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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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2016 No. 34157/01

IN THE MATTER OF AN APPLICATION BY BRANDON RAINEY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE DEPARTMENT OF JUSTICE FOR NORTHERN IRELAND MADE ON 1 APRIL 2016

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MAGUIRE J

Introduction

[1] The applicant in this case is Brandon Rainey who was born on 28 August 1996. He is now aged 21 but he was under 21 at the date of sentencing. On 11 March 2015 he was sentenced for offences of (a) rape of a child under 13 (b) attempted rape of a child under 13 and (c) sexual assault of a child under 13.

[2] For these offences he was sentenced by the Crown Court by means of an Extended Custodial Sentence ("ECS") involving a custodial term of two years followed by an extended period on licence of four years.

[3] As a result of this sentence the applicant became entitled to release on licence on 1 April 2016. On that day, he was technically released but, later in the day, he was recalled to prison by the Department of Justice ("DOJ"). His period outside the prison seems to have been in the region of five hours.

[4] In these proceedings the applicant raises two issues: the first is whether his recall as aforesaid was lawful and the second is whether there is an incompatibility as a matter of law between Article 28(6)(a) of the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order") and Article 5(4) of the ECHR.

The relevant statutory provisions

[5] There is no dispute that the applicant's offences for which he was convicted as set out above are both specified and serious offences for the purpose of Part II of the 2008 Order. At his trial he was found to be a dangerous offender. This meant that his sentencing was to take place within the context of Chapter 3 of Part II aforesaid. The sentence deployed by the trial judge is provided for at Article 14 of the 2008 Order. Article 14 is headed "Extended Custodial Sentence for Certain Violent or Sexual Offences". It provides:

> "(1) This Article applies where—
>
> (a) A person is convicted on indictment of a specified offence committed after the commencement of this Article; and
>
> (b) The court is of the opinion—
>
> (i) that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences; and
>
> (ii) where the specified offence is a serious offence, that the case is not one in which the court is required by Article 13 to impose a life sentence or an indeterminate custodial sentence.
>
> (2) The court shall impose on the offender an extended custodial sentence.
>
> (3) ….
>
> (4) …..
>
> (5) Where the offender is under the age of 21, an extended custodial sentence is a sentence of detention at such place and under such conditions as the Secretary of State may direct for a term which is equal to the aggregate of—
>
> (a) The appropriate custodial term; and

(b) A further period ('the extension period') for which the offender is to be subject to a licence and which is of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by the offender of further specified offences.

(6) In paragraph (5)(a) 'the appropriate custodial term' means such term (not exceeding the maximum term) as the court considers appropriate, not being a term of less than 12 months.

(7) …..

(8) The extension period under paragraph (3)(b) or (5)(b) shall not exceed—

(a) Five years in the case of a specified violent offence; and

(b) Eight years in the case of a specified sexual offence.

(9) The term of an extended custodial sentence in respect of an offence shall not exceed the maximum term.

(10) In this Article 'maximum term' means the maximum term of imprisonment that is, apart from Article 13, permitted for the offence where the offender is aged 21 or over."

[6] Article 15 of the 2008 Order deals with the assessment of dangerousness. It provides:

"(1) This Article applies where—

(a) A person has been convicted on indictment of a specified offence; and

(b) It falls to a court to assess under Article 13 or 14 whether there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further such offences.

(2) The court in making the assessment referred to in paragraph (1)(b)—

(a) Shall take into account all such information as is available to it about the nature and circumstances of the offence;

(b) May take into account any information which is before it about any pattern of behaviour of which the offence forms part; and

(c) May take into account any information about the offender which is before it."

[7] Article 18 of the 2008 Order is of importance to this case as it deals with the duty to release prisoners serving, *inter alia*, extended custodial sentences. It provides -

"(1) This article applies to a prisoner who is serving –

(b) An extended custodial sentence.

(2) In this Article – 'P' means a prisoner to whom this Article applies;

'Relevant part of the sentence' means –

(b) In relation to an extended custodial sentence, one half of the period determined by the court as the appropriate custodial term under Article 14.

(3) As soon as –

(a) P has served the relevant part of the sentence, and

(b) The Parole Commissioners have directed P's release under this Article, the Department of Justice shall release P on licence under this Article.

(4) The Parole Commissioner shall not give a direction under paragraph (3) with respect to P unless –

(a) The Department of Justice has referred P's case to them; and

(b) They are satisfied that it is no longer necessary for the protection of the public from serious harm that P should be confined.

(5) P may require the Department of Justice to refer P's case to the Parole Commissioners at any time –

(a) After P has served the relevant part of the sentence; and

(b) Where there has been a previous reference of P's case to the Parole Commissioners, after the expiration of the period of two years beginning with the disposal of that reference or such shorter period as the Parole Commissioner's may on the disposal of that reference determine;

And in this paragraph "previous reference" means a reference under paragraph (4) or Article 28(4).

(6) …..

(7) …..

(8) Where P is serving an extended custodial sentence the Department of Justice shall release P on licence under this Article as soon as the period determined by the court as the appropriate custodial term under Article 14 ends unless P has previously been recalled under Article 28."

[8] Article 28 of the Order deals with the recall of prisoners while on licence. It states:

"(1) In this Article "P" means a prisoner who has been released on licence under Article 17, 18 or 20.

(2) The Department of Justice … 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 Department of Justice or (as the case may be) 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 Department of Justice … 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 Department of Justice 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—

(a) Where P is serving an indeterminate custodial sentence or an extended custodial sentence, it is no longer necessary for the protection of the public from serious harm that P should be confined;

(b) …..

(7) On the revocation of P's licence, P shall be—

(a) Liable to be detained in pursuance of P's sentence; and

(b) If at large, treated as being unlawfully at large."

Summary

[9] In short summary the key features of these arrangements may be summarised as:

(a) What triggers a special sentencing regime is the finding of the court that an offender is a dangerous offender.

(b) A dangerous offender is one in respect of whom there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.

(c) In respect of a dangerous offender, he may be sentenced to one of three types of sentence, in descending order of severity. He may be sentenced to (a) a life sentence, or (b) an indeterminate custodial sentence or (c) an extended custodial sentence.

