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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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

Appellant

and

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

Respondent

_____

Before: Treacy LJ, McCloskey LJ and McBride J

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Desmond Fahy QC and Malachy McGowan BL (instructed by Phoenix Law, Solicitors) for the Appellant
Peter Coll QC and David Reid BL (instructed by the Crown Solicitor's Office) for the Respondent

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TREACY LJ ***(delivering the judgment of the Court)***

Introduction

[1] This is an appeal from a decision of Colton J dismissing the appellant's application for judicial review of a decision of the Secretary of State ("the SoS") whereby his licence was revoked and he was recalled to prison. At the conclusion of the hearing we unanimously dismissed the application.

Factual Background

[2] On 21 April 2015 at Newtownards Crown Court the appellant was sentenced to a determinate custodial sentence of 12 years' imprisonment as a result of 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.

[3] On 14 September 2019 he was released on licence pursuant to Article 17(1) of the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order"). His licence was due to expire on 14 September 2025. On 27 March 2020 the SoS revoked his licence and he was recalled to prison.

Chronology

[4] The chronology of events leading to the appellant's recall were described as follows by Colton J:

> "[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 email 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 email 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 – Email sent from NIO Stormont House to NIO 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 email (TAB 7, Pages 448-449).

This was immediately forwarded by email 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 email (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, p212).

(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 emailed the Secretary of State for Northern Ireland to confirm that the Applicant had been apprehended."

The Applicable Legislation

[5] The relevant sections of The Criminal Justice (NI) Order 2008 are set out below:

"**Duty to release certain fixed-term prisoners**

17.-(1) As soon as a fixed-term prisoner, other than a prisoner serving an extended custodial sentence, has served the requisite custodial period, the Department of Justice shall release the prisoner on licence under this Article.

…

"**Recall of prisoners while on licence**

28.–(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) 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 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) 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) in any other case, it is no longer necessary for the protection of the public that P should be confined.

(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.

(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."

Open Statement of Evidence

[6] On 27 March the appellant was served with recall papers which included an OPEN Statement of evidence. This was one of the papers that intelligence services had delivered to the NIO Caseworker on 25 March 2020 (see Chronology at para [4] above). In the Statement, at para 3, the following appeared:

> "**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 exercisd 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."

[7] The phrase "following a recommendation of the Parole Commissioners" showed the SoS was relying on the power conferred on him by Article 28(2)(a) of the 2008 Order. This allows him to revoke a licence:

> "(a) **if** recommended to do so by the Parole Commissioners."

However, the OPEN Statement recording this decision by the SoS already existed on 25 March 2020 – that is two days **before** any version of the Parole Commissioner's recommendation had been seen by the SoS. If what the Statement said was right, it meant the SoS had used a "power" to issue a revocation decision before the statutory condition that MUST be satisfied in order for that power to exist had, in fact, been satisfied. In those circumstances the revocation decision would obviously be unlawful because there would be no "live" statutory basis on which the SoS could have done what the Statement said he did do.

[8] At para 29 of the OPEN statement of evidence the document also refers to 'anticipated effects of the licence revocation', stating:

> "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 heavy use of alcohol, as well as involvment 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.**" (Emphasis added)

[9] Further at para 30, the following is stated:

> "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 reminder of his sentence in prison."

[10] It is clear that broad considerations such as deterrence and "public confidence in the legal process" have no role to play in relation to recall decisions. The reference to such irrelevant matters would invalidate any decision taken by the SoS if it were shown that he had taken these matters into account when making his decision. On the face of it therefore, the Open Statement served on the appellant raised serious questions about the legality of his recall.

The Appellant's Application for Leave to Apply for Judicial Review

Grounds

[11] The appellant was granted leave to apply for judicial review on the following 2 grounds:

> "(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."

The Decision at First Instance

[12] In his decision, Colton J states:

"[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.

…

[24] … 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. (Emphasis added)

…

[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. (Emphasis added)

[27] On the face of the material this must be correct. Clearly therefore an explanation is called for. …"

[13] Having received and considered the explanation given by Mr Larmour in his two affidavits (see para 4 above) and having reviewed all the other materials in the case Colton J concluded on the illegality/pre-determination aspect:

"[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.

