Neutral Citation No: [2021] NIQB 102	*Ref:* COL11660
	ICOS No: 2021/7325/01
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 19/11/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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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

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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

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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 men 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 question 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.

Life Sentences (Northern Ireland) Order 2001

Parole Commissioners' Rules 2009

NOTE: IT IS UNLAWFUL UNDER RULE 22(3) OF THE PAROLE COMMISSIONERS' RULES 2009 TO MAKE PUBLIC INFORMATION ABOUT THESE PROCEEDINGS OR THE NAMES OF ANY PERSONS CONCERNED IN THEM.

Michael Stone A385

Decision of the Panel

1. This case was referred to the Commissioners on 18 July 2018 under Article 6 of the Life Sentences (Northern Ireland) Order 2001 which requires them not to direct the release of a prisoner 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.

2. The Commissioners have been asked to make any recommendations regarding conditions to be attached to the licence if they make a decision to release Michael Stone. If release is not directed, the Commissioners have been asked to make recommendations on:

- Areas of risk management to be addressed prior to next review;
- Any other areas to be addressed prior to next review;
- Timing of next review; and
- Any other matters relevant to the progression of this case.

3. On 17 November 2018, the single Commissioner appointed to consider Mr. Stone's case provisionally directed that he not be released.
A panel of Commissioners was appointed to consider the prisoner's case in accordance with Rule 12(2) of the Parole Commissioners' Rules 2009.

Decision

4. Following consideration of the case, the Panel was satisfied that it is no longer necessary for the protection of the public from serious harm that Mr Stone[1] be confined and has directed that he be released on licence at this time. This decision is binding on the Department of Justice.

5. In reaching its decision, the Panel took into consideration all of the documents before it, the oral evidence of the prisoner and witnesses and submissions on behalf of the prisoner.

Test

41. Article 6(4) (b) of the Life Sentences (Northern Ireland) Order 2001 requires that when a prisoner's case is referred to the Commissioners under Article 6(4) (a) of the Order, the Commissioners shall not direct the release of a prisoner 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.
The Panel are so satisfied and therefore direct that Michael Stone should be **released**.

Reasons

42. This case was initially referred in 2018 but a following the decision of the single Commissioner in November 2018 the process was interrupted as an interested party had taken a judicial review around the issue of the calculation of the prisoner's licence. As it happened the court at first instance found for the applicant and held that the prisoner was not entitled to be considered for release until he had actually served the full length of his tariff in custody. However that decision was recently overruled by the Court of Appeal which delivered its judgement on 20 November 2020 and that the period that the prisoner spent lawfully on licence ought to be included in the relevant part of his sentence. Accordingly the case was referred back to the Parole Commissioners to be determined by the present panel on foot of the original 2018 referral.

[1] Hereinafter called "the prisoner"

43. The full background of the case is set out in previous paragraphs and need not be restated here. However in summary the prisoner was sentenced in 1989 for the infamous Milltown Cemetery murders and three other troubles related murders in respect of which he made a voluntary confession to police. He expressed no remorse and served his sentence in the separated [paramilitary aligned] wing of the prison. The sentencing judge stated that the prisoner was considered to be a *"dangerous and ruthless criminal, willing to offer his services as a killer to loyalist groups throughout Northern Ireland"*.

44. The prisoner was later determined eligible for early release along with hundreds of other prisoners under the Northern Ireland (Sentences) Act 1998. He was duly released on licence under these arrangements on 24 July 2000. Then in November 2006 he was arrested following a further apparently freelance attack on Parliament Buildings at Stormont and was later convicted of two counts of attempted murder and related explosives and firearms offences. He received a further custodial sentence of 16 years of which he would serve 8 years under the sentence remission rules then pertaining[2]. However in any event, as the prisoner's life licence was subsequently revoked on 06 September 2011 by the Sentence Review Commissioners he remained in custody and has not been released to date, save for some short periods of pre- release testing.

45. On 29 July 2013 the Lord Chief Justice of Northern Ireland determined that the tariff in respect of the life sentence imposed on 03 March 1989 should be 30 years imprisonment.

