strangled her with a ligature. He was convicted of the murder, despite his denials, and sentenced to life imprisonment with a minimum term set at 16 years. Simms sought to appeal his conviction but was unsuccessful. He continued to deny his guilt and has never revealed the whereabouts of Helen’s remains.

[91] It is significant that this case was heard after DSD which was cited extensively in the judgment. I do not propose to recite passages from the judgment save to point out that notwithstanding the very sensitive nature of the case and the obvious public revulsion engendered by the prisoner in that case permission to apply for judicial review was refused.

[92] The facts are that Mr Stone has served 27 years in prison, six years on licence and when released was three years beyond the date when he became eligible for release. The Commissioners are obliged by law to make a difficult and very anxious judgment. They have a specialist expertise in the domain and as has been made clear repeatedly in the authorities the court should be slow to interfere with their decisions.

[93] I am conscious that this application is only at a leave stage and that the court has not seen the entirety of the dossier available to the Commissioners. Nonetheless, the court is satisfied that there is no arguable basis upon which it could interfere with the actual decision of the Commissioners to release Mr Stone on the relevant licence conditions. To grant leave would be to provide false hope to the applicant, who in the course of this litigation has contributed to important advances in the law in relation to the conduct of parole hearings, particularly in the context of providing information to victims.

[94] However, the fact remains that she is not a party to the Parole Commissioners' hearings concerning Mr Stone and in the view of the court the Commissioners have carried out their statutory function lawfully. As was said in *DSD* at paragraph [116] in the context of rationality or reasonableness:

"116. The issue is whether the release decision was so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

[95] The court is satisfied that it is not arguable in the context of this application that such a case can be made.

[96] Accordingly, save for leave referred to at paragraph 23 above leave to apply for judicial review is refused.



Summary of
Reasons (M.Stone) F