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*(subject to editorial corrections)**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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

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**CD's Application [No. 2] [2009] NIQB 5**

**AN APPLICATION FOR JUDICIAL REVIEW BY CD (No.2)**

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**WEATHERUP J**

[1] This is an application for judicial review of a decision of 20 March 2008 of the Life Sentence Review Commissioners (now the Parole Commissioners from 15 May 2008) by which the Commissioners failed to direct the release on licence of the applicant, a life sentence prisoner. Mr Hutton appeared for the applicant, Mr Larkin QC and Mr Sayers appeared for the respondent, the Parole Commissioners, and Mr Maguire QC appeared for the notice party, the Secretary of State.

[2] The applicant was convicted of murder on 16 September 1982 and was sentenced to life imprisonment. On 26 April 1996 the applicant was released on licence under section 23(1) of the Prison Act (Northern Ireland) 1953. On 5 March 1997 the applicant was arrested for alleged sexual offences against two young girls and on 7 March 1997 his licence was revoked by Order of the Secretary of State under section 23(2) of the Prison Act (Northern Ireland) 1953. Charges against the applicant in relation to the alleged sexual offences were withdrawn by the Director of Public Prosecutions on 13 January 1998. The applicant remained in detention under the sentence of life imprisonment.

Life Sentences (Northern Ireland) Order 2001

[3] The Life Sentences (Northern Ireland) Order 2001 came into effect on 8 October 2001. The 2001 Order established the Life Sentence Review Commissions and provided for new procedures for the judicial setting of tariffs/ minimum terms for life sentence prisoners. Article 3 (4) required the Commissioners to have regard in particular in the need to protect the public from serious harm from offenders, the desirability of preventing the

commission by them of further offences and of securing their rehabilitation. Under Article 6 of the 2001 Order a prisoner, in respect of whom a Court had imposed a life sentence and specified a tariff/minimum term that had expired, may be directed by the Commissioners to be released. Article 9 of the 2001 Order deals with a life sentence prisoner who has been released on licence and recalled to prison and provides that the Secretary of State shall refer such a case to the Commissioners who may direct release. Article 9 applied to the applicant as a recall prisoner and provides -

> "(1) If recommended to do so by the Commissioners, in the case of a life prisoner who has been released on licence, the Secretary of State may revoke his licence and recall him to prison.
>
> (2) The Secretary of State may revoke the licence of any life prisoner and recall him to prison without a recommendation by the Commissioners, where it appears to him that it is expedient in the public interest to recall that person before such a recommendation is practicable.
>
> (3) A life prisoner recalled to prison under this Article -
>
> (a) on his return to prison, shall be informed of the reasons for his recall and of his right to make representations; and
> (b) may make representations in writing to the Secretary of State with respect to his recall.
>
> (4) The Secretary of State shall refer the case of a life prisoner recalled under this Article to the Commissioners.
>
> (5) Where on a reference under paragraph (4) the Commissioners direct the immediate release of a life prisoner on licence under this Article, the Secretary of State 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. [added on 27 July 2005]
>
> (6) On the revocation of the licence of any life prisoner under this Article, he shall be liable to be detained in

> pursuance of his sentence and, if at large, shall be deemed to be unlawfully at large.

The history of Commissioners hearings.

[4] On 29 November 2001 the Secretary of State referred the applicant's case to the Commissioners. This involved consideration of the sexual offences alleged against the applicant and an assessment of the applicant's current risk to the public were he to be released. The panel was chaired by the Chief Commissioner, Mr Peter Smith QC (the Smith Panel). On 3 August 2005 the Smith Panel was satisfied that the applicant had committed the sexual offences and further that the current risk to the public was such that the applicant should not be released. The applicant applied for judicial review of the decision of 3 August 2005 and Girvan J dismissed the application. The applicant appealed and on 6 September 2007 the Court of Appeal quashed the decision of 3 August 2005 – reported as CD's Application [2008] NI 60. The Court of Appeal held that the Smith Panel had been mistaken in its approach to the issue of the standard of proof and should have recognised that the offences alleged against the applicant called for a flexible approach to the civil standard of proof of the balance of probabilities and required more cogent evidence than would be conventionally required. The Commissioners appealed against the decision of the Court of Appeal and on 11 June 2008 the House of Lords upheld the appeal and restored the decision of the Smith Panel – reported as CD's Application [2008] NI 292. The House of Lords approved the approach of the Smith Panel to the issue of the standard of proof and confirmed the conclusion of the Smith Panel that the applicant had committed the sexual offences.

