Neutral Citation No: [2021] NIQB 14	*Ref:* **COL11408**
	ICOS No: **20/57231**
Judgment: approved by the Court for handing down (subject to editorial corrections)*	*Delivered:* **11/02/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY KIERAN SMYTH FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE SECRETARY OF STATE FOR NORTHERN IRELAND

_____

COLTON J

Introduction

[1] This case involves a challenge by the applicant in relation to a decision of the Secretary of State ("hereinafter SOS") on 27 March 2020 to order that the applicant's determinate custodial sentence licence should be revoked and that he should be recalled to prison.

[2] I am obliged to Mr Desmond Fahy QC who appears with Mr Michael Magowan on behalf of the applicant and Mr Coll QC who appears with David Reid on behalf of the respondent for their helpful written and oral submissions.

[3] On 21 April 2015 at Newtownards Crown Court the applicant was sentenced to a determinate custodial sentence of 12 years' imprisonment arising from his plea of guilty to offences including robbery, carrying a firearm or imitation firearm with intent to commit an indictable offence, three counts of false imprisonment and aggravated vehicle taking.

[4] He was released on licence pursuant to the provisions of Article 17(1) of the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order") on 14 September 2019. His licence is due to expire on 14 September 2025.

[5] On 27 March 2020, the SOS revoked the applicant's licence which resulted in his recall to prison on 27 March 2020.

[6] After a leave hearing, McAlinden J granted the applicant leave to challenge the decision as per an amended Order 53 Statement:

> "*Grounds of Challenge*
>
> *The applicant's grounds of challenge are:*
>
> *(i)* ***Illegality.*** *The applicant contends that the impugned decision was unlawful in the following respects:*
>
> > *(a) as appears from paragraph 3 of the Secretary of State's OPEN statement of evidence, the Secretary of State took the decision to revoke the applicant's licence prior to the recommendation of the Parole Commissioners. He therefore failed to exercise the statutorily prescribed discretion. This was in breach of the requirements of Section 28 of the Criminal Justice (Northern Ireland) Order 2008.*
>
> *(ii)* ***Material considerations.*** *The applicant further contends that the impugned decision is vitiated by the proposed respondent having taken into account the following immaterial facts/considerations:*
>
> > *(a) in paragraph 29 of his OPEN statement of evidence, the Secretary of State appears to suggest that the applicant should be recalled for reasons of deterrence and to set an example (see paragraph 29 of the Statement of Evidence). These amount to materially irrelevant considerations*."

Legal Background

[7] The relevant legal context is set out in Article 28 of the Criminal Justice (Northern Ireland) Order 2008 which provides:

> *"(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 or the Secretary of State may revoke P's licence and recall P to prison –*
>
> *(a) if recommended to do so by the Parole Commissioners; or*
>
> *(b) …*
>
> *(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 or (as the case may be) the Secretary of State shall refer P's recall under paragraph (2) to the Parole Commissioners.*
>
> *(5) Where on a reference under paragraph (4) the Parole Commissioners direct P's immediate release on licence under this Chapter, the 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) …*
>
> *(b) in any other case, it is no longer necessary for the protection of the public that P should be confined.*
>
> *…*

> *(8) The Secretary of State may revoke P's licence and recall P to prison under paragraph (2) only if his decision to revoke P's licence and recall P to prison is arrived at (wholly or partly) on the basis of protected information."*

[8] The Secretary of State was involved in this case by reason of Article 28(8) since the decision to revoke the applicant's licence and recall him to prison was arrived at wholly or partly on the basis of protected information.

[9] It will further be seen that under Article 8 the Secretary of State may only revoke a prisoner's licence and recall him to prison "if recommended to do so by the Parole Commissioners" (Article 28(2)(a)).

[10] In accordance with the statutory scheme, the decision to revoke the applicant's licence is now the subject matter of a pending review by the Parole Commissioners, who have the power to hear oral evidence, receive submissions and determine whether the applicant's licence should be revoked in accordance with the statutory test.