(d) Where neither (a) nor (b) is appropriate, the offender shall be sentenced to an extended custodial sentence.

(e) Such a sentence involves the term of imprisonment or detention which is the aggregate of two elements: (a) the appropriate custodial term; and (b) the extension period i.e. the period during which the prisoner will be subject to a licence.

(f) The object of the licence is the protection of members of the public from serious harm occasioned by the commission by the offender of further specified offences.

(g) In the case of an offender serving an extended custodial sentence he is to be released on licence at the end of the custodial term. The offender, however, can be released on the instruction of the Parole Commissioners ("PCs"), at any date after the half way point of the custodial term.

(h) However the offender, once released, is subject to the possibility of recall.

(i) The usual route in respect of recall will be where the Department of Justice decide to revoke the offender's licence and recall him to prison following a recommendation to do so from the PCs.

(j) It is clear that the Department of Justice have a broad discretion to revoke and recall. This is not confined by any particular statutory criteria.

The applicant's SOPO

[10] As part of his sentence for the index offences referred to above, the sentencing court imposed on the applicant a Sexual Offences Prevention Order ("SOPO"). This order is designed to help protect against the commission of further offences of the same type.

[11] The main features of the Order in the applicant's case were a number of prohibitions on what he could do. Thus he could not contact his victim; or associate with a child under 16 save where this was approved; could not have a child in or on premises where he resides or stays overnight, without permission; could not take up employment which would bring him into contact with a child or children under 16 without written approval; could not be in facilities designed specifically for children's education or play or be in a place which is likely to be frequented by children under 16 without consent; could not enter into any relationship with a female without permission; could not be resident at any address without prior approval; and could not deny police entry to premises where he resides.

The licence

[12] It is worth dwelling for a moment on the arrangements in respect of licences generally. These are specified in the Criminal Justice (Sentencing) (Licence Conditions) (Northern Ireland) Rules 2009. The licence is a document provided to the offender which enables his release. It is issued by the Department of Justice. It will inaugurate a period of supervision which begins at the time of the commencement of the licence and expires at the end date of the licence. In general terms, the licence will contain standard conditions (found in rule 2), which derive from the terms of the subordinate legislation *supra*, and conditions specifically aimed at the offender (what in argument were referred to as "bespoke" conditions). These are dealt with in rule 3 under the heading "Other conditions of licence" The objectives of supervision are stated in the licence to be (a) to protect the public, (b) to prevent re-offending, and (c) to achieve successful rehabilitation. These objectives derive from the language of Article 24 of the 2008 Order. The offender is under a statutory duty to comply with the conditions of his licence: see Article 27 of the 2008 Order, though it is not a criminal offence to breach those terms *per se*.

The applicant's licence conditions

[13] The applicant was granted a licence on 1 April 2016. It contained licence conditions applying to him. The licence is said on its face to have been granted under the provisions of Article 18(3) of the 2008 Order but this appears to be an

error, as the applicant, it seems to the court, was released under Article 18(8) at the end of the appropriate custodial term.

[14] The licence required him to keep in touch with his probation officer who appears to have had a key role to play. It was for him/her to approve where the applicant was to live, what work he was to undertake and so on. It is clear in the licence that the applicant "must not" behave in a way which undermined the purposes of the release *viz* the protection of the public, the prevention of re-offending and his rehabilitation. Moreover, he was not to commit any offence.

[15] Included within the additional licence conditions were conditions dealing with obtaining an approved address; a prohibition on him residing elsewhere without prior approval; conditions dealing with contact with any child under 16 years or the victim of his offences; and conditions prohibiting the consumption of alcohol or illegal substances or drugs, backed up by a requirement that he submits as required to drugs or alcohol testing. Condition 8 made clear that if he failed to comply with any requirement of his licence or if he otherwise poses a risk of serious harm to the public, he would "be liable to have his licence revoked and be recalled to custody until the date on which [his] licence would otherwise have expired". There is a clear emphasis in the conditions on the applicant keeping probation staff aware of his whereabouts and on controls being placed on his ability to make contact with other persons. A specific condition envisaged the applicant, if living otherwise than in hostel accommodation, being subject to a curfew during certain hours. He was also to attend appointments with his GP and other medical professionals, such as a psychiatrist.

The background to the revocation of his licence

[16] The essential chronology of events is as follows:

(a)	Applicant sentenced	11 March 2015
(b)	His case referred to PCs by DOJ	12 March 2015
(c)	A single commissioner recommended that the Applicant be not released	15 July 2015
(d)	The applicant was to be released under Article 18(8)	1 April 2016
(e)	On that morning the Probation Board for Northern Ireland ("PBNI") decide to make a recall request	1 April 2016
(f)	The recall request was notified to DOJ and provided to PCs	1 April 2016
(g)	A single commissioner recommended recall to DOJ	1 April 2016

(h) DOJ decide to revoke the Applicant's licence 1 April 2016

(i) Offender's recall referred by DOJ to PCs under Article 28(4) 4 April 2016

[17] As can be seen from the above, the decision to recall the Applicant was made by the DOJ. That decision, it is clear from the affidavit evidence before the court, was based on two principal sources of information. These were the recall request made by the PBNI and the PCs recommendation provided by a single Commissioner. Both of these documents are worthy of detailed examination.

The recall request

[18] The recall request was made by an Area Manager of the Probation Service. It sets out, by way of background, basic information about the applicant's sentence; the terms of the "SOPO" imposed on the applicant as part of the sentencing exercise; and the key features of the licence conditions which applied to him.

[19] This document also contains reference to the circumstances of the applicant's offending, which need not be set out here; his criminal record, which was substantial, and reference to an offence of exposure committed by the applicant after his sentencing for the index offences, at a time when he was, in fact, in custody.

[20] As regards the risk the applicant represented, it is recorded that he had been assessed as a high likelihood of re-offending. It is recorded that in recent times he has been managed under the Public Protection Arrangements for Northern Ireland and that, as of 7 January 2016, he had been assessed as a Category 3 offender. Such an offender, it is explained, is "someone whose previous offending and/or current behaviour and/or current circumstances present clear and identifiable evidence that they are highly likely to cause serious harm through carrying out a contact sexual or violent offence". There are, the court was told, only 20 such offenders in this category in Northern Ireland, with only 3 of them being at liberty.