[5] In the meantime, before the decision of the Court of Appeal on 6 September 2007, the Secretary of State had made a second referral of the applicant's case to the Commissioners, as two years had passed since the first decision of 3 August 2005. Article 6(5) of the 2001 Order provides that a life prisoner may require the Secretary of State to refer his case to the Commissioners, where there has been a previous reference of his case to the Commissioners, after the end of the period of two years beginning with the disposal of that reference. This second panel was chaired by Mr Brian Garrett, solicitor (the Garrett Panel).

[6] When the Court of Appeal quashed the decision of the Smith Panel the Court stated that the original reference would have to be reconsidered and it was suggested that this be undertaken by a differently constituted panel of Commissioners. Accordingly the Chief Commissioner wrote to the applicant on 19 September 2007 indicating that a new panel had been appointed to consider afresh the applicant's recall. It was further indicated that the second panel, the Garrett Panel, no longer had jurisdiction and that its proceedings were at an end.

[7] Thus a third panel was convened and chaired by His Honour Judge Rodgers (the Rodgers Panel). The Rodgers Panel was reconsidering the reference made by the Secretary of State on 29 November 2001, further to the quashing of the decision of the Smith Panel of 3 August 2005 by the Court of Appeal. The Rodgers Panel, like the Smith Panel, had to consider the alleged sexual offences and the applicant's current risk to the public. The Rodgers Panel conducted a hearing on 4 January 2008. It was decided that consideration would first be given to the issue of current risk. Three witnesses had each prepared reports on the issue of risk in March 2007, August 2007 and October 2007 and they were Governor Allenby, Dr Claire Byrne, a psychologist and Mr Niall McEvoy, a probation officer. On 4 January 2008 Governor Allenby and Dr Byrne gave evidence on the issue of risk and the hearing resumed on 12 March 2008 when Mr McEvoy gave evidence on the issue of risk. At that stage Counsel for the applicant submitted that the evidence on the issue of risk was such that the Panel could direct the applicant's release on licence.

[8] The hearing adjourned to dates in May 2008 to hear evidence in relation to the alleged sexual offences. In response to the applicant's submission that, in light of the evidence already heard, the Rodgers Panel should direct the release of the applicant on licence, the Rodgers Panel furnished a letter to the applicant's solicitors dated 20 March 2008. The letter referred to Article 9(5A) of the 2001 Order which provides that the Commissioners shall not direct release "unless they are satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner be confined" and continued –

> "The Panel are aware that they have not heard all the available evidence in this reference.
> The Panel consider that it is not possible for them to reach a decision at this stage.
> The Panel believe that they required to hear all the available evidence so that they can come to a decision:
>
> (a) Whether to direct the release of (CD) or not, and
> (b) If his release was to be directed what licence conditions should be imposed on (CD) to ensure the protection of the public."

[9] Further evidence was heard by the Rodgers Panel on 21 and 27 May 2008. The decision of the House of Lords was delivered on 11 June 2008 restoring the decision of the Smith Panel of 3 August 2005. Accordingly by letter dated 18 June 2008 to the applicant's solicitors the Chief Commissioner indicated that the Rodgers Panel was functus officio and its proceedings to date were a nullity. It was stated and that a new panel would be appointed

under Article 6 of the 2001 Order to review the applicant's case. It was further stated that in light of the previous involvement of the members of the Rodgers Panel in the applicant's case that those members would be appointed to conduct the Article 6 review (the second Rodgers Panel).

