Neutral Citation No: [2013]NIQB 2

Ref: **HOR8698**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **21/01/13**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Foden's (Ivan) Application [2013] NIQB 2

IN THE MATTER OF AN APPLICATION BY IVAN FODEN FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE DEPARTMENT OF JUSTICE FOR NORTHERN IRELAND DATED 31 JANUARY 2012

AND IN THE MATTER OF DECISIONS OF THE PAROLE COMMISSIONER FOR NORTHERN IRELAND DATED 25 APRIL 2012 AND 17 MAY 2012

HORNER J

Introduction

[1] By this application for judicial review, Ivan Foden ("the applicant") seeks to challenge the decision of the Department of Justice for Northern Ireland ("the Department") dated 31 January 2012 whereby it revoked the applicant's licence and the decision of the Parole Commissioner dated 25 April 2012 that the applicant should not be released in accordance with Article 28(5) of the Criminal Justice (Northern Ireland) Order 2008 ("the Order"). He further seeks to quash the decision of a Parole Commissioner dated 17 May 2012 denying him an oral hearing in respect of his challenges to the January and April decisions. Finally it is asserted that there has been a breach of Article 5(4) of the ECHR because the applicant has been deprived of any proper review of the remitted recall reconsideration. Accordingly Article 28(6)(b) of the Order is incompatible with the ECHR. At the outset I must express my indebtedness to counsel for the comprehensive and well organised written and oral arguments presented on behalf of all the parties to this application.

Factual Background

[2] On 2 September 2011 the applicant received a determinate custodial sentence for offences which included taking a vehicle without the owner's consent, burglary and theft, dangerous driving, driving whilst disqualified, failing to stop and driving without insurance. The determinate custodial sentence was 12 months' custody and 12 months' release on licence. The pre-sentence report from the Probation Service records:

> "Mr Foden's misuse of alcohol and prescription medication and the associated distorted thinking and chaotic emotional state, his unstructured lifestyle and association with pro-criminal peers, poor impulse control, limited financial income, a lack of victim awareness and the absence of consequential thinking skills are risk factors that have contributed to his involvement in the current offences."

The risk of serious harm assessment dated 6 September 2011 states, inter alia:

> "To manage the risks identified, Mr Foden needs to develop internal protective controls to enable him to desist from further offending. External controls such as his engagement with PBNI and appropriate support services could compliment (sic) this process."

It is thus clear that the management of the risk which Mr Foden was considered to pose to society was considered to be a two-way process. Firstly, Mr Foden had to make a personal commitment to desist from further offending and, secondly, he had to engage with the Probation Board (ie PBNI). The imposition of external controls was designed to reduce the risk of serious harm to the public.

[3] The applicant was released on licence on 14 January 2012. The conditions of his licence included the following:

(a) Keeping in touch with the probation officer as instructed by the probation officer.

(b) Receiving visits from the probation officer as instructed by the probation officer.

(c) Not to behave in a way which undermined the purposes of the release on licence which are the protection of the public, the prevention of reoffending and the rehabilitation of the offender.

(d) He was to permanently reside at Centenary House, 2 Victoria Street, Belfast. He was not to reside elsewhere without obtaining the prior approval of his probation officer.

(e) He was to confine himself to that address between the hours of 9.00pm and 7.00am and had to return to the approved address each evening on or before 9.00pm.

The licence was signed by the applicant under the legend:

> "The licence has been given to me and its requirements have been explained".

Prior to his release, a release panel decided he should also be subject to an additional curfew and therefore had to be in his residence between 2.00pm and 4.00pm, that is at Centenary House.

[4] The chronology of events can be briefly summarised as follows:

(i) On 15 January 2012 the applicant failed to keep his afternoon curfew.

(ii) On 18 January 2012 the applicant again failed to keep his afternoon curfew. His excuse, when contacted by hostel staff, was that he had not had the money to travel from his mother's home back to the hostel for the curfew.

(iii) On 19 January 2012 Probation decided that the afternoon curfew would be temporarily suspended. However, home visits would be carried out by the supervising officer as well as face to face contact being maintained twice weekly, and arrangements would be made for the applicant to report to Andersonstown Probation Office 2 days a week for an initial period.

(iv) On 20 January 2012 the Supervising Officer attended the applicant at his home but he was not there. When contacted by telephone the applicant advised that he had forgotten about his home visit and was currently in a Social Security Agency applying for a Crisis Loan.