[21] A substantial history is recorded in the recall request about the range of options for dealing with the applicant's case which had been considered in the run-up to his release on licence. These options included the following:

(i) Possible referral to a secure Personality Disorder facility in Doncaster to be paid for by one of the Trusts. This option, however, required the applicant's consent which was not forthcoming

(ii) Possible housing of him in a hostel. This option was not viewed as suitable as the applicant had in the near past had difficulty when residing at children's homes in England and Northern Ireland. Indeed there had been serious incidents involving him at such homes. When

the applicant had visited a hostel in the recent past, moreover, with a view to a possible placement there, he had accessed illicit substances and become incapable. The applicant appears to have maintained a position that if sent to a hostel he would slash other residents or staff. This led to the view that it would be too risky to place the applicant in a hostel.

(iii) Possible placement of him in approved accommodation. The applicant had for a time resided in the Juvenile Justice Centre but he was there assessed as being a significant risk to others and there had been violent incidents involving his control, as he had threatened to store and throw blood at staff and others.

(iv) Possible housing of him with his father in Lurgan or with his father and his partner in Bangor. As to the Lurgan property, it was viewed as unsuitable as his father as a taxi driver was not going to be at the address for long periods at night and his grandmother and uncle, who lived at the premises, were identified as vulnerable people, both being well into their 70s. As to the Bangor property, it was viewed as too close to where the applicant's victim lived.

(v) Possible accommodation living with family members in Ballymena. The proposed accommodation was in very poor condition when inspected by probation. His mother, moreover, a recovering heroin addict was present there.

(vi) Possible housing in a caravan in Millisle.

[22] In short, while the options above were all considered, for various reasons, none of them was judged as suitable for a person in the applicant's position.

[23] In these circumstances, consistent with his conditions of licence, the recall request refers to a plan which was developed which involved the applicant, upon release on licence, being taken to an office of the Northern Ireland Housing Executive to see if any appropriate accommodation could be found for him. It is noted that this was to occur at 11 am on 1st April 2016 but it is recorded that, before it was to occur, the prison had advised that "he had accessed substances and had been under the influence overnight" and that he "had also failed to take his anti-anxiety medication for 3 days and had refused an appointment with his GP and the psychiatrist".

[24] The document then refers to other information provided to PBNI by the prison. This was that, when told he would be drug tested, the applicant stated that he would fail on cannabis and that when presented with a drug test he refused to take it.

[25] The recall request then goes on:

> "Mr Rainey has been interviewed by Probation and Police and is assessed as being under the influence of substances.
>
> It is now the position of PBNI that we have arrived at a situation where, because of Mr Rainey's behaviour and the very real threats he has made and the risk he poses to others and himself, it is concluded that his failure to comply with his risk management plan has created a situation where he cannot be safely managed in the community. In these circumstances, given the imminence of the risk to himself and others, a request for his recall is necessary to protect the public and police.
>
> …
>
> The perceived risk in relation to Mr Rainey's current attitudes and activities are that he:
>
> - Has stated that it is [his] intention to "Get off his head and have sex on the day of his release". Mr Rainey has already achieved the first of these.
>
> - Continues to reject supervision as previously.
>
> - Behaviours that indicate continued use of legal substances.
>
> - Behaviours that are indicating a level of threat towards himself and others.
>
> - Behaviours which are unpredictable and cannot be managed safely in the community.
>
> It is clear that Mr Rainey has breached the following licence conditions:
>
> • You must not behave in a way which undermines the purpose of the release on licence, which is the protection of the public, the prevention of re-offending and the rehabilitation of the offender.

- You must not consume any illegal drugs or misuse substances including prescription drugs".

[26] The document ends with the recommendation that the applicant be recalled.

The Recommendation of the Commissioner

[27] The recall request went, *inter alia*, to the PCs and a single Commissioner considered the case with a view to deciding whether or not to make a recommendation for recall to the DOJ.

[28] It seems clear that the Commissioner who dealt with the case did so with little advance notice. However he was able to consider the papers and make a recommendation which is contained within a report produced later on 1st April 2016.

[29] The report runs to 7 or so pages. It is clear from this that the writer had considered the Recall Request, the PBNI's pre-sentence report relating to the applicant in respect of his index offences, the terms of the applicant's licence and the applicant's previous convictions.

[30] Most of the written report is taken up with a rehearsal of the information which can be garnered from the above written sources. It is unnecessary to summarise these here. At paragraph 19 of the document the author refers to the test he had to apply. He said:

> "In considering whether or not an offender released on a ECS licence should be recalled, a Parole Commissioner should determine whether there is evidence that proves on the balance of probabilities a fact or facts indicating that the risk of that offender causing serious harm to the public has increased significantly, that is more than minimally since the date of release on licence and that the risk cannot be safely managed in the community".

[31] The Commissioner then give his reasons for recommending recall. He stated:

> "… I am satisfied that Mr Rainey's behaviour…is such that the risk of serious harm to the public has increased significantly (i.e. more than minimally) since his release and that this risk can be no longer safely managed in the community.
>
> I accept that the information from the PBNI in the papers before me establishes on the balance of

probabilities that Mr Rainey has behaved in the following ways:

a. On the day of his release he was found to have been using illicit substances that altered his mood and in the context of his behaviour increases the risk of serious harm to himself and others.

b. On the day of his release he refused to undergo a drugs test as required under his licence conditions.

c. His behaviour both prior to and on the day of his release shows continuing attempts by him to manipulate the circumstances of his release so as to frustrate PBNI oversight and control"

The Commissioner went on:

