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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY MARTIN MAUGHAN FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE PAROLE COMMISSIONERS FOR NORTHERN IRELAND

Martin McCann BL (instructed by Oliver Roche & Co, Solicitors) for the Applicant
Lara Smyth BL (instructed by Carson McDowell LLP) for the Respondent

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SCOFFIELD J

Introduction

[1] By these proceedings the applicant, Martin Maughan, challenges a decision of the Parole Commissioners for Northern Ireland ('the Parole Commissioners') of 17 August 2020, whereby they ordered that he should not be further released on licence.

[2] Proceedings having been issued on 10 November 2020, after compliance with initial case management directions made by McAlinden J the application for judicial review has been brought on urgently and dealt with by way of a rolled-up hearing in light of the fact that the applicant is now imminently due for release from prison in any event (on 13 February 2021) so that, unless the proceedings were dealt with urgently, they ran the risk of being unable to produce any result of practical effect for the applicant even if he was successful in his claim.

[3] The applicant was represented by Mr McCann, of counsel; and the respondent by Ms Smyth, of counsel. I am grateful to both counsel for their helpful written and oral submissions.

Factual Background

[4] On 8 July 2011 the applicant was sentenced at Omagh Crown Court to a determinate custodial sentence consisting of 2½ years custody and 2½ years of supervision on licence in the community for serious offences including robbery, kidnapping, burglary, theft and blackmail. He was aged 18 years old at that time. Having served the custodial element of his sentence, he was in due course released on licence on 21 June 2013 (taking into account time spent on remand) but, in light of his failure to reside at the designated hostel where he was required to reside and having left Northern Ireland in breach of the conditions of his licence, his licence was revoked on 2 July 2013.

[5] The applicant remained at large until August 2018, at which point he was taken into custody in the Republic of Ireland in respect of offences committed there. He was later extradited back to Northern Ireland on suspicion of involvement in a shooting incident in Londonderry in 2015. The applicant faces serious charges of unlawful wounding and possession of a firearm arising out of this incident. He denies these charges and contends the charges against him are a result of mistaken identification. Nonetheless, he was returned to Northern Ireland on 10 April 2019.

[6] The applicant's recall to prison was referred to the Parole Commissioners on 15 April 2019 under article 28(4) of the Criminal Justice (Northern Ireland) Order 2008 for review by them. The single commissioner appointed to consider the case directed that the applicant should not be released. A request that this be considered by a full panel was granted on 25 July 2019 and a panel of commissioners duly considered his case at a hearing on 25 October 2019 at HMP Magilligan. At that stage, the Department of Justice ('the Department') was represented at the hearing and opposed the applicant's release. Input from the Probation Board for Northern Ireland (PBNI) also assessed the applicant as unsuitable for release at that point: his ACE score in May 2019 was 54, indicating that the applicant presented a high likelihood of reoffending, albeit that PBNI accepted that he had been more settled in his lifestyle recently. It was common case between the parties at the October 2019 hearing that the central issue was the decision by Mr Maughan to abscond shortly after his release on licence and his failure to abide by his licence conditions (including an obligation to engage with PBNI).

[7] The Parole Commissioners authorised the applicant's continued detention on foot of his original custodial sentence, his licence having been revoked, but made four recommendations, namely that (i) the applicant should engage with the probation authorities; (ii) he should continue to engage with the organisation 'Ad:ept' in relation to his alcohol issues; (iii) he should engage with any psychology assessment and any subsequent offence-focused work; and (iv) that he should remain free of drugs and any adverse prison adjudications and maintain his status as an enhanced prisoner. These recommendations seem to have reflected, at least in

part, the PBNI evidence to the Commissioners that, at that point (October 2019), the probation authorities had not been able to properly assess Mr Maughan because of his lack of engagement with them over the preceding years since he absconded. The probation witness is noted in the commissioners' ruling as saying that "*release should not be considered until Mr Maughan had engaged in a meaningful way*".

[8] The applicant's evidence is that he followed these recommendations to the best of his ability. An important plank of his challenge is that, having faithfully done so, he was entitled to expect a different result when his case was next reviewed by the Parole Commissioners. In the commissioners' decision of October 2019 it was directed that such a review should occur within 8 months.