[10] As the decision of the Smith Panel of 3 August 2005 had been reinstated by the House of Lords, which included the finding that the applicant had committed the sexual offences, it was not necessary for the second Rodgers Panel to make a further determination on that issue. The issue for the second Rodgers Panel was that of current risk. By Notice dated 22 August 2008 the Chairman of the second Rodgers Panel directed that the Panel would take into account the evidence of Governor Allenby, Dr Byrne and Mr McEvoy on the issue of risk without the necessity of the witnesses reappearing before the new Panel.

[11] The second Rodgers Panel conducted a hearing on 7 October 2008 which included updated evidence from previous witnesses and additional evidence from Senior Officer Blackshaw as to the applicant's progress in the prison and the applicant's own evidence. The Panel directed that the applicant be released on licence subject to conditions which included arrangements for supervision and restrictions on his movements and his behaviour and contacts with young people.

[12] The decision not to release the applicant as set out in the letter of 20 March 2008 is the subject matter of this application for judicial review. The applicant's grounds for judicial review are as follows:-

> (a) The decision of the Commissioners was unreasonable and unlawful in that in coming to their decision the Commissioners took into account an irrelevant factor and/or applied an incorrect test in that the Commissioners took into account a test introduced into the legislation in 2005 by the Criminal Justice (Northern Ireland) Order 2005, when the present proceedings pre-dated that Order and were commenced on 29 November 2001.
>
> (b) The decision of the Commissioners was unreasonable and unlawful in that it violated the applicant's rights under Article 5(4) of the European Convention in that, having all relevant material before them to determine the lawfulness of the current detention of the applicant, the Commissioners failed to come to a decision and therein failed to provide the applicant with a speedy determination of the lawfulness of his current detention.
>
> (c) The decision of the Commissioners was unreasonable and unlawful in that in allowing the applicant to remain a sentenced prisoner, when there was no relevant risk or dangerousness such as

justified his continued status as a sentenced prisoner, and that it allowed the applicant to remain a sentenced prisoner at a time when he should have been granted his licence, the continuing detention is arbitrary as a result.

(d) The continuing detention of the applicant was arbitrary in that it was not justified by any sufficient causal connection to the original objectives of the sentencing court which imposed his life sentence and to that end the detention represented an arbitrary detention contrary to Article 5(1) of the European Convention.

(e) The applicant suffered damages as a result of the violation of his rights under Article 5 of the European Convention and should receive compensation as a result in order to secure for him just satisfaction. (Consideration of this last ground was deferred pending a conclusion on the other grounds.)

[13] It is proposed to consider the grounds under two broad headings, namely the operation of Article 9(5A) of the 2001 Order and the issue of the protection of the public and further the operation of Article 5 of the European Convention and the right to liberty as it applies to the recall of life sentence prisoners.

Article 9(5A) of the Life Sentences (NI) Order 2001.

[14] The applicant contends that the Rodgers Panel was in error on 20 March 2008 when it relied on Article 9(5A) of the 2001 Order to apply the test that it should not give a direction for the release of the applicant unless satisfied that it was no longer necessary for the protection of the public from harm that the applicant be confined. This amendment was introduced into the 2001 Order by the Criminal Justice (Northern Ireland) Order 2005 further to the decision of Kerr J in Hinton's Application (2003) NIQB 7. Hinton was a recall prisoner, in respect of whom the Commissioners had concluded that they would direct his release only if satisfied that it was no longer necessary for the protection of the public that he be confined. This was the test set out in Article 6(4) of the 2001 Order. That test was not set out in the original version of Article 9 of the 2001 Order in relation to recall prisoners. Kerr J quashed the decision of the Commissioners as they had applied a test that was not provided for in the 2001 Order in relation to recall prisoners. The 2001 Order was then amended in 2005 to introduce Article 9(5A). As the present applicant's case had been referred to the Commissioners as a recall case under Article 9 in 2001, before the amendment of Article 9, and as in March 2008 the Rodgers Panel was reconsidering that reference after the Court of Appeal had quashed the original decision of the Smith Panel, the applicant contends that Article 9(5A) did not apply.