(v) On 20 January 2012 Mr Foden did not return to the hostel for his night time curfew. The hostel advised the Probation Area Manager. The Area Manager tried to contact Mr Foden on his mobile but it went straight to an answering

service. In liaison with G4S it was confirmed that Mr Foden had left the hostel at 9.05 and Lisburn Police were informed of the situation. Probation decided that the situation should be monitored and reviewed the next day before any further enforcement decisions were taken.

(vi) On 21 January 2012 a Probation Area Manager contacted the applicant on his mobile phone. He claimed he had arrived at the hostel at 9.00pm the previous evening, but on being told by a member of staff that he could not get in, he had spent the night with his uncle in Lisburn. The applicant was advised at that stage that he could be the subject of a recall request by Probation if he failed to stay in the hostel that evening. The applicant returned to the hostel for his evening curfew.

(vii) On 24 January 2012 a case strategy meeting took place with key members and the applicant. At this meeting it was made clear to the applicant what were the requirements of the case management plan and the licence conditions.

(viii) On 27 January 2012 the applicant arrived at the hostel 36 minutes late for his 9.00pm curfew blaming public transport for his delay.

(ix) On 30 January 2012 the applicant did not return for his 9.00pm curfew. Hostel staff contacted a Probation Area Manager who then contacted the applicant on his mobile phone. The applicant stated that he would not be able to be at the hostel in time for his curfew and requested permission to stay at his uncle's address. The applicant was advised of his licence conditions and that he must return to the hostel immediately. The applicant disobeyed the instruction and failed to return to the hostel as required by his licence.

(x) On 31 January 2012 the Probation Service received a phone call from the police who advised that the applicant was in their custody, having been arrested with two other males at 12.30am for an alleged attempted burglary in the Lisburn area. These two males were subject to licence conditions and both had relevant criminal records.

(xi) On 31 January 2012 Probation sent a referral to the Parole Commissioners seeking a recommendation to revoke the applicant's licence.

(xii) On 31 January 2012 the single Parole Commissioner recommended that the applicant's licence should be revoked and he should be recalled to custody.

(xiii) On 31 January 2012 the Department of Justice, Offender Recall Unit, revoked the applicant's licence and he was returned to Hydebank Wood YOC to resume his status as a sentenced prisoner.

(xiv) Submissions were made on behalf of the applicant by his solicitor on 13 April 2012.

(xv) On 25 April 2012 the Parole Commissioner did not give a direction to the Department to release the applicant immediately on licence under Article 28(5) of the Order. In fact the Parole Commissioner made no recommendation under Article 29(2)(b) to fix a date for further review of the case. He was also unable, on the basis of the evidence provided, to identify a date prior to licence expiry on which it would become no longer necessary for the protection of the public for him to be confined and thus made no recommendation under Article 29(2)(a) for his earlier release.

(xvi) Following that decision, an application was made for an oral hearing. This was refused by a Parole Commissioner on 17 May 2012.

The Issues in this Application

[5] The issues for determination in this judicial review application are as follows:

(a) Was the decision of 31 January 2012 by the Department to revoke the applicant's licence under Article 28(2) of the Order lawful?

(b) Was the decision of the Parole Commissioner of 25 April 2012 lawful?

(c) Was the refusal by the Parole Commissioner to give the applicant an oral hearing a lawful decision?

(d) Did the Parole Commissioner's failure to make the applicant aware of the Sentence Manager's letter of 14th May 2012 in time to allow him to make representations render the decision unlawful?

(e) Is Article 28(6)(b) of the Order compatible with Article 5(4) of the EHCR?

All parties are agreed that the last issue only arises if the applicant was unlawfully recalled to prison by the Offender Recall Unit of the Department of Justice on 31 January 2012. If the applicant was properly and lawfully recalled the issue of the EHCR compatibility of Article 28(6)(b) of the Order does not arise.

Statutory Scheme

[6] Article 8(5) of the Order states:

> "In paragraph (4) *the licence period* means such period as the court thinks appropriate to take account of effect of the offenders supervision by a Probation Officer on release from custody –
>
> (a) In protecting the public from harm from the offender; and
>
> (b) In preventing the commission by the offender of further offences."

Article 17(1) of the Order provides that:

> "As soon as a fixed-term prisoner, other than a prisoner serving an extended custodial sentence, has served the requisite custodial period, the Secretary of State shall release the prisoner on licence under this Article."

Accordingly a prisoner, such as the applicant, who has a fixed custodial period is automatically entitled to release on licence regardless of the risk he poses to the community as soon as the custodial part of his sentence finishes. Article 27 provides:

> "A person subject to a licence under this Chapter shall comply with such conditions as may for the time being be included in the licence."