> "The behaviour outlined above is in my judgment a clear breach of Mr Rainey's standard licence condition that specifies he must not behave in a way which undermines the purpose of the release on licence, i.e. the protection of the public, the prevention of reoffending and his own rehabilitation.
>
> In addition, evidence establishes that on the day of his release he informed the prison authorities that he would fail a drugs test because he had consumed cannabis, that he refused to take a drugs test and was assessed during interview by Probation and Police to have been under the influence of substances. I conclude therefore that he also breached his licence conditions which prohibited the consumption by him of illegal drugs.
>
> All of the aforementioned licence conditions were imposed because they were deemed necessary to manage Mr Rainey's risk in the community. There is also clear evidence from which I can infer that Mr Rainey agreed to abide by these licence conditions and was informed about their nature. The fact that Mr Rainey has breached these conditions in the way outlined above means self-evidently that his risk of serious harm has increased and that the risk cannot be safely managed in the community under such licence conditions. Indeed PBNI have initiated these

> recall proceedings because in their professional opinion they are unable to manage his risk under licence any longer.
>
> The circumstances as outlined above (when taken in the context of all the evidence before me, including the fact that he is assessed as having a high likelihood of reoffending and posing a risk of serious harm, his behaviour in general and his use of illegal drugs and his lack of self-control in particular, as well as the way in which Mr Rainey has breached his licence conditions) in my judgement provide strong evidence that establishes on the balance of probabilities that the risk of him causing serious harm to the public has increased significantly, that is more than minimally since the date of his release on licence and that the risk cannot be safely managed in the community.
>
> Accordingly, I recommend that Mr Rainey's licence be revoked".

The DOJ's response to the recommendation

[32] The decision maker on behalf of the DOJ decided, having considered the PC's recommendation, to accept it. He, therefore, recalled the applicant.

[33] In these proceedings the decision maker has sworn an affidavit which provides a commentary as to the circumstances which led to his decision. The matter is dealt with between paragraphs 22-37 of his affidavit. From these paragraphs it is clear that the person who was to become the decision maker had been aware of the applicant's case from at least the week leading up to 1 April 2016. Indeed he records having spoken with a member of the PBNI staff in the run-up to the release. There appears to have been concern about the risks posed by the applicant and he was informed, in particular, about the difficulty of securing a suitable address on release. On 1 April 2016 he was alerted to the fact that PBNI was going to submit a recall request. His affidavit makes clear that he was aware of the applicant's status as a Category 3 offender.

[34] Matters appear to have developed swiftly on 1 April 2016. It would appear that the decision maker first saw the PBNI recall request around lunch time. At or around the same time he spoke with an official of PBNI on the telephone. Shortly after that he was told that the Commissioner was minded to recommend recall. The decision maker then had a further conversation with the official within PBNI dealing with the case. He was told that the applicant had said to PBNI staff on the ground that he was hearing voices (but they were not telling him to do anything at the

moment). He was also told that the Police Service of Northern Ireland response team which had been present with the applicant had indicated that they would have to leave to deal with other matters at 2.30 pm.

[35] The Commissioner's decision recommending recall was provided to the decision maker close to 2.52 pm. At 2.53 pm the decision maker was told by PBNI that the applicant and his father had been abusive to police and their staff and that there might be a public disorder incident. The decision maker made his decision at 3.06 pm.

[36] In his affidavit he has outlined how he went about making his decision. He said:

> "In order to reach a decision on recall, I asked myself two questions. Firstly, is there evidence that the risk had increased? On the basis of the reported drug misuse, I concluded the risk of serious harm posed by the applicant post-release had increased more than minimally. Secondly, could the increased risk be safely managed in the community? Based on the evidence available to me, particularly the absence of approved accommodation, coupled with the reduction in PSNI staffing levels, I concluded the risk could not be safely managed".

[37] The decision to recall was communicated orally to those dealing with the applicant.

[38] At paragraph 37 of his affidavit the decision maker avers that at the time when he made his decision the risk of serious harm had increased significantly.

[39] By a letter from the DOJ, dated 1 April 2016, the applicant was told as follows:

> "From the information provided the Department of Justice is satisfied that the risk of serious harm you pose to the public has increased more than minimally since you were released on licence on 1 April 2016. The Department concludes from the information provided that the increased risk can no longer be safely managed in the community".

The applicant's evidence

[40] The applicant has filed several affidavits in these proceedings. The court has considered all of them. The main points he has made can be described as follows:

(i) He viewed himself as being entitled to automatic release on licence.

(ii) He accepts that on 1 April 2016 he was released from prison, albeit in somewhat attenuated circumstances.

(iii) He accepts that prior to his release he was asked to submit to a drugs test and that his response was that he would fail it as he had used cannabis. He says he told the authorities that his use of cannabis had been 'the week before' and that it would still be within his system. This response on his part is denied by the prison authorities. In any event, he acknowledges that when asked to take the test he refused to do so. This was prior to release.

(iv)He accepts that on his release he was told that the intention was to try and find secure accommodation for him.

(v) He accepts that it was a requirement of his licence that, accompanied by a Public Protection Team, he was to be taken to the offices of the NIHE after his release.

(vi) While at the offices of the NIHE he says that he contacted his father. This was because his name appeared on an application for housing made by his father.

(vii) After a time at the NIHE office, he was taken to a local 'Subway' where he had lunch.

(viii) After lunch he returned to the NIHE office. He says that there was no chance that he was going to be provided with his own accommodation.

(ix) Around 4 pm he was told that he was going to be recalled.

(x) He denies that he had accessed substances and had been under the influence of them from the night before.

(xi) He is adamant that he was not using illicit substances on the day of his release.

(xii) He avers that he was taking his normal medication for the three previous days, although he had missed doses of it.

(xiii) He accepts that he had refused to make an appointment with his GP.

(xiv) He did not dispute that on an occasion he had told a Forensic Psychologist that on his first day of release he would get drunk and have sex. However, he said that he made this remark because he had

been asked a direct question as to how ideally he would spend his first day outside prison.

(xv) He denies that after his release he had rejected supervision. On the contrary he says he complied with all requests made of him.

(xvi) He denies that while on release he made threats to anyone.

(xvii) He points out that at the time of release he did not have an approved address.

(xviii) He accepted that on a visit to a hostel in the run-up to his release (within a matter of weeks before) he had consumed cannabis and subsequently failed a drugs test.

(xix) He said he thought that he may have been viewed as being under the influence of substances on the day of release because of the effects of his of medication which he had taken that morning.