[15] The applicant considers Article 9(5A) to be a substantive amendment which did not have retrospective effect and could only apply to references made to Commissioners after the date of commencement of the amendment in 2005. In this regard the applicant refers to Bennion on Statutory Interpretation at page 288 to the effect that in the absence of clear intention in an amending enactment the substantive rights of the parties in any civil proceedings fall to be determined by the law as it existed when the action commenced. Bennion's section 97 provides that unless the contrary intention appears, an enactment is presumed not to be intended to have a retrospective operation. Bennion's section 98 provides that a change in procedural provisions is presumed to apply to pending as well as future proceedings.

[16] The introduction of Article 9(5A) was made by Article 9 of the Criminal Justice (Northern Ireland) Order 2005. By Article 1(2) of the 2005 Order Article 9 was to come into operation on such day as the Secretary of State appointed, being 27 July 2005. The clear effect of this framework was that Article 9(5A) came into operation on the appointed day, to be applied to directions given by the Commissioners from that date. Thus it fell to be applied by the Commissioners to the present case which was determined after the appointed day. Whether the amendment be regarded as a substantive amendment or a procedural amendment I am satisfied that the statutory framework is such that the amendment fell to be applied by the Commissioners to directions given from the day appointed by the Secretary of State.

[17] In any event Mr Maguire QC refers to the manner in which equivalent provisions in the English legislation were dealt with by the Court of Appeal in R (Watson) v Parole Board (1996) 1 WLR 906, a decision not cited to Kerr J in Hinton's Application. In the Criminal Justice Act 1991 section 32 required the Secretary of State to have regard in particular in the need to protect the public from serious harm from offenders, the desirability of preventing the commission by them of further offences and of securing their rehabilitation, in a similar manner to Article 3 of the 2001 Order; section 34 dealt with the release of life prisoners and specified a protection of the public test, in a similar manner to Article 6 of the 2001 Order; section 39 dealt with the recall of life prisoners and did not specify a test for release, in a similar manner to Article 9 of the 2001 Order. At page 916G Sir Thomas Bingham MR noted the absence of a statutory test for recall prisoners and stated that the Parole Board's functions in relation to recall prisoners was exactly the same as that for other life prisoners and that "in the absence of express statutory provisions, it is to be assumed that the same test is applicable".

[18] Thus, an alternative approach to the status of Article 9(5A) on 20 March 2008 is that, if it was not applicable to deliberations of the Rodgers Panel because the reference had been made prior to the commencement of the amendment, the protection of the public test was in any event applicable on

the basis that it could be implied that the test specified in Article 6 of the 2001 Order in respect of life prisoners would also be applied to recall prisoners.

Article 5 of the European Convention.

[19] The applicant claims a breach of the right to liberty under Article 5 of the European Convention. Article 5(1) provides:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with the procedure prescribed by law –
>
> (a) The lawful detention of a person after conviction by a competent court."

Article 5(4) provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if his detention is not lawful."

[20] The European Court of Human Rights considered the application of Article 5(1)(c) and Article 5(4), as it applied to life sentence prisoners, in Stafford v United Kingdom (2002). The applicant had been sentenced to a mandatory life imprisonment for murder and after his release on licence had been recalled in relation to fraud offences. The complaint related to the period of detention between the completion of the fraud sentence and his later release on licence by the Secretary of State. In relation to the lawfulness of his detention for the purpose of Article 5(1)(a) the Convention requires compliance with the substantive and procedural rules of national law and also conformity with the purposes of Article 5(1)(a), namely a sufficient causal connection between the conviction and the deprivation of liberty. The ECtHR found that the applicant's continued detention under the mandatory life sentence after completion of the fraud sentence could not be regarded as justified by his punishment for the original murder. Nor was the applicant's recall justified by the Secretary of State on grounds of mental instability and dangerousness to the public from the risk of further violence. Rather, the continued detention was based on the risk of non-violent offending by the applicant. Accordingly the ECtHR found no sufficient causal connection between the possible commission of other non-violent offences and the original sentence for murder and there was a breach of Article 5(1). In relation to Article 5(4) the ECtHR stated that, after the expiry of the tariff, continued detention depended on dangerousness and risk associated with the objectives of the original sentence of murder. These elements may change

with the course of time and thus new issues of lawfulness may arise, requiring determination by a body satisfying the requirements of Article 5(4). After the completion of the fraud sentence the lawfulness of the applicant's continued detention was not reviewed by a body with the power to release or following a procedure containing the necessary judicial safeguards and there was a violation of Article 5(4).