[9] A further probation report was prepared in March 2020 by the applicant's prison probation officer (referred to as his prisoner development plan or 'PDP' coordinator), who had been his PDP coordinator since December 2019 and was a different probation officer from the one who had completed the report for the previous Parole Commissioners' hearing. This report concluded that PBNI now assessed the applicant as suitable for release. This report, and its treatment in due course by the Parole Commissioners, is a mainstay of the applicant's challenge in these proceedings.

[10] Notwithstanding PBNI's now favourable recommendation towards the applicant, a single commissioner determined that he was not suitable for release. Mr Maughan requested a review of that determination and applied for his case to be considered again at an oral hearing before a panel of commissioners. The request for a hearing was granted and the hearing took place in August 2020. It is the outcome of this hearing which is impugned in the present proceedings.

[11] It had been hoped that, by the time of that determination, the further charges which Mr Maughan faced in Northern Ireland in respect of the Derry incident would have been dealt with but, unfortunately, due to the Covid-19 pandemic, the trial which had been listed for May 2020 did not take place. As appears below, that had some knock-on effect on consideration of the applicant's circumstances.

[12] A further change which might be thought favourable to the applicant is that, this time, the Department indicated that it would not be represented at the hearing before the Commissioners and that it had no representations to make regarding the PBNI assessment of the applicant's suitability for release. The applicant says that this appeared to him to be "*a clear indication from the Department that it was no longer opposed to [his] release*".

[13] The hearing before the Commissioners was convened and the applicant's PDP coordinator gave evidence at the hearing before the panel of commissioners ('the Panel') and was questioned by them. The Panel rejected her assessment that the applicant was suitable for release for the reasons set out in their written decision, which I summarise below. The applicant contends that this decision was unfair; and

he avers to his belief that it is "*very unusual for a prisoner who has been assessed as suitable for release with no objection from the Department of Justice not to be in fact released by the Parole Commissioners*".

Grounds of Challenge

[14] The applicant challenges the decision of the Parole Commissioners on two overlapping grounds, namely (i) irrationality; and (ii) a species of procedural unfairness, in that it is contended that the Panel did not give the applicant's case conscientious consideration.

[15] More particularly, the applicant contends that the commissioners involved rejected the assessment on the part of PBNI that he was suitable for early release; and that they were irrational in doing so, setting a hurdle which was so high that it was effectively impossible for the applicant to qualify for early release. Relatedly, the applicant contends that the PBNI assessment contained in the PDP coordinator's report was not given conscientious consideration by the Panel but, rather, the commissioners' attitude to that assessment was "*characterised from the outset by scepticism and negativity and precluded proper consideration of the PBNI recommendation*".

The Parole Commissioners' Role

[16] This is an instance where the applicant's case was referred to the Parole Commissioners under article 29(6) of the Criminal Justice (Northern Ireland) Order 2008 ('the 2008 Order'). That is because the applicant is a recalled prisoner in whose case the Parole Commissioners had previously, on a reference under article 28(4) of the 2008 Order, not directed his immediate release on licence; but had fixed a date for further review pursuant to article 29(2).

[17] Pursuant to article 29(6), the options open to the Parole Commissioners at the August 2020 hearing were threefold, namely to direct the applicant's immediate release on licence; to make a recommendation for his release on licence at some later date; or to fix a date for further review of his case by them. Having regard to the fact that the applicant was due for unconditional release in any event within 24 months of the hearing (indeed, within some 6 months or so), there was a fourth option open to them under article 29(4) – the course ultimately adopted in this case – which was simply to allow the applicant to serve out the remainder of his sentence without making a recommendation for later release or further review.

[18] Significantly, pursuant to article 29(7) the Commissioners "*shall not give a direction [for immediate release]… <u>unless</u> they are satisfied that it is no longer necessary for the protection of the public that [the prisoner] be confined*" [underlined emphasis added].