Chronology

[11] The chronology that led to the SOS's decision is taken from two affidavits from Mr Mark Larmour who is a Director with responsibility for political stability and national security in the Northern Ireland Office. From those affidavits and the exhibits attached, the following emerges.

[12] On 25 March 2020, a caseworker in the NIO received information from MI5 or PSNI indicating that an individual (the applicant) was in breach of his licence, or poses a risk of harm to the public and should be recalled to prison. The material in support was hand delivered.

[13] On the same date, the caseworker contacts the Parole Commissioners for Northern Ireland ("PCNI") Secretariat to advise that a commissioner will be required to attend Stormont House to view the sensitive information and draft a recommendation.

[14] On the same date, referral papers are sent to the PCNI Secretariat.

[15] On 26 March 2020, the commissioner attends Stormont House to review documents between approximately 11.00am and 12.30pm.

[16] On 27 March 2020, the timeline of events was as follows:

> *"(a) 09:39 - an e-mail from the PCNI Secretariat to the Northern Ireland Office was received (TAB 3, Pages 433-434) with a recommendation from the Single Parole Commissioner attached, in which he recommended that Mr*

Smyth's determinate custodial sentence (DCS) licence should be revoked. The Northern Ireland Office was asked to check that no CLOSED information was included in the written OPEN recommendation of the single Parole Commissioner, as is normal practice in these proceedings. It was identified that there was a single reference made to CLOSED material and some references to a previous PCNI case.

(b) 10:20 - These issues were indicated by e-mail to the PCNI Secretariat (TAB 4, Pages 435-438), who contacted the single Parole Commissioner to consider whether any amendment of the OPEN recommendation was required.

(c) As a recommendation from PCNI to revoke the Applicant's licence had been received, the OPEN and CLOSED papers were prepared for the Secretary of State for Northern Ireland to consider. The Secretary of State travelled into the London office from his home specifically to do so.

(d) 11:20 - E-mail sent from NIO Stormont House to NJO London Office (TAB 5, Pages 439-440) attaching a submission (TAB 6, Pages 441-447) for the Secretary of State for Northern Ireland to consider and a Notice of Revocation for him to sign if he decided to revoke the Applicant's licence. He was advised that he would be provided with the amended PCNI recommendation as soon as the amended version was available, but that given the significant volume of papers, he could begin reading.

(e) 11:45 - the Secretary of State for Northern Ireland arrived in his office in London and was provided with the submission and all documents (OPEN and CLOSED), apart from the amended PCNI recommendation.

(f) 12:35 - the amended PCNI recommendation (Gavin Booth exhibits, p.198-210) was received by NIO officials from the secretariat for the Parole Commissioners on behalf of the single Parole Commissioner via e-mail (TAB 7, Pages 448-449). This was immediately forwarded by e-mail to the Secretary of State for Northern Ireland upon receipt (also TAB 7, Pages 448-449).

(g) 13:15 - Confirmation was received by NIO officials by e-mail (TAB 8, Page 450) that the Secretary of State for Northern Ireland had decided to revoke the Applicant's licence and that he had signed the revocation notice (Gavin Booth exhibits, p.212).

(h) 14:22 - Revocation documents were issued to the PSNI by NIO officials to apprehend the Applicant.

(i) 14:59 - Revocation documents were issued to the Northern Ireland Prison Service (NIPS) by NIO officials.

(j) 16:23 - NIO officials e-mailed the Secretary of State for Northern Ireland to confirm that the Applicant had been apprehended."

The Applicant's Case

[17] The focus of the applicant's case is the document entitled "OPEN Statement of Evidence." This document was one of the documents sent to the PCNI Secretariat by email on 25 March 2020. This statement was also served on the applicant on 27 March 2020 along with a copy of the commissioner's recommendation and with a Notice of Revocation signed by the Secretary of State. This Statement of Evidence was served in accordance with Article 28(3) of the 2008 Order.