[21] The interaction of Article 5(1)(c) and 5(4) was considered by the Court of Appeal in Secretary of State for Justice v Walker and James (2008) EWCA Civ. 30. The applicant was serving an indeterminate sentence for public protection and at the expiry of the minimum term the Parole Board had to determine whether it was necessary for the protection of the public that the applicant should continue to be detained. At paragraph 54 Lord Phillips stated that where the Court imposes a sentence of indefinite duration the objective is that once the penal tariff has been served the offender will remain in custody only so long as this is necessary for the protection of the public. In such circumstances the detention will only be justified under Article 5(1)(a) so long as it is necessary to achieve that objective. In those circumstances there will be a requirement for periodic review by a Court in order to comply with Article 5(4). The object of that review will be to determine whether or not the detention remains justified under Article 5(1)(a). At paragraph 61 Lord Phillips added:

> "The post-tariff period of an indeterminate sentence imposed for public protection is dependent upon the prisoner remaining a threat to the public. Article 5(4) requires this legality to be subject to periodic review by a body with the qualities of a court. If, in the period between the two reviews, a prisoner ceases to be dangerous, this will not mean that his detention in the remainder of that period infringes Article 5(1). That article must be read in conjunction with Article 5(4) so as to produce a practical result. If, however, a review is unreasonably delayed and it is shown that, by reason of that delay, the prisoner has been detained after the time that he should have been released, that period of detention will constitute an infringement of Article 5(1). *So long as the prisoner remains dangerous, his detention will be justified under Article 5(1)(a) whether or not it is subject to timely periodic reviews that satisfy the requirements of Article 5(4). If however a very lengthy period elapses without such a review a stage may be reached at which it is right to conclude that the detention has become arbitrary and no longer capable of justification under Article 5(1)(a)."(Italics added)*

[22] The applicant contends that by its decision of 20 March 2008 the Rodgers Panel ought to have directed the release of the applicant, subject to appropriate conditions. The applicant had been detained in Erne House, HMP Maghaberry and was then transferred to Martin House which provides a reduced supervision regime. Thereafter he moved to the pre-release scheme in Belfast where prisoners may proceed through three phases in preparation for release. The applicant entered phase 1 of the pre-release scheme in January 2007, which involved six hour unaccompanied temporary release on Saturdays and Sundays. The applicant entered phase 2 of the pre-release scheme in February 2007, which involved staying in hostel accommodation at weekends. During a weekend in March 2007 the applicant, contrary to conditions, tested positive for alcohol and he was returned to Erne House, HMP Maghaberry.

[23] At the hearing before the Rodgers Panel in January 2008 there were reports from Governor Allenby, Dr Byrne and Mr McEvoy. The first round of reports were all dated March 2007, at which time the applicant was on phase 2 of the pre-release scheme. Governor Allenby expressed the opinion that the applicant could be deemed no longer a risk of serious harm to the public and she recommended his release on licence. Dr Byrne expressed concerns about the risk of future sex offending because of the limited nature of assessment and interventions that had been possible as the applicant denied the offences. However she expressed the opinion that the applicant would not pose a significant risk of serious harm on release to the community as long as he was carefully supervised and able to maintain his positive progress to that date. She stated that it would be important that his progression towards release continued to be a gradual process. Mr McEvoy stated that the applicant should complete his period in the pre-assessment unit before being released and stated that the issue of the alleged sex offences would influence the risk management. A second round of reports had been obtained in August 2007, at which time the applicant was back in Erne House at HMP Maghaberry because of the alcohol incident in March 2007. Governor Allenby stated that a return to the prisoner assessment unit was not advisable at that time but he would be eligible for consideration for return to Martin House in September 2007 and she supported his move at the earliest opportunity. Dr Byrne continued to recommend a gradual transition to the community and emphasised the importance of ensuring genuine positive adjustment demonstrated over time before considering any progress from one stage of the pre-release process to the next. Mr McEvoy identified a number of issues that the applicant had to address when he returned to the community namely alcohol management, resettlement and employment. A third round of reports had been obtained in October 2007 when it had been agreed that the applicant would return to the prisoner assessment unit on 5 November 2007 and his case would be reviewed on a monthly basis. Neither Governor Allenby nor Dr Byrne nor Mr McEvoy altered their previous views.