[19] The role of the Parole Commissioners in considering the case of a recalled prisoner both at the point of recall and thereafter has been examined by the courts in a number of previous cases. In *R (West) v Parole Board* [2005] 1 WLR 350

Lord Bingham, at paragraphs [22]-[26] of his judgment, summarised a number of fundamental and relevant principles on which the sentencing, licensing and recall regimes rest. *Inter alia*, he said as follows:

> *"All, or almost all, determinate sentence prisoners are expected to return to the community on release from prison after serving their sentences. It is in the interests of society that they should, after release, live law-abiding, orderly and useful lives. For a host of practical, psychological and social reasons, the process of transition from custody to freedom is often very difficult for the prisoner you sentence. It is accordingly very desirable that the process of transition should be professionally supervised, to maximise the chances of the ex-prisoner's successful reintegration into the community and minimise the chances of his relapse into criminal activity. 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, the question will arise whether, in the interests of society as a whole, he should continue to enjoy the advantages of release.*
>
> *Lastly, it is plain from the statutory provisions already quoted that the resolution of questions of the type indicated is entrusted, and entrusted solely, to the Parole Board. In exercising this very important function, it is recognised to be an independent and impartial tribunal for the purposes of article 6(1) of the European Convention. It is the primary decision maker, not entitled to defer to the opinion of the Secretary of State or a probation officer: R v Parole Board, ex p Watson [1996] 1 WLR 906, 916. As 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"*
>
> *Ex p Watson, at p 916. The sole concern of the Parole Board is with risk, and it has no role at all in the imposition of punishment: R v Sharkey [2000] 1 WLR 160, 162-163, 164."*

[20] In the same judgment, Lord Bingham also gave the following pithy summary:

> "*In considering what procedural fairness in the present context requires, account must first be taken of the interests at stake. On one side is the safety of the public, with which the Parole Board cannot gamble: R v Parole Board, ex p Watson [1996] 1 WLR 906, 916-917. On the other is the prisoner's freedom. This is a conditional, and to that extent precarious, freedom*."

[21] Understandably, Ms Smyth for the Parole Commissioners laid emphasis on the statement that the Parole Commissioners' "*cannot gamble*" with public safety. In this case, the Panel was required to assess the risks presented by the applicant of further release on licence. They were not permitted to order his immediate release unless they were satisfied that the applicant's detention was no longer necessary for public protection. That assessment is one entrusted by the statutory scheme to the Parole Commissioners, and *solely* to the Parole Commissioners, subject always to the requirements that they act fairly and lawfully.

[22] As to how they approach their task in a hearing of this sort, it is also worth noting that the Parole Commissioners' procedural rules – set out in the Parole Commissioners' Rules (Northern Ireland) 2009 (SR 2009/82) – provide them with a broad discretion as to how their proceedings are managed. Rule 3(1) provides that, subject to the provisions of the rules, the Parole Commissioners may regulate their own procedure. Part 3 of the Rules, which provides more detailed provisions as to the conduct of hearings, has been held not to apply to recalled prisoners serving determinate custodial sentences: see *Re Olchov's Application* [2011] NICA 73. However, even in those cases where Part 3 does apply and where the Commissioners' procedures are therefore more prescriptive, the chairman of the panel is empowered to give directions about a wide range of matters, including the calling of witnesses (see rule 18(1)). It is also for the chairman to explain the order of the proceedings which the panel proposes to adopt, conducting the oral hearing in such manner as they consider most suitable to the clarification of the issues before them and generally to the just handling of the case, avoiding formality in the proceedings so far as appropriate (see rule 23(1) and (2)). In short, the Parole Commissioners are not constrained to the usual adversarial procedure evident, for instance, in criminal proceedings.

[23] It has also been held that the Parole Commissioners have the power to call a witness of their own motion, although this is likely to be rare: see *Re CK* [2017] NIQB 34; and *Re Toal's Application* [2017] NIQB 124 and, on appeal, at [2019] NICA 37. I would add, however, that it seems to me to be entirely unexceptional that a panel of commissioners may wish to hear from the author of a probation report which has been placed before them in an appropriate case, whether or not the prisoner's representatives or some other party wishes to call the author of the report. The lack of a power on the part of the Commissioners to *compel* attendance of a witness, discussed in the cases mentioned above, is of course highly unlikely to cause any difficulty in relation to such a witness.