(xx) During the period of his release he says he did not see any Armed Support Unit Officers.

(xxi) He avers that no address was offered to him while he was at the office of the NIHE.

[41] It can be seen from the above that there are points of fact which appear to be in issue as between the official version of events and the applicant's version.

Was the recall lawful?

[42] The terms of the discretion conferred on the decision maker in the DOJ to determine whether or not to recall has already been set out in this judgment. In the court's view, the open-ended nature of the discretion which has been conferred should not be neglected.

[43] In this case the decision maker has indicated how he went about his task. It appears to the court that it was open to the decision maker to determine what factors he viewed as relevant, provided his choice of particular factors is rational and not unreasonable.

[44] The weight he or she gives to such relevant factors will ordinarily be a matter for the judgment of the decision maker.

[45] The approach taken by the decision maker to his task, as he has averred, was to ask two questions: (a) whether there was evidence that the applicant's risk had increased and (b) whether the applicant could, in the decision maker's judgment, be

safely managed in the community. It seems to the court that this was a permissible way of lawfully going about the task, though this is not to say that necessarily or inevitably, there may not have been other ways of approaching it.

[46] In respect of both questions the decision maker had to make his decision on the material available to him. This is an important, if elementary, point. In particular, it is not for the court in judicial review proceedings to judge the lawfulness of the decision-maker's decision by reference to materials which have come into existence long after the event. This is a point which has direct application in this case as the court has been provided with extensive materials which have been generated at a later stage and which was not before the decision maker.

[47] The material which was before the decision maker has been described above and, clearly, was not insubstantial. It consisted of two substantial reports, the latter of which made a statutory recommendation to recall from an expert and independent Parole Commissioner. Both reports, in the court's judgment, had to be taken into account and could not have been ignored by the Department, although it is clear that the DOJ decision maker is not obliged to accept the advice contained in them. In addition, it also seems clear that the decision maker had the opportunity to speak with a representative of PBNI on the ground at the relevant time and was able, to an extent, to monitor how events were unfolding.

[48] In assessing the DOJ's decision, the court will bear in mind the remarks of Kerr LCJ (as he then was) in the case of Re Mullan's Application [2007] NICA 47. At paragraph [32] of his judgment, the Chief Justice noted that "the decision to recommend a recall should not be regarded as one that requires the deployment of the full adjudicative panoply". Later, at paragraph [34] he added: "…the decision whether to recall is directed at the question whether there is sufficient immediate cause to revoke the licence and recall the prisoner. That decision is taken in the knowledge that there will thereafter be a review of continued detention. Of its nature it is a more peremptory decision than that involved in the later review. While one should naturally aspire to a high standard of decision making, the need to ensure that there is an exhaustive and conclusive appraisal of the facts is self-evidently not as great at the recall stage as it will be at the review stage".

[49] It has been suggested to the court on behalf of the applicant that the first question should not have been answered in the affirmative. The central submission in support of this argument can be put simply and was that there was insufficient material available after the applicant's release to enable a conclusion to be made that the applicant's risk had increased, more than minimally, since his release. Mr Lavery QC makes the bold submission that the decision maker is under no circumstances able to take into account events which had occurred before release, even if they may have an impact or continue to apply after release. This means, as applied to this case, that, for example, it was wrong for the decision maker to have regard to such factors as whether the applicant had been under the influence of substances taken before his release. By the same token, to take another example, any refusal by the applicant to

take a drugs test, it is said, is irrelevant or any failure by the applicant to take his medication, to control a condition to which he is subject, is to be placed outside the balance in any assessment made. In short, all that can count, Mr Lavery submits, are events after release, irrespective of any importance a factor may have to the applicant's stability; his propensity to offend; or to his likely adherence to licence conditions.

[50] On the other hand, Mr McGleenan QC for the respondent, has argued that the key consideration in the context of recall is risk, which, he says, is fundamental to the whole of the statutory arrangements. Risk, he argues, can be generated by conduct irrespective of the point or time of origin or the place from which it derives. Aberrant conduct while in custody is capable of being relevant, such as in the case of an offender who consumes illicit substances immediately pre-release with full knowledge that he is about to be released and/or who is under the influence of them at the time of release or for some time thereafter.

[51] In the court's view, what cannot be doubted is that at the end of the custodial period, the applicant is entitled to release on licence. This must accommodate the fact that the terms of the proposed licence have to be fixed in advance of release and that elemental to the success of release is that the applicant complies with them. These are the essential bases for release. The object in having conditions is to reduce risk to as manageable a level as possible. In a case of this type, it is hard to escape the conclusion that the licence conditions represent the baseline for release. Accordingly, anything which occurs which casts doubt on the licence holder's commitment to comply with them, it seems to the court, will be relevant to the question of potential recall of the prisoner. Consequently, the court does not accept the argument that a temporal line can be drawn so that it is sustainable to say that all events which occur prior to release should be viewed as irrelevant to any potential recall situation and only matters which occur after release can be relevant. Behaviour, whenever it occurs, in the court's judgment, can be viewed as part of the on-going consideration after release of whether the conditions of the licence are going to be observed in practice, so that the risk, as set by the existence of the licence conditions, does not escalate.

[52] If a prisoner turns up on the date designated for his release inebriated or high on drugs or if he says prior to his release that he intends to offend or has no intention of complying with an approved address and cares nothing for the conditions to which his release is made subject, while it may be that he nonetheless is entitled to be released on licence, such conduct, in the court's view, has something to say about the extent of the risk and falls to be assessed accordingly. While every case is not the same, it may have the effect of heightening the risk as it undermines adherence to measures designed to reduce risk and go to the heart of the question of whether the plan for his management once released remains viable. Moreover, in the court's eyes, it surely could not be right that those whose job it is to manage the risk represented by a prisoner on licence have to don a blindfold in respect of pre-release

conduct and stand back and await an actual breach of licence – which could have very serious consequences - before taking any action.

[53] In the court's view, those concerned with the risk the applicant represented in this case were entitled, indeed bound, to consider the signs that the applicant may not adhere to licence conditions. His apparent consumption of drugs; his refusal to take a drugs test; and his non-compliance with medication cannot be regarded as extraneous matters which have no relevance to the issue of recall.

