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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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2016 No. 99835

IN THE MATTER OF AN APPLICATION BY STEPHEN HILLAND FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE DEPARTMENT OF JUSTICE DATED 21 OCTOBER 2016

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COLTON J

[1] I am obliged to counsel who appeared in this matter for their helpful written and oral submissions. Mr Hugh Southey QC led Mr David McKeown for the applicant. Dr Tony McGleenan QC led Philip McAteer for the respondent. Mr Donal Sayers QC appeared for the notice party, the Parole Commissioners for Northern Ireland ("PCNI").

Introduction

[2] The applicant, Stephen Hilland, was a prisoner serving a Determinate Custodial Sentence ("DCS") who challenged the decision of the Department of Justice dated 21 October 2016 that he be recalled to prison under Article 28 of the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order"). He contends that the policy of the Department of Justice which underpinned the decision is unlawful and discriminatory in the enjoyment of his right to liberty protected by Articles 5 and 14 of the European Convention on Human Rights.

[3] The factual background to the issue is somewhat limited. It relates to matters of a significant vintage and the applicant has long since been released from prison. Nonetheless, an important issue of law arises in this case which has implications for future similar decisions. On that basis the court has sought to determine the issue raised.

[4] The application was originally listed for a substantive hearing on 10 November 2017 but had been adjourned pending a decision by the Supreme

Court in the case of **R (On the Application of Stott) v Secretary of State for Justice** which considered many of the issues raised in this application.

[5] Judgment was delivered by the Supreme Court on 28 November 2018 – **R (Stott) v Secretary of State** [2018] 3 WLR 1831. The expectation that **Stott** might definitively decide the issues raised in this applicant proved unfounded. No clear path emerges from the decision in **Stott**. It undoubtedly informs the approach that the court should take to the issues raised but does not provide any definitive answer.

Factual Background

[6] The applicant received two consecutive 12 month prison sentences, one for driving offences, the other for assault, contrary to Section 47 of the Offences against the Person Act 1861. He was released on licence on 4 February 2016.

[7] On 7 October 2016 the Offender Recall Unit of the Department of Justice ("the ORU") decided to revoke the applicant's licence. Revocation had been recommended by the PCNI. The recommendation was triggered by the applicant's arrest in respect of a number of allegations including driving whilst disqualified, driving with no insurance, aggravated vehicle taking and driving whilst unfit. The revocation was on the basis that "the risk of harm to the public has increased significantly". The letter from ORU relied on that decision and stated that it had been decided the applicant's licence should be revoked to protect the public.

[8] The applicant was returned to custody on 10 October 2016.

[9] On 12 October 2016 the applicant's case was referred to PCNI.

[10] The initial revocation decision of 7 October 2016 was quashed on 21 October 2016 by Maguire J following an application by the Department of Justice ("the Department") (to which the applicant did not consent). However, the PCNI recall recommendation dated 7 October 2016 remained extant. As a consequence the ORU made a further decision to recall on 21 October 2016. This was on the basis that:

> *"[The applicant] was involved in behaviour that significantly (i.e. more than minimally) increased the risk of harm you pose to the public."*

[11] The fresh revocation decision was again referred to PCNI. It was upheld on 16 January 2017. Again, the test applied was whether the risk of harm to the public had increased significantly (i.e. more than minimally). It is the decision of 21 October 2016 that is the subject matter of the challenge in this judicial review.

[12] The applicant has not challenged the subsequent decision of the PCNI not to release him when the matter was referred to it for review on 16 January 2017. Indeed it is difficult to disagree with the submission of Mr Sayers that on the facts the

determination of the PCNI would have been the same irrespective of whether the test applied was the risk of harm or serious harm which is at the heart of this application.

The statutory scheme under the Criminal Justice (Northern Ireland) Order 2008

[13] At the heart of this application is the sentencing regime under the 2008 Order.