Thus there is a mandatory requirement on a prisoner released on licence to comply with the conditions of his licence, but the Order does not provide any sanction for what must (or may) happen if a prisoner breaches (or appears to breach) one or more of the conditions of his licence. Article 28(2) provides:

> "The Secretary of State may revoke P's licence and recall P to prison –
>
> > (a) if recommended to do so by the Parole Commissioners; or
> >
> > (b) without such a recommendation if it appears to the Secretary of State that it is expedient in the public interest to recall P before such a recommendation is practicable.
>
> (3) P –

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

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

(4) The Secretary of State shall refer P's recall under paragraph (2) to the Parole Commissioners.

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

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

(b) … it is no longer necessary for the protection of the public that P should be confined."

Article 29 then provides for further release after recall for certain fixed term prisoners which need not concern us in this particular case because it was not invoked by the Parole Commissioners.

[7] The Criminal Justice (Sentencing) (Licence Conditions) (Northern Ireland) Rules 2009 provide standard conditions for a licence at Rule 2 and also other conditions which may be individually tailored to meet the risks posed by a particular prisoner. For example they may include a requirement that the prisoner resides at a certain place: see Rule 3(2)(a). Again, nothing is provided in these Rules as to what is to happen if a condition or conditions of a licence are breached or appear to be breached.

[8] It therefore seems tolerably clear that so far as a prisoner such as the applicant with a determinate custodial period and a period of licence is concerned, the scheme works as follows:

(i) The court passes a determinate period of custody and a period of licence. At the end of the period of custody the prisoner is automatically entitled to release on licence, regardless of what risk he poses to the community.

(ii) The licence will contain standard conditions and may also contain "bespoke" conditions to manage the risk associated with that particular prisoner.

(iii) The prisoner must comply with each of the conditions of the licence.

(iv) The prisoner, while on licence, can have his licence revoked and be recalled to prison if this is recommended by the Parole Commissioners.

(v) The prisoner is entitled to be informed of the reasons for the recall and of his right to make representations in respect of that recall.

(vi) The Department shall refer the prisoner's recall to the Parole Commissioners who shall give a direction whether the prisoner shall be immediately released on licence.

(vii) The Department shall give effect to any direction given by the Parole Commissioners who shall operate on the basis that they will not give a direction to release the prisoner on licence unless they are satisfied such imprisonment "is no longer necessary for the protection of the public".

Discussion

[9] The first issue which has to be determined is on what basis should a prisoner on licence be recalled to prison and on what basis should the Parole Commissioners decide whether or not that prisoner should remain in prison. The arguments made by the parties can be briefly summarised, although the summaries that follow cannot represent the detailed and nuanced arguments contained in the skeleton arguments which were filed on behalf of the parties and expanded upon in great detail by counsel at the hearings of the judicial review.

Mr Scoffield QC submitted that recall could only be on the basis of increase of risk of harm to the public and not on whether or not the conditions of the licence have been breached and that risk had to be assessed on the basis of the risk of harm, ignoring the conditions of the licence imposed to manage that risk.

Mr Sayers on behalf of the Parole Commissioners submitted that breach of a condition of the licence by itself or even an apparent breach of a condition of the licence could justify recall in the first instance and that:

> "Thereafter, the PCNI will consider the prisoner's case and may direct release if satisfied that continued detention is no longer necessary for the protection of the public."

Mr McGleenan QC on behalf of the Department submitted that the test for recall was whether there was a significant increase in risk of harm to the public and that the risk had to be assessed on the basis of the licence with the conditions in place.

[10] At the outset it is important to stress that the legislation in Northern Ireland, although similar, is different in a number of important aspects from legislation dealing with prisoners in England. While some of the legal authorities from the English courts have much to say about the proper legal principles that should be applied, it would be a grave error to follow them slavishly. Not only is the legislation in England and Wales different, the courts there have to consider Prisoner Service Orders and Offender Management National Standards. None of these have any application to Northern Ireland: see for example paragraphs 11-67 to 11-69 of Prisoner's Law and Practice, Chapter 11 at pages 552-553.

[11] When a statute does not give a list of matters which should be considered, then the legal position is as set out by Laws LJ in R (Khatun) v London Borough of Newnam [2004] EWCA Civ 55 at paragraph 35 when he said:

> "Where a statute conferring a discretionary power provides no lexicon of the matters to be treated as relevant by the decision-maker, then it is for the decision-maker and not the court to conclude what is relevant subject only to Wednesbury review."