On 10 September 2013 the Northern Ireland Prison Service calculated that the prisoner's "*parole referral date*" would be 06 September 2017. By letter dated 20 September 2017 the Prison Service (in effect the Department) made a formal statutory referral of the prisoner's case to the Parole Commissioners, intimating that the tariff expiry date would be 21 March 2018. It was this position which was recently confirmed by the Court of Appeal.

[2] This predated the Criminal Justice (NI) Order 2008

46. Therefore the present process concerns the eligibility of the prisoner for release on life licence in respect of his original sentence. When the Court of Appeal considered these issues in the recent appeal from the judicial review, they observed that the provisions of the original early release scheme which the prisoner had the benefit of were of considerable concern to many in the community but they were;
"…unique and extraordinary. They were the outcome of a political process supported by a referendum. They undoubtedly produced a windfall for the prisoners affected".

47. The Panel is 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. The Panel is also cognizant that the prisoner was afforded the benefit of the "*windfall*" previously referred to and that he was one of only a limited number of individuals who had their new found liberty revoked following significant breaches of the conditions of their licence. It has been recorded in the dossier that the prisoner has long held the view that the Stormont episode was not a genuine attempt at violence, but rather some type of "*performance art*". However, it is accepted that he had real munitions and intent and the trial judge had no hesitation in rejecting the "*performance art*" defence. It is also clear that although the prisoner has not only served the entire 16 years of the sentence imposed in the custodial setting, his maintaining of the position that the offences were not serious has perhaps represented an element of impediment to his release in previous referrals.

48. The prisoner's views on the Stormont case was cited as concerning by the Panel in April 2018, and again by the single Commissioner in the present review, combined with the fact that the prisoner expressed a view that these actions had some positive political outcome. As set out in para 16 *ibid*. the previous Panel discussed their entitlement to caution in their approach to this prisoner given the seriousness of his crimes, his calculated breach of a previous licence by reoffending, the lack of offence related work in custody for paramilitaries, and his inability to pursue a more usual pre-release programme "*for reasons of his own safety*". The 2018 Panel proceeded to indicate that additional testing, and some assurance that his rigid thinking in relation to his Stormont offence has moderated, would potentially go some way towards satisfying a future Panel that risk had reduced sufficiently for his release to be directed.

49. This case has now been referred back to the Commissioners after considerable interlocutory delay and the Panel notes that the prisoner has now fully served his tariff of 30 years [3] which in fact expired on 21 March 2018. On our calculation the prisoner is therefore almost 3 years post tariff. It is also clear that the additional sentence which was imposed for the Stormont offences in 2006 has been served in full and is not part of our remit.

50. The prisoner in this case has served the entirety of his sentence in separated wings of the prison estate which are reserved for prisoners serving sentences for terrorist and politically motivated offences. The prisoner has maintained that he was not aligned to any particular group and he has maintained that he has refused welfare assistance from paramilitary prisoners' organisations. It was acknowledged by the previous Panel that he remained in separated conditions largely for his own safety. The present Panel have heard evidence from a variety of sources that there remains a constant threat to the safety of the prisoner. For this reason, he cannot seemingly avail of the normal arrangements for progressing through the staged pre-release testing via Burren House. It was suggested to the Panel that in order to proceed to Burren House the prisoner's security categorization would have to be reclassified as D whereas it currently is A. In any event the prisoner's deteriorating health would preclude him from participation in a working out type scheme.[4]

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 judgement 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. For reasons given below, having taken into

[3] Including time spent on licence
[4] See parainfra.

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.

52. In consideration of the statutory test the Panel must first consider the issue of the risk of serious harm. This task is made more difficult by the absence of professional assessments in the form of PBNI or psychology reports in cases concerning TRO prisoners. Clearly, given the absence of current risk assessments, the factors informing risk are likely to be static and focussed around the very grave index offences and further offending. Indeed, according to the MARA report received on 13 January 2021 in respect of these proceedings,

"PSNI colleagues have articulated the view that given the nature of the offences for which Mr Stone was convicted and his history of offending (including that whilst released on licence), they believe that he still presents a significant risk of harm to the public".