[24] On 4 January 2008 the Rodgers Panel heard the evidence of Governor Allenby and Dr Byrne. The Chairman's note of Governor Allenby's evidence recorded that she did not think he was a serious risk to the community but that he should be tested for a further six months before release. The note of Dr Byrne's evidence was that the applicant presented a risk which was manageable in the community but that it would be appropriate to delay release for six months. The notes of the applicant's representatives of Governor Allenby's evidence recorded that the applicant was not a risk to the public but there were concerns related to him being a more well-rounded individual and his application for release should be reviewed in six months. The notes of Dr Byrne's evidence were that the applicant would not pose a significant risk of harm to the public, conditional on monitoring and supervision, but there continued to be concerns and a delay for six months was considered suitable. The witnesses proceeded on the basis that the applicant had committed the sexual offences. The evidence of Mr McEvoy was heard on 12 March 2008 and a transcript was available. Mr McEvoy's opinion was that a greater degree of release into the community would not be wise and that the applicant should spend another period of six months completing phases 2 and 3 of the pre-release programme. Mr McEvoy had concerns about the sexual offences and the use of alcohol, which he considered impacted on risk. He took a different view to the other witnesses in relation to the sexual offences and considered it an issue that needed to be addressed. He accepted that if the issue of the sexual offences were removed from the equation it would impact on his view of the management of the applicant. The Chairman's note expressed this evidence in terms that Mr McEvoy's view of risk would be more affected by the truth of the allegations than the other witnesses.

[25] The applicant's approach to the evidence of Governor Allenby and Dr Byrne and Mr McEvoy was that it was invalid to accept that the applicant presented a manageable risk in the community and then to continue his detention and refuse his release on such conditions as were appropriate.

[26] The Rodgers Panel approach to the evidence of Governor Allenby, Dr Byrne and Mr McEvoy, as appears in the letter of 20 March 2008, was that they had not heard all the available evidence and that it was not possible to reach a decision and that they required to hear all the available evidence before deciding whether to direct the release of the applicant and if so to direct appropriate conditions. The Chairman reiterated that position in his affidavit of 8 May 2008 where, under the heading "The Effect of the Evidence of Mr McEvoy" he stated that Mr McEvoy's evidence significantly altered the complexion of the proceedings; that he had expressed a firm view notwithstanding the length of time since recall; that the issue of conduct grounding recall was relevant to the issue of present risk; that the panel had received evidence for the first time that in the view of the applicant's probation officer the issues were interlinked in such a manner that a proper

conclusion and present risk could not be reached without a prior determination in respect of the conduct grounding recall; that the issue of whether the conduct relied on for recall had occurred remained relevant to the issue of present risk and to the issue of safe management of risk in the community. The Chairman stated -

> "…. a judgment is to be made by the LSRC on the basis of *all relevant material* – and given the evidence of Mr McEvoy, such material must include evidence in respect of the conduct grounding recall. Further evidence in the case is due to be heard on 21 and 27 May 2008. It is not yet clear what issues touching on the questions of risk will arise from that evidence, (and in this regard and the partly inquisitorial character LSRC proceedings is recalled). However it certainly cannot be said that all relevant evidence has been considered in the present case."