…

[57] … 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."
(Emphasis added)

[14] On the deterrence issue he stated:

[62] … 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. … 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."
> (Emphasis added)

The Present Appeal

[15] The appellant's Notice of Appeal contains 13 points grouped under three headings. His skeleton argument does not follow the structure of his Notice. It makes arguments under overlapping but different headings and it fails to develop some of the Notice points at all.

The Appellant's Arguments

'Chronology'

[16] The appellant attacks the **quality** of the respondent's evidence about how this recall decision was made. The focus of attack is the fact that the evidence was provided by a civil servant (Mr Larmour) who had no direct knowledge of the events in question and that it provided no information about what the SoS actually considered. He asserts that since the judge had found that an "explanation was called for in this case" it was not appropriate for Mr Larmour to provide that explanation when he had no personal knowledge of the thinking behind it. Therefore, his "evidence" ought to have been discounted or accorded little weight.

[17] Secondly, in relation to the treatment of the respondent's evidence, he asserts that it was not sufficiently scrutinised by the trial judge – for example he asserts that the chronology provided by Mr Larmour "was repeated uncritically by the LTJ."

The proper deponent –Civil servant or Secretary of State

[18] Colton J had concluded that an explanation was *'called for'* to avoid the conclusion that the decision had been unlawful. As the person who considered the

material and took the decision, that explanation, it was argued, could only properly have been provided by the Secretary of State personally and not by a civil servant such as the deponent Mr Larmour.

"Predetermination"

[19] The appellant argued that there are a number of different ways to characterise the alleged public law flaws in the Secretary of State's decision to recall. However, it was contended "the most appropriate way" to describe this is a case of "predetermination", which it is said can be considered a form of illegality or a breach of procedural fairness. Notably "predetermination" nowhere features as one of the pleaded grounds on which leave was granted.

[21] Relying on *R(Lewis) v Redcar & Cleveland Borough Council* [2009] 1 WLR 83, the appellant introduces another variant of predetermination "the effective surrender of the body's independent judgment." It is now contended that this precisely describes the Secretary of State's decision and that there is no evidence that the Secretary of State exercised independent judgment.

The Test for "predetermination"

[22] The appellant asserts that the correct test to apply in cases of alleged predetermination is that established in *Porter & Magill* 2 AC 357 by Lord Hope at [103]:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased." (see also [74], [95]-[96]. [103].
> (Emphasis added)

[23] He quotes the trial judge's conclusion:

> "[57] … I have come to the conclusion that as a matter of fact there was no predetermination 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."

Somewhat unrealistically Mr Fahy QC asserts that this conclusion does not deal with the 'real possibility' limb of the *Porter & Magill* test and, that by failing to consider this aspect of the test, the judge fell into error.

[24] In support of this argument he submitted that the evidence provided by the respondent was plainly insufficient to discharge the conclusion that predetermination had occurred, or that an informed observer would consider there was a real risk that it had occurred."

The Deterrence Issue

[25[The respondent's explanation of the reference to deterrence in paragraph 29 of the Open Statement was that it purports to explain the anticipated effects of the licence revocation, rather than suggesting that this should be the reason that the Applicant should be recalled.

[26] The respondent drew attention to the fact that there is there is no reference to deterrence in the submission provided to the Secretary of State. Nor was it advanced as a factor to consider as part of the decision to revoke the applicant's licence.

[27] The submission provided to the Secretary of State was a different document to the Open Statement which was provided to the appellant on the basis that it contained the reasons for his recall. The appellant objects that the respondent cannot on the one had say that the reasons for recall were provided in the Open Statement and on the other claim that they really appeared in a different document or that another document needed to be read in conjunction with the Open Statement in order to understand the true reasons for recall.

[28] Mr Fahy relies on *Hinton's Application* [2003] NIQB 9 which dealt with the grounds for a decision issued by the Parole Commissioners under different legislation and in which Kerr J said:

> "[29] … The Commissioners are obliged to give reasons for their decision under regulation 13(2) of the 2001 Rules. They gave those reasons in the letter of 14 May 2002. It appears to me that it is not now open to them to resile from the reasons that have been conveyed to the applicant and to invite the conclusion that those reasons were not those that underlay their decision. The likelihood that the explicit statement in the first sentence of the letter played some part in the decision simply cannot be dismissed."