This assessment in itself appears to reflect the static nature of the risk factors arising from the gravity of the offending as there is no detailed information to indicate the evidential basis of the assessment. In his summing up, counsel for the prisoner submitted that it was accepted by the NIO that there was no information that the prisoner currently represented any threat to national security and that the MARA assessment was at odds with the stated position of the prisoner Governor who had written in December 2018 that "*The Department's position in respect of Mr Stone is that we have no reason not to support release*". The letter referred to was compiled following an extensive series of temporary releases and can be reproduced here for reference:

"RE: A385 – Michael Stone – PCNI hearing – 15.01.19

Dear Sir / Madam,

The Departments position in respect of Mr Stone is that we have no reason not to support release.

Mr Stone has availed of pre-release testing and adhered to all conditions set.

It has not been possible to replicate Burren from a custodial setting. The only option is for Mr Stone to continue on monthly periods of 48 hour UTR's, which have already proved successful to date.

As Mr Stone is recorded as a TPMO, probation services for Northern Ireland will not be supervising this individual in the community unless he requests specific assistance, and do not engage with him in custody either".

NIPS psychology services have also confirmed they have nothing to offer this individual. All documents and reports have been supplied to assist you in making your decision". [5]

53. It was submitted by counsel for the prisoner that this was effectively the position of the Department in 2018 and that there had been no material change since, therefore he was aghast at the content of the MARA report. On enquiry from the Panel chair, counsel for the Department stated that the Governor did not speak for the Department but that the letter suggested there was no reason why release was not supported at that stage as he had been compliant in prison. It was reiterated that the Department's present position in opposing release is informed by the MARA report. However there was no evidence from any source that there had been any adverse material change to the risk presented since 2018 other than the passage of time since the last Panel decision.

54. The Governor's letter is also informative about the lack of input from PBNI in cases involving TRO prisoners. Notwithstanding that this appears to be the accepted position, the Panel notes that the MARA report now states:

"PBNI's role within the arrangements is in respect of resettlement and social welfare. PBNI have noted that Mr Stone has refused offers of contact with probation whilst in prison they are therefore not in a position to comment on risk".

Thus PBNI are unable to comment on risk due to their restricted role with TROs. There are, as far as the Panel is aware, no interventions offered to deal with terrorist related offending, and the prisoner stated that none had been offered. It would thus seem incongruous to oppose release just on the basis that there has been no contact when there is no prospect of any interventions in the future custodial setting for TROs.

55. Following the oral hearing the Department made an application to submit an update from PSNI. This update dated 14 January 2021 refers to the HM Prison and Probation Service: - Risk of serious Harm Guidance 2020 and states that:

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[5] Dossier :Page 9(c)(1)

"The criminal Justice system has defined risk as: - The risk of serious harm: **-** *the probability that a further offence will be one of "serious harm"*
Police believe Mr Stone still meets this threshold and presents a significant risk of "serious harm" to the public".

56. The Panel admitted the additional report which appears to qualify the MARA report by the addition of the words "*serious*" harm. However as with the MARA report the update gives no further information whatsoever on the basis of the assessment. In any event the Panel in considering this case concludes that the prisoner does continue to represent a risk of *serious harm* to the public. This is based on an objective assessment of the index offences comprising 6 murders and the very serious offending in 2006 which resulted in the revocation of the prisoner's life licence in this case. There is no PBNI or psychology assessment and therefore the Panel must reach its conclusions based on the entirety of the information in the dossier and the evidence presented to the oral hearing. The fact that the prisoner had no remorse for the offending is well canvassed in the dossier, and was clearly a factor in the lengthy tariff imposed.