Consideration

[24] I turn then to consider the challenge in the present case. In summary, it is that the Panel was not entitled in law to go behind the recommendation for release in the March 2020 PBNI report in circumstances where the Department was no longer opposing the applicant's release *and* when he had done all that could be expected of him in terms of compliance with the recommendations of the commissioners who had given the October 2019 decision and fixed a further review for the summer of 2020.

The determination of the panel of Parole Commissioners in October 2019

[25] It is important to bear in mind, however, that the decision of the panel of commissioners in October 2019 roundly rejected the applicant's case for release. In the section of their decision giving reasons, the panel described the submissions made on his behalf (to the effect that he could then be released subject to strict conditions) as "*unconvincing*". Rather, they said, "*The facts in this case speak for themselves*". Those facts included the following elements which were specifically referred to in the panel's reasoning:

(i) The applicant absconded within two weeks of being released in June 2013 and was then unlawfully at large for almost 6 years.

(ii) Whilst he was unlawfully at large he had amassed 35 convictions in the Republic of Ireland. Although he contended that 15 of these matters pre-dated his release in Northern Ireland, that still left 20 new offences, including convictions for assault, criminal damage, entering a building with intent to commit an offence, theft and other matters, which had been committed whilst he was unlawfully at large in breach of his licence conditions.

(iii) In relation to the charges he faced in the Crown Court in relation to the Derry incident, although the applicant maintained his innocence in relation to those serious charges, he had at the least admitted to driving on that evening whilst he was disqualified.

(iv) In the panel's view the applicant had placed himself beyond PBNI supervision and disengaged completely from the supervision which was inherent in his licence conditions.

(v) Moreover, this was not the first time he had acted in such a manner. In 2012, when he had been released on compassionate temporary release, he did not return to prison when required and was unlawfully at large for three days, during which time he was unlawfully in possession of a class B drug.

[26] In light of all of this, the panel accepted the evidence of the probation officer who had provided the assessment at that point that he did not believe that the

applicant would be capable of safe management in the community. The applicant himself was found to be an unconvincing witness who was evasive and was also found by the panel to have been untruthful in certain important respects.

[27] The panel was unable to identify a date prior to the expiration of the applicant's sentence when it would in their view no longer be necessary for the protection of the public that he be confined. They could not, therefore, recommend a further date for his release on licence.

[28] Although the panel provided a series of recommendations (set out at paragraph [7] above) which, if followed, would undoubtedly improve the applicant's prospects of future release, they certainly gave no indication that compliance with the recommendations would guarantee future release when the applicant's case was next considered by a panel of commissioners. Indeed, any such guarantee would almost certainly have been unlawful. Authority is clear that the Parole Board in England, and similarly therefore the Parole Commissioners in Northern Ireland, must consider the circumstances of the case "*as they appear to it when it makes its decision*" [underlined emphasis added]: *R (Gulliver) v Parole Board* [2008] 1 WLR 1116, at paragraph [19].

[29] Another feature of the panel's requirement in October 2019 that the applicant's case be further reviewed not later than eight months from the completion of that reference was that the panel expected that, by that time, the outstanding matters that he faced in Northern Ireland should have been dealt with, that is to say that the Crown Court trial in respect of the alleged 2015 offences in Derry would have been concluded by that time. As a result of the public health circumstances which then emerged, the applicant's Crown Court trial has not proceeded as was originally expected. This has given rise to a number of significant impacts in relation to his consideration for release on licence. Firstly, the panel in August 2020 was not equipped, as it had expected it might be, with the outcome of the Crown Court trial. (Mr McCann referred to this in his submissions as "*the elephant in the room*".) Perhaps more importantly in the present context, however, is that it is clear from the evidence that the non-conclusion of the Crown Court case has impeded work which would otherwise have been undertaken with the applicant by the prison psychology department.

