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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY ANDREW COULTER FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE SECRETARY OF STATE FOR JUSTICE

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Ivor McAteer KC and David McKeown (instructed by McConnell Kelly, Solicitors) for the applicant
Laura Curran (instructed by the Crown Solicitor's Office) for the respondent

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SCOFFIELD J

Introduction

[1] The applicant is a recalled prisoner who seeks to challenge a decision of the Secretary of State for Justice ("the Secretary of State") to decline to grant him 'executive re-release', pursuant to section 255C of the Criminal Justice Act 2003 ("the 2003 Act").

[2] Mr McAteer KC appeared for the applicant with Mr McKeown; and Ms Curran appeared for the respondent. I am grateful to all counsel for their helpful written and oral submissions.

[3] This case is somewhat unusual because it involves application of provisions within Chapter 6 of Part 12 of the 2003 Act which do not frequently fall for consideration by the courts of this jurisdiction and, in fact, do not appear to have legal effect in this jurisdiction (see the extent provisions in section 337 of the 2003 Act). The reason for this is that the applicant was sentenced, released and later subject to recall in England and Wales. The consequences of that recall are now being felt in Northern Ireland, since the applicant has recently been detained in this

jurisdiction and the Secretary of State's decision-making which is at issue in these proceedings governs the applicant's current status here. Having considered the guidance given by the Court of Appeal in *Re McVeigh's Application* [2014] NICA 23 in an analogous context, I am satisfied that I have jurisdiction to determine the case. No issue was raised by the respondent as to the court's jurisdiction or to the Administrative Court in England and Wales being a more convenient forum to deal with the application. For similar reasons to those considered in the *McVeigh* case, it seems to me that this was an entirely responsible approach on the part of the respondent.

[4] The application was also brought on for hearing quickly, and on a rolled-up basis, in light of the applicant's contention that his liberty is at stake and that he should be immediately released. The target of the challenge has altered since the proceedings were issued on an emergency basis and as matters have developed; but it is now squarely focused on the issue identified in para [1] above.

Factual background

[5] The applicant moved to England from Northern Ireland in 2007 due to a threat which had been made against him. While he was living in England, he received a custodial sentence of 12 months and one day in that jurisdiction on 2 November 2007 for offences of aggravated vehicle taking, driving with excess alcohol, driving with no insurance and driving whilst disqualified. He was initially imprisoned in HMP Reading but was subsequently released on home detention curfew on 14 January 2008. He then transferred to normal licence conditions in the community from 7 April 2008 and was due to remain on licence until 7 October 2008. It seems that he had indicated to the probation authorities in England at that time that he wished to return home to his father's address in Belfast; but this request was never approved.

[6] The applicant was then subsequently charged (again, in England) with an offence of assault on 2 April 2008. He then failed to report for supervision under the conditions of his licence on three occasions. He made no contact with the relevant authorities and provided no reason as to his non-engagement. He also stopped residing at the approved premises in which he was required to reside under the terms of his licence and, relatedly, failed to inform the probation authorities of his change of address. He then also failed to attend court to answer the charge of assault in May 2008.

[7] As a result of the events described immediately above, the applicant's licence was revoked and he was recalled to prison on 3 June 2008 pursuant to section 254 of the 2003 Act. By that time, however, as we now know, he had returned to Northern Ireland to reside with his father. By virtue of section 254(6), when his licence was revoked at the point of recall, the applicant was then liable to be detained in pursuance of his sentence and, whilst at large, was to be treated as being unlawfully

at large. At the date of his licence being revoked, Mr Coulter was considered to pose a medium risk of serious harm and a high risk of reconviction.

[8] It is accepted on behalf of the applicant that, between 2008 and 2014, he continued to offend, receiving a wide range of sentencing disposals from the courts in Northern Ireland (including fines, suspended sentences, lengthy probation orders and community service orders). The applicant relies upon the fact that he complied with all of the sentences and orders imposed upon him.

[9] The applicant was arrested and briefly imprisoned in Northern Ireland, for a period of some five days, in 2014. The precise reason for this unfortunately remains unclear. In any event, it appears that the probation services in England were not alerted to the fact that he had been located. On Mr Coulter's part, he has indicated that he believed that, as a result of this arrest, the outstanding issues with his licence in England had been resolved. As matters have now developed, that is plainly not the case.

[10] More immediately, on 5 October 2022 the applicant was arrested and interviewed in respect of an allegation of being concerned in the supply of Class A drugs. The applicant asserts that the only evidence linking him to this offence is a single fingerprint on an outer plastic bag in which drugs were located. The arrest was part of a wider drugs investigation which involved the seizure of some £190,000 worth of drugs.

[11] The applicant was charged but released on unconditional police bail in respect of this matter. However, when he was in police custody in October 2022, it was discovered that he had been recalled to prison. As a result, he was taken to HMP Maghaberry and further detained. When returned to the prison, the applicant says that he was informed that this was being treated as a 'standard recall' and that he was not being considered for automatic re-release. The respondent says that, after HM Prison and Probation Service in England and Wales were alerted to the applicant having been detained in Northern Ireland, he was provided with a copy of the recall dossier, which contained the recall report upon which he had been recalled, as well as documentation explaining the process for consideration of this case by the Parole Board. At that time, the applicant was also assigned a Community Offender Manager (COM) – the equivalent of what we would call a probation officer in Northern Ireland – to carry out a 28 Day Risk Management report (also known as 'a Part B report').