[12] Mr Scoffield QC relied on the decision of Treacy J in An Application for Judicial Review by Dimitris Olchov [2011] NIQB 70 when he had to consider applications to the Parole Commissioners under Article 28(4). That was a challenge to the Parole Commissioner's decision not to release the applicant (and against a refusal to offer an oral hearing). In the course of his judgment at paragraph 45 Treacy J said:

> "It is only risk which justifies revocation of licence and breach of licence is not of itself grounds for revocation of a licence. Plainly, however, such breach may evidence the risk justifying the revocation. However the context, background and possible explanation for the breach are important. In the particular circumstances of this case exploration of those considerations may expose the prospect of sufficiently managing any identified risk by devising, if possible, an alternative licensing architecture *following an oral hearing* which could resolve or displace the dispute between the applicant and the Probation

> Board underpinning the residence requirements which - *may* have triggered the absconding."

[13] It is not altogether clear from that judgment whether Treacy J is simply repeating the contention of the applicant in the first sentence or whether that sentence is entitled to stand on its own. In any event the context of the argument related to the decision of the Parole Commissioners under Article 28(4) and not to the decision of the Secretary of State to recall the prisoner under Article 28(2).

[14] However in Gulliver v The Parole Board [2007] EWCA Civ 1386 the Court of Appeal in England heard an appeal in respect of a judicial review of a decision by the Parole Board not to direct a re-release of a prisoner from prison. In the course of giving his judgment Sir Anthony Clarke MR said at paragraph 5:

> "Thus, as I read the Parole Board's decision, it did not accept that it had been proved that the appellant was in breach of the conditions on his licence. On the other hand, it was persuaded that there was evidence upon which the Secretary of State could reasonably conclude that there had been a breach. The Parole Board had available evidence both from the appellant and from Securicor. In any event, it was correctly conceded by Mr Fitzgerald on behalf of the appellant that the Secretary of State could reasonably think that the appellant was in breach of his licence conditions. In those circumstances the revocation of the licence and the recall was lawful."

This seems to suggest that breach of the conditions of the licence meant that revocation of the licence and recall were lawful without having to consider the effects of the breach of the licence and whether it effected the risk of the prisoner to the public. He also suggests that there does not have to be a breach and it is sufficient that the Secretary of State reasonably thought that the prisoner was in breach of his licence conditions (see paragraph 21). This reasoning was followed by His Honour Judge Pelling QC sitting as a Judge of the High Court in The Queen on the Application of McDonagh v Secretary of State for Justice [2010] EWHC 369 (Admin) where he said at paragraph 26:

> "Gulliver is a Court of Appeal authority for one proposition that is relevant for present purposes, namely that if the Secretary of State has reasonably concluded that there had been a breach of condition, then revocation of the licence and recall is lawful – see paragraph 5 of the judgment of the Master of the Rolls."

This was followed by His Honour Judge Langan QC in The Queen on the Application of Jamie Howden v Secretary of State for Justice & The Chief Constable of South Yorkshire [2010] EWHC 2521 (Admin) at paragraph 14.

[15] It will be noted that in R v Parole Board ex parte Smith & West [2005] UKHL 1 Lord Bingham said at paragraph 25:

> "But of course there will be cases in which such professional supervision may not be, or appear to be, effective. If a prisoner is released, subject to conditions, before the expiry date of the sentence imposed by the court, and he does not comply, or appears not to comply, with the conditions to which his release was subject, a question will arise whether, in the interests of society as a whole, he should continue to enjoy the advantages of release."

He went on to say at paragraph 26:

> "Lastly, it is plain from the statutory provisions directly quoted that the resolution of questions of the type indicated is entrusted, and entrusted solely to the Parole Board … the materials already cited make clear, the Parole Board is concerned, and concerned only, with the assessment of risk to the public: it must *balance the hardship and injustice of continuing to imprison a man who is unlikely to cause serious injury to the public against the need to protect the public against a man who is not unlikely to cause such injury;* ibid. The sole concern of the Parole Board is with risk, and it has no role in the imposition of punishment: R v Sharkey [2000] 1 WLR 160, 162-63, 164."

It is also important to note that the decision of the House of Lords in Smith and West related to the Parole Board's decision not to recommend the prisoners for release to the Secretary of State rather than the Secretary of State's decision to recall them. This passage was specifically quoted with approval by Sir Anthony Clarke MR in Gulliver at paragraph 19.