57. The Panel has heard directly from the prisoner that he now accepts that he broke the law and that he is a mass murderer. He said he will have to live with the consequences of this. On the basis of all available information it is impossible for the Panel to assess this recent expression of remorse for its genuineness, but it does at least represent a movement in position on the part of the prisoner. In any event, based on careful consideration of all the available evidence the Panel have reached the conclusion that the prisoner continues to represent a risk of serious harm as based on the past history he has clearly demonstrated a capacity for inflicting serious harm [within the legal definition], when he had decided to take that course. This is also amplified by the deliberate breaches of licence by re-involving himself in violent paramilitary type activity at Stormont in 2006. Whilst the MARA report states that the prisoner is considered a significant risk of harm, the supplementary PSNI report affirms the PSNI view that the prisoner remains assessed as a significant risk of *serious* harm. However in reaching its determination on the statutory test, the Panel is satisfied on a balance of probabilities that the prisoner continues to represent a risk of serious harm, at this point in time, albeit the level of risk appears to be declining.

58. This brings us to the second limb of the statutory test; whether the risk of serious harm can be safely managed in the community with the addition of appropriate licence conditions. In considering the risk the Panel has taken into account the length of time the prisoner has spent in custody and his behaviour in the prison setting. The prisoner has been in custody for a total of 27 years, and has completed his tariff around three years ago. There have been virtually no disciplinary or security issues in the custodial setting and there are no indicators of addictions, violent activity or ideation, or mental illness. The prisoner has apparently made constructive use of his time in developing his art and has produced a large number of works. He told the Panel that his work has attracted some commercial interest and that he would pursue this if he was released. It is common case that no offence specific or risk reduction programmes were ever offered to the prisoner nor are they available for TRO prisoners in any event.

59. The relevant index offending and the Stormont offences were evidently of a paramilitary nature and the prisoner has served his sentence in the segregated conditions associated with paramilitary prisoners. According to a security report dated 20 July 2018 prisoners are only accepted for separated conditions if the meet all the relevant NIPS criteria, including that the prisoner is a member or supporter of a proscribed organisation involved in the affairs of Northern Ireland. According to the report, the prisoner was considered to have fully met this criteria, although it is stated that in his case this was based on "*confidential information*".[6] However he has given evidence that he remained in the separated wings for his own safety as his life would be at risk in the general prison population. Furthermore in an updated Security Report dated 14 June 2019 it is stated as follows:

"No further information is held to indicate that he is a "high profile member of a loyalist paramilitary organisation."

60. This issue was considered by the single Commissioner in his decision dated 17 November 2018 when he referred to the Security Report dated 20 July 2018 which recorded that the prisoner "*<u>does remain a high profile member of a loyalist paramilitary</u>*

[6] Dossier: 7J:8

organisation." However he went on to clarify that a letter from the NIO dated 01 August 2018 stated that the PSNI has confirmed that it does not hold any information indicating that the prisoner is involved in terrorism or linked to a terrorist organisation. It is noteworthy that the 2019 Security Report concludes with the following clarification:

"The previous report was entered in error however in the prison environment Mr. Stone does remain high profile and the separated conditions he is managed under are fully justified."

In his decision the single Commissioner accepted that the information had been erroneous and that he accepted the submissions on behalf of the prisoner that he was not a member or supporter of any such group. In addition the prisoner reiterated in his evidence that he always sought a low profile , declining any financial assistance from prisoner's welfare groups and refusing any offer of political lobbying on his behalf outside the prison. The present Panel has no reason to doubt these assertions.

61. It is also significant that the NIO are presenting no evidence that the prisoner is involved in terrorism or that he represents any threat to public safety or security in the UK. In a letter dated 8 December 2020 the NIO stated as follows:

"LIFE SENTENCE PRISONER – MICHAEL STONE A385

I refer to the above named prisoner.

The PSNI has confirmed that it does not hold any information indicating Michael Stone is involved in terrorism or linked to a terrorist organisation. Or any other information which if disclosed would be damaging to national security (this could include information obtained by the use of sensitive sources or techniques, if its disclosure would be damaging to national security), and which we assess might have a bearing on the question of whether Michael Stone's release could threaten the public with serious harm.

The Secretary of State will therefore not be submitting any material to the Parole Commissioners in relation to this case."

