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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

NEIL HEGARTY

Appellant:

-and-

THE DEPARTMENT OF JUSTICE and

THE PAROLE COMMISSIONERS

FOR NORTHERN IRELAND

Respondents:

Neil Hegarty' Application for Judicial Review

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Before: Stephens LJ, Treacy LJ and Sir Richard McLaughlin

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STEPHENS LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal against the dismissal by McCloskey J of an application for judicial review brought by Neil Christopher Hegarty ("the appellant") a sentenced offender who seeks to impugn two decisions dated 6 December 2017, namely:

(a) a decision by a Single Commissioner of the Parole Commissioners of Northern Ireland ("the Commissioners") pursuant to Article 28(2)(a) of the Criminal Justice (NI) Order 2008 ("the 2008 Order") to make a "recommendation" that the appellant's licence should be revoked and he should be recalled to prison; and

(b) a subsequent decision by Steven Alison, an official of the Department of Justice ("the Department"), pursuant to Article 28(2)(a) of the 2008 Order revoking the appellant's licence and recalling him to prison.

In essence the appellant contends that both decisions were unlawful being based on an inaccurate and un-particularised assertion that the appellant had stated before leaving prison that he would not be consenting to the fitting of electronic monitoring equipment in respect of his curfew. It is submitted that this assertion could and should have led to further enquiries by the decision makers prior to making their respective decisions.

[2] The hearing before McCloskey J proceeded as a rolled up hearing of the leave and the substantive applications. As we have indicated McCloskey J dismissed the application for judicial review. In this court the appellant proceeded on the basis that in doing so the application for leave to apply for judicial review was refused. In the event it is not necessary to decide whether leave was refused or whether the application was dismissed on the merits as all the parties submitted and we agreed that if we were of the view that there was an arguable case with a reasonable prospect of success so that leave should have been granted then we should proceed to hear and determine the substantive application under Order 53 Rule 5(8) of the Rules of the Court of Judicature (Northern Ireland) 1980, see *Re Rice's Application* [1998] NI 265 at 268, *Re SOS's Application* [2003] NIJB 252 at 254 paragraph [5] and *Jordan's (Theresa) Application* [2018] NICA 34 at paragraph [3]. On that basis the hearing before us was a rolled up hearing.

[3] Mr Hutton appeared on behalf of the appellant. Mr Sayers appeared on behalf of the Commissioners for Northern Ireland. Mr McGleenan QC and Mr McAteer appeared on behalf of the Department.

The statutory provision

[4] The recall of offenders while on licence is governed by Article 28 of the 2008 Order. Article 28(2) in so far as it relates to the Department provides that it *may* revoke the appellant's licence and recall the appellant to prison if (a) recommended to do so by the Commissioners or (b) without such a recommendation if it appears to the Department that it is expedient in the public interest to recall the appellant before such a recommendation is practicable. It can be seen that it is the Department under Article 28(2) that makes the decision whether to revoke and recall not the Commissioners. Furthermore before the Department can make such a decision under Article 28(2)(a) there must be (i) a recommendation by the Commissioners and (ii) the Department must have exercised its own discretion in arriving at a decision. Of course in making that decision the licence revocation recommendation of the Commissioners is not binding on the Department. The recommendation is essentially advisory. The Department may disagree with the Commissioners'

assessment simply coming to a different conclusion or it may come to a different conclusion for instance on the basis of updated information not available to the Commissioner.

[5] In accordance with Article 28(3) upon the appellant's return to prison he shall be informed of the reasons for the recall and of the right to make representations in writing with respect to the recall. As can be seen the procedural obligation of fairness of informing the appellant of the reasons for revocation and recall only arises under the 2008 Order after the decision to revoke and recall has been made. There is no statutory requirement to inform the appellant as part of the Article 28(2)(a) procedure prior to recall. It can also be seen that as soon as the decision to revoke and recall has been made the appellant has the right to make representations in writing in respect of the recall and we consider that such a right includes a right to make representations immediately to both the Department and to the Commissioners. The appellant does not have to wait for a reference by the Department to the Commissioners nor does he have to wait for the timetabling of the reference by the Commissioners before making written representations to them.

[6] The effect of Article 28(4) - (6), in so far as relevant to this case, is that once the Department has made a decision to recall the appellant then it is required to make a reference to the Commissioners. Where on such a reference the Commissioners direct the appellant's immediate release on licence the Department shall give effect to the direction. However the Commissioners shall not give such a direction unless they are satisfied that it is no longer necessary for the protection of the public that the appellant should be confined. It can be seen that after a recall decision by the Department the ultimate decision is made by the Commissioners and the obligation on the Department is to comply with any direction of the Commissioners directing the release of the appellant on licence.