[16] So some authorities support the proposition that a breach or apparent breach of a condition of the licence means automatic recall. Others suggest that it is only where there is evidence of a significant increase in risk of harm to the public, which may be evidenced by a breach of a condition of the licence or by other evidence, that

a recall should be ordered. Silber J in R (on the application of Jorgenson) v Secretary of State for Justice [2011] EWHC 977 (Admin) suggested an intermediate way at paragraph 16:

> "It is not every breach of his or her licence, which will justify a decision to recall an offender and indeed arriving at a hostel a minute or two after the stipulated time could not justify a recall especially if the prisoner had invariably been punctual on many previous occasions. In my view, in every case where the Secretary of State could reasonably conclude there has been a breach, he or she must then proceed to consider as an important free-standing separate issue, which is what steps should be taken to deal with this breach (sic). In other words, the mere fact that a prisoner released on licence is in breach of his or her licence or is reasonably believed to be in breach does not mean that recall must automatically be ordered. Of course, in many cases there will be no difficulty in concluding that the Secretary of State was entitled to order a recall such as where the licensee has committed identical offences to those for which he was originally sentenced."

[17] It is important to appreciate that the process of recall by the Department was considered by Kerr LCJ in In the Matter of an Application by William John Mullan for Judicial Review [2007] NICA 47 where he said at paragraph 32:

> "We agree with Mr Maguire's contention that the decision whether to recommend a recall should not be regarded as one that requires a deployment of the full adjudicative panoply but we do not consider that this derogates from the importance of the decision being customarily taken by the commissioners."

[18] It seems to me that in the context of a recall by the Department, and the nature of the process as described by Kerr LCJ, that the test should not be whether a licence condition has been broken. It should be whether there has been an increase (or an apparent increase) in the risk of harm to the public. The increase in the risk has to be significant. Breach of a condition and/or refusal to engage with the conditions can provide evidence from which the Department could reasonably conclude that there is a significant increase in the risk of harm to the public. Although in a particular case they may not reach that opinion – it all depends on the

facts of any particular case. The decision by the Department is fact sensitive, and will be based on the facts and circumstances then known.

[19] I reject Mr Scoffield QC's argument that the increased risk of a prisoner causing harm to the public has to be considered in the absence of the conditions imposed by the licence. If this were correct then it would give rise to the rather unusual situation where a prisoner with a determinate custodial sentence who wasconsidered to be at the highest risk possible of causing harm to the public could breach the conditions of his licence and then argue that he was not liable to recall because the risk of harm to the public could not be said to have increased. It was always high and remained high, it might be said. Thus a person with the highest risk of causing harm to the public could breach his conditions of licence with impunity knowing that he could not be the subject of recall. Mr Scoffield QC said, inter alia, this was not a fair example and that the proper way to deal with such a case was by increasing the prisoner's custodial sentence. However, it may be that the offences of which the prisoner was convicted do not permit of an increase in his custodial sentence. In any event, it is often not possible at the date of sentencing to determine what risk there will be to the public at the end of the period of custody. It is, of course, possible for a prisoner to change his attitude for the worse while in jail. Furthermore, while the example is extreme, the principle applies. On Mr Scoffield QC's analysis the higher the risk a prisoner presents of harming the public the better his chances of resisting a recall on the basis that his risk has not increased. Such a result would be unreasonable. In those circumstances I prefer the submissions of Mr McGleenan QC on this issue.

[20] This seems to me to accord with the legislative intent. Namely that a prisoner will be released on standard conditions and "bespoke" conditions to manage the risk he poses of causing harm to the public while on licence. If he breaches those conditions or refuses to engage with those conditions, so as to give rise to a significant increased risk of harm to the public, then he should be recalled.

[21] I consider that the lawful approach to recall by the Department where there has been a breach or an apparent breach of the conditions of a prisoner's licence is as follows:

(a) Has there been a breach of the licence conditions and/or failure to engage with the licence conditions?

(b) Is there an explanation for the breach that excludes fault on the part of the prisoner: see de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69.

(c) Does that breach of condition or failure to engage with the conditions give rise to an increased risk of harm to the public? (The increase in risk has to be viewed with the imposition of the conditions of the licence in place.)

(d) Is that increase in risk of harm to the public significant?

(e) The prisoner must be informed of why he is being recalled so that he can understand the basis upon which the decision has been made: see Lord Brown in South Bucks DC v Porter (No 2) [2004] 1 WLR 193 at paragraph 36

(f) The decision must be proportionate to the aim of avoiding risk to the public: see paragraph 19 of the judgment of Silber J in Jorgenson.

(g) The primary aim of recall must be the protection of the public. Lord Slynn said in Smith and West at paragraph 56:

> "Recall of a prisoner on licence is not a punishment. It is primarily to protect the public against further offences."