The single commissioner decision in May 2020 to decline to direct release

[30] In the single commissioner decision of 19 May 2020, the commissioner indicated that he had carefully considered all of the papers and reports which had been provided to him. He noted that the applicant had been an enhanced prisoner since August 2019 and had attended a range of courses and programmes within prison, with a picture emerging of Mr Maughan being a "*compliant, hard-working prisoner*", who was working with Ad:ept. The single commissioner accepted that it was indisputable that Mr Maughan had complied with all that was required of him. He did, however, identify one aspect of the applicant's sentence plan which had not

been fulfilled. That was the work with the Prison Service Psychology Department ('Psychology') for assessment and any subsequent treatment, which the previous panel had recommended be undertaken. The single commissioner accepted that this was not due to any reluctance on the part of the applicant. Nonetheless, this was plainly an important element of the work which the October 2019 panel had expected to be undertaken which remained outstanding.

[31] As noted above, it seems that the non-resolution of the Crown Court case in relation to the wounding charge had meant that Psychology was not in a position to assess Mr Maughan, let alone offer him a place on any subsequent programme deemed necessary. Notwithstanding the progress that the applicant had made, the single commissioner still harboured concerns about the link between alcohol and aggression in the applicant's offending, which the commissioner identified as a "*significant unmet treatment need*" and about the bearing of his history of absconding on his risk to the public. The single commissioner's conclusion is summarised in this paragraph:

> "*Mr Maughan deserves credit for the responsible way in which he has approached his sentence since recall, and also weathered the disappointment of the decision not to release him in October last year. But his behaviour in custody is not the issue here; it is his conduct in the community which represents his level of risk to the public. He has accrued a large number of offences for a relatively young man, and a number of those appear to have been committed whilst he should have been back in custody for breaching his licence conditions. He has not demonstrated in the past that he either respects or can comply with supervision requirements.*"

[32] The single commissioner also made a number of recommendations, namely that the applicant should maintain his current level of custodial behaviour; that he should cooperate with any assessments by Psychology and any subsequent programme recommendations (an element which had to date been lacking for the reasons mentioned above); that a more developed release plan should be provided with particular reference to his greater risk of absconding (again, another element which had to date been lacking); and that there should be further enquiry into the applicant's criminal offending whilst in the Republic of Ireland, which the commissioner felt would repay further detailed consideration in relation to the assessment of risk.

The determination that a further oral hearing before a panel was appropriate

[33] Further to the decision of the single commissioner, the applicant's representatives sought an oral hearing before a panel of commissioners on the applicant's behalf, as he was entitled to do. The consideration of that request was undertaken by Commissioner Mageean on 30 June 2020. According to the Parole

Commissioners' policy on this matter, the commissioner considering a request for an oral hearing will look at three factors, namely (i) whether there is a dispute of fact crucial to the determination of the reference that can only be determined after an oral hearing; (ii) whether the assessment of risk requires oral evidence from the prisoner and/or a witness or witnesses; or (iii) whether fairness dictates that the prisoner's case be so considered.

[34] The commissioner dealing with this matter did not consider that the first or second factors required an oral hearing in this case. As to the second, he said that although the applicant's submissions focused on that factor, he was not persuaded that a persuasive case had been made that the assessment of risk required oral evidence from either the applicant or another witness. He went on however to determine that the third factor, namely fairness, *did* suggest that an oral hearing should be convened. He was persuaded that an oral hearing interrogating the views of the PDP coordinator on the reasons for her view that Mr Maughan was suitable for release may assist in the independent assessment of risk in the case. Mr McCann made a forensic point about an apparent internal inconsistency in the reasoning in this determination. He pointed out that on the one hand the commissioner had said that the assessment of risk did not require oral evidence; but on the other hand had also said that an oral hearing was required to further explore the views of the PDP coordinator on the very question of the assessment of risk.

[35] Although there may be some presentational force in this point, it ultimately takes the applicant's case nowhere. That is because the determination that a hearing was appropriate to further consider the release is not under challenge. Furthermore, it is precisely what the applicant was seeking. The applicant's case that the hearing was directed simply to seek to undermine the assessment of the PDP coordinator is addressed below. However, the commissioner did not, as he might have, dismiss the request for further consideration. The applicant can hardly complain that a further hearing was directed, at which the PDP coordinator's assessment would be further explored. The alternative was for the single commissioner's decision refusing release to stand. As appears below, I do not consider that any unfairness is established simply because the Panel considering the case wished to hear from the probation officer who had compiled the report in relation to the applicant recommending release.