[54] Likewise, it seems to the court that if key conditions cannot be complied with in practice, this also cannot be viewed as irrelevant. This is a live issue in the present case because of the inability for an approved address to be found in the applicant's case. In the quest to control the risk which a serious offender (such as the applicant) represents, having approved accommodation will often be a critical element, as without it supervision of the offender will be much more difficult or, at least in some cases, impossible. On the facts of this case, it became clear after release that, in fact, an approved address could not be found in the applicant's case, though this does not seem to have been for the lack of trying. Without such an address, however, it appears logical to say that the level of risk which would have been envisaged as applying to the offender in the presence of functional licence conditions will have become higher, as the ability of the authorities to exercise effective supervision diminishes.

[55] None of the above should be viewed as the court saying that any failure by an offender to embrace any licence conditions or any dilution of them necessarily requires that the offender be recalled. The court fully accepts that a decision to recall will involve an exercise of judgment in which the various competing interests must be balanced, such as those of the individual who wishes to enjoy the advantages of release and those who might be at risk from a person with the offender's criminal record and propensities.

[56] On the facts of this case, the court is unable to conclude that the finding of the Department's decision maker that there had been a more than minimal increase in the risk the offender represented was wrong never mind outside the discretionary area of judgment available to him.

[57] The second question which the decision maker posed was whether in the circumstances which had transpired it could be said that the applicant could be safely managed in the community. To this, he answered that it could not. This was, it seems to the court, a response which was well within the ambit of a rational and proportionate conclusion in the circumstances which have already been explained. This was because not only had the applicant no approved accommodation to go to but he had evinced an apparent absence of commitment to adherence to his licence conditions, which, as already discussed, were central to the management of the offender as a person who was viewed as a category 3 prisoner with a high likelihood of re-offending.

[58] The court records that while there was considerable debate at the hearing of this application about possible competing tests which might be applied to the issue of recall in a case of this type, it is, however, unnecessary for the court to rehearse these arguments in this judgment. All the court need say is that it does not consider that the conclusion it has reached is in conflict with the terms of the decision maker's statutory discretion and it does not consider that the approach the court has taken is inconsistent with the range of authorities in this area. This is especially so in the context of Horner J's judgment in the case of Re Foden's Application [2013] NIQB 2, which was strongly supported by Mr Lavery as the acid test for a recall. In Foden, at paragraph [18] Horner J did not view the issue of recall as being determined by whether or not a licence condition had been breached. Rather he put the matter into a broader context which involved whether there had been an increase (or a perceived increase) in the risk of harm to the public. The increase in the risk had to be significant but he noted that the decision of the Department will always be fact sensitive and be based on the facts and circumstances then known (not what may become known at some later date). The court does not believe that its approach in this case is at odds with what was said by the learned judge in Foden. Moreover, in this court's view, another aspect of Foden is very much in line with the court's approach in this case. At paragraph [20], Horner J acknowledged the role of licence conditions, both general conditions and bespoke ones. He noted that their role was to manage the risk of harm to the public which the prisoner may represent on licence. Consequently: "…if [the prisoner] 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, he should be recalled". This court believes that the underlined words in the passage just quoted have an obvious application to a case like that of Mr Rainey. Finally, the learned judge also unequivocally stated that the increase in risk in a recall case is to be considered in the presence of the conditions imposed by the licence – both standard and bespoke conditions. This has a direct resonance for a case of this type where the prospective level of risk is based on an assumption that generally the conditions will be adhered to with the consequence that if they are not adhered to the likely outcome will be that the risk will rise.

[59] Looking at the matter objectively, the court holds that the recall in this case was lawful, even though it may be that upon review, when the matter can be considered in a forensically more thorough manner, it may be that other views about it may be justified. The court holds that the matter is not to be viewed through the narrow perspective alone of whether a particular breach occurred at a particular point but considers that a wider focus – centred on risk – is the key. In the court's opinion, applying that approach, as the decision maker did, there is no basis for the court to intervene.

Is there an incompatibility between Article 26(6)(a) of the 2008 Order and Article 5(4)?

[60] The second issue in these proceedings is whether or not there is an incompatibility between Article 26(6)(a) of the 2008 Order and Article 5(4) of the ECHR.

[61] The applicant maintains there is while the respondent argues there is not.

[62] The terms of Article 26(6)(a) have been set out above at paragraph [8].

[63] The terms of Article 5(4) need to be set out in context, which is Article 5 of the Convention as a whole. It states:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) The lawful detention of a person after conviction by a competent court;
>
> (b) …
>
> (c) …
>
> (d) …
>
> (e) …
>
> (f) …
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> (2) …
>
> (3) …
>
> (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> (5) …"

[64] It will be remembered that following recall there is an obligation, in accordance with Article 28(4) of the 2008 Order, on the Department of Justice to refer the prisoner's recall to the Parole Commissioners.

[65] This is what occurred in this case on 4 April 2016.

[66] Under the scheme of the legislation, it is for the Parole Commissioners on such a reference to decide whether or not to direct the prisoner's immediate release on licence. Where the Parole Commissioners decide on this course and issue a direction, the Department of Justice is obliged to give effect to it (see Article 28(5)). However Article 26(6) provides that the Parole Commissioners:

> "Shall not give a direction … unless they are satisfied that:
>
> (a) Where P is serving … an extended custodial sentence, it is no longer necessary for the protection of the public from serious harm that P should be confined."

The applicant's submission on incompatibility

[67] The applicant's submission on incompatibility has been dealt with at length in a full skeleton argument which the court has considered carefully. The summary of it which follows, reducing it to a number of headline propositions, the court accepts does not do it full justice but, hopefully, it will be sufficient to enable the reader to understand the applicant's position. The following appear to the court to be the main points:

(i) Article 5(4) applies to the case of a prisoner who is serving an ECS and who is recalled. His detention post recall has no sufficient nexus or connection to this original conviction. Consequently, it is a fresh detention which is not based on the sentence of the original sentencing court and so cannot be justified by reference alone to Article 5(1).