(h) Finally it is important to recognise that the court is not seeking to substitute its view for that of the Secretary of State. As Richards J said in Bradley v The Jockey Club [2004] EWHC 2164 QB at paragraph 37:

> "The function of the court is not to take the primary decision but to ensure that the primary decision-maker has operated within lawful limits … the essential concern should be with the lawfulness of the decision taken; whether the procedure was fair, whether there was an error of law, whether any exercise of judgment or discretion fell within the limits open to the decision-maker, and so forth …"

And at paragraph 43:

"… In the context of the European Convention on Human Rights it is recognised that, in determining whether an interference with fundamental rights is justified and, in particular, whether it is proportionate, the decision-maker has a discretionary area of judgment or margin of judgment. The decision is unlawful only if it falls outside the limits of that discretionary area of judgment. Another way of expressing it is that the decision is unlawful only if it falls outside the range of reasonable responses to the question of whether a fair balance between the conflicting interests.

The same essential approach must apply in a non- ECHR context such as the present. It is for the primary decision-maker to strike the balance in determining whether the penalty is proportionate. The court's role, in the exercise of its supervisory jurisdiction, is to determine whether the decision reached falls within the limits of the decision-maker's discretionary area of judgment. If it does, the penalty is lawful; if it does not, the penalty is unlawful. It is *not* the role of the court to stand in the shoes of the primary decision-maker, strike the balance for itself and determine on that basis what it considers the right penalty should be."

[22] The report by the Parole Commissioner advising the Department is a most impressive document given the pressures of time under which it was produced. She accurately sets out the facts as known at the time. She records that the "PBNI initiated a recall request in respect of Mr Foden on 31 January 2012 due to the deteriorating engagement with the conditions of his licence." The words used are of significance. The concern is with the applicant's engagement with the conditions of his licence. She does not proceed on the basis that the breach of a condition (or an apparent breach of a condition) of itself justifies a recall. She asks herself whether or not "the risk of his or her causing harm to the public has increased significantly (ie more than minimally) since the date of his or her release on licence and that it cannot be safely managed in the community". Her conclusion, namely that the current level of risk cannot be safely managed in the community based on the fact that Mr Foden "has breached licence conditions and has not complied with supervision measures on several occasions", is beyond reproach. That direction was accepted by the Department and on 31 January it sent a letter to the applicant informing him that his licence was being revoked because he had "behaved in such a way as to suggest that the risk of (his) causing harm to the public had increased significantly since the date of (his) release on licence." I consider that in the circumstances this response by the Department to the direction was a proportionate one.

[23] If I am wrong in my conclusion that the increase in risk has to be considered with the conditions in place and the proper approach is to assess the risk without the imposition of the conditions of the licence as submitted by Mr Scoffield QC (see above) I still consider the decision lawful for the following reasons:

(a) This is a value judgment and not a "tick box" exercise with the Parole Commissioner looking at the prisoner's ACE score, which relates to the risk of reoffending and not of harm to the public, before he was released and then checking to see if the ACE score has increased following his return to prison. It is an assessment of risk carried out by the Parole Commissioner at that particular time on the facts known to her. It is an assessment of the risk of harm to the public and is particularly fact sensitive.

(b) In any event the ACE score was produced in November 2011. When the applicant was released he had signed up to the conditions of the licence and therefore the basis upon which he was released must have been that he was prepared to engage with those conditions. In other words he had signed up to the conditions, not rejected them. By the time of his recall, the Parole Commissioner was able quite reasonably to conclude that he was not prepared to engage with those conditions despite his earlier agreement to do so. Therefore, as the conditions were to manage his risk, the failure to engage with those conditions subsequent to his release necessarily must have increased that risk. I note that on 31 January 2012 the applicant's Probation Officer and Area Manager had both concluded that:

> "In the light of this it is determined that Mr Foden cannot be managed in the community at present."

Mr Scoffield QC pointed out that an assessment made in respect of the applicant prior to his release on licence had been that there was a high risk of serious harm to the public. He said that this high risk of serious harm had not increased according to the recall report. The risk of serious harm both before and after his release on licence was high. But it is important to note that:

(1) The test for recall is risk of harm to the public, not serious harm to the public. Like was not being compared with like.

(2) In any event the serious harm assessment was assessed in the absence of the conditions imposed by the licence.

[24] It was accepted by counsel, as I have said, that if the initial recall was lawful, as I find it to be, then the challenge to the legislation on the basis that it is not compatible with Article 5(4) does not arise. In those circumstances I have not considered it appropriate for me to express a view on an issue which I do not have to decide. These cases are, as Mr McGleenan QC submitted, fact specific, and it would be infinitely preferable for the judge who has to rule on the "incompatibility issue" to do so on facts that required such an adjudication.