[29] Colton J dealt with the deterrence issue as follows:

> "[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."

[30] The appellant challenges this conclusion on the basis that it is not supported by the evidence in the case.

The Respondent's Arguments

"Predetermination & Quality of Respondent's Evidence"

[31] In response to the appellant's argument that this recall decision was infected by predetermination the respondent states that in relation to the complaint of illegality raised in the Order 53 Statement, that this focused on <u>actual</u> predetermination by the SoS; depended upon the claim that the he did <u>in fact</u> make the recall decision he received the recommendation from the Parole Commissioners. The respondent asserts that the affidavits from Mr Larmour establish that this was not the case and therefore this complaint must fail.

[32] In relation to the appellant's complaint about a civil servant having sworn an affidavit rather than the Minister the respondent relies on what is characterises as the "common practice" in judicial review proceedings for civil servants to provide affidavits when Ministers' decisions are challenged and that there are obvious practical reasons why this should be so, such workload and availability.

[33] On the basis of the explanation provided the timing of the SoS's decision to revoke was in line with the order of events set out in Article 28(2)(a).

Predetermination by "effective surrender of discretion"

[34] In relation to 'predetermination by effective surrender of discretion' the respondent notes that this ground was raised by the appellant relying on *R v Redcar & Cleveland Borough Council* EWCA Civ 746. *Redcar* related to the pushing through of a planning application by the majority group on a local council in the run-up to local government elections. *Redcar* focused on the appearance of predetermination in the sense of a mind closed to the planning merits of the decision in question. The respondent submits that it is difficult to see how that decision can have practical application in the appellant's case. The facts of the instant case do not it is said give rise to predetermination of the *species* in respect of which the appellant seeks to rely now in his skeleton argument. Not only has it not been *pleaded* by him, but he has failed to establish the existence in fact of a closed or surrendered mind in the manner of the making of the revocation decision in this case.

The Test for Predetermination

The Real Possibility of Bias issue

[35] In relation to the application of the *Porter & Magill* test to the facts of the present case, the respondent draws attention to *Electronic Collar Manufacturers Association v Secretary of State for the Environment, Food, and Rural Affairs* [2019] EWHC 2813 (Admin) which states:

> "140. Whilst actual pre-determination (under Coughlan (1)) involves a finding on the subjective attitude or state of mind of the decision-maker, a decision may be impugned on the grounds of an appearance of pre-determination. The question here is for the Court to consider whether a fair-minded and informed observer would think that the evidence gives rise to real possibility or risk that the decision-maker had pre-determined the matter, in the sense of closing his mind to the merits of the issue to be decided. R (British Homeopathic Association) v NHS Commissioning Board [2018] EWHC 1359 (Admin) at para73. That risk falls to be assessed by the Court: Lewis v Redcar paras96-97. However, this is not easy to prove, where the role of the decision-maker in the statutory context is to put forward a proposal and/or his role is political: Spurrier para511 and Franklin v Minister of Town and Country Planning [1947] AC 87 at 104-105."

[36] Our attention was also drawn to *Re McQuillan* [2019] NICA 13 at [151]:

> "[…] From Porter v Magill and from these authorities it is clear that the test is a two stage test. First the observer must be informed by ascertaining all the relevant facts which have a bearing on the suggestion either one way or the other that the decision-maker has the appearance of bias. Second the observer must be fair-minded so that question becomes whether all those facts would lead to an objective conclusion that there was a real possibility that the decision-maker is biased."
> (Emphasis added)

[37] The respondent strongly challenged the appellant's assertion that Colton J applied the wrong test to the predetermination issue. They rely upon the para [57] of his judgment set out above which to demonstrate their contention that (i) the judge expressly held that as a matter of fact there was no predetermination of the issue by the SoS; (ii) that, having considered the explanation on behalf of the SOS and the entirety of the material before the court, he had concluded that a fair minded observer, in possession of the material to which he has referred, would not conclude that the SoS had predetermined the issue, or that his decision was infected by bias. There was therefore no basis for the appellant's to assertion that the judge applied the wrong test.