[18] The applicant's challenge is founded on this document which Mr Fahy referred to as the "Ground Zero" document.

[19] The document sets out the background to the revocation, citing the statutory basis for the order.

[20] It goes on to refer to the applicant's activities prior to imprisonment in 2013.

[21] It provides a summary of the case and the information which the SOS says demonstrates that the applicant represents a threat to the public. In the succeeding paragraphs, it goes into considerable detail of the activities of the applicant post-release.

[22] The document suggests that since his release the applicant has:

"(i) Immediately re-engaged with associates with the New IRA, established an operational role for himself in that terrorist organisation and demonstrated a commitment to an enthusiasm for that role;

(ii) Associated with a number senior New IRA figures in the performance of his operational role;

(iii) Targeted and attempted to collect intelligence on members of the security forces to facilitate attacks on them by New IRA;

(iv) Possessed, or had access to, a military rocket launcher for use in terrorist attacks."

[23] At paragraph 29 the document refers to "*anticipated effects of the licence revocation*" and at paragraph 30 sets out the conclusion as follows:

> "*In the light of the above, the Secretary of State takes the view that Smyth has behaved in a way that undermines the purpose of the licence, and demonstrated that the licence is not an effective means of mitigating the threat he poses to public safety. The Secretary of State therefore believes that it is necessary for the protection of the public that Smyth should be confined and should serve the remainder of his sentence in detention.*"

[24] In his admirably focussed and succinct submissions, Mr Fahy submits that the illegality in the decision under challenge emanates from this document and establishes the basis for the assertion that firstly, it demonstrates that the SOS actually took the decision to revoke the applicant's licence prior to the recommendation of the Parole Commissioners and thus was in breach of the requirements of Article 28(2)(a) and secondly, that in making the decision he took into account a material irrelevant consideration.

[25] In relation to the first ground (what he characterises as "the pre-determination issue") he points to paragraph 3 of the statement which in full is as follows:

> "*Following a recommendation from the Parole Commissioners, the Secretary of State decided to revoke Smyth's licence and recall him to prison under Article 28(2) of the 2008 Order, on the grounds that a recall is necessary for the protection of the public in accordance with Article 28(6)(b). This power was exercised by the Secretary of State by virtue of Article 23(d) of Schedule 5 to the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 ("the 2010 Order") because his decision was made partly on the basis of protected information.*"

[26] Put simply, given that this document was drafted and provided to the Parole Commissioners prior to any recommendation from them the plain meaning of the words is that in fact the SOS has already made a decision under Article 28.

[27] On the face of the material, this must be correct. Clearly therefore, an explanation is called for. This explanation is provided again by Mr Larmour on behalf of the SOS.

[28] Referring to the way in which the document was drafted he avers in his first affidavit as follows:

> *"11. This document was drafted in this way in the knowledge that the applicant himself would later be presented with this document, if the Secretary of State were to decide to revoke the licence. The same document therefore serves several purposes:*
>
> *(a) to provide the relevant information to the single parole commissioner to inform their recommendations;*
>
> *(b) to provide the same relevant information to the Secretary of State for his consideration if the Parole Commissioner recommended the licence be revoked;*
>
> *(c) to be able to immediately provide the document to all parties, including the applicant, if a decision to revoke was made, for the purposes of the future hearing by the Parole Commissioners reviewing the applicant's licence revocation, without the requirement for changes to be made.*
>
> *12. An identical copy of the open statement of evidence was subsequently provided to the applicant when he was provided with a copy of his notice of revocation (Gavin Booth exhibits P1). The document was therefore drafted in the manner above to allow for prompt action in the event that any recommendation for revocation that recall was received and any revocation and recall decision was made. This is common practice in cases of this nature. I have been able to ascertain that in all such recall cases falling within the auspices of the Secretary of State for Northern Ireland since 2011 the same* `following a recommendation from the Parole Commissioners, the Secretary of State decided to revoke (names) licence and recall (him/her) to prison …' *has been used."*