[25] Mr Scoffield QC asserted that the decision of 25 April 2012 was unlawful because it did not assess the applicant on the basis of the increased risk of harm to the public without taking into account the conditions of the licence. For the reasons which I have already given, I consider this approach to be impermissible. The increase in the risk of harm to the public must be judged on all the circumstances, and these include the conditions imposed by the licence. If I am wrong, and the assessment should be made on the basis of the increased risk to the public absent the conditions, I am satisfied that it was reasonable for the Parole Commissioner to

conclude that there was a significant increase in risk of harm to the public when the applicant was released. It was reasonable to conclude that when released he intended to abide by the conditions of the licence and engage with his Probation Officer. After all, he had signed up to the conditions of the licence. However by the time of his recall it was reasonable to conclude that the applicant did not intend to be bound by his licence conditions, or, perhaps more accurately, to be bound only by the licence conditions when it suited him. Accordingly it was open to the Parole Commissioner to conclude there was a change in the attitude of the applicant so as to increase the risk of him causing harm to the public.

[26] The next issue for consideration is the refusal of an oral hearing by the Parole Commissioner and the related point of the unfairness of the Parole Commissioner in not making the applicant aware of the Sentence Manager's letter and giving him time to make representations in respect of it.

[27] In his submissions to the Parole Commissioners the applicant asked for an oral hearing on the following basis:

(a) There were disputes of an evidential nature as to his compliance with licence conditions and this required the calling of evidence.

(b) There had been no increase in the risk of serious harm (but as I have pointed out the test is not serious harm, but rather harm). This required hearing evidence from the professionals who had assessed the applicant.

(c) Further, the applicant claimed that his Sentence Manager had told the applicant that his risk could be safely managed in the community.

[28] The response from the Parole Commissioner is at paragraph 16 of the report of the Parole Commissioner dated 17 May 2012 which recorded:

> "I do not believe that there is a dispute of fact which is crucial to the reference. The factual disputes identified by the solicitors in their note are not crucial to the reference. The Commissioner dealt with each of them in her direction. Whilst there may be some dispute over the circumstances of some of the breaches, it does not dictate that there is any dispute over the fact that he breached his curfew six times in two weeks after his release and it was this which appears to have been crucial to the determination of the reference."

[29] The Parole Commissioner also rejected at paragraph 17 the assertion that oral evidence was needed in order to ensure that the review by the Parole Commissioner was carried out fairly. He noted the views of the PBNI "are clearly articulated in the PBNI Recall Report". In that report PBNI say:

> "… The pattern that has emerged since his release from custody clearly evidences a propensity on his part to increasingly flout the external controls in place as part of his licence. The further evidence is a heightened risk of further potential offending and in turn the potential to pose a risk of harmful behaviour through any offending."

Clearly one of the central issues for PBNI was not the conditions or their architecture but the unwillingness of the applicant to engage with those conditions and to abide by their terms. Further, the Parole Commissioner concluded that it was unnecessary to hear evidence from the Sentence Manager and in any event the Sentence Manager had made it clear that his view was that the applicant should not be released. Finally, he concluded that there was nothing "in this matter to suggest an oral hearing is required in the interests of justice". In any event the Parole Commissioner was entitled to conclude that the assessment of the risk of harm to the public did not require oral input from applicant's Sentence Manager

[30] In R v Parole Board ex parte Smith and West [2005] UKHL 1 Lord Bingham said at paragraph 35:

> "The common law duty of procedural fairness does not, in my opinion, require the Board to hold an oral hearing in every case where a determinate sentence prisoner resists recall, if he does not decline the offer of such a hearing. But I do not think the duty is as constricted as has hitherto been held and assumed. Even if important facts are not in dispute, they might be open to explanation or mitigation, or may lose some of their significance in light of other new facts. While the Board's task certainly is to assess risk, it may well be greatly assisted in discharging it (one way or the other) by exposure to the prisoner or questioning of those who have dealt with him. It may often be very difficult to address effective representations without knowing the points which are troubling the decision-maker. The prisoner should have the benefit of procedure which fairly reflects, on the facts of his particular case, the importance of what is at stake for him, as for society."

[31] In Dimitris Olchov's application Treacy J said:

> "Common law fairness does not require an oral hearing in every case in which a DCS prisoner resists recall. Whether such a hearing is required depends on the circumstances of the particular case."

[32] In Osborne & Booth v The Parole Board [2010] EWCA Civ 1409 Carnwath LJ said at paragraph 38:

> "Thus, the emphasis is on the utility of the oral procedure in assisting in the resolution of the issues before the decision-maker. There is no suggestion that an oral hearing is necessary even where the decision-maker is able fairly to conclude, having regard to the material before it and the issues in play, that an oral hearing can realistically make no difference to its decision."