[12] The COM completed her assessment of the applicant on 26 October 2022. She concluded that Mr Coulter's risk of serious harm was low in relation to the public, known adults, children, prisoners and staff. She also concluded that the applicant's probability of proven reoffending and probability of non-violent reoffending were medium; and that his probability of proven violent reoffending was low. This was therefore a mixed assessment; and each side in these proceedings relies upon it in support of their case. In particular, the applicant relies upon the following passage:

> "Mr Coulter appears to have matured since the commission of the index offence for which he was recalled and there is nothing to suggest that he poses any risk of harm at this time."

[13] Notwithstanding this, the COM did not recommend Mr Coulter for executive release and therefore his case was prepared for referral to the Parole Board for review by the relevant unit within the Ministry of Justice – the Public Protection Casework Section (PPCS) – which deals with these matters on behalf of the Secretary of State. In the meantime, the applicant's solicitor sent pre-action correspondence on his behalf. In light of that, the respondent's Executive Release Team undertook a review to determine whether Mr Coulter was suitable for release at that time. It concluded that he was not.

[14] The applicant then commenced proceedings. He was made aware that he was not being considered for automatic re-release because his recall predated the automatic re-release provisions in the 2003 Act, discussed further below. However, he was informed that he had been considered for executive re-release but that he had been deemed unsuitable. In the context of the proceedings, the applicant wrote to the respondent making further representations about the process which had been followed and about his suitability for re-release. This led to the respondent reviewing its position but maintaining the same decision. It is this decision which is now challenged in the present application. The respondent's reasons for same have also now been elucidated further in his affidavit evidence and submissions.

[15] In the review decision, the respondent relied upon a variety of matters, including that Mr Coulter had absconded to Northern Ireland whilst on licence and then remained unlawfully at large for some 14 years; that he had committed further offences whilst unlawfully at large, including offences of burglary, theft, criminal damage on several occasions and driving offences; that he has been arrested for possession with intent to supply Class A drugs with a value of £190,000 (albeit there was no further information about the offence at that stage), raising key risk-related questions in relation to his level of possible involvement in drug supply and distribution; as well as potential safeguarding concerns in relation to the six children living at his address (although in the absence of a safeguarding assessment on the suitability of the home as a release address, which would require be undertaken). The report concluded that the lack of clarity in relation to a variety of the matters mentioned meant that the case was unsuitable for executive release and would need to be explored in full detail by the Parole B1oard.

Relevant statutory provisions

[16] The provisions at the heart of the issue in this case are to be found in the 2003 Act. However, they were introduced into this Act by the Criminal Justice and Immigration Act 2008 ("the 2008 Act") and were commenced on 14 July 2008. (This

date is significant as it was some six weeks *after* the applicant was recalled, which has the consequences described below).

[17] Insofar as relevant for present purposes, the 2008 Act introduced two features. First, there was automatic fixed term re-release for certain types of offenders (section 255B). This applies to determinate sentence prisoners unless they are serving an extended custodial sentence, are a serious terrorism prisoner or are otherwise a certain type of high-risk prisoner (see section 255A(2)). Second, there was discretionary executive re-release for recalled prisoners (section 255C(2)), with which this application is concerned.

[18] Section 255C is of particular importance in the present case and is set out below. However, section 255A governs whether a recalled prisoner will be dealt with under section 255B or 255C. Section 255A(1) makes plain that the section applies for the purpose of identifying which of sections 255B and 255C governs the further release of a person who has been recalled under section 254. By virtue of section 255A(2), the Secretary of State must, on recalling a person other than an extended sentence prisoner, a serious terrorism prisoner or a prisoner whose case was referred to the Parole Board under section 244ZB, consider whether the person is suitable for automatic release. "Automatic release" means release at the end of the automatic release period which, for present purposes, is a period of 28 days beginning with the day on which the person returns to custody (with a shorter period of 14 days applying where the person is serving a sentence of less than 12 months). By virtue of section 255A(4), a person is suitable for automatic release only if the Secretary of State is satisfied that the person will not present a risk of serious harm to members of the public if released at the end of the automatic release period. If suitable for automatic release, the person must be dealt with in accordance with section 255B. Otherwise, he must be dealt with in accordance with section 255C.

[19] It is common case that, at the point of recall, the applicant was *not* eligible for automatic release because, at that point, the automatic release provisions had not been introduced into the 2003 Act. The applicant was, therefore, simply recalled under section 254 and subject to a 'standard recall', whereby his case would be referred to the Parole Board for consideration for re-release under the then extant section 254(3). That the determination of whether or not a prisoner is suitable for automatic release is to occur at the point of recall (and not at a later stage where, for instance, as in this case, the person's return to custody occurs sometime *after* the recall) is thought to be clear from the words "on recalling a person" in section 255A(2). No contrary argument has been made in these proceedings. Where a person *is* suitable for automatic release, the mechanics of this are provided for in section 255B, which need not be set out for present purposes.

[20] It is also common case that the Secretary of State would, in principle, be able to exercise his discretion to order the release of the applicant under section 255C. It provides as follows:

"(1) This section applies to a prisoner ("P") –

(a) whose suitability for automatic release does not have to be considered under section 255A(2), or

(b) who is not considered suitable for automatic release.

(2) The Secretary of State may, at any time after P is returned to prison, release P again on licence under this Chapter.

(3) The Secretary of State must not release P under subsection (2) unless the Secretary of State is satisfied that it is not necessary for the protection of the public that P should remain in prison.

(4) The Secretary of State must refer P's case to the Board—

(a) if P makes representations under section 254(2) before the end of the period of 28 days beginning with the date on which P returns to custody, on the making of those representations, or

(b) if, at the end of that period, P has not been released under subsection (2) and has not made such representations, at that time.