[7] It was submitted on behalf of the appellant that the impact of a revocation decision under Article 28(2)(a) was that there would be a period of imprisonment of "3 months at the very least" which was a consequence of the time that it would take to consider a reference under Article 28(4). The skeleton argument on behalf of the appellant stated that "the evidence in this case indicates that the initial" Article 28(2)(a) "revocation was envisaged as resulting in an interim and interlocutory period of imprisonment of approximately 3 months at very least." In that way the appellant contended that such a significant deprivation of liberty required a higher degree of procedural fairness when making a recommendation or a decision under Article 28(2)(a). In the event the reference of the appellant's recall to the Commissioners is dated 8 December 2017 and that reference concluded just over two months later on 19 February 2018. That approximate two month period has to be seen in the context that it was not until 6 February 2018 some two months after the appellant's recall on 6 December 2017 that the appellant's written submissions were made to the Commissioners despite the fact that on 6 December 2017 he was

informed of his right to make written representations. He could have and we consider that he should have made representations at a much earlier stage to the Commissioners.

[8] We do not accept that a decision under Article 28(2)(a) necessarily involves a period of imprisonment of either two or three months. Rule 25 of the Commissioners Rules (Northern Ireland) 2009 provides for the alteration of periods of time taking into account "both the desirability of reaching an early decision in the prisoner's case and the need to ensure fairness to the prisoner." Any party can request expedition under rule 25 at any stage and one of the grounds for doing so would be if it was contended that inaccurate information had been supplied to the Single Commissioner to support a recall request under Article 28(2)(a). It is clear that Commissioners can expedite certain procedures.

[9] However rule 25 applies to recalled life, indeterminate and extended custodial sentenced prisoners. The appellant was recalled in relation to a determinate custodial sentence. A reference to the Commissioners in relation to a determinate custodial sentence is not subject to rule 25 which on its face has no application to determinate custodial sentences. However the Commissioners' website whilst noting that at this time, the rules do not provide for the recall and review of determinate custodial sentenced prisoners goes on to state that as the Commissioners are entitled to regulate their own procedures under rule 3(1) of the Commissioners' Rules an interim policy is in place for dealing with these cases. That policy is that as far as is practicable, any reference under Articles 28(2)(a), 28(4) and 29(6) of the Criminal Justice (Northern Ireland) Order 2008 will be dealt with as if they were referred under the rules. We consider that this means that the principles in rule 25 will be applied by the Commissioners in dealing with their powers in relation to recall and review of a prisoner serving a Determinate Custodial Sentence.

[10] Steven Alison averred in his affidavit sworn on 12 January 2018 that he "was not aware that the (appellant's) legal representatives have requested an expedited review of the case." That averment was not challenged by the appellant and this court is also not aware of any application by or on behalf of the appellant pursuant to that practice or to rule 25 for expedition to the Commissioners. If there had been and if it had been acceded to then the information which had been provided to the single Commissioner leading to the recommendation could have been challenged at an earlier and more appropriate stage. Furthermore at an earlier and more appropriate stage the appellant could have unequivocally stated that he was prepared to co-operate with electronic monitoring. At the very least the judicial review proceedings distracted from addressing these issues promptly and appropriately before the Commissioners. It was not argued before us that judicial review was inappropriate given this alternative remedy and so we refrain from considering that point in this appeal.

The sequence in relation to these proceedings and in relation to the further decision of the Commissioner

[11] On 6 December 2017 the impugned decisions were made. On 15 December 2017 judicial review proceedings were commenced. On 20 December 2017 McCloskey J issued a case management order which, amongst other matters, directed a "rolled up" hearing on 8 January 2018. That date was altered on the application of the appellant to convenience his counsel. The rescheduled hearing date was 22 January 2018. A further affidavit having been filed on behalf of the appellant together with a draft amended Order 53 statement that hearing date had to be vacated. The hearing took place on 9 February 2018 and McCloskey J gave judgment on 13 February 2018 dismissing the judicial review application and ordering the appellant to pay the costs not be enforced without further order of the court.

[12] As McCloskey J observed the reason for maximum expedition was that the case involved the liberty of the citizen. We agree that expedition was required and we support the judge in his efforts to obtain an expedited hearing and the commendable speed with which judgment was given. We also confirm that there is an obligation on the parties to assist the judge in achieving expedition.

[13] The judicial review proceedings were not the only method by which the appellant's liberty could be achieved as once the Department had made a decision under Article 28(2)(a) to recall the appellant to prison it was obliged to make a reference to the Commissioners under Article 28(4). That reference was made on 8 December 2017 which meant that there was a reference to the Commissioners before the judicial review proceedings were commenced on 15 December 2017. On 13 December 2017 the Commissioner issued a timetable for the review of the case with the Single Commissioner due to issue a direction to the Department by 7 March 2018. In relation to the reference to the Commissioners and some two months after that reference had commenced the appellant's solicitors made written representations on 6 February 2018 in which, amongst other matters, they stated that

> "We are assured by Mr Hegarty that he, like his co-accused (sic) Mr Ceulemans and Harkin, is "consenting" to the fitting of a tagging device even if he subjectively does not consider that the fitting of the devices is necessary to effect any element of public protection."