Sedley LJ said at paragraph 61:

> "But the Parole Board's view that the element about which an oral hearing was sought was not one on which oral as against written testimony was likely to assist it in coming to a just conclusion on re-release was a legitimate factual appraisal of the case involving no evident unfairness towards the prisoner."

[33] In the Matter of an Application for Judicial Review by James Clyde Reilly [2011] NICA 6 the Court of Appeal in Northern Ireland had an opportunity to consider this issue and expressly approved the statement of Lord Slynn in Smith and West at paragraph 50 where he said:

> "If there is any doubt as to whether a matter can be fairly dealt with on paper then in my view the Board should be predisposed in favour of an oral hearing."

Coghlin LJ giving the judgment of the Court of Appeal went on to say at paragraph 42:

> "Ultimately the question whether procedural fairness requires their deliberations to include an oral hearing must be a matter of judgment for the Parole Board. In

> exercising that judgment the Board must have regard to the individual circumstances of the case which are likely to be infinitely variable. Relevant factors may include the existence of factual disputes, issues of personal credibility, conflicting experts' reports that cross-examination might help to resolve, significant issues as to the development of the prisoner's personality, behaviour and attitudes, the reasons put forward on behalf of the prisoner when requesting an oral hearing, etc."

In other words, the Parole Commissioner should be looking to ensure that any hearing was fair, and that if fairness requires an oral hearing, then one should be afforded to the applicant.

[34] The approach adopted by the Parole Commissioners in this case was lawful. In the circumstances of this particular case it was reasonable for the Parole Commissioner to conclude that an oral hearing was not required because fairness did not require it for the following reasons:

(a) There was no dispute on the facts. The Parole Commissioner proceeded on the basis of the applicant's explanation for the breaches of the conditions of his licence. There was ample evidence, even accepting the applicant's explanations, to conclude that he had failed to engage with the conditions of his licence.

(b) Assessment of risk was a matter of judgment for the Parole Commissioner on those facts and no help was likely to be obtained from speaking to the professionals. The judgment was one the Parole Commissioner had to make.

(c) The question of a different architecture for the applicant's licence conditions did not arise because it was not the conditions which were the problem, it was the applicant's failure or refusal to engage in the process and this remained the central issue.

The Parole Commissioner was entitled to conclude that it did not matter what conditions of licence were imposed upon the applicant as he was not prepared to engage with such conditions. For example, any licence had to include a condition that the applicant had to keep in touch with the probation officer as instructed by the probation officer; see Rule 2(2)(a). The applicant had demonstrated an unwillingness to adhere to this basic requirement.

[35] This effectively leaves the issue of the letter of the Sentence Manager which was couched in very emphatic terms. In that letter the Sentence Manager denied

ever discussing management of the applicant's risk post release or of giving his opinion about whether the applicant should be released. His view was that he should remain in custody. In those circumstances it is, to put it as neutrally as possible, difficult to see how the Sentence Manager attending an oral hearing would have advanced the applicant's case. Given the terms of the letter which emphatically and trenchantly reject the claims of the applicant, it is not possible to see how the applicant's position could have been either altered or improved, if he had known of the letter prior to the decision of the Parole Commissioner. There was a dispute between the applicant and the Sentence Manager as to what was said and discussed. It remained the word of one person, the applicant, against that of another person, the Sentence Manager. The Parole Commissioner did not have to form a view. It was simply the case that there was no basis to proceed on the claims made by the applicant about what the view of the Sentence Manager was as to his suitability for release. An oral hearing would simply have given the Sentence Manager the opportunity to deny the claims of the applicant in the presence of the Parole Commissioner. In any event it was reasonable for the Parole Commissioner to conclude that oral evidence from the applicant's Sentence Manager would not assist him on the decision he had to make. In the circumstances the failure to show the applicant the letter or to allow him an oral hearing to challenge the Sentence Manager's letter was not unfair and did not taint the decision of the Parole Commissioner.

Conclusion

[36] On the basis of the present facts and circumstances:

(1) The decision of the Department of Justice of 31 January 2012 was lawful.

(2) The decision of the Parole Commissioner of 25 April 2012 was lawful.

(3) The refusal to give the applicant an oral hearing by the Parole Commissioner was lawful.

(4) The failure of the Parole Commissioner to draw the applicant's attention to the actual letter written by the Sentence Manager or to give him an oral hearing before he reached his final decision did not make the Parole Commissioner's decision unlawful.

(5) The issue of whether or not Article 28 of the Order was compatible with the ECHR does not arise on the facts of this application.