[29] In short therefore, Mr Coll submits that this document and in particular the wording at paragraph 3 was included on a prospective basis by the author of the document. The document itself would only have been issued in the future to the applicant subsequent to and only in the event of a later recommendation to revoke being made by the Commissioners, followed by a decision to revoke by the SOS. It was drafted in this way to allow for prompt action once any recommendation was received and any revocation decision was made. He points out that this is the common practice since 2011. He argues that on this issue that should be the end of the matter given the limited basis upon which leave was granted. As a matter of

fact, no decision had been taken by or on behalf of the SOS and the document was drafted to permit prompt action and expedition in the event of a recall decision being made which, as is apparent from the timeline set out above, actually occurred.

[30] He goes further, however, and submits that it is clear from the remainder of the evidence in this case that again as a matter of fact no decision was taken by the SOS until after a recommendation by the Parole Commissioners and further that it is clear from an analysis of the material available to the court that ultimately a proper and lawful decision was made.

[31] Notwithstanding the debate on the extent to which leave was granted, Mr Fahy develops his argument to say that even if no decision was actually made by the SOS prior to the Parole Commissioners' recommendation this is a case of apparent pre-determination which should vitiate the decision in accordance with the principles in the well-known case of *Porter v Magill* [2002] 2 AC 357. On this basis the question for the court is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the decision maker was biased.

[32] Mr Fahy's second argument (what he characterises as "the deterrence issue") is founded on the contents of paragraph 29 of the Statement of Evidence which provides in full as follows:

> "***Anticipated effects of the licence revocation***
>
> *29. MI5 and PSNI assess that Smyth's imprisonment will likely have significant detrimental impact upon the New IRA's operational capabilities, given Smyth's rapid return to terrorist activity and his energetic commitment to such activity. Given his complete disregard for his licence conditions, manifested by unauthorised foreign travel and the heavy use of alcohol, as well as involvement in terrorist activity, it is not assessed that more stringent licence conditions would mitigate the risk he presents, and it is possible that the imposition of such conditions would spur Smyth into taking violent action. In addition, a revocation would demonstrate that the authorities are prepared consistently to return to custody those who carry out terrorist activities whilst on licence. Such consistency reinforces both public confidence in the legal process and the deterrent effect of licence conditions."*

[33] It is clear that the issue of deterrence plays no part in the decision to be made by the Parole Commissioners or the SOS under Article 28. What has to be determined is the issue of risk to the public. By referring to the issue of deterrence, Mr Fahy argues that the SOS has introduced a wholly immaterial consideration

which at the very least must have played a part in the determination to recall the applicant to prison. He points out that the only parties who actually see this document are the SOS, the Parole Commissioners and the applicant. In those circumstances, he asks why is this issue referred to at all? He argues that this is plainly an immaterial consideration which means that the decision to revoke is irredeemably flawed.

[34] Mr Coll replies that the reference to the deterrent effect of licence conditions in this document should be seen in context. The document should be read as a whole. He points to the heading in paragraph 29 which indicates that the paragraph is looking at the anticipated effects of a decision to revoke once made. In other words, it is not the basis for the recommendation. The basis for the recommendation is set out in detail in the preceding paragraphs. Essentially, the comment is a predictive one indicating the potential outcome of the decision. He seeks to distinguish cause from effect. To determine that the decision in this case should be vitiated on the basis of this reference would involve an unduly intense scrutiny or parsing of the wording of the statement, which should be read as a whole.

[35] As was the case with the "pre-determination issue" he invites the court to consider all the material available in relation to this decision which overwhelmingly points to the conclusion that the proper test was applied and there should be no question of the decision being vitiated or set aside because of the single reference to deterrence in paragraph 29.