(ii) Where there is "a new deprivation of liberty", as here, the prisoner under Article 5(4) of the Convention is entitled to take proceedings by which the lawfulness of the detention can be decided speedily by a court.

(iii) In respect of such a review, the reviewer, here the PCs, must be entitled to deal with the issue of the lawfulness of the recall and order release where the recall has not been lawful.

(iv) Article 28(6)(a), however, prevents the reviewer from releasing the applicant in circumstances where the recall was unlawful as the reviewer is bound to order release only where it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined.

(v) Consequently there is an incompatibility between Article 28(6)(a) and Article 5(4).

The respondent's submission on incompatibility

[68] While this subject is also dealt with at length in the respondent's skeleton argument, at the risk of not during justice to it, the court will only provide a headline summary of the respondent's response, sufficient to enable the reader to follow the thrust of it. The following appears to represent the main points:

(i) If the court holds that the recall in this case was lawful, the issue of incompatibility simply does not arise.

(ii) This is not a case of a new deprivation of liberty. Rather it is a case where there is a nexus or connection between the original sentence of the court and the recall. The *modus operandi* of the sentencing judge's sentence is well known and defined by law. The sentence pre-ordains a release on licence and the potential for recall. The requirements of Article 5(4), therefore, are subsumed into the sentencing process and cannot be relied on in a case of this type.

(iii) The present process in which the Parole Commissioners are charged with reviewing the whole of the applicant's case is sufficient, in any event, to comply with Article 5(4).

(iv) If the proposition at (iii) is wrong, the availability of judicial review or *habeas corpus* to test the lawfulness of the applicant's detention is sufficient to meet the requirements of Article 5(4).

The court's assessment

[69] The court considers that it can deal with the issue of compatibility by determining whether or not Article 5(4) of the Convention applies to the recall situation in this case. On this point, the court is clear that Article 5(4) does not apply to the applicant's detention following recall. In this case, an ECS was the sentence imposed by the trial judge. It was the most lenient of the options available to him in the light of the finding that the applicant was a dangerous offender. The constituent elements of an ECS are well known, have been prescribed by law and are evident from the statutory provisions the court has already cited in this judgment. By way of simple resume, the sentencing judge must determine (in accordance with Article 7 of the Order) the appropriate custodial term and, in addition, must determine the period known in the legislation as the extension period i.e. the period in respect of which the offender is subject to licence. It is these elements together which make up the sentence of the court. Consequently, in this court's opinion, an ECS, properly analysed, is to be viewed as a determinate sentence in the sense that its temporal application is fixed by the court of sentence in advance and, under the terms of the statute, the sentence ends at a finite and definite point. Its character is to be contrasted with an indeterminate sentence in which no release date is identifiable

and release depends on a decision about the risk the prisoner represents. The question of release on licence is explicitly dealt with in the Order, as is the issue of recall. The architecture of the statutory scheme, it seems to the court, is such that where there is a recall decision this is not properly to be viewed as inaugurating a fresh detention or a new deprivation of liberty, which attracts Article 5(4) in its own right.

[70] Rather, the true position, in the court's judgment, is that any deprivation of liberty following recall forms part of the lawful sentence of the court consistently with the terms of Article 5(1)(a) of the Convention.

The case law

[71] In reaching the conclusion the court has just reached, the court relies centrally on the recent decision of the Supreme Court in the case of R (Whiston) v Secretary of State for Justice [2015] AC 176, together with authorities which have applied its reasoning subsequently.

[72] In Whiston, Lord Neuberger, speaking for the majority of the court, considered the broad issue of the applicability of Article 5(4) to a recall situation in the case of a determinate sentence. He cited in paragraphs [21]-[24] of his judgment the main Strasbourg jurisprudence in respect of Article 5(4): De Wilde, Oms and Versyp v Belgium (No 1) (1971) 1 EHRR 373; Ganusauskis v Lithuania (Application 47922/99), 7 September 1999; and Brown v United Kingdom (Application No 986/04), 26 October 2014. He also referred thereafter to domestic jurisprudence on the same subject, in particular, the case of R (Giles) v Parole Board [2004] 1 AC 1.

[73] In Whiston the appellant prisoner had relied, for his argument that Article 5(4) applied, on the approach taken by the House of Lords in R (West) v Parole Board [2005] 1 WLR 350. This appeared to confirm that, on the facts of that case, Article 5(4) was applicable, notwithstanding that the sentence involved was a determinate one. The majority in Whiston, however, held that West had, on the point of whether Article 5(4) applied to the recall in that case, been decided *per incuriam*. The majority, moreover, did not accept that the view of Lord Brown in R (Black) v Secretary of State for Justice [2009] AC 949, which also had been relied on by the appellant. This also had pointed in the direction of Article 5(4) having application even in the case of a determinate sentence, but in Whiston the majority in the Supreme Court declined to follow it.

[74] In essence, Lord Neuberger indicated that where a person is lawfully sentenced to a determinate term of imprisonment by a competent court, there will (at least in the absence of unusual circumstances) be no question of him being able to challenge his loss of liberty during that term on the ground that it infringes Article 5(4). The reason for this finding was that the duration of the sentence period and the lawfulness of the detention has been decided by the sentencing court, consistently with Article 5(1).

[75] The key passages in Lord Neuberger's judgment can be taken from his discussion of the issue after his consideration of the range of authorities, including those referred to above. He said:

> "38. If one limits oneself to the decisions of the Strasbourg court…and the reasoning in Giles…the law appears to me to be clear. Where a person is lawfully sentenced to a determinate term of imprisonment by a competent court, there is (at least in the absence of unusual circumstances) no question of his being able to challenge his loss of liberty during that term on the ground that it infringes article 5.4. This is because, for the duration of the sentence period, "the lawfulness of the detention" has been "decided …by a court", namely the court which sentenced him to the term of imprisonment.
>
> 39. This does not appear to me to be a surprising result. Once a person has been lawfully sentenced by a competent court for a determinate term, he has been "deprived of his liberty" in a way permitted by article 5.1 (a), for the sentence term, and one can see how it follows that there can be no need for "the lawfulness of his detention" during the sentence period to be "decided speedily by a court", as it has already been decided by the sentencing court…
>
> 40. On this approach, article 5.4 could not normally be invoked in a case where domestic discretionary early release provisions are operated by the executive in relation to those serving determinate sentences…
>
> 41. However, the issue is complicated by the decision of the House of Lords that article 5.4 was engaged in West because if the legal analysis just summarised were correct, article 5.4 would not have been engaged in West. I am bound to say that the decision in West appears to me to be unsatisfactory in relation to article 5.4…
>
> 43 …Ms Natalie Lieven QC, for the Secretary of State argues that we should follow the Strasbourg jurisprudence, as explained and applied in the Giles case…and hold that Mr Whiston cannot invoke