Previously the appellant had questioned the need for the tagging condition. He had not asserted that he was not going to co-operate with it. However he had not explicitly made clear that he was going to comply with it. This was the first occasion upon which the appellant unequivocally stated that he consented to the fitting of the tagging device. In view of the fact that on 5 February 2018 he stated that he was now

going to comply with all of the licence conditions there was then a powerful case before the Commissioners that he should be released on licence.

[14] The Commissioner issued her decision on 19 February 2018 which was six days after McCloskey J delivered judgment on 13 February 2018. In her decision the Commissioner directed that the appellant should be released and in accordance with Article 28 (5) the Northern Ireland Prison Service ("NIPS"), which is under the control of the Department, released the appellant.

Salem

[15] Mr Sayers in his skeleton argument submitted that given that the appellant had been released and applying the principles in *R v Secretary of State for the Home Department, ex parte Salem* [1999] UKHL 8, there was no good reason in the public interest for the appeal to be determined. He submitted that any issue as to the lawfulness of the appellant's detention could or should be determined by way of a conventional claim for damages.

[16] This submission was not made on behalf of the Department.

[17] In response Mr Hutton provided detailed written submissions in the light of which Mr Sayer withdrew the submission that the appeal involved an academic question, the answer to which could not affect the appellant in any way and he recognised that the appellant had an interest in the outcome of the appeal. In light of that concession we need only mention one matter which indicates that the proceedings were not 'academic.' An order for costs was made against the appellant by McCloskey J which order could be enforced at some future date and which order, the appellant contends, should never have been made, see *R (Bushell) v Newcastle Upon Tyne Licensing Justices* [2006] 2 All ER 161, at paragraph [5].

[18] We determined that we should proceed to hear the appeal.

Factual background

[19] The appellant, now 53 (DOB: 11.1.1965) has a number of criminal convictions. On 20 December 1988 when he was 23 he was convicted of membership of a proscribed organisation together with three counts of robbery, one count of attempted robbery and two counts of conspiracy to rob. The effective sentence imposed was one of nine years' imprisonment. The appellant's convictions thereafter were for minor offences until on 15 May 2014 he was convicted of one count of possessing explosives with intent to endanger life or cause serious injury to property and another count of possession of articles for use in terrorism. The effective sentence imposed was a determinate custodial sentence of 10 years (five years custody; five years on licence).

[20] The last two convictions arose out of events which occurred on Thursday 6 December 2012 on which date at approximately 8:38pm police stopped a black

Renault Megane on Westway, Creggan Estate, Londonderry. The car was searched by police and an improvised explosive device ("IED") was found in a holdall on the floor behind the driver's seat. The appellant was one of three male occupants of the car being the rear nearside passenger. The other two occupants were Mr Ceulemans and Mr Harkin. All three were dressed in dark clothing and two of them including the appellant were found to be wearing two pairs of gloves, one over the top of the other. A "walkie talkie" radio communication device and torch were also found in the car.

[21] On examination the IED was classified as an Explosively Formed Projectile ("EFP") consisting of a metal cylinder approximately 10" x 3" wrapped in black PVC tape. The top of the device had a copper dome which appeared to be held in place by expanding foam. The device contained approximately 200gms of military grade explosive semtex and approximately 1gm of a white powder. A commercial detonator was situated internally within the device and moulded into the semtex which was in good condition. A clear sheath command wire ran from the detonator and out of the base of the device to a power unit which had two switches marked A and F, assessed to represent "Arm" and "Fire." There was approximately 30-40 metres of command wire with a significant portion of the wire painted black in colour. An EFP explosive device is designed to penetrate armour so that on impact this projectile was capable of penetrating a considerable thickness of steel armour plate.

[22] All three men were arrested at the scene and detained in custody. All were subsequently prosecuted and convicted and the sentences imposed on each of them were the same, namely determinate custodial sentences of 10 years (five years custody; five years on licence). This meant that the custodial element of the sentence was to expire on 5 December 2017 so that all three were to be released on licence on that date. All three would remain on licence until 6 December 2022 unless in the meantime they were recalled to prison under Article 28 of the 2008 Order.

[23] In anticipation of their release at the end of the custodial period licence conditions were being considered by Head of Licensing within the Northern Ireland Prison Service. On 1 December 2017 Steven Alison, Head of the Offender Recall Unit ("ORU") of the Department attended a meeting arranged by the Head of Licencing within the NIPS to discuss potential additional licence conditions to be included in the Article 17 licence to issue to the appellant and to the other two offenders. NIPS is solely responsible for prescribing additional licence conditions but it is not unusual for the Head of Licencing or a member of his team to ask ORU advice on proposed licence conditions. It was agreed that a curfew and electronic monitoring would be necessary and proportionate additional licence conditions in relation to all three offenders. The appellant and his co-offenders were to provide an address prior to release.