Consideration

[36] Before considering the respective arguments, it is useful to make some general comments about the Article 28 procedure which has been the subject matter of a number of judicial decisions in this jurisdiction. See, for example, *Hinton's Application* [2003] NI 139, *Adair's Application* [2003] NIQB 16; *Foden's Application* [2014] NIJB 133; *Hegarty's Application* [2019] NICA 16, *Re Mullan* [2007] NICA 47 and *Re Rainey* [2019] NICA 76.

[37] From these various decisions the following principles, which may be relevant to this case, emerge.

[38] The starting point is that it is clear from the statute that the SOS is provided with a very broad discretion. Whilst the statute does not provide a test to be applied by the SOS, the relevant test to be applied by the Parole Commissioners at Article 28(6)(b) is whether "*… it is no longer necessary for the protection of the public that P should be confined*". In *Re Foden* the test was described as whether, on the balance of probabilities, there has been post-release conduct on the part of the licensee which indicates that the risk of harm posed by him to the public has increased significantly

(that is, more than minimally) and that the risk could no longer be safely managed in the community.

[39] Having regard to the exercise of this discretionary judgment in the case of *Re Mullan*, the then Lord Chief Justice noted "*The decision to recommend a recall should not be regarded as one that requires the deployment of the full adjudicative panoply*." [Para [33]].

[40] At paragraph [34] he went on to say:

> "*… The decision whether to recall is directed to 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 his 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."*

[41] What constitutes a "*high standard of decision-making*" will be fact specific in any given case but it will be informed by a number of features which were described by Stephens LJ in *Hegarty* [2019] NICA 16 in the following way:

> "*i. The purpose of the recall of convicted offenders is protection of the public. The standard required of the decision makers should be informed by that purpose so that the public are not imperilled by an inappropriate standard delaying recall.*
>
> *ii. The impact of Article 28(3) is that the prisoner does not have to be informed of the case against him until after the recommendation and recall decisions have been made so that the principles set out in R. v Secretary of State for the Home Department Ex p. Doody [1994] 1 A.C. 531; [1993] 3 W.L.R. 154 do not apply.*
>
> *iii. Article 28(2)(b) refers to practicability in the context of a decision to recall without a recommendation from the Commissioners. Practicability must also inform*

the standard required of the decision makers. R (on the application of Hirst) v Secretary of State for the Home Department [2006] EWCA Civ 945 being an example of an impracticable or unrealistic standard of decision making.

iv. Expedition and urgency are highly relevant factors informing the standard of decision making.

v. The information upon which the Commissioners and the Department act need not be imbued with the qualities of evidence admissible before a court.

vi. The decision makers at the recall stage are entitled to assume that those compiling a report or application are acting in good faith unless that assumption is displaced. However there is a distinction between an assumption of good faith and an assumption that all the information provided is accurate. The tasks of the decision makers when considering a recall recommendation or a recall decision must be to consider the facts without assuming that they are accurate. In that way if certain facts are implausible, vague or un-particularised then consideration can be given by the decision maker as to whether further inquiries should be made.

vii. On this basis the Tameside principle has some traction in relation to the high standard of decision making though it is for the decision maker and not the court, subject only to Wednesbury *review, to decide upon whether any inquiry should be made and if so the manner and intensity of any inquiry which is to be undertaken into any relevant factor. Furthermore on a Wednesbury review it should be recognised that the purpose of any inquiry is not to lead to an exhaustive or conclusive examination of the facts. It should also be recognised that the inquiries should be strictly limited to what realistically can be achieved in a limited period of time given the need for expedition and the obligation to fulfil the purpose of protecting the public. Furthermore recognition should be given to the feature that any inquiries must not subvert the distinction between the more peremptory recall decision and the decision upon a reference.*

viii. That application of the Tameside principle may lead to further enquiries being made by one but not both of the decision makers which in turn may lead to the Department acting on the basis of further factual information which has not been assessed by the Commissioners. We consider that if further facts become apparent to the Department there is no obligation on it to return to the Commissioners for its assessment of those further facts though it might in the exercise of discretion decide to do so."