The Panel's decision in August 2020 and the applicant's challenge to it

[36] I can deal briefly with the applicant's suggestion that the commissioners failed to give conscientious consideration to the PBNI assessment. The Panel's decision shows clearly that this contention is unsustainable. The relevant probation officer gave oral evidence and was questioned by the Panel. The Panel's reasoning shows careful engagement with the views of the probation officer and her oral evidence. The *real* complaint which is made by the applicant in these proceedings is twofold: firstly, that the respondent commissioners were unfairly prejudiced against

the views expressed by the probation officer from the start; and, secondly, that their decision to reject the Probation Board's recommendation for release was irrational.

[37] As to the first of these contentions, I accept the submission made by Ms Smyth that an assertion of what amounts to pre-determination on the part of the Panel would require cogent evidence. It is accepted on behalf of the applicant that the commissioners are experienced and professional. There was no suggestion of any bad faith on their part. Ms Smyth was also correct to highlight that the affidavits provided by both the applicant and his solicitor, Mr Roche, each of whom was present at the oral hearing before the Panel, do not make any allegation of impropriety or unfairness in the actual conduct of the commissioners' hearing or the questioning of the witness. Nor, it seems, was any objection taken on those grounds during the hearing itself.

[38] Rather, the applicant's focus is on the *outcome* of the hearing and the Panel's written decision. In paragraph 9 of his grounding affidavit he says:

> "*My probation officer (PDPC) gave evidence at the oral hearing and was questioned by the panel members. The panel rejected her assessment that I was suitable for release for the reasons set out in the written decision. I believe that <u>that decision</u> is unfair. I believe that it is very unusual for a prisoner who has been assessed as suitable for release with no objection from the Department of Justice not to be in fact released by the Parole Commissioners*." [underlined emphasis added]

[39] The respondent did not accept the assertion that it was "*very unusual*" for a prisoner assessed as suitable for release with no objection from the Department not to be released, although this was not addressed in any detailed statistical evidence in light of the fact that this case was dealt with at a rolled-up hearing. A central feature of Ms Smyth's submissions, backed up by the case law referred to above, was that the commissioners are required to form their own independent view.

[40] As with the applicant's affidavit evidence, so too his counsel Mr McCann focused on the Panel's decision, contending that evidence of unfairness in the Panel's approach to the evidence and/or pre-determination of the issues was to be found in the Panel's discussion of the probation officer's oral evidence and in its reasoning. For instance, he drew attention to a number of passages in the decision which made clear that the Panel had pressed the probation officer on a number of statements in her report which were favourable to the applicant, seeking to probe and test – or, on the applicant's case, to undermine – the robustness and reliability of the conclusion of her report.

[41] In his submissions Mr McCann described this process as 'nit-picking' and 'fault-finding'. I accept that there are passages within the Parole Commissioners' decision which may be thought to indicate a degree of scepticism about the

conclusions and recommendation within the probation report which was before them. One must remember, however, that this decision was written up *after* the hearing at which the commissioners heard oral evidence. In my view, it is an unreliable guide to the commissioners' attitude to the case *before* the hearing, which is the focus of the applicant's case on pre-determination. As appears below, at the hearing, the author of the probation report qualified the views expressed in the report in a number of ways. In any event, in my view there is nothing inherently untoward or unlawful in a panel of Parole Commissioners, experienced as they are, approaching a report from a professional witness before them with a degree of caution or even scepticism where they are, and can rationally be, surprised at its conclusion. It seems to me for the reasons summarised below, that this is not a case where the applicant is able to discharge the burden of showing that the commissioners have either closed their mind to such a degree as to have deprived the applicant of a fair consideration of his case or that they have strayed beyond a proper testing of the evidence before them.