[27] In my opinion this was an entirely reasonable position to adopt. Governor Allenby and Dr Byrne appeared to accept that the applicant was a manageable risk in the community. The applicant challenged their contention that in those circumstances it would have been appropriate for the panel to decide, had the panel agreed with their assessment, that the applicant should nevertheless be detained for a further six months. However that was not the position adopted by the Rodgers Panel. The Rodgers Panel preferred the line taken by Mr McEvoy to the effect that a conclusion on the sexual offences was required in order to make the appropriate evaluation of risk and any conditions for release. Accordingly the Rodgers Panel refused to reach a conclusion on risk until they had heard further evidence as to the basis of the recall. This the Rodgers Panel was entitled to do.

[28] The nature of the assessment undertaken by Commissioners has been described by Lord Bingham on a number of occasions. In McClean's Application (2005) UKHL, in relation to the condition for the release of life sentence prisoners under the Northern Ireland (Sentences) Act 1998 that they would not be a danger to the public, he described the exercise as "a predictive judgment" in which the Commissioners were called upon to make the best judgment they could on the material available (paragraph 25). Further the primary concern of the Commissioners must be to protect the safety of the public, with which they are not entitled to gamble, and that "in the last resort, any reasonable doubt which the Commissioners properly entertain whether, if released immediately, a prisoner would be a danger to the public must be resolved against the prisoner (paragraph 29). In R v Lichniak (2002) 4 All ER 1122 Lord Bingham doubted whether there was a "burden" on the prisoner to persuade the Parole Board that it was safe to recommend release since this was "an administrative process requiring the Board to consider all the

available material and form a judgment." There was a balance to be struck between the interests of the individual and the interests of society and at paragraph 16 "….I do not think it objectionable, in the case of someone who has once taken life with the intent necessary for murder, to prefer the latter in case of doubt."

[29] The applicant contends that from March 2008 there was no issue of 'dangerousness' and there was no 'causal connection' between the original conviction and the continued detention. I am unable to accept either contention. There was an issue of risk in the community in March 2008 which might have been addressed by conditions, had the Rodgers panel accepted the applicant's view of the effect of the evidence of Governor Allenby and Dr Byrne. However that was not the position of the Rodgers Panel, based on the evidence of Mr McEvoy, which the Panel were entitled to follow, as the letter and the Chairman's affidavit make clear. The Rodgers Panel remained to be persuaded that the issue of dangerousness, being the risk of harm to the public that the applicant represented, should be resolved in favour of release on conditions. Thus there was a causal connection between the original conviction and the risk of harm to the community that justified the detention of the applicant in March 2008.

[30] With dangerousness remaining an issue in March 2008 there was continued justification for the detention of the applicant for the purposes of Article 5(1)(a). Periodic review was required for the purposes of Article 5(4). There had been ongoing Panels dealing with the applicant's detention, commencing with the Smith Panel, which gave its decision against the applicant on 3 August 2005, which was set aside by the Court of Appeal on 6 September 2007 and reinstated by the House of Lords on 8 June 2008; the short-lived Garrett Panel appointed to conduct a review in August/September 2007; the Rodgers Panel appointed on 19 September 2007 to reconsider the discharge of the applicant, which conducted hearings in January and May 2008 and was satisfied that the applicant should not be released at that time; the reconstituted second Rodgers Panel appointed on 18 June 2008 that completed a review of the applicants detention and recommended his release on 10 October 2008. I am satisfied that it could not be said that there was such an absence of consideration and review of the applicant's case that his detention had become arbitrary and offended Article 5 of the Convention.

[31] When the second Rodgers Panel came to make its assessment in October 2008 the House of Lords had delivered its decision and reinstated the finding of the Smith Panel that the applicant had committed the sexual offences. By that time the applicant had completed a further six months in detention and had been subject to ongoing monitoring in the pre-release scheme. With the benefit of testing in stage 3 of the pre-release scheme the Secretary of State no longer opposed the release of the applicant. In the

circumstances that existed in October 2008 the second Rodgers Panel directed the release of the applicant.

[32] I have not been satisfied on any of the applicant's grounds for judicial review and the application is dismissed.