Indeed the position adopted by the NIO in its letter of 8 December 2020, is fully consistent with its position expressed previously (letters of 9 April 2015, 3 October 2017, and 1 August 2018).

62. Accordingly there is currently no evidence before the Panel that the prisoner would be likely to become re-involved in paramilitary activity if he was released into the community at this point. This report does seem to be at variance with the updated PSNI assessment and the MARA report presented for this review although neither assessment refers to prospective paramilitary offences in their assessment of risk, nor provides any evidence of likely future involvement.

63. However there are several relevant issues raised in the decision of the previous reviews which need to be considered at this point. It was of concern to the previous reviews that the prisoner had adhered to the indefensible position that his offending in 2006 was not really serious violence. The Panel which considered the case 2018 was surprised that the prisoner had maintained this ridiculous stance and were of the view that the Commissioners can only be so satisfied that the test for release has been met; *"…after further testing and supervision in the community has been completed and Mr. Stone is able to evidence a change in his attitude towards his past offending behaviour and his future risk".*

Dealing with the latter point, it is now clear from the evidence of the prisoner at the oral hearing, [whether based on robust legal advice or otherwise], that he is now accepting that this offending was serious and wrong and that he has had to live with the consequences. He was also of the view that after the Stormont incident he lost all credibility with loyalist paramilitaries. Given that he has served the entire 16 years in custody this issue should have been rendered academic a long time ago and the Panel notes that the prisoner has at least belatedly articulated a more pragmatic view of the events of 2006.

64. The second area of concern for the previous Panel and repeated by the single Commissioner was the desirability of further pre-release testing and progression through Burren House and staged release into the community. According to the minutes of the case conference on 19 September 2018 the PCNI recommendations were considered regarding replicating the Burren House process from the prison for the prisoner. It is recorded that the emphasis in Burren House is to find work and for work placements to occur. It also states that:

"Mr. Stone's health does not permit him to consider work placements. Burren house cannot be replicated without this key component, however, pre-release testing will continue, and Mr Stone will be eligible to apply for Christmas Home Leave".

65. In a separate letter dated 21 December 2018 the Governor also addresses the previous PCNI recommendation regarding progress to Burren House:

"In relation the PCNI recommendation to replicate Burren House this has not been possible from custody. Burren is a working out unit; the emphasis is on individuals attending work placements and or training courses to assist them in attaining work placements. Mr Stone's poor health does not permit him to avail or consider such placements and Burren cannot be replicated from custody without this key component. As mentioned in our direction for release, the only option for NIPS is to continue with Mr Stone's monthly 48hr periods of UTR on an indefinite basis".

66. The same letter sets out in detail the number and nature of temporary releases as follows:

"ATR/ UTR's

09.01.18; 14.02.18; 12.03.18; 18.04.18; 23.05.18; 31.05.18; 25.06.18

Progressed to 24hr UTR's

9.07.18 – 10.07.18

9.08.18 – 10.08.18

03.09.18 – 04.09.18

Progressed to 48 hr UTR's

10.10.18 – 12.10.18

05.11.18 - .7.11.18

03.12.18 – 05.12.18

The letter goes on to state that:

"In addition Mr Stone has been granted Xmas home leave from 24th December to 2nd January 2019

A case conference was held yesterday, 20th December, of which I chaired, and I have agreed to a further period of 48 hour release in January if his Xmas home leave is successful, and prior to his PCNI hearing set for 15th January 2019."

67. The January hearing did not take place, due to the legal challenge.[7] It does appear from the evidence that pre-release testing was stopped in 2019 following the judicial review and there has been none since. In the ordinary course of events, eligible life sentence prisoners who are post tariff are expected to progress through several stages of pre-release before being granted their life licence. Stage one comprises ATR's and UTR's; stage two progresses to overnight 48 hour periods and then there is a progression to the working-out unit, in which prisoners work in the community and return to the supervision at Burren House in the evenings. It is evident that the prisoner was progressing very well without any breaches in the first phases of pre-release testing before the legal challenge and in fact it is apparent that he availed pf temporary releases, without any problems or adverse incidents during every month of 2018. It is also clear that, due to a combination of his declining health and the systemic security issues for this type of prisoner, he was never going to be able to progress to Burren House or any equivalent to phase three testing in any event. In the words of the Governor in his letter of 21 December 2018, *ibid;*

"The only option for NIPS is to continue with Mr Stone's monthly 48 hr periods of UTR on an indefinite basis".