The Deterrence Issue

[38] On this issue the respondent again strongly challenged the claim that deterrence was taken into account as a reason for recalling the appellant to prison pointing that the reference to deterrence is contained in para 29 of the OPEN Statement under the heading "Anticipated Effects of the licence revocation." (Emphasis added).

[39] The respondent draws attention to para 6 of the Open Statement which sets out a summary of the necessity for revocation and recall for the protection of the public. This is explained as:

- His conduct since release on licence.
- Re-engagement with associates in the nIRA, establishing an operational role.
- Targeting of Security Forces.
- Possession of a military rocket launcher.

[40] Deterrence is not included as a basis for recall and asserts:

> "… What was included was more than sufficient basis for the Secretary of State to act to revoke in order to provide properly for public protection."

[41] On this basis he argues that the analysis of Colton J at para [62] of his judgment is sound and that there is no basis upon which this court could interfere with it.

Discussion

Context

[42] Before dealing with the grounds of appeal in detail it is important to remind ourselves of the nature of the exercise that is under review. This was a recall decision on whether or not a prisoner, already convicted and sentenced in relation to serious offences and who has been released on licence subject to conditions, ought to have his licence revoked and be recalled to prison.

[43] Recall decisions can be triggered by information provided by intelligence services which suggests that a licenced prisoner may pose a risk to the public. This is usually sensitive information which cannot be made public or scrutinised in the normal way because to do so might generate risks to intelligence personnel or otherwise be contrary to the public interest.

[44] Special "closed" procedures exist to scrutinise such intelligence information to the fullest degree possible compatible with protecting the public interest. Those procedures come into play when recall decisions are reviewed by the Parole Commissioners. Such review is provided for by Article 28(4) of the 2008 Order and it **must** happen in every case where a licence is revoked. Revocation of licence decisions therefore effectively have two stages and this appeal relates to the decision made at Stage 1 – the point where the prisoner is recalled.

[45] The principles governing the level and nature of scrutiny required at the recall stage have been considered several times by the Courts. In *Re Mullan's Application* [2008] NI 258 Kerr LCJ said the following:

> "[34] … 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. …" (Emphasis added)

[46] In *Re Hegarty* [2019] NICA 16 Stephens LJ stated that:

"[55] …

(h) The constituent elements of *"a high standard of decision making"* will be fact specific in any given case but it will be informed by a number of features some or all of which will be common to all or to the vast majority of cases. Those features are:

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. (Emphasis added)

…

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

…"

The information upon which the decision maker acts:

"v. … need not be imbued with the qualities of evidence admissible before a court. (Emphasis added)

v. 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. …"

It is in the context of these authorities that the appellant's arguments around the predetermination issue need to be evaluated.

The 'Predetermination issue'

[47] In considering the appellant's arguments on predetermination, Colton J acknowledged that there was a clear anomaly in the wording of para 3 of the OPEN statement of evidence which required an explanation. The respondent provided an explanation and the judge evaluated it.

[48] A very significant portion of the appellant's skeleton (paras 44-59 inclusive) is dedicated to criticising the quality of the affidavit evidence submitted in this case. Throughout his argument the appellant placed great emphasis on the fact that the explanation came from an official and not from the SoS in person. He challenges the quality of the explanation offered for the apparent anomaly in the wording of para 3 of the OPEN statement asserting that 'there is no evidence that he [the Secretary of State] has in fact exercised independent judgment' and also that the handling of the respondent's evidence was not rigorous enough and that Colton J accepted some material 'uncritically.'

[49] This court has reviewed Colton J's treatment of the respondent's evidence in the light of the scope and purpose of the recall decision which is under scrutiny. That decision is directed to the question whether there is "sufficient immediate cause to revoke the licence" [per Kerr LCJ in *Mullan*]. We also bear in mind that "expedition and urgency" are important factors influencing the level of scrutiny to be applied to recall decisions and the fact that the information relied upon "need not be imbued with the qualities of evidence admissible before a court [as per *Hegarty*].

[50] We consider that the appellant's submission that there "is no evidence" is plainly wrong. There is "evidence" appropriate to the nature of the decision making process in question and which is in line with the guidance about evidence given in *Hegarty*. The judge's handling of the materials must also be seen in the context of the nature of the process he is engaged in.