[42] In large measure, the determination of the issues in this case turns on whether the court accepts the explanations provided by the respondent in respect of the two issues raised by the contents of paragraphs [3] and [29] of the Statement of Evidence.

[43] In assessing the explanations provided, Mr Coll submitted that although unnecessary the remainder of the material available to the court supported the explanations and submissions provided on behalf of the respondent.

The "Pre-determination Issue"

[44] If one turns to the recommendation of the Parole Commissioners, it is clear that the Commissioner was alive to the very point made by Mr Fahy. Thus when the Commissioner turns to the question of evidence he says:

"*The open statement appears to make two factual errors in the first (background) section. In paragraph 3, it suggests that the Secretary of State has already decided to revoke Mr Smyth's on the basis of a recommendation from the Parole Commissioners. Prior to this consideration there has been no such recommendation. In paragraph 4 it is suggested this consideration was referred to under Article 28(4) of the Criminal Justice (Northern Ireland) Order 2008. This refers me to consider Article 28(2)(a)."*

[45] It is clear from this passage and indeed from the recommendation which runs for 27 paragraphs that the Commissioner made the recommendation on the premise that the Secretary of State had not made any decision on the basis of a recommendation.

[46] It is also clear from the recommendation of the Commissioner that he applied the appropriate test, carefully reviewed the material presented to him and sets out clearly the basis for his recommendations and reasons. Bearing in mind the authorities to which I have referred, there would be no basis for suggesting that there was anything unreasonable or irrational in the decision or that the Commissioner had taken into account any immaterial considerations.

[47] The court has already set out the chronology of what took place in relation to the decision of the SOS after the Parole Commissioner's recommendation. The court has considered the material that was presented to the Secretary of State for his consideration on 27 March 2020 when he went to his office in London for the specific purpose of considering this matter.

[48] The covering e-mail to the SOS included a covering submission for the SOS and a Notice of Revocation for him to sign (if he was content with the PCNI recommendation).

[49] As indicated at 11:20, the SOS was told that the PCNI recommendation would be coming through shortly and that until it was received the SOS should not sign anything although he could start reading.

[50] The basis for the delay in the receipt of the recommendation was that it had been checked for protected material and reference to a previous PCNI decision, which it was felt should be edited in the recommendation. This had no bearing on the actual decision and was an entirely appropriate course to take.

[51] The covering submission is also important. It is headed "*Potential Revocation of Licence – Kieran Smyth*". The submission includes a recommendation that the licence should be revoked due to the risk of harm to the public – which was the appropriate test. It also recommended that certain material should be certified as confidential and an offer was made to provide a briefing with officials, legal advisers and MI5 to discuss the case before making any decision. The document goes on to provide the appropriate history and background of the applicant and goes on to make the case for licence revocation. The submission refers to the appropriate statutory provision and also refers to the appropriate test. The recommendation makes it clear that the SOS may only revoke a licence following a recommendation by the PCNI and that recall can only be ordered on the grounds that it is necessary for the protection of the public that the person be confined. The submission points out that if the licence is revoked and the matter referred to PCNI under the order for

review that evidence supporting the decision would be provided to the PCNI and the applicant or his representatives.

[52] At paragraph [13] the submission says:

> *"Ultimately, your priority in making this decision is the protection of the public; you may consider it as clear from the information provided that Smyth poses a significant risk. The decision to ask you to consider recalling a prisoner is not taken lightly by security partners and is only requested when intelligence indicates that a released prisoner represents a threat to the public and when NIOLA agrees that the legal threshold has been met."*

[53] The submission refers to the recommendation from the Parole Commissioner and confirms the recommendation at the outset of the submission together with the next steps that need to be taken.