[42] Firstly, stepping back and looking at the wider picture, the Panel's hearing was only some nine months after the hearing in October 2019 at which Mr McCann accepted there was a strong case against release on the part of the applicant. In paragraph 37 of their decision, the commissioners confirmed that there had been no material change in Mr Maughan's ACE score, which remained at 53, still indicating a high risk of reoffending. This was hardly a firm foundation on which to build a case for release.

[43] The probation officer's report expressly made the recommendation that Mr Maughan was suitable for release "*in the absence of any further psychology involvement*". Of course, further engagement with Psychology had been one of the important matters identified in the previous panel's recommendations. This qualification was therefore understandably probed further in the course of the hearing. The probation officer stated that no work had been identified for Mr Maughan to complete with Psychology, even though a referral had been open since November 2019. It was accepted by all parties that this was not Mr Maughan's fault. It seems that a view was taken that appropriate work with Psychology could not be identified until the outcome of the applicant's pending Crown Court trial was known, since that may radically alter the risk profile to which such work was addressed. However, it meant that an important element of assessment and offence-focused work remained outstanding.

[44] The Panel also had concerns about a comment made by a member of staff from Ad:ept at a case conference in November 2019 expressing worry about the applicant controlling himself when he has taken alcohol. After further discussion about these matters the Panel recorded (at paragraph 43 of their decision) that the probation officer agreed that work in relation to alcohol-related aggression and violence, which was a fundamental risk for Mr Maughan, was an area which required to be addressed – albeit there was some equivocation on her part as to whether this should be done whilst Mr Maughan was in custody or could equally

effectively be done whilst he was in the community. A similar issue arises in relation to the absence of a Violence Risk Assessment which the witness accepted had not been completed in relation to Mr Maughan. The Panel was also concerned that a release plan had not been prepared although it seems to me, as Mr McCann submitted, that this could probably have been rectified without undue difficulty.

[45] The key issue is whether, whilst Mr Maughan was accepted as being compliant in custody, he would behave responsibly if released on licence. The probation officer accepted that "*he struggles with boundaries imposed in the community*". Her evidence was that he "*should progress incrementally on a programme of pre-release testing and with the benefit of such testing, could be capable of being released*" [underlined emphasis added]. In the applicant's case, there had not been a programme of pre-release testing in the community which may have given the Panel more reassurance about his reliability when released subject to conditions.

[46] A more troubling frailty in the probation officer's assessment, at least in the Court's mind, is the fact (recorded in paragraph 44 of the Commissioners' decision) that she had not spoken to Mr Maughan about his criminal record in the Republic of Ireland and did not know the nature of his convictions there. It is evident from the decision of the panel in October 2019 that this offending – whilst the applicant had absconded and should have been subject to PBNI supervision and compliant with his licence conditions – was highly influential in the earlier assessment of the risk he posed whilst released on licence.

[47] On the other hand, the Panel recognised the applicant's "*excellent engagement*" with Probation and were obviously cognisant of the conscientious progress he had made. However, the Panel's task was to assess the risk he would pose if released. That necessitated a weighing of his progress (which might provide reassurance as to the risk he presented) against the factors, notably his previous absconding and offending whilst on licence, which militated against release. The Panel ultimately formed the view, expressed in paragraphs 54 and 55 of their decision, that Mr Maughan had *begun* the process of turning his life around but had not yet completed sufficient work to address the root causes of his aggressive and violent offending behaviour to such a degree to satisfy them that his risk could safely be managed in the community.

[48] The Panel's ultimate conclusion (expressed in paragraph 59 of its decision) that sufficient risk reduction work had not been completed to allow them to direct the applicant's immediate release was, in my view, a conclusion rationally open to it.

[49] As McCloskey J said in *Re Hegarty's Application* [2018] NIQB 20, at paragraph [28]:

> "*The nature of the test which both the single Commissioner and the departmental decision-maker were applying entailed the formation of an evaluative judgement on the part of persons*

> *with presumptive relevant credentials and expertise. This starting point, therefore, inclines towards a high threshold for judicial intervention in an irrationality based challenge."*

[50] In that case the judge also referred to the heightened standard of scrutiny which applies in a case involving the liberty of the citizen. The facts of that case were somewhat different from the present case because, in that case, the challenge was to a decision to revoke a licence; but I bear in mind that this is still a case in which liberty is involved.