[24] Steven Alison, as head of ORU, was not only involved in the discussions about the licence conditions but, as will become apparent, was in further communication with NIPS and also with G4S who were responsible for installing the electronic tagging equipment. Also he was the official in the Department who made the decision on 6 December 2017 to revoke the appellant's licence and to recall him to prison. Prior to considering the replying affidavits in this case the appellant was not aware that Steven Alison had been involved except that the appellant knew that he had signed the Revocation of Licence notice dated 6 December 2017 and signed the letter dated 6 December 2017 to the appellant giving reasons for the decision. We do not consider that it was necessary for him to have been aware of Steven Alison's earlier involvement prior to these proceedings.

[25] On the afternoon of 1 December 2017 Steven Alison was forwarded an email from NIPS Licencing Unit advising that the appellant and his two co-offenders had refused to provide an address. It was initially considered by Steven Alison that the appellant had been requested to provide an address, had initially refused to do so but had then complied on 5 December 2017. However during the course of these proceedings it was accepted that the appellant had not been asked to provide an address on 1 December 2017 but rather that the request was made on 4 December 2017 and the appellant provided his address on 5 December 2017. In the event on enquiry it has transpired that there was no attempt by the appellant to disrupt his release on licence by failing to provide an address.

[26] At 10.16 am on 5 December 2017 Steven Alison was copied into an email from the Head of Licencing with NIPS to Governors within HMP Maghaberry requesting the Senior Officer in Reception to take each of the three offenders through the licence conditions and point out that the curfew was in effect from date of release so they had to be at their approved address no later than 10.30 pm.

[27] On receipt of that e mail Steven Alison then contacted G4S to advise that the appellant had provided an address and that NIPS would issue the instruction to G4S to install the equipment that evening. He advised G4S to liaise with the PSNI and he asked the G4S director to keep him updated on the installation of the equipment that evening. It can be seen that whatever may have been Steven Alison's understanding at an earlier stage he was aware on 5 December 22017 that the appellant had co-operated by providing an address.

[28] On 5 December 2017 prior to his release on that date the appellant was provided by Prison Officers with a copy of his licence which he signed affirming that its requirements had been explained to him. The licence contained a number of conditions including a requirement to reside at an approved address and to be subject to a curfew and electronic monitoring at that address daily between 22.30 hours and 06.30 hours. The electronic monitoring condition and the residence condition were imposed as an integral aspect of the management plan for the

appellant and his co-offenders. The appellant was surprised by the condition subjecting him to a curfew and that this curfew was to be monitored by a 'tagging device'. He had a brief discussion about these conditions with the two Prison Officers who were staffing the reception desk and administering the release. At one stage it was believed that during this meeting the appellant stated that he would not be consenting to these conditions and not cooperating with them. The appellant asserts and it is now accepted that this did not occur.

[29] The appellant states that he was given little detail by the officers about the process of 'tagging' and was not told to expect anyone at his home to fit the tag that particular night. However the appellant was given a booklet which gave details about the process for fitting the electronic tag at his curfew address. He asserts that he did not read it. The booklet is branded with the G4S logo and is headed "Your Curfew. The first 24 hours." It describes "What is an electronically monitored curfew" and "What equipment is used." Under the heading "What happens next?" it states that G4S will visit the appellant at home to fit the tag and set up the box. It goes on to state that the visit will be on the first day of the appellant's curfew, or the day after and that G4S will come to the curfew address during the curfew hours and anytime up to midnight. The booklet then repeats that G4S will visit the appellant to install the equipment on the day his curfew starts or the day after. It also states that the appellant must be in at the start of his curfew and that the appellant's curfew starts even if no one has yet fitted the tag. The booklet also provides 24 hours a day free phone contact details for G4S so that they can be contacted if the appellant had any questions. We consider that even if the appellant did not read the booklet he knew that he was to be subject to a curfew at his home, that the curfew applied on the night of 5-6 December 2017, that he required to be at his home after 22.30 hours, that it was likely that an electronic tag was to be fitted at his home that night given that it was a condition of his licence and that individuals would arrive at his home to fit the electronic tag. In addition we consider that the appellant had ample opportunity to read the simple booklet that was provided to him and that no acceptable explanation has been provided as to why he did not read it.

[30] Following the appellant's release on licence information about the attitude of the appellant to the licence conditions had been given by NIPS to Steven Alison by an email sent at 12.14 on 5 December 2017 which stated

> "Just to confirm … the three individuals were presented with their licences and have now left Maghaberry.
>
> Hegarty challenged the tagging condition and asked when it was added. He was advised to make any representations through his solicitor.
>
> Neither Ceulemans nor Harkin made any comment.

> All three signed their licences confirming that the licences had been given to them and their requirements had been explained."