[54] From all this material, it is clear that both the Commissioner and the SOS made the decision entirely in accordance with the statute. There is nothing to suggest that a decision had been made or that it had been pre-determined or that the SOS had a closed mind. Indeed the evidence points to the contrary.

[55] When the SOS confirmed his decision to revoke the licence, the covering e-mail communicating this says as follows:

> *"I facilitated the SofS in London this afternoon.*
>
> *In summary he was content to sign the notice (attached). He has one question, relating to the request, which I was able to answer from the bundle.*
>
> *SofS was grateful for the work in putting this together for him, and for teams being on standby to brief him. …"*

[56] The fact that the SOS actually raised a question again supports the submission that he made his decision on the basis of the material before him, that he considered the material to the extent that he asked a question and refutes any suggestion of pre-determination on his part.

[57] On this analysis, I have come to the conclusion that as a matter of fact there was no pre-determination of this issue by the SOS. Furthermore, having considered the explanation on behalf of the SOS and the entirety of the material before the court I have concluded that a fair minded observer, in possession of the material to which I have referred, would not conclude that the SOS had pre-determined the issue, or that his decision was infected by bias.

The "Deterrence" Issue

[58] Nowhere in the consideration of the matter by either the Parole Commissioners or the Secretary of State is there any reference to the question of deterrence save for paragraph [29] in the statement which was drafted prior to the recommendation of the Parole Commissioners and the decision of the Secretary of State, in the circumstances described by the respondent.

[59] After leave was granted, Mr Larmour served a second affidavit in the matter which focused on the actions of the Secretary of State when he made the decision to revoke the licence.

[60] He avers as follows:

> *"4. In line with Article 28(2)(a) of the 2008 Order, a recommendation on the revocation of the Applicant's licence was sought from the Parole Commissioners. The single Parole Commissioner recommended that the Applicant's licence be revoked. This recommendation was received by the Secretary of State before he made a decision to revoke the Applicant's licence.*
>
> *5. The timeline of events leading up to the Secretary of State's decision to revoke the Applicant's licence is set out in an Action Log which is found at TAB 1, Pages 430-431). The log was used to capture and record the key actions of staff in the Northern Ireland Office in respect of the revocation case. It was a 'live' document that was created and then continually updated as actions relating to this case occurred, to record all actions taken up until the time that the Secretary of State for Northern Ireland signed the Notice of Revocation and the Police Service of Northern Ireland (PSNI) had been contacted to return the individual to prison."*

[61] In considering this matter, I am conscious of the fact that the court is dealing with the liberty of the subject. As Lord Bingham said in the case of **R(West) v Parole Board** [2005] 1 WLR 350:

> *"30. 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, Exp Watson, above, at 916-917. On the other is the prisoner's freedom. This is a conditional, and to that extent precarious, freedom."*

Lord Bingham's reference to the Parole Board applies equally to the Secretary of State in this case.

[62] I have given anxious consideration to the contents of paragraph 29 of the Statement of Evidence. There is no dispute that any consideration of deterrence or punishment is immaterial to the decision which the Secretary of State was considering. Having looked at all the material in the case, I am satisfied that it points to the decision of the Secretary of State having been made on the basis of the appropriate legal test. This is not a case of a respondent seeking to suggest that whilst the papers may suggest a decision was taken on one basis it was in fact taken on a different lawful basis as was the case in ***Hinton*** (see above). If one looks at the material as a whole and in particular the submission and summary provided for the Secretary of State prior to making his decision, I consider that the correct test was applied and this formed the basis of the decision. I am satisfied that the reference to deterrence played no material or substantive part in the decision making. Furthermore, in light of the material which was put before the Secretary of State including the recommendation of the Parole Commissioners it overwhelmingly supports the determination which was made. I cannot see that it could be reasonably concluded that the decision was vitiated by the reference in the Statement of Evidence to the potential consequences or effects of the decision which was made.

[63] The application for judicial review is therefore refused.