[14] The starting point is **Article 7** of the Order which provides that where a court passes a sentence of imprisonment for a determinate term then:

> *"7(2) Subject to Article 14 … the sentence shall be for such term (not exceeding the permitted maximum) as in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it."*

[15] **Article 8** provides that where a court passes a sentence of imprisonment for a determinate term then:

> *"8(2) The court shall specify a period (in this Article referred to as 'the custodial period') at the end of which the offender is to be released on licence under Article 17."*

[16] Under Article 8(3) the custodial period shall not exceed one half of the term of the sentence.

[17] Article 8(5) deals with "the licence period" and provides as follows:

> "8(5) In paragraph (4) "*the licence period*" means such period as the court thinks appropriate to take account of the effect of the offender's supervision by a probation officer on release from custody—
>
> *(a) in protecting the public from harm from the offender; and*
>
> *(b) in preventing the* commission by the offender of further offences."

[18] The Order then goes on to deal with "*dangerous offenders*" and introduces new forms of sentences, in particular Indeterminate Custodial Sentences ("ICS") and Extended Custodial Sentences ("ECS").

[19] Article 13 deals with life sentences or indeterminate custodial sentences for serious offences (which are defined in the Order).

[20] Article 13(1) and (2) empowers the court to impose a life sentence in circumstances where the offence is one in respect of which the offender is liable to a sentence of life imprisonment. In the circumstances the court may impose such a sentence if it is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences (defined in the Order) and the court is of the opinion that the seriousness of the offence or of the offence or one or more offences associated with it is such as to justify the imposition of such a sentence.

[21] Article 13(3) goes on to provide that if the court considers that an ECS would not be adequate for the purpose of protecting the public from serious harm occasioned by the commission by the offender for the specified offences, the court shall:

> *"(a) impose an indeterminate custodial sentence; and*
>
> *(b) specify a period of at least 2 years as the minimum period for the purposes of Article 18, being such period as the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence, or of the combination of the offence and one or more offences associated with it."*

[22] The Extended Custodial Sentence referred to in Article 13 is provided for in **Article 14** of the Order. Such a sentence applies to certain violent or sexual offences. The Article provides:

> *"(1) This Article applies where –*
>
> *(a) a person is convicted on indictment of a specified offence committed after the commencement of this Article; and*
>
> *(b) the court is of the opinion –*
>
> *(i) that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences; and*
>
> *(ii) where the specified offence is a serious offence, that the case is not one in which the court is required by Article 13 to impose a life sentence or an indeterminate custodial sentence.*
>
> *(2) The court shall impose on the offender an extended custodial sentence.*

> *(3) Where the offender is aged 21 or over, an extended custodial sentence is a sentence of imprisonment the term of which is equal to the aggregate of*
>
> *(a) the appropriate custodial term; and*
>
> *(b) a further period ("the extension period") for which the offender is to be subject to a licence and which is of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by the offender of further specified offences."*

[23] Thus, it can be seen that in certain circumstances the court can impose either a Determinate Custodial Sentence (DCS); a life sentence, an ICS and an ECS.

[24] In each case a person may be released on licence. A person serving a DCS will be released on licence when he has served the requisite custodial period imposed by the court.

[25] A person serving a life sentence may be released on licence by the Parole Commissioners after having served a minimum tariff imposed by the court.

[26] A person serving an Indeterminate Custodial Sentence may be released on licence by the Parole Commissioners having served the tariff specified by the court at the time of sentence as being the minimum custodial period (Article 18(2)(a)).

[27] A person serving an ECS shall be released on licence having served one half of the period determined by the court as the appropriate custodial term under Article 14 (Article 18(2)(b)). On release he shall be on licence for the remainder of the custodial term and for the extended period determined by the court at the time of sentence.

[28] Rule 2 of the Criminal Justice (Sentencing) (Licence Conditions) (Northern Ireland) Rules 2009 ("the 2009 Licensing Rules") sets out the prescribed standard licence conditions, as provided by enabling provisions in Article 24(3)(a) of the 2008 Order, that must be included within all post-release licences issued under the 2008 Order.