The email stated that the appellant challenged the tagging condition. It did not state that he was not going to comply with it. This email is relevant to the judge's decision to accept the evidence of Steven Alison that he gave no weight to the appellant's reported attitude whilst in prison to the tagging licence condition

[31] The attempts to fit an electronic tag at the appellant's address should be seen in the context of the security position. G4S have been faced with dissident republican threats in relation to their involvement in fitting electronic monitoring devices. In June 2014 shots were fired into the vehicle of one of the electronic monitoring officers during an installation and a verified threat issued to all G4S staff involved in electronic monitoring indicating that they were now deemed "legitimate targets." In August 2014 this was followed up with a threat to G4S staff nationally after a viable explosive device was intercepted at the Mallusk Royal Mail Sorting Office with a warning that other devices were in the system, as yet undelivered, addressed to Northern Ireland and English G4S office addresses. It is clear that there is a real and serious threat to G4S employees including those who have the responsibility of installing the electronic tagging devices. As of September 2017 the PSNI advised the Department that the threat level assessment was "*substantial*", which denotes a "*strong possibility*" of attack. The appellant and the two other offenders were the first persons considered to have been involved in terrorist related offending released on licence subsequent to this threat level assessment so that this was the first occasion on which tagging devices were to be fitted to those who had been involved in terrorism subsequent to this threat level assessment.

[32] In order to enhance the personal safety and security of its employees and in order to promote the privacy of the individual subject to electronic tagging G4S does not make advance arrangements with the person concerned for the purpose of installing the equipment. Nor is there any "G4S" branding on the vehicles or clothing of the employees. An additional security measure is that G4S have the facility of contacting the ORU of the Department or the police at any time.

[33] On the evening of 5 December 2017 two G4S staff first attended at the homes of the appellant's two co-offenders successfully installing the electronic monitoring equipment. They then attended at the appellant's address for that purpose. They gained the attention of a person within, who they considered matched the appellant's description, but were not admitted to the property.

[34] At 23.17 hours on 5 December 2017, G4S informed Steven Alison by text that while the installation had been successful as regards two of the three persons released:

> "One refused, he was having some sort of house party. Team assessing situation but expect we will have to stand down and breach him."

This was supplemented by a further communication at 10.02 hours on 6 December 2017 that G4S staff upon attending the appellant's place of residence encountered:

> "A very challenging situation and obvious and deliberate refusal to allow them to engage and complete the task."

[35] On 6 December 2017, the Police Service of Northern Ireland submitted a Recall Report to the Commissioners. The report not only identified the name of the police officer who had prepared it but also provide his telephone contact details. Appended to the report was a document described as an Outline of Case, which contained an account of the offences which had been committed by the appellant; a summary of the supporting forensic evidence; particulars of the charges to which the appellant pleaded guilty; and a description of his criminal record. In the report the police express the view that the appellant's offending was based on his affiliation with violent dissident Republican terrorism and his espousal of "the use of violence for a political, religious, ideological or racial cause". The report further expressed the view that the appellant "… presents a significant risk to public safety."

[36] The police report contained an account of events at the appellant's home address at around 23.20 hours on 05 December 2017. The key passage is in the following terms:

> "At approximately 23:20 hours on Tuesday 5th December 2017 two female G45 staff attended the specified address for Mr Hegarty in order to install home monitoring equipment and to place an electronic tag on Mr Hegarty. On arrival they noted the house was a mid-terrace property which had a white PVC door. The lights were on in the ground floor of the property. The blinds were open in the living room at the front of the property and they noted there were a number of males in the living room. They were all sitting down apart from one male who was standing up facing the window, looking out towards the street. G4S staff then knocked on the front door and no one answered. They then rang the doorbell once and still no one answered. G4S staff then proceeded to knock on the living room window where the male was standing, the male then mimicked the staff member knocking with his hand.

> Staff then gestured to him to come to front door which he did not, the male then went on to ignore staff and engaged in chat with the other males in the living room. G4S staff then decided to leave the property. They would estimate they were at the property a couple of minutes in total. The male in question is described as in his late forties or early fifties with a shaved head, he was of slim to medium build and he was clean shaven. According to police the description provided does match that of Mr Hegarty leaving prison yesterday"

The report further notes that G4S Management "…has raised serious concerns about the safety of their staff should they be required to attend the address a second time."

[37] The report then considers the options of (a) abandoning the electronic licence monitoring condition, (b) writing to the appellant and (c) a further attempt by G4S to install the necessary equipment. Discounting each of these options, the author states:

> "The fact that *Mr Hegarty was aware staff would be attending last night to fit the equipment* and refused them entry shows he took a conscious decision not to co-operate. When we consider his *wilful disengagement with prison authorities during the licence process and his affirmation before leaving prison that he would not be consenting to the fitting of such equipment* we have good reason to believe that a second attempt would be met with a similar response." (emphasis added)

It can be seen that the first part of the passage which we have emphasised was not literally accurate. The appellant had been told that G4S would be attending to install the equipment on the day his curfew starts *or the day after*. However we consider that he would have been aware that it was likely that they would be attending on the day his curfew started. It can be seen that the second part of the passage which we have emphasised was incorrect in that there had been no wilful disengagement with prison authorities during the licence process. The appellant had not affirmed before leaving prison that he would not be consenting to the fitting of such equipment.

[38] The report stated that none of the alternative options which we have set out in paragraph [37] was reasonable or viable concluding that the revocation of the appellant's licence was the only appropriate course.

[39] The police report was sent to the Commissioners and was considered by a single Commissioner whose task was to decide whether to make a recommendation.