> article 5.4, as, so long as his sentence period was running, it has been satisfied by the sentence which was imposed at his trial.
>
> 44. I have reach the clear conclusion…that we should reach the conclusion advocated by Ms Lieven…
>
> 46. It would be wrong not to confront squarely the decision in West on article 5.4 and Lord Brown's obiter dictum in Black's case, para 74. As Elias LJ said…there is "a growing number of cases which have bedevilled the appellate courts on the question whether and when decisions affecting prison detention engage" article 5.4…I believe that this makes it particularly important we grasp the nettle and hold (i) the decision in West was per incuriam so far as it involved holding (or assuming) that article 5.4 was engaged, and (ii) the obiter dictum of Lord Brown in Black's case…is wrong in so far as it suggests that the law of the United Kingdom in relation to article 5.4 differs from the Strasbourg jurisprudence, as summarised by Lord Hope in Giles…".

[76] Lords Kerr, Carnwath and Hughes agreed with Lord Neuberger's judgment. Baroness Hale did not.

[77] It seems to this court that the reasoning in Whiston encompasses the facts of the present case and that the court should therefore apply it.

[78] While the above was the court's reaction when it first read Whiston, subsequent cases involving Whiston have added to the court's belief that its principles should be given effect to in the applicant's case.

[79] The appellate courts in Scotland have considered a similar issue in a recent case called Brown v Parole Board for Scotland [2015] CSIH 59. The importance of this case to the present is that in Brown the court was considering the question of whether an extended sentence in Scotland which, while not on all fours with a ECS in Northern Ireland, was materially similar, was or was not a determinate sentence for the purpose of determining the application of Convention provisions.

[80] The Scottish Court has no hesitation in holding that the sentence it was dealing with was a determinate sentence in a context in which the sentence was made up of a custodial term and an extended licence period. Lady Clark of Calton, in her judgment stated at paragraphs 36 and 37 as follows:

"36. The first question we consider is how an extended sentence under and in terms sec 210A of the 1995 Act should be classified. We note that in terms of sec 210A(2), an extended sentence is defined as the aggregate of 'the custodial term' and a further period 'the extension period' for which the offender is to be subject to a licence. The extension period is selected by the court but the maximum period is limited to 10 years…A person subject to an extended sentence is liable to be detained until the date, on which the extended sentence imposed by the sentencing court expires. Such a prisoner may in fact be released, for example, on mandatory release or at the end of the custodial term but if he is in breach of his licence, he is liable to be returned to custody until the end of the sentence.

37. We have no hesitation in concluding that, on a proper analysis of the legislation, an extended sentence is a determinate sentence. We accept that as in many sentences which are not extended sentences, the judge in imposing the extended sentence has regard to public protection in the sentencing process along with other sentencing considerations. It is an essential element however of an extended sentence that the court specifies both the custodial element and the period of extension. Under current statutory provisions, the person serving an extended sentence will be eligible for consideration both for discretionary release and as happened in this case, will be released on mandatory release after serving two-thirds of the custodial term. That is a statutory privilege (or in the case of a mandatory release a statutory right) given to the prisoner subject to licence conditions. Where the sentence includes an extension period, the sentence will continue for longer than the period of custody until the period of extension has expired. Where an extended sentence is imposed, the court in sentencing has made a specific determination of what public protection requires in relation to both custody and the sentencing period. In our opinion, a critical difference, in comparison to various forms of indefinite sentences for the purpose of public protection is that at the end of the period of the extended sentence, the prisoner must be released. That applies even if the prisoner is

> considered to be a serious threat to public safety at the end date of the sentence".

[81] It seems to the court that the elements described above also apply to the present case and so buttresses the conclusion that an ECS in Northern Ireland is to be viewed as a determinate sentence. The only significant difference which the court can see between the Scottish regime in Brown and the Northern Irish extended sentence regime seems to be that in the context of the Northern Ireland legislation there will be circumstances where, because the criterion of dangerousness is fulfilled, a ECS will be mandatory when neither a life sentence nor an indeterminate sentence is required. The court is unconvinced that this factor *per se* would alter the nature of a ECS as a determinate sentence.

[82] Finally, the court will refer to a recent decision of the first instance courts in England and Wales. In R (Youngsam) v Parole Board [2017] EWHC 729 Admin, Turner J applied Whiston to the facts of the case before him, despite an argument that Whiston should be viewed narrowly and be applied only to facts similar to the facts which were at issue before the Supreme Court, involving the return of Mr Whiston to prison following a breach of home detention curfew.

[83] In the course of a careful analysis Turner J rejected the approach urged on him. He stated by way of conclusion:

> "Where a person is lawfully sentenced to a determinate term of imprisonment by a competent court, there is (at least in the absence of unusual circumstances) no question of his being able to challenge his loss of liberty during that term on the ground that it infringes article 5.4. The conclusion of the majority in Whiston's case…to this effect should be regarded as binding on all inferior courts notwithstanding the fact that, strictly speaking, it was obiter to the extent that it was more broadly stated than was necessary for the determination of the central issue in that case."

[84] The court will follow this approach.

[85] For the avoidance of doubt, the court will indicate that it has also considered the leave decision of Colton J in Re CL's Application [2017] NIQB 2 but does not view that case as inconsistent with the court's decision as regards Article 5(4) in the present case.

[86] In view of the above, the court does not consider that any purpose would be served by considering other aspects of the compatibility issue.

Conclusion

[87] In the circumstances set out above the court is of the opinion that this judicial review application should be dismissed.