[51] We find nothing to criticise in the judge's handling of the respondent's evidence in this case. He treated these materials in a manner appropriate to the nature and purpose of the review exercise he was engaged in. We therefore dismiss the appellant's challenges based on the quality and handling of the evidence in this case.

[52] Having reviewed all the material before him the judge declared himself satisfied that there 'is nothing to suggest that a decision had [already] been made [by the Secretary of State] or that it had been predetermined.'

Did the Judge apply the wrong test?

[53] The appellant asserts that the judge's reasoning in para [57] (set out above) shows that the court applied the wrong test. He says submitting that the evidence provided by the respondent was plainly insufficient to dispel the conclusion that predetermination had occurred, or that an informed observer would consider there was a real risk that it had occurred.

[54] A proper reading of the decision makes it plain that this assertion is unsustainable. Not only did the judge find as a fact that there was no actual predetermination by the SoS but he explicitly went beyond that finding to consider "what the fair minded observer, in possession of the material to which I have

referred" would have concluded. He decided that such an observer "would not conclude" that the SoS had predetermined the issue or that the decision was infected by bias (emphasis added). This is because, as he said in para 54:

> "… 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] It is clear from this reasoning that the judge did consider whether a fair minded observer would have concluded there was a "real possibility" of predetermination. He found that once they had reviewed all the relevant material, they 'could not' have come to that conclusion. Once informed with all the relevant materials, the observer would decide that there had been no predetermination and that the SoS did not have a closed mind because there was "nothing to suggest" any other possibility (emphasis added).

[56] In this circumstance, it is clear that the judge excluded the "real possibility" of predetermination of bias. There was "nothing" to suggest such a possibility and all the evidence available to the observer pointed "to the contrary" (emphasis added). Clearly the trial judge concluded both that there was no actual predetermination and also that a fair minded observer could not have found that there was a real possibility of such error because there was "nothing" to support such an option and all the materials pointed in the opposite direction.

[57] For all these reasons we dismiss the appellant's argument in relation to predetermination. For the avoidance of doubt, this dismissal is intended to apply to **all** the manifestations of predetermination raised by the appellant whether in his Notice of Appeal, his skeleton argument or in oral argument.

The Deterrence Issue

[58] There is no doubt that "deterrence" is mentioned in the Open Statement that was presented to the appellant as containing the reasons for his recall to prison.

[59] The respondent's explanation for its presence there was that it was to set out and explain anticipated effects of the licence revocation, rather than suggesting that this should be the reason that the appellant should be recalled. The appellant contended that this did not explain why the SoS considered it should be included within the document which purported to set out his reasoning.

[60] This observation asks the question – "why was it drafted that way?" rather than asking, whether its appearance within the "reasons" documents affected the thinking of the SoS on the specific question he had to address.

[61] The respondent does not need to explain why it was drafted the way it was. He needs to explain whether or not the SoS took it into account.

[62] The judge reviewed all the material related to the pertinent question and he decided that it:

> "… points to the decision of the Secretary of State having been made on the basis of the appropriate legal test. …" [para [62]

[63] He distinguished this case on its facts from the case of *Hinton* in which parole commissioners at the review stage of the revocation process sought to claim their reasons were not contained in their original "reasons" document but in a different one.

[64] In the present case the reasons for the recall did appear in the Open Statement represented to the appellant as the document that contained the reasons for his recall. That statement also contained other material. Perhaps that material should not have been there; perhaps the document was poorly drafted- but that is not the question. The question is "did that material affect the outcome of the decision?"

[65] Having reviewed all the material the judge, in a passage with which we are in full agreement, states:

> "I am satisfied that the reference to deterrence played no material or substantive part in the decision making."

Conclusions

[66] For all these reasons set out above we dismiss this appeal.

[67] Having regard to the manner in which the issue of predetermination was introduced and evolved we take this opportunity to remind counsel of the importance of confining arguments to the grounds pleaded upon which leave has been granted. The Notice of Appeal may limit the issues in play but it cannot, without the leave of the court, enlarge the grounds. Straying beyond the permitted bounds is unfair to the other parties who may respond evidentially to one case only to find that the case pursued is significantly broader.