68. Therefore it is clear that the prisoner in this case was on a progressive trajectory towards release which would in all likelihood circumvent the standard phase three Burren House elements of the process. Indeed the Panel chair in 2018 remarked that he expected that the prisoner would be spending more time in the community than in prison by the time of the next review. All of the relevant releases were to the prisoner's wife's home and it was never contemplated that pre-release testing would involve accommodation in a hostel or other approved accommodation. Counsel for the prisoner submitted to the Panel that given the progress on temporary release, the prisoner would probably have been released before this stage, but for the judicial review. The Panel do not resile from this proposition, given the ample evidence of sustained and successful pre-release testing over 2018 and which was planned for 2019. It is clear from the notes of the case conference[8] and the Governor's letter that Burren House would not be an option in this case. Moreover if the present Panel had

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[7] McGuinness No.2 [2019] NIQB 10

decided not to release at this stage, there would be no prospect of any progression to Burren House and indeed any further pre-release testing would in all probability simply follow the previous pattern of 48 hour and other extended periods of release Articles to

Articles 8 & 2 (Location) of course all of this would be affected by the current suspension of all pre-release testing due to the COVID 19 pandemic. In light of the available evidence the Panel accepts that the prisoner has successfully completed all previous releases undertaken, fully complying with the Licence conditions set on each occasion.

69. The next issue which the Panel has considered in the evidence is that the prisoner is suffering from significant ill-health Article 8 (Health Information)

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. He said he was not physically capable of re-offending and he was not interested in politics or sectarianism. The physical health of the prisoner and the

possibility of a deterioration in his mobility and capacity is a protective factor in any case and the Panel have taken this evidence into account in considering whether the prisoner can be safely managed in the community if he was released.

71. It is uncontentious that the prisoner has been in custody for over 27 years and during this time he has attracted only one minor adjudication which was discussed elsewhere in this decision. Although there is no Probation report there is nothing in the dossier to suggest that there are any underlying issues around addictions to alcohol or substances that would represent any of the typical risk factors for the deterioration of behaviour or compliance whilst on licence. The Panel has heard the submissions from counsel about the prisoner's behaviour in prison and it is clear that there have really been no adverse issues at any stage throughout the sentence. The fact that the prisoner has been compliant with his sentence for so long [with the only exception being the lockup incident] has added credibility to the argument that he would comply with licence conditions if released.

72 .Due to the nature of the offences and the fact that the prisoner has remained in separated conditions in prison there is no psychology assessment available, although it appears that the prisoner would not have consented to or co-operated with such an assessment as outlined in previous PCNI decisions. The Panel believe that such an assessment may have been helpful, but nonetheless, there is no evidence that the prisoner is suffering from any underlying mental illness or psychotic condition which would be relevant to the risk of further offending in this case. According to the healthcare report which confirmed the physical diagnosis, there is no record of any referral or assessment to Mental Health or psychiatric services during the present sentence. The prisoner gave evidence to the Panel and previous Panels in a logical and coherent way and he presented as someone who had a clear insight into his offending and the process in which he was now involved. In any event the Governor's letter clarifies that "*NIPS psychology services have also confirmed they have nothing to offer this individual.*"

73. In considering the application of 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. Any

prisoner who is released on licence will be subject to the standard licence conditions together with such additional conditions as are considered appropriate and proportionate in any given case. However the prisoner has been notified in this case that he is classified as a TRO.[9] The background to this was that on 8 September 2020, the Minister of Justice published new guidance under Article 50 of the Criminal Justice (Northern Ireland) Order 2008. This guidance gave effect to new Multi-Agency Review Arrangements (MARA) which have been established to manage the risks posed to the public by Terrorist-Related Offenders, and to support their rehabilitation. The organisations represented in the arrangements are: - the Department of Justice; Northern Ireland Prison Service (NIPS); Probation Board for Northern Ireland (PBNI); and Police Service of Northern Ireland (PSNI). These organisations have a statutory duty to give effect to the guidance in exercising their functions to contribute to the effective assessment and management of risks posed by terrorist-related offenders. Following commencement of the MARA arrangements, the prisoner was written to confirm his classification as a Terrorist-Related Offender (TRO) and was provided with a copy of the guidance.