[51] The expertise of the Parole Commissioners in these matters is a feature which has been referred to more than once in previous case law: see, for instance, the discussion of the requirements of the constitution of a panel at paragraph [33] of the opinion of Lord Kerr in *In Re Corey* [2014] AC 516 in the context of the release on licence of life sentence prisoners. Lord Kerr gave the following warning to judges hearing a challenge to a decision of a parole body:

> "*Put simply, the legislature has placed in the hands of a panel of experts the difficult decision as to when life sentence prisoners should be released. Their role should not be supplanted by a judge who does not have access to the range of information and skills available to the commissioners.*"

[52] In light of the factors identified above, I conclude that the Panel was rationally entitled to depart from the recommendation of the probation officer in this case in the exercise of their independent judgment; and was entitled to do so notwithstanding that the Department was not objecting to the applicant's release. The decision as to risk – and whether they were satisfied that the applicant's confinement was no longer necessary for public protection – was one for them alone. Their conclusion was not *Wednesbury* irrational and, for the reasons given above, did not in my view suffer from any unlawful pre-determination or unfairness.

[53] Mr McCann may well be right to say that, in light of the Panel's approach, from his client's perspective it would seem virtually impossible for him to have done enough by the time of the review of his detention to achieve release. Whether that is correct or not, the responsibility for the initial assessment of risk, and the mountain which he was therefore required to climb to satisfy the commissioners that he could be released safely, rests firmly on the applicant's shoulders by reason of his previous behaviour.

[54] I might perhaps say something more about the examination by the Panel of the probation witness who appeared before them. The reason why an oral hearing was granted was expressly in order to interrogate the views of the PDP co-ordinator on the reasons for her opinion that the applicant was suitable for release, which it was thought may assist in the independent assessment of risk in the applicant's case. I do not believe that the applicant can legitimately complain about this. The Parole

Commissioners are entitled to robustly test and probe the evidence of witnesses who appear before them in hearings at which they exercise their important public function. Professional witnesses such as probation officers should be prepared to justify their conclusions and opinions on the basis of evidence and their own experience and expertise. They should also be prepared, as the probation officer appears to have done in this case, to make concessions which might undermine their recommendation (either way) where that is fair and appropriate. This is all part and parcel of their important role and functions.

[55] Obviously, Parole Commissioners must treat such witnesses with courtesy, respect and professionalism. There is no suggestion, as I have noted above, that the commissioners involved in the decision under challenge in these proceedings did anything other than that. Rather, the suggestion, which I have rejected, is that the commissioners did not approach their task in an open and fair-minded way. For their part, Parole Commissioners must pay careful attention to the evidence of experienced probation officers who appear before them, particularly when the probation officer has greater first-hand knowledge of the prisoner concerned, and give their views due weight. But they are at liberty to depart from the views of such officers, whether giving evidence in person or merely through a report which they have compiled. The Parole Commissioners are entitled, indeed bound, to form their own independent view of the matter. Where they do so, they should seek to explain why they have done so in the reasons given for their decision, as I believe the commissioners did in this case. That should not be taken as any slight on the probation officer concerned (unless, exceptionally, the commissioners make some express criticism of them for some reason): again, this is part and parcel of the proper and healthy functioning of the parole system and simply reflects the division of responsibilities between those involved in that system.

Conclusion

[56] The decision of the Panel in this case may seem harsh towards the applicant. I accept that that is certainly how Mr Maughan himself will view it, particularly in light of the concerted efforts he has made to both behave and engage with the authorities since the previous panel decision of October 2019. However, this court exercises a supervisory jurisdiction only. It lacks both the extensive experience and expertise which the Parole Commissioners enjoy in these matters and its proper constitutional role in an application such as this is to conduct an audit of the legality of the proceedings below only and not to act as a court of appeal.

[57] For the reasons I have given above the applicant's grounds of challenge must be rejected. As this application was considered at a rolled-up hearing, I grant the applicant leave to apply for judicial review but dismiss his substantive application on the merits.