This task was accomplished within less than three hours. The single Commissioner compiled a written decision which begins:

> "… I have relied on the documentary evidence submitted to me on the assumption that the information therein is accurate."

In fact the information provided was not accurate in relation to the attitude displayed by the appellant in prison towards the electronic tag licence condition. Under the heading "Release on Licence" the Commissioner states:

> "The PSNI Outline of Case states that (the appellant) displayed 'wilful disengagement with prison authorities during the licence process' and affirmed before leaving prison that he would not be consenting to the fitting of electronic monitoring equipment."

Again there was no wilful disengagement with the prison authorities during the licence process and the appellant had not affirmed before leaving prison that he would not be consenting to the fitting of electronic monitoring equipment.

[40] The Commissioner then formulates the following test:

> "… whether there is evidence that proves on the balance of probabilities a fact or facts indicating that the risk of the offender causing harm to the public has increased significantly, i.e. more than minimally since the date of release on licence and that this risk cannot be safely managed in the community."

The Commissioner was "satisfied" that this test had been met. This was expressed in the following terms:

> "There is information in the papers before me which I am satisfied establishes, on the balance of probabilities, that Mr Hegarty is not abiding by the measures put in place to manage his risk. I am satisfied that there is evidence that Mr Hegarty has breached the conditions of his licence, namely by refusing to consent to the fitting of his electronic tag and monitoring equipment *both immediately before and after his release* and by behaving in a manner which undermines the purposes of his release on licence, which are to protect the public, prevent re-offending and the rehabilitation of the offender. I consider that his attitude and behaviour demonstrate that his risk

> of harm has increased since his release ……. I also take into consideration the serious nature of his index offence and his criminal record." (emphasis added)

It is apparent that the part of the passage to which we have added emphasis was incorrect in that the appellant had not refused to consent to the fitting of his electronic tag and monitoring equipment immediately before his release.

[41] The Commissioner then considered the issue as to whether the risk posed by the appellant "… can be safely managed in the community." The text continues:

> "Given that he has removed himself from the requirements of his licence within one day of his release, I do not consider that Mr Hegarty's increased risk would be manageable even if licence conditions were to be augmented and strengthened."

The Single Commissioner recommended to the Department the revocation of the appellant's licence.

[42] On 6 December 2017 Steven Alison on behalf of the Department acceded to this recommendation deciding to revoke the appellant's licence and recall him to prison. The process leading up to that decision was set out by Steven Alison in these proceedings. The test which is applied by the Department acting under Article 28(2)(a) involved posing two questions and answering both affirmatively:

(i) Has the risk of harm that the offender poses to the public increased more than minimally since his release from custody?

(ii) Can the increased risk be safely managed within the community?

Steven Alison stated that he applied these tests explaining that the electronic monitoring requirement was "an integral component within the risk management plan for the (appellant)" and he:

> "…was satisfied the (appellant) would have been fully aware he was subject to electronic monitoring as a condition of his licence."

Steven Alison further took into account "the reported refusal by the (appellant) to permit G4S to install the monitoring equipment …." His assessment was that the risk of harm had increased. In relation to the appellant's purported attitude in prison to the tagging condition he stated:

> "I gave no weight to the (appellant's) reported attitude to the additional licence condition ….

> I considered the (appellant) was entitled to query the relevance or otherwise of the additional licence conditions and could make the relevant representations on this issue …"

Steven Alison further stated that:

> "I considered his actions on the evening of 5 December 2017 displayed a wilful disregard of this licence condition at the earliest opportunity on his release from custody ….. (and) ….. the options to manage the increased risk which were considered and discounted on the basis that further attempts to install the equipment would place G4S and police staff at risk."

Steven Alison determined to accede to the Commissioner's recommendation.

[43] The Department's decision was immediately notified to the police, giving rise to the appellant's arrest and return to custody.

[44] On the appellant's return to prison on 6 December 2017 he was provided with the PSNI recall request report, the recommendation of the Parole Commissioner, the Department's Revocation Notice, a letter from the Department entitled "Revocation of your licence" setting out the reasons for revocation and recall and a Department document entitled "Guidance on Recall." So on 6 December 2017 the appellant was able to see all the documents including those which contained inaccurate information about his attitude in prison prior to release as to compliance with the tagging licence condition.

The grounds of challenge

[45] Mr Hutton with his usual high standard of professionalism and thoroughness submitted that the decision of the Single Commissioner was unlawful on the basis that (a) there was an uncritical assumption that all the facts in the police report were correct and (b) there was an obvious need to make simple enquiries of the officer compiling the police report given the vague and un-particularised assertion as to what the appellant had said in prison as to electronic monitoring of his curfew. In summary Mr Hutton also submitted that the decision of the Department was unlawful in that the pre-condition of a lawful decision of the Commissioners was absent and in any event it also proceeded on the basis of the vague and un-particularised assertion as to what the appellant had said in prison.