[29] Rule 3 of the 2009 Licensing Rules set out the nature of the additional conditions which may be included on a licence, where appropriate and proportionate to the risks posed, (as provided for in enabling provisions Article 24(3)(b) of the 2008 Order). In paragraph 16 of the affidavit sworn by Steven Allison, who is the Head of the Offender Recall Unit of the Department of Justice, he avers that:

> *"16. … the combination of the standard licence conditions, together with any additional licence conditions imposed, are intended to support the purpose of the licence, namely*

protection of the public; prevention of reoffending; and rehabilitation of the offender. Article 24(4) of the 2008 Order may be used to add, vary or cancel additional conditions, imposed on Article 24(3)(b) of the 2008 Order, but not to vary or undermine the prescribed standard licence conditions set out at Rule 2 of the 2009 Licensing Rules.

17. The legislative intent of the 2008 Order and the 2009 Licensing Rules is clear. The licence period is an integral part of the sentence of imprisonment imposed by the court. …"

[30] All persons released on licence may be recalled to prison under the provisions of **Article 28**:

*"**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."

[31] As can be seen, Article 28(2) provides no test for the circumstances in which the Department of Justice may revoke a prisoner's licence and recall him to prison. The Department is provided with a very broad discretion.

[32] After a recall the Department shall refer the matter to the Parole Commissioners. It will be seen that Article 28(6) provides different tests for the Parole Commissioners when they consider the question of a direction to release the prisoner. ICS and ECS prisoners may be released on the basis of an assessment of the risk of "*serious harm*" as opposed to "*it being no longer necessary for the protection of the public*" in respect of other prisoners. Although protection of the public is not defined, reading Article 28(6)(b) together with the purposes of the licence period described in Article 8(5), the concern is for the protection of the public from the risk of any (not serious) harm and/or further offending.

The Applicant's Recall

[33] The issue raised in this application is demonstrated in the documentation relating to the applicant's recall. In the Probation Report for Northern Ireland recall report to the PCNI dated 7 October 2016 the report indicates that:

> "*Using PBNI's ACE assessment procedures, Mr Hilland has been assessed as presenting a high likelihood of re-offending due to the following risk factors; …"*

[34] Thereafter the report says:

> "*Notwithstanding the physical harm and distress caused to the victim as a result of his offending and behaviour and based on the information available Mr Hilland <u>does not meet PBNI threshold to be assessed as posing a significant risk of serious harm to others at present</u>."* (My underlining).

[35] In the final section of the report headed "**Future actions to reduce risks"**. The report concludes:

> "*I am recommending the recall of Stephen Hilland under Article 28(2)(a) of the Criminal Justice (Northern Ireland) Order 2008.*
>
> *In an attempt to address the high likelihood of re-offending presented by Mr Hilland it is PBNI's assessment that a number of external controls would be needed for Mr Hilland to reduce the high likelihood of further involvement and offending behaviour …"*

[36] This report was then forwarded to the Parole Commissioners who also had access to the PBNI pre-sentence report (PSR), the Determinate Custodial Sentence (DCS) licence, the record of the applicant's previous convictions and PSNI information regarding the further offences.

[37] Following consideration of the documentation the Commissioner recommended that the applicant's licence should be revoked on the grounds that his post-release conduct indicated that he posed "*an increased risk of harm to the public which can no longer be safely managed in the community*." The Commissioner referred to the appropriate test in the following way:

> "*13. In considering whether or not an offender released on a DCS licence should be recalled, a Parole Commissioner should determine whether there is evidence that proves on the balance of probabilities a fact or facts indicating that the risk of that offender causing harm to the public has increased significantly, that is more than minimally since the date of release on licence and that the risk cannot be safely managed in the community."* (My underlining).