74. Whilst the MARA report of 14 January 2021 indicates that the partners are not supportive of release, the report concludes that "*should the Panel determine that Mr Stone is suitable for re-release on licence, in line the Article 50 guidance MARA partners have identified that licence conditions are required to support his effective management in the community. These conditions are outlined overleaf at Annex A.*" The Panel has carefully reviewed the recommended licence conditions which it considers both appropriate and proportionate in this case. Moreover the Panel has considered the impact of these bespoke licence conditions when combined with the series of protective factors as outlined in preceding paragraphs. In summary these include:

1. The successful previous temporary releases;
2. His positive behaviour record in prison.
3. The age and failing health of the prisoner;
4. His reduced mobility;
5. His prospective domestic relationship and accommodation;

[9] Terrorist-Related Offender

6. His expressed rejection of criminal and activity and violent activities;
7. His expression of the unacceptability of taking life;
8. His recognition of the "outlandishness" of his previous stance with regard to the Stormont 2006 attack and acceptance it was unlawful and he deserved to be punished;
9. His disassociation from terrorist organisations; and,
10. His expressed commitment to licence conditions;

Summary

75. Taking all the aforementioned evidence into consideration the Panel is satisfied that the prisoner remains a risk of serious harm given the gravity of his offending and his previous capacity for murder and violence. However according to the statutory test the Parole 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 should be confined. Having carefully considered all the evidence and submissions, the Panel is now satisfied, on a balance of probabilities, that the risk can be safely managed with the imposition of a series of robust licence conditions, including the conditions recommended in Annex A of the MARA report. Accordingly the Panel has determined that the statutory test for release has been met. Given the background to this case, the number of victims, the media interest and the potential risks to the prisoner the Panel acknowledge that a comprehensive level of oversight will of necessity be applied in this case. Indeed the Panel will expect that its decision will be carefully considered and that those tasked with monitoring the prisoner will do so with the professionalism and level of diligence which would be appropriate to a prisoner with a history of convictions such as the index offences. This should be continued as long as is considered necessary and proportionate for the protection of the public from serious harm.

76. The Panel has referred to the fact that when released, the prisoner will then be subject to the MARA licence regime and that this will provide a substantive layer of supervision and protection for the public in this case. These organisations have a statutory duty to give effect to the guidance in exercising their functions to contribute to the effective assessment and management of risks posed by terrorist-related offenders. Accordingly the Panel will proceed on the basis that we will include the standard licence conditions along with additional MARA conditions which are

recommended in in this particular case. For his part the prisoner should be left in no doubt about the level of monitoring he will be subject to and he must be ever mindful that the authorities have the powers to recall him to custody should the risk become unmanageable due to his lack of commitment compliance or otherwise. Finally the Panel are mindful of the registered victims in this case and would request that any information will be communicated with the requisite sensitivity and discretion.

77. Indeed the Panel have taken note of the victim representations contained within the dossier. The Panel is thus recommending that a licence condition is included prohibiting contact with the victim's family, nor encouraging others to do so. The Panel notes the representations regarding the prisoner not being able to leave Northern Ireland but note that this falls within the remit of the newly established Multi Agency Review Arrangements (MARA). Their role includes considering applications from TROs to travel and to reside outside of NI and it will be for them to determine these matters. A licence condition referring such requests to MARA is included.

Recommendations.

The Panel recommends that the following licence conditions be imposed on Michael Stone. The MARA partners may seek to request further conditions or amend the foregoing conditions as they deem necessary.

On your release you must report to the probation officer or PSNI station as so nominated at the time and place designated.

You Must:

-Keep in touch with the probation officer as instructed by the probation officer;

-Receive visits from the probation officer as instructed by the probation officer;

-Permanently reside at an address approved by the probation officer and obtain the prior permission of the probation officer for any change of address;

-Undertake such work, including voluntary work, as approved by the probation officer, and obtain the prior permission of the probation officer for any proposed change;

-Not travel outside the United Kingdom, the Channel Islands or the Isle of Man without the prior permission of the probation officer, except where you are deported or removed from the United Kingdom in accordance with the Immigration Act 1971 or

the Immigration and Asylum Act 1999;

You must not:

Behave in a way which undermines the purposes of the release on licence, which are to protect the public, prevent re-offending and the rehabilitation of the offender;

Commit any offence.

Additional licence conditions

Where, as a consequence of the additional conditions set out below, more than one organisation is engaged in an approval role, the necessary approval must be sought by submitting an application to Multi-Agency Review Arrangements (MARA) at MARA@licencesupervision.org.uk

Pursuant to Rule 3 (2) (a)

You shall permanently reside at **[INSERT APPROVED ADDRESS]** and obtain the prior permission of the Police Service of Northern Ireland (PSNI) for any change of address (either permanent or temporary). All applications to change address must be submitted to MARA@licencesupervision.org.uk at least 30 days in advance of any proposed change or absence[1]. *This condition will be monitored by PSNI.*

Pursuant to Rule 3 (2) (d)

You must not engage in any paramilitary activities nor participate in any organisation that supports, directs, authorises or controls such activities. You shall not engage in any conduct in support of terrorism including making public statements to that effect, nor encourage others to do so

This condition will be monitored by PSNI.

Pursuant to Rule [3] (2) (c)

You must not seek to approach or communicate with any of the families of the victims of your crimes nor encourage any others to do so.

This condition will be the subject of monitoring by PSNI.

Pursuant to Rule [3] (2) (d)

You may only use one mobile phone, which may have internet access. The make, model, IMEI number, telephone number and access code of this phone must be provided to the PSNI. You may not use any other internet enabled communications device. Use of the device is subject to the following conditions: The internet search history and any communications held on internet based applications must not be deleted on your specified device. Any application that has automated deletion functionality must not have this setting activated.

You must provide the device to the PSNI upon request and provide any PIN or lock code for the purposes of examination/download.

The device must not be solely accessible by fingerprint or facial recognition technology.

Location settings must remain enabled on the device at all times.

In respect of the single mobile phone which you elect to use, the details of the make, model, IMEI number, telephone number and PIN number should be communicated in writing to:

Multi-Agency Review Arrangements (MARA) via email to:

MARA@licencesupervision.org.uk

You must also include in this correspondence the number of the existing landline at your approved address. This information should be communicated within seven days from the date of your release.

This condition will be the subject of monitoring by PSNI.

Pursuant to Rule [3] (2) (d)

You must attend all appointments with the PSNI, as instructed by the PSNI.

This condition will be the subject of monitoring by PSNI.

Pursuant to Rule [3] (2) (f)

You must confine yourself to the address – **[INSERT APPROVED ADDRESS]** – between the hours of 10.00pm and 7.00am unless otherwise authorised by the PSNI for a period of 120 days; and thereafter for as long as deemed necessary by the PSNI.

Pursuant to Rule [3] (2) (g)

You must return to your approved address each evening on or before 10.00pm and not go outside the walls of the building at the curfew address in which the electronic

monitoring unit is installed before 7.00am in the morning and during these hours be subject to electronic monitoring for a period of 120 days; and thereafter for as long as deemed necessary.

Pursuant to Rule 3 (2) (h)

You shall not leave Northern Ireland without the prior permission of the Police Service of Northern Ireland (PSNI). All applications to travel must be submitted to MARA@licencesupervision.org.uk at least 7 days in advance of any proposed travel outside of Northern Ireland[10].

This condition will be monitored by PSNI.

[10] Please refer to MARA –APPLICATIONS TO TRAVEL - POLICY AND GUIDANCE