The judgment of McCloskey J

[46] The judge considered that both the Single Commissioner and the Departmental decision maker were applying tests which "entailed the formation of

an evaluative judgment on the part of persons with presumptive relevant credentials and expertise." He considered that this inclines towards a high threshold for judicial intervention in an irrationality based challenge. However the judge accepted as a matter of fact that whilst the reference under Article 28(4) was being considered the effect of a decision under Article 28(2)(a) was imprisonment for a minimum period of three months. On that basis he considered that the intensity of the Court's review lies towards the upper end of the notional scale. He considered that this was not in disharmony with the approach adopted in *Re Mullan's Application* [2007] NICA 47 at paragraphs [33] – [34] which was a binding authority and was consistent with the approach expressed by Laws LJ in *R v Department for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 at 1130B, where reasonableness was described as "a spectrum, not a single point" and that "the *Wednesbury* principle itself constitutes a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake." The judge referred to *Sheffield City Council v Smart* [2002] EWCA Civ 4, at paragraph [42] where it was stated that "The intensity of judicial review varies with the subject matter." The judge at paragraph [28] resolved the issue as to where this case came as towards the upper end of the notional scale despite his identification of the countervailing factor. However the judge went on at paragraph [37] to state that the discretion which the Department exercises in making such decisions is a broad one and at paragraph [44] he referred to an "elevated threshold for intervention."

[47] The judge referred to the *Tameside* principle derived from *Secretary of State for Education and Science v Tameside MBC* [1977] AC 104 which involves a legal duty on the decision maker to inform himself properly and adequately before he can move to a position of making the decision. The judge considered that this principle must also have purchase in the context of executive decisions entailing deprivation of liberty though he went on to state that "it may be said that the *Tameside* principle has been restrictedly construed and applied in practice."

[48] The judge defined the restrictions to the *Tameside* principle by reference to *In Re Findlay* [1985] AC 318, 333 – 354 and *Creednz v Governor General* [1981] 1 NZLR 172, relying upon the analysis of those cases conducted by Laws LJ In *R (Khatun) v Newham LBC* [2004] EWCA Civ 55 in which he stated at paragraph [35] that:

> "In my judgment the *CREEDNZ Inc* case (via the decision in *In re Findlay*) does not only support the proposition that where a statute conferring discretionary power provides no lexicon of the matters to be treated as relevant by the decision-maker, then it is for the decision-maker and not the court to conclude what is relevant subject only to *Wednesbury* review. By extension it gives authority also for a different but closely related proposition,

> namely that *it is for the decision-maker and not the court, subject again to* Wednesbury *review, to decide upon the manner and intensity of inquiry to be undertaken into any relevant factor accepted or demonstrated as such.*" (our emphasis added).

The judge having referred to *R (Plantagenet Alliance) v Secretary of State for Justice* [2014] EWHC 1662 (Admin) at paragraph [100] held that there was

> "a relatively high cross bar for litigants who seek to establish that a decision involving the exercise of public law powers is vitiated by a failure on the part of the decision making agency to undertake certain enquiries."

The judge expressed his view that there was clear scope for further examination of this restrictive approach at a higher judicial level. He also stated that he would not "venture further … because the decision which (he proposed) to reach (did) not entail the application of the *Tameside* principle.

[49] The judge accepted that every licence revocation decision pursues the purpose of protecting the public and that the discretion which the Department exercises in making such decisions is a broad one an element of which is that the decision maker's assessment of what facts and factors are relevant and irrelevant is open to challenge only on an irrationality basis and the weight he or she gives to such factors will ordinarily be a matter for the judgment of the decision maker. The judge referred to the context of the dominant consideration being the protection of the public as importing the requirement of expedition and in some cases urgency. Those factors serving to calibrate <u>how</u> established public law principles, especially the duty of enquiry fall to be applied in any given case.

[50] The judge relied on the decision of this court in *Mullan* [2007] NICA 47 adopting the passage at paragraph [32] that "…. the decision to recommend a recall should not be regarded as one that requires the deployment of the full adjudicative panoply."

[51] The judge accepted that the information upon which the single Commissioner and the Department acts "need not be imbued with the qualities of evidence admissible before a court" and relying on *Hirst v Secretary of State for the Home Department and Parole Board* [2006] EWCA Civ 945 at paragraph [10] that there was an "assumption" that those compiling a report or application to the relevant decision maker "will act in good faith." Assumptions can be displaced by proof of bad faith but in addition he considered that the report or application to the decision maker could be called into question on the basis for instance of material omission and material error of fact.

[52] The judge relying on *R (Gulliver) v Parole Board* [2008] 1 WLR 1116 at paragraph [5] adopted the approach that the legality of a recall decision did not depend upon proof that the prisoner had breached a licence condition, rather the barometer was whether the decision maker "… could reasonably think that the claimant was in breach of his licence conditions." The judge also referred to *R (West) v Parole Board* [2005] 1 WLR 350 at paragraph [25] in which it was stated that it was sufficient, from the decision maker's perspective, that the prisoner "appears not to comply with the conditions to which his release was subject …."