[38] The Commissioner concluded that this test had been met. This is confirmed in the penultimate paragraph of the Parole Commissioner's decision at paragraph [20]:

> "*The circumstances as outlined above, were taken in the context of all of the evidence before me, including the fact that he is assessed as having a high likelihood of re-offending, and his alleged new offending, in my judgment provides strong evidence that establishes on the balance of probabilities the risk of him causing harm to the public has increased significantly, that is more than minimally since the date of his release on licence and that the risk cannot be safely managed in the community."* (My underlining).

[39] It will be seen that a key element of the Commissioner's assessment was focussed on the increased "risk of harm" to the public. This wording is reflected in

the Department's decision on recall which is the subject matter of the challenge in this judicial review. In the decision on recall dated 21 October 2016 the Department refers to the fact that it was satisfied that the "*risk of harm*" posed by the applicant had increased more than minimally since he was released on licence.

[40] The essence of the applicant's case is that for a prisoner serving an ECS or an ICS the test for recall is based on the risk of serious harm to the public as opposed to the risk of harm in the case of a DCS prisoner. It is contended that this difference constitutes a breach of a DCS prisoner's rights under Articles 5 and 14 of the ECHR. It is contended that such a difference cannot be justified as it means that the Department imposes a lower threshold for the recall of the DCS offenders as opposed to dangerous offenders (either ECS or ISC).

Consideration of the recall provisions by the Northern Ireland Courts

[41] Dr McGleenan points out that Article 28 provides a broad open ended discretion to the Department. The legislature did not choose to provide specific tests other than the requirement to consider a recommendation by the Parole Commissioners or in the absence of such a recommendation whether it is expedient "*in the public interest*".

[42] He emphasises that the approach adopted by the Department to the recall of prisoners in this jurisdiction has been validated by a number of decisions of the High Court.

[43] In **Re Foden's Application** [2014] NIJB 133 the court considered a challenge to the revocation of a DCS prisoner's licence.

[44] In his judgment Horner J at paragraph [17] refers to the comments of Kerr LCJ in **Re Mullan's Application** [2007] NICA 47 at [32] where he said:

> "*[32] We agree with Mr Maguire's contention that the decision whether to recommend a recall should not be regarded as one that requires the deployment of the full adjudicative panoply but we do not consider that this derogates from the importance of the decision being customarily taken by the commissioners.*"

At paragraph [18] Horner J goes on to say:

> "*It seems to me that in the context of a recall by the Department, and the nature of the process as described by Kerr LCJ, that the test should not be whether a licence condition has been broken. It should be whether there has been an increase (or an apparent increase) in the risk of*

> *harm to the public. The increase in the risk has to be significant. …"*

The court went on to set out its view of the lawful approach to be taken by the Department at paragraph 21 as follows:

> *"[21] I consider that the lawful approach to recall by the Department where there has been a breach or an apparent breach of the conditions of a prisoner's licence is as follows:*
>
> *…*
>
> *(c) Does that breach of condition or failure to engage with the conditions give rise to an increased risk of harm to the public? (The increase in risk has to be viewed with the imposition of the conditions of the licence in place.)*
>
> *(d) Is that increase in risk of harm to the public significant?*
>
> *…*
>
> *(f) The decision must be proportionate to the aim of avoiding risks to the public;*
>
> *(g) The primary aim of recall must be the protection of the public. Lord Slynn said in **Smyth** at paragraph 56:*
>
> > *'Recall of a prisoner on licence is not a punishment. It is primarily to protect the public against further offences'."*

[45] In similar vein in **Rainey's (Brandon) Application** (unreported, 20/10/2017, MAG10303) Maguire J considered both the lawfulness of the recall of an ECS prisoner and the question of incompatibility of Article 28 with Article 5(4) of the ECHR. Although the applicant in this case contends that Article 28 is incompatible with Article 5(4) it is accepted that this court is bound by authority and any such argument must fail at this level. However, in assessing the lawfulness of the recall Mr