(4A) The Board must not give a direction for P's release on a reference under subsection (4) unless the Board is satisfied that it is not necessary for the protection of the public that P should remain in prison.

(5) Where on a reference under subsection (4) the Board directs P's release on licence under this Chapter, the Secretary of State must give effect to the direction.

…

(8) For the purposes of this section, P returns to custody when P, having been recalled, is detained

(whether or not in prison) in pursuance of the sentence."

[21] For my own part, I am in some doubt as to whether the applicant in this case is actually eligible for executive re-release under section 255C. There is a respectable argument that he is not a relevant prisoner within section 255C(1) on the following basis. He is not a prisoner whose suitability for automatic release "does not have to be considered under 255A(2)." The reason he did not have to be considered for such release was simply that, at the point of recall, the relevant provision for automatic release was not in force. Nor is it the case that the applicant has been considered unsuitable for automatic release under section 255A(4). Again, this simply did not arise in his case. Insofar as consideration under section 255C is parasitic upon an earlier determination in substance that automatic release is unavailable for a reason set out in section 255A or 255B, it is arguable that the applicant has not passed through the gateway for consideration of his case under section 255C. Put another way, assuming the provisions introduced in 2008 come as a package, with section 255C operating as a fall-back only when section 255B is not engaged on its own terms, it is arguable that the applicant cannot avail of any of these provisions. That would go some way to resolving the anomalous position in which he finds himself and of which he complains (see para [24] below).

[22] However, both parties have proceeded on the basis that it would be open to the Secretary of State to release the applicant again on licence under section 255C(2). This is also an arguable construction if one considers those whose suitability for automatic release does not have to be considered under section 255A(2) to include the (no doubt) small category of prisoners who were recalled before the automatic release provisions came into force but are now detained in pursuance of their sentence. Since this issue has not been raised by the respondent, I proceed on the basis that he would have a power to release the applicant under section 255C(2) if he considered it an appropriate case to do so.

Summary of parties' cases

[23] The applicant contends that the consideration given to his executive re-release was procedurally unfair and that the outcome was irrational. He emphasises the difference in regimes in relation to recall in England and Wales on the one hand and in this jurisdiction on the other hand. He contends that, in the former jurisdiction, recall can occur in respect of any breach of licence conditions and can be used as a means of ensuring compliance with conditions or punishing non-compliance. In contrast, he submits, in light of the court's decision in *Re Olchov's Application* [2011] NIQB 70, in this jurisdiction recall may only occur as a last resort when the offender's risk becomes unmanageable in the community.

[24] The applicant also relies on the fact that, were he recalled today (rather than having been recalled in 2008), he would be an appropriate candidate for automatic re-release, since he would be eligible for automatic release under section 255A(2)

and would not present a risk of serious harm applying the test in section 255A(4). However, as the determination of suitability for automatic fixed re-release is made at the point of recall, the applicant was not able to avail of this. He is therefore in the anomalous position of not being a high-risk prisoner but having to satisfy the same strict test for executive release as those prisoners would, they having been deemed ineligible for automatic release.

[25] On a variety of bases, the applicant next contends that the key test for the Secretary of State is whether he poses a risk of serious harm. He further says that it is plain that he does not, including on the face of the Part B report prepared after his recent return to custody, and it was therefore irrational for the Secretary of State to do anything other than order his executive release. Relatedly, he contends that the Secretary of State has taken irrelevant considerations into account and left relevant considerations into account.

[26] For the Secretary of State, Ms Curran emphasised the discretionary nature of the Secretary of State's power to order executive release; the nature of the statutory pre-condition to executive release in section 255C(3); and the fact that, unless the Secretary of State is satisfied that that condition is met, the default position is that the recalled person must remain in custody. On the basis of the information available to him, it was submitted that the respondent could not be satisfied – or, at least, that it was not irrational for him not to be satisfied – that it is *not* necessary for the protection of the public that the applicant should remain in prison.

The nature of the statutory test

[27] In the course of submissions, there was considerable debate in relation to the nature, scope and intensity of the test which the Secretary of State should apply when considering the executive release of a prisoner under section 255C. At first glance, it seems clear that the Secretary of State must direct himself to whether it is "not necessary for the protection of the public that [the recalled person] should remain in prison." That is set out in section 255C(3). However, what does "the protection of the public" mean in this context? What risks are relevant? And how, if at all, does this question overlap with the question of whether the recalled person poses a risk of serious harm.

[28] Mr McAteer relied on the case of *King* in suggesting that there must be a symmetry between the test for the Secretary of State under section 255C(3) and that to be applied by the Parole Board which, he argued, was whether it was necessary for the prisoner to be confined to protect the public from serious harm (that is to say, from injury to life and limb). On this basis, he argued that the respondent should have asked himself whether the applicant's risk of serious harm required him to be remain in custody. I reject that submission for the reasons set out below.

[29] The issue in the *King* litigation was the lawfulness of guidance issued by the Parole Board to its panels in December 2013, particularly relating to the test to be

applied by such panels considering the re-release after recall of a prisoner serving a determinate custodial sentence. Judgment at first instance was given by a Divisional Court (Aikens LJ and Mitting J): see *R (King) v The Parole Board* [2014] EWHC 564 (Admin). The relevant guidance was to the effect that, in order to direct release, the Board "should be satisfied that it is no longer necessary for the prisoner to be detained in order to protect the public from serious harm (to life and limb)" and that it was not a requirement to balance the risk occasioned by release against the benefits of release either to the public or the prisoner. The challenge was to the second element of the guidance just mentioned, namely that no balancing exercise was required. It arose in circumstances where, in the case of determinate sentence prisoners, there was no statutory test set out in the legislation to be applied by the Parole Board; whereas statutory tests to be applied by the Secretary of State had been introduced by the 2008 amendments to the 2003 Act (see para [40] of the judgment of Aikens LJ).

[30] It was accepted by both sides in *King* that when the Parole Board was exercising its powers under the relevant provisions it had to apply some uniform test to decide whether to direct that the prisoner be released. Panels could not simply make up the test as they went along. The Divisional Court considered that the structure of the legislation strongly indicated that Parliament intended that the Parole Board should apply the equivalent of an existing statutory test when making its decision on the possible re-release of a determinate sentence prisoner who had been recalled (see para [57] of the judgment). Against that background, it considered that the test the Parole Board must apply when deciding whether to direct a determinate sentence prisoner's re-release after recall must be equivalent to the statutory test to be applied by the Secretary of State when considering release in the same context.

[31] The claimant in *King* appealed to the Court of Appeal, which dismissed his appeal: see [2016] EWCA Civ 51; [2016] 1 WLR 1947. It agreed with the Divisional Court that where the Secretary of State referred a case to the Parole Board, the Board should apply the same test which the statute required the Secretary of State to apply when it (the Board) came to review his decision. Detailed reasons for this conclusion were provided in the judgment of Lord Dyson MR: see paras [22]-[27]. The Court of Appeal also addressed its mind to the meaning and effect of the statutory test for the Secretary of State, which set out the test which was also to be applied by the Parole Board. The words "necessary for the protection of the public" in section 255C(3) did not entail a balancing exercise in which risk to the public was to be weighed against the benefits of release to the prisoner or the public; but simply involved safeguarding the public from the danger posed by the prisoner: see para [31].

[32] Sales LJ gave a concurring judgment but made a potentially important point in para [48]. He noted that – apart from the question of interpretation of the public protection test addressed in Lord Dyson's judgment (that is to say, whether it permitted or required a balancing exercise to be undertaken) – "the precise content

of the statutory public protection test was not the subject of debate" before the Court of Appeal. He then observed:

> "It is not obvious to me why the board employs the "life and limb" approach when applying the statutory test. On the face of it, the public might require protection if, for example, an incorrigible fraudster were released early in circumstances where there was a significant risk he would again prey upon the public, even though he represented no threat to life and limb."

[33] Sales LJ said he expressed no view about that aspect of the Parole Board's guidance because it was not an issue in the appeal before them. Tomlinson LJ agreed with this judgment (as he did with the judgment of Lord Dyson): see para [49]. The result of the litigation, therefore, was that the Parole Board was to apply the test applicable to the Secretary of State's consideration (the 'protection of the public' test); it was clarified that this did not require a balancing exercise with the benefits of release being weighed against the risks; and the precise nature of the risks which were relevant was not conclusively ruled upon. Sales LJ raised the point that the 'life and limb' test set out in the Parole Board's guidance put a gloss on the statutory test but whether it was correct to do so as a matter of law, or not, was not resolved.

[34] Subsequent to the judgment in *King* the 2003 Act has been amended by the Police, Crime, Sentencing and Courts Act 2022 in order to insert section 255B(4A) and section 255C(4A) to give legislative effect to the decision of the Court of Appeal and remove any doubt that, in the circumstances where those provisions apply, the Parole Board will apply the same test as would the Secretary of State whose decision was being reviewed in the circumstances.

[35] Perhaps more importantly for present purposes, the test for the Secretary of State under section 255C(3) was considered again and in some detail in the case of *R (Oakes) v Secretary of State for Justice and Others* [2010] EWCA Civ 1169; [2011] 1 WLR 321. In that case, it was held that the test under section 255C(3) of "the protection of the public" was different from, and broader than, the test under section 255A(5) of "risk of serious harm to members of the public", in that the former included the risk of non-violent re-offending upon release. The test under section 255A(5) was not to be read into section 255C(3).

[36] This authority is in my view fatal to the applicant's submission in the present case that the Secretary of State ought to have applied the 'risk of serious harm' test or a test which was materially similar to it. A submission to like effect was expressly rejected by Pill LJ in *Oakes*, with whose judgment the other two members of the court agreed. The competing submissions were recorded at paras [19] and [20]. The Court of Appeal accepted the submissions of the Secretary of State that the wording deployed by the legislature in different provisions of the 2003 Act was

deliberately differentiated, reflecting its intention that the 'protection of the public' test would be different from the 'significant risk to members of the public of serious harm' test. At para [21], Pill LJ held that, "The broader expression "protection of the public" was used advisedly in section 255C(3)." The Court accepted that, in circumstances where a recalled prisoner was not eligible for automatic release but did not pose a risk of serious harm, yet nonetheless could not satisfy the stricter condition in section 255C(3) because a perceived risk of non-violent reoffending was present, that might lead to unfairness. However, it could see no other way to construe the statutory scheme.

[37] It is clear that the statutory scheme, as it currently stands, deploys different wording in respect of different tests to be applied in different circumstances. The first question for the Secretary of State under section 255C is whether he is satisfied that it is not necessary for the protection of the public that the prisoner should remain in prison. That is also test for the Parole Board if referral is made to it by the Secretary of State under section 255C(4): see sub-section (4A). This wording ("protection of the public") is not the same as that used in elsewhere in the 2003 Act. For instance, when considering whether a person who is in principle eligible for automatic release is suitable for such release under section 255A, the Secretary of State must address himself to the question of whether that person "will not present a risk of serious harm to members of the public": see section 255A(4). I accept Ms Curran's submission that the legislature should be taken to have used its words carefully and to have intended some differential consequence as a result of the deployment of different wording in these respective provisions. I made a similar point recently in an analogous context in my judgment in *Re McKeown's Application* [2022] NIKB 23, at para [41]. The point applies with equal, if not greater, force where the contrasting tests are set out in the same Act. More importantly, this was a point emphasised by Aikens LJ at para [43] of his judgment in *King* at first instance: a 'risk of serious harm' test is "obviously not the same test" as a general 'public protection' test (and see also para [45] of that judgment).

[38] Mr McAteer relied upon the *King* judgment as authority for his contention that the 'public protection' test is essentially another formulation of the 'risk of serious harm' test, because there should not be significant divergence between the test applied by the Secretary of State on the one hand and the Parole Board on the other, with the latter maintaining its guidance about risk to life and limb. In my view, this is a misreading of that authority. In *King*, the statutory test to be applied by the Secretary of State was read across to the Parole Board's consideration in the absence of an express statutory test for it to apply. That was considered to be the true statutory intention, albeit it had not been clearly expressed. More importantly, the *King* case did not consider the correct meaning in law of the public protection test (other than in relation to the question of whether a balancing exercise was required). It did not confirm that the 'life and limb' guidance which had been issued by the Parole Board was a correct interpretation of the relevant statutory test. On the contrary, Sales LJ's judgment cast doubt on that.

[39] As matters stand now, the 2003 Act having been further amended after the decision in *King*, the statutory intention is clear. Where a case is referred by the Secretary of State to the Parole Board, each will apply the same test. However, there are two different tests to be applied at different times for different purposes. The public protection test (which applies to consideration of executive release) is more onerous than the risk of serious harm test (which applies to consideration or suitability for automatic release). They mean different things. It is the former which was to be applied by the Secretary of State and the circumstances of the present case.

[40] As Ms Curran accepted, the decision of the English Court of Appeal in *Oakes* is not binding on the High Court in Northern Ireland; but I nonetheless accept her submission that in circumstances such as the present – where I am called upon to construe provisions of UK legislation which do not apply in this jurisdiction but do apply in England and Wales and which have been considered by the courts of that jurisdiction – I should accord a decision of the English Court of Appeal the highest respect and treated as extremely persuasive authority. In any event, I consider the reasoning and conclusion in *Oakes* to be plainly right, in light of the contrast between the statutory wording in section 255A(4) and section 255C(3) respectively.

[41] In the course of exchanges during the hearing of this application, I clarified with the respondent's counsel that the outcome in this case arose because the Secretary of State was not satisfied that the statutory condition in section 255C(3) was met; and *not* because, albeit that condition was met, the Secretary of State declined to exercise his discretion undersection 255C(2) to release the applicant.

[42] In the present case, the applicant therefore finds himself having to satisfy a more stringent test under section 255C(3) than he would do if the Secretary of State was considering whether he was suitable for automatic release; and having to do so in quite unusual circumstances, namely that he is not an extended sentence prisoner, a serious terrorism prisoner or a high-risk offender to whom section 244ZB applies. But that is simply a feature of the application of the statutory scheme in the particular circumstances of this case and the fact that the applicant is seeking executive release because section 255B has (it is accepted) no application in his case. Put bluntly, this arises because the applicant absconded so long ago and evaded reconsideration of his case by the Secretary of State for so long.

[43] The applicant also relies upon guidance issued by the Parole Board in December 2013 in relation to the test to be applied. In section 3 of that guidance, entitled 'New Test for Release for All Determinate Sentence Prisoners' the 'protection of the public' test is mentioned and then explained. It is said to be a risk-only test, without the need for a balancing act between the risk of reoffending and the benefits of early release. In respect of recalled prisoners subject to a life sentence or indeterminate sentence for public protection, the guidance notes that the Board is required to protect the public from the risk of serious harm (that is, risk to life and limb). Then there is set out the Board's view that "the same test must be

applied to determinate sentence prisoners", although also noting that every Parole Board panel is a judicial body in its own right which must interpret the statutory test as it sees fit and cannot be fettered by the guidance. The guidance on the test itself is expressed in the following para, which the applicant in this case contended should be applied by the Secretary of State:

> "Panels may interpret the test for all determinate sentence prisoners as follows:
>
> > **In order to direct release, the Board should be satisfied that it is no longer necessary for the prisoner to be detained in order to protect the public from serious harm (to life and limb). It is not a requirement to balance the risk against the benefits to the public or the prisoner of release.**
>
> Panels are reminded to interpret the statutory test as they see fit with the above guidance in mind.
>
> > **Panels are reminded that when considering a case, public protection must be the over-riding consideration.**
>
> The identification and management of risk remains the focal point for panels' consideration."
>
> [bold and underlined emphasis in original]

[44] But in my judgment no legitimate expectation could arise that the Secretary of State is required to apply the 'life and limb' test when exercising his functions under section 255C. As noted above, the decision of the English Court of Appeal in *Oakes* makes clear that the public protection test is *broader* than a test directed to serious harm. The guidance issued by the Parole Board could not bind the Secretary of State. Indeed, on its own terms it is clear that it cannot even bind panels of the Parole Board, let alone a third party. More importantly and in any event, even if this guidance prima facie applied to the exercise of the Secretary of State's functions, he could not be bound to apply if (as I consider) it misstates the nature of the statutory test he is to apply as a matter of law. The decision in *Oakes* makes clear that the public protection case is *not* limited to injury to life and limb and that the risk of non-violent reoffending may be enough to preclude a recalled prisoner's release.

[45] The position is a little more complex when one comes to the Secretary of State's *own* internal guidance document, on which the applicant also relies. At para 6.12.1 of this document, one finds the following:

> "PPCS, on behalf of the Secretary of State, has the power to executively release determinate sentence prisoners into the community subject to licensed supervision at any time during the recall. Including those prisoners subject to extended sentences. All such releases take place without reference to the Parole Board; in making a decision to re-release, the Secretary of State must be satisfied that the recalled prisoner's RoSH [risk of serious harm] can be safely managed in the community."

[46] Ms Curran points to other parts of the Secretary of State's guidance which refer to whether the prisoner can be safely re-released and managed in the community or simply refer to "the statutory test" being met. Even assuming that this internal guidance can be used to ground a legitimate expectation, I do not consider it to represent an abuse of power for the Secretary of State to rely on a broader understanding of the statutory test in section 255C(3). Firstly, the guidance is not clear and unqualified on this issue. As noted above, it does make reference to "the statutory test" and does not purport to set out a definitive understanding of what that test means or how it is to be applied. Moreover, it does *not* say that if the Secretary of State is satisfied that a recalled prisoner's risk of serious harm can be safely managed in the community he *will* be executively released. That is a minimum requirement but it not expressed as being sufficient to mandate release. In any event, for the reasons discussed above, to reduce the relevant test to the equivalent of that set out in section 255A(4) would represent an error of law because the public protection test is not confined to the issue of serious harm (or harm to life and limb) alone. The respondent's submissions in this case made clear that he correctly understood the position. In light of that, it would be of assistance if his guidance were revised to more accurately reflect the legal position he correctly applied in this case. It would be wrong, however, to require him to apply a different test to that set out in the statute simply because his internal guidance was infelicitously drafted.

Utility of the application

[47] Before resolving the rationality challenge, there is a preliminary issue to be addressed. The respondent contends that the applicant's case should be dismissed because it lacks any utility. When these proceedings were initially commenced, it was thought that the applicant's sentence licence expiry date (SLED) was 23 February 2023. However, after further analysis, the respondent has confirmed that Mr Coulter's SLED is actually 15 December 2022, which was much closer to the hearing date in this application. The respondent therefore contends that, even if the applicant is entirely successful in these proceedings, it would be impractical for any judgment in his favour to be given effect. This is because it is contended that the applicant's sentence would not be suitable for transfer to Northern Ireland so that (i) he would need to be transferred to a prison in England prior to release, (ii) approved accommodation in England would also then need to be found for him to

which he could be further released on licence; and (iii) he would then have to be made subject to supervision by the probation authorities in England. Not only would this not accord with the applicant's wishes (since he wishes to be released back to his home in Northern Ireland) but it would "not substantially reduce his period in detention", the respondent submits, by the time all these steps had been undertaken. In the alternative, it is said that it would not be feasible to transfer the applicant's sentence to Northern Ireland (allowing him simply to be released on licence in this jurisdiction) within the period of his sentence remaining to be served.

[48] This amounts to a submission that it is too difficult at this point to release the applicant for practical reasons even if he was legally entitled to re-release under section 255C. I cannot accept that submission. I proceed on the basis that, if the applicant was to succeed on his case entirely and the court was to make appropriate orders in his favour, the Secretary of State would do his utmost to give effect to both the letter and spirit of the court's disposal and that this would result in the applicant being released from custody sooner than will otherwise be the case. (As appears further below, this does not arise in any event; but, as a matter of principle, the respondent's submission on the practical difficulties was in my view a particularly unattractive one.)

Application of the statutory test to the facts

[49] In light of the conclusions I have reached as to the operation of the statutory scheme, discussed above, it seems to me that this challenge largely resolves to a debate about whether it was irrational for the Secretary of State *not* to be satisfied that it was not necessary for the protection of the public that the applicant should remain in prison. In addressing the issue in this way, the Secretary of State relies upon the expertise and experience which he enjoys (through the medium of the relevant unit within the Ministry of Justice). He emphasises the limited nature of his role at this stage; the limited evidence-gathering powers available to him as compared with those of the Parole Board; and the fall-back position that, where he is not so satisfied, including by virtue of outstanding information, the applicant should remain in custody. In turn, the applicant contends that, on the facts of this case, the outcome should be clear. Insofar as the respondent relies upon any lacunae in the information available to him, the applicant also submits that the respondent has failed in his duty to enquire into the circumstances of the case.

[50] I reject the applicant's case based on alleged failure on the part of the Secretary of State to discharge his *Tameside* obligation. Mr Coulter contends that the respondent has washed his hands of enquiring into the applicant's circumstances in favour of simply referring the matter on to the Parole Board. This arises from reference made on behalf of the respondent to there being an ongoing risk which required to be explored by the Parole Board in order to assess what risk the applicant currently poses. It seems to me that the statutory scheme is composed in such a way that the Secretary of State should be able to grant executive release in clear cases. Where he is not satisfied that the statutory condition in section 255C(3)

is met, the default position is that the prisoner remains in custody. In considering the grant of such release, the respondent must obviously consider representations made to him (as he has done in this case, on a number of occasions) and other material considerations of which he is aware. He is not obliged, however, to chase down every available piece of information. As usual, the extent of information he is required to obtain before making a lawful decision will be reviewable on a *Wednesbury* basis: was it irrational for him not to make further enquiries? In turn, the context for such review is the nature of the respondent's role under the statutory scheme.

[51] The Secretary of State must make a speedy reference of the matter to the Parole Board under section 255C(4), either when the prisoner makes representations under section 254(2) or, in the absence of such representations, at the end of 28 days after the prisoner's return to custody. When the applicant's case is referred to it by the respondent, the Parole Board is required to make one of three decisions, set out in rule 19 of the Parole Board Rules 2019, namely that the prisoner is suitable for release, that he is unsuitable for release, or that the case should be directed to an oral hearing. If an oral hearing is convened and once the prisoner's case has been considered, he must either be determined to be suitable for release or not: see rule 25. The respondent, in contrast, does not enjoy the same evidence-gathering powers of the Board; may often, as here, be making a decision within a limited period of time; and is not constrained in the same way as is the Board to making a positive decision one way or the other.

[52] In this case, the respondent has clearly considered the various representations made to him on behalf of the applicant at different times and has obtained and considered the detailed Part B report referred to above. I do not consider that it was irrational for him to fail to go off and make additional enquiries in the circumstances of this case. It is clear that in respect of the applicant's pending prosecution for drugs offences, for instance, there is limited information available at this time in any event.

[53] I also reject the applicant's contentions that the Secretary of State has taken immaterial considerations into account or has failed to take into account material considerations, for the reasons given below.

[54] The applicant contended that the Secretary of State had left a material consideration out of account by failing to engage with the appropriate statutory test for re-release and that set out in his own internal guidance because he did not address himself to the risk of serious harm posed by the applicant. For the reasons given above (see paras [35]-[46]) I do not consider that this represents an instance of the respondent leaving a relevant consideration of account. He has clearly taken into account the COM's view that the applicant does not pose a risk of serious harm but that is not determinative in the way in which the applicant has suggested.

[55] I also reject the case made by the applicant that the passage of time renders his disengagement from supervision in 2008 and his offending between 2008 and 2014 irrelevant to the respondent's consideration. Their antiquity may go to weight, but it was clearly necessary for the respondent to consider these in the context of the statutory test he was called upon to apply.

[56] The applicant further contended that the pending criminal case against him should have been left out of account on the basis of *R (Broadbent) v Parole Board* [2005] EWHC 1207 (Admin). That was a recall case in which, like the present case, the recalled prisoner was alleged to have been found in possession of a large quantity of drugs but denied the allegations against him. In that case, however, his arrest and charge were the *only* basis for revocation of his licence (on the basis that he had breached the condition of his licence to be of good behaviour and not to commit any offence: see paras [4], [22] and [24]-[25] of the judgment). Stanley Burnton J, at para [26], in a passage relied upon by the applicant, said this:

> "… I am clear that the fact of a charge and a pending prosecution alone cannot without more justify a conclusion that there is a risk of reoffending. If it were, the Parole Board would be delegating to the prosecution authority the assessment of the conduct of a prisoner and the evidence or facts said to give rise to a risk of reoffending. Moreover, if the fat of a charge and a prosecution for the offence was sufficient, it is difficult to see how the Board could give the prisoner the fair hearing to which he is entitled…"

[57] Ms Curran unsurprisingly emphasises the phrases "alone" and "without more" in the above passage (and see also "of itself" in para [33]). Moreover, it is clear from Stanley Burnton J's judgment that the Parole Board was entitled to consider the new allegation and the evidence surrounding it (see, for instance, para [27] of his judgment). The major issue before him was the extent to which the Parole Board had to enquire into that evidence, rather than simply taking the charge and pending prosecution at face value.

[58] I am satisfied that the present case is readily distinguishable from the *Broadbent* case. In this case, the Secretary of State has a variety of concerns arising from the applicant's past offending, his disengagement from supervision and breach of his licence conditions, and more recent offending (including offending in 2019, albeit these were less serious driving offences). The circumstances of his recent arrest are far from the only matter which have given rise to concern in his case, albeit it was this arrest which brought him back onto the respondent's radar.

[59] The applicant also contends that the Secretary of State has wrongly taken into account the fact that children reside at his home address. He makes the point that the respondent contends that he could not be released to Northern Ireland. If

he was to be released under section 255C, he would need to be transferred back to England in order to remain under the supervision of the probation authorities there. In that case, the applicant says, how are his home circumstances in Northern Ireland relevant? However, the applicant himself has been seeking release to his home address in Northern Ireland, which would be possible if his sentence could be transferred to this jurisdiction alongside his release. Moreover, when issue was first considered it was at a time when the respondent thought Mr Coulter's SLED was much further off, which may well have allowed for his transfer back to Northern Ireland. In light of young children living at his address and the recent charge relating to potential involvement in a major illegal drugs operation, I do not consider it irrational for the respondent to have considered it relevant to obtain further safeguarding information about the address to which the applicant was seeking further release on licence.

[60] I also have little hesitation in dismissing that aspect of the applicant's case whereby he contends that the respondent has failed to take into account material considerations which weighed in favour of release including, for instance, his lack of convictions since 2014 and successful completion of a lengthy probation order and community service; the information contained within the OASys and Part B reports about the applicant's stability within his current setting, low risk of serious harm and other matters; his release on unconditional post-charge bail when recently arrested; and the purported weakness of the current case against him in respect of the pending drugs charges. There is no proper basis in my view upon which I could conclude that the respondent has left these matters out of account. The respondent has clearly taken into account and recorded that the applicant has expressed remorse; that he was significantly younger at the time when he previously breached his licence conditions; and that he believed that the matter had been dealt with in 2014. The other issues were either dealt with in the reports considered by the respondent or in the applicant's submissions (with the exception of the issue of the limited 'fingerprint' evidence, which the applicant only disclosed at a later point in the course of his submissions in these proceedings but to which, therefore, I do not consider the respondent can legitimately be criticised for failing to have had regard). I also see no proper basis for considering the respondent was unaware of, or failed to consider, his power to vary or supplement the licence conditions to which the applicant was subject. This is an issue specifically covered in the Part B report and the COM did not wish to add any additional licence conditions. The concern in this case was a more fundamental one, namely whether the applicant could be trusted to abide by conditions in light of his previous behaviour.

[61] The factors argued to have been left out of account are, in reality, simply factors in support of the applicant's case that he can be released without risk to the public which he wishes to emphasise and which he contends have been given insufficient weight. This case, if it is to succeed at all, must succeed on a straight rationality challenge to the Secretary of State's conclusion (or, more accurately, the

Secretary of State's failure to be satisfied that the relevant statutory condition was met) on the basis of all of the evidence before him.

[62] Having reflected carefully on this issue, I cannot hold that the Secretary of State's view was irrational. I remind myself that I must avoid any temptation to substitute my own view for that of the decision-maker. Previous authority also suggests that the court should not exercise a particularly intense review in this field, firstly because the Secretary of State's decision is subject to full merits review by the Parole Board, to which the applicant's case must be referred and, secondly, because of the expertise and experience enjoyed by the parole authorities in decision-making of this type. In this context, the Executive Release Team within the PPCS of the Ministry of Justice is made up of officials with a background in probation and experience in risk assessment of prisoners. Whilst the approach taken by the Secretary of State may seem highly cautious on the facts of this case, and might not even be the same decision I would have reached had I been the decision-maker, he is entitled to take the view that he should not gamble with the safety of the public.

[63] The applicant has a number of powerful points in his favour. He has a very limited record of offending from 2014 to 2022. When recently arrested, he was released on unconditional police bail. As the Part B report noted, leaving aside the recent suspected drugs offending, he appears to have matured and to have settled down. A very strong point in his favour is the COM's view that he does not pose a risk of harm (see para [12] above).

[64] Nevertheless, the applicant has been unlawfully at large since 2008 (see sections 254(6) and 255ZA of the 2003 Act). The respondent was entitled to take the view, which he did, that the applicant had previously shown a complete disregard for his supervision under licence. Not only did he do so in 2008 but, after that, he continued to offend Northern Ireland, including some serious non-violent offending. The COM assessed him as currently having a medium probability of proven reoffending and a medium probability of non-violent reoffending. Notwithstanding the early stages of the case and the current relative paucity of evidence against the applicant, the respondent was also entitled to take into account that he had now been arrested and was due in court in connection with possession with intent to supply Class A drugs in relation to a high-value drugs find.

[65] The grant of unconditional police bail is really neither here nor there. The Secretary of State must make his own assessment of the risk posed by the applicant. That much is also re-affirmed by the decision in the *Broadbent* case, referred to above (see para [30] of the judgment of Stanley Burnton J, there dealing with the grant of bail by a Crown Court judge).

[66] Where the public protection test is to be applied, the overriding consideration is the protection of the public, placing the protection of innocent

people above the personal liberty of one who has been guilty of grave offending and may still represent a danger to others: see para [66] of *King* at first instance.

[67] The respondent has reviewed the applicant's case twice. Four different members of the Executive Release Team have now concluded that the respondent cannot be satisfied that the statutory test in section 255C(3) has been met: in each instance a case manager reviewed the case and the matter was then signed off by a senior manager. Even the COM who provided a broadly favourable conclusion in her report did not positively support executive release for the applicant. There was sufficient concern, and sufficient issues in respect of which reassurance or information was outstanding, that the respondent was simply not satisfied that it was not necessary for the protection of the public for the applicant to remain in custody. I do not consider that that outcome, whilst cautious, was outside the range of rational responses available to the respondent on the evidence before him.

[68] The applicant's pleaded case based on article 5 ECHR and article 14 ECHR was not pursued, either in his skeleton argument or orally. This is perhaps unsurprising given that the applicant's continued detention arises from the order of the sentencing court (see the discussion in *Re Larkin's Application* [2021] NIQB 66 at paras [44]-[50]) and given that his particular predicament is likely to be a highly unusual one arising out of the chronology of his offending and absconsion, along with the bright line rules inherent in the introduction of new features to the statutory scheme.

Conclusion

[69] As I mentioned at the outset, this case was brought on for hearing on a rolled up basis. There were two broad thrusts to the challenge: namely that the respondent had applied the wrong test in law and that his decision was irrational on the facts. The first element of the challenge was plainly misguided in light of the discussion above. I refuse leave to apply for judicial review on that aspect of the applicant's case. The second element of the challenge was partly reliant on the first, since the more generous the legal test to be applied in the applicant's favour the easier it is likely to be for him to show that the respondent has acted irrationally in determining that he is not suitable for executive release. Even applying the broader public protection test, I am satisfied that it was arguable that the respondent reached an irrational conclusion on the substance of that test in this case. I therefore grant leave to apply for judicial review on that issue; but nonetheless dismiss the application on the merits. I therefore do not need to grapple with the respondent's submissions on the question of remedy or the interesting question of whether, even if the statutory condition in section 255C(3) was met, the respondent retained scope to lawfully refuse to release the applicant in the exercise of his discretion under section 255C(2) (an issue tantalisingly left open by Pill LJ in the *Oakes* case, at para [12]).