[53] The judge held that:

a) The assertion in the police report that the appellant had wilfully disengaged with prison authorities during the licence process and had affirmed before leaving prison that he would not be consenting to the fitting of such equipment was inaccurate.

b) The single Commissioner assumed that this information was accurate.

c) The inaccurate information was both "opaque and un-particularised, crying out for explanation and illumination."

d) The single Commissioner ought to have but failed to call the mobile telephone number of the officer who had compiled the report to "probe further."

e) The police should take scrupulous care in the compilation of every report to a single Commissioner which invites a licence recall recommendation.

f) The single Commissioner in arriving at the recall recommendation relied on both the inaccurate information and the events at the appellant's home on the 5 December 2017.

[54] The judge then considered the decision of the Department. He accepted as factually accurate Steven Alison's assertion that he took no account of the inaccurate information holding (on the basis of the other information available to him) that his recall determination "plainly lay within the range of reasonable decisions available to him." On that basis the judge dismissed the application for judicial review.

Legal principles

[55] The leading and binding authority in this jurisdiction is *In re Mullan* [2007] NICA 47. We have also been referred to a number of other authorities including *Re Martin O'Neill's Application* [2017] NIQB 37 at paragraphs [21] and [23], *X Council V B (Emergency Protection Orders)* [2004] EWHC 2015 (Fam) - [2005] 1 FLR 341 at paragraph [57](vi), *KY v DD (Injunctions)* [2011] EWHC 1277 (Fam) - [2012] 2 FLR 200 at paragraph [16](1) and *R (Plantagenet Alliance) v Secretary of State for Justice* [2014] EWHC 1662 at para [100]. Applying those authorities and the provisions of the 2008 Order we consider that

(a) The decision to recall is for the Department who under Article 28(2)(a) is required to obtain assistance from the Commissioners in arriving at its decision in the form of a recommendation.

(b) Absent a recommendation from the Commissioners the Department cannot recall under Article 28(2)(a).

(c) The remedy of quashing a recommendation of the Commissioners is discretionary so that the recommendation is lawful until it has been quashed.

(d) A decision of the Commissioners whether to recommend a recall and a decision of the Department to recall should not be regarded as decisions that require the deployment of the full adjudicative panoply.

(e) The decision by the Commissioners to recommend a recall and the decision of the Department to recall under Article 28(2)(a) is quite different from the decision subsequently taken by the Commissioners on review under Article 28(4).

> "The latter involves a careful sifting of the evidence, with relevant material being provided to the prisoner so that informed representations can be made about it. … By contrast, 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." (see *Mullan* at paragraph [34])

(f) Both the decision of the Commissioners to recommend a recall and the decision of the Department to recall "should naturally aspire to *a high standard of decision making*" though "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." (our emphasis added to paragraph [34] of *Mullan*).

(g) The high standard of decision making applies to both the Commissioners and the Department.

(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.

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.

[56] We consider that the intensity of review in relation to decisions under Article 28(2)(a) in relation to an offender who is after all still subject to a determinate custodial sentence of imprisonment, even though on licence, lies at the lower end of the scale given the public interests involved and the nature of the legislative scheme. In considering where this case fell on the scale of intensity of review the judge relied not only on the appellant's loss of liberty but also on a factual determination as to the duration of that loss finding that a decision under Article 28(2)(a) necessarily involves a loss of liberty for three months. The loss of liberty in this case was some two months despite the lack of any representations to the Commissioners at an early and appropriate stage. Furthermore the judge was not referred to the power of the Commissioners to shorten periods of time and if he had been he would not have accepted the factual assertion as to the duration of the loss of liberty. The intensity of review under Article 28(2)(a) is in contrast to the intensity of review of decisions under Article 28(4) which is at the higher end of the scale.

Discussion

[57] The Single Commissioner ought not to have proceeded on the basis of an assumption that the information within the police report was accurate. However the information which transpired to be inaccurate was restricted to what had taken place in the prison. We consider that the information as to what occurred at the appellant's home would necessarily have led the Single Commissioner to make the same decision.

[58] There is no evidence that the Single Commissioner considered making any enquiries of the police officer. She ought to have considered doing so given the vagueness of what was being alleged as to the appellant's attitude in prison and the simplicity of the enquiry. We are prepared to proceed on the basis that she may well have made an enquiry. However if she had done so and if she had discovered that the information as to what occurred in prison was inaccurate we consider that given

the appellant was a convicted terrorist, given the facts set out at paragraph [31] and what occurred at the appellant's home set out at paragraph [36] her decision would necessarily have been the same. On that basis the decision of the Single Commissioner was not unlawful.

[59] The judge found as a fact that the Department did not take into account the inaccurate information given the close contact between Steven Alison of the Department and NIPS. On the basis of that factual finding there was no need for any further enquiries to be made by the Department. The information available to the Department as to what had taken place at the appellant's home was more than sufficient to justify his recall.

Conclusion

[60] We allow the appeal in so far as we grant leave to apply for judicial review but dismiss the appeal on the merits.

[61] We will hear counsel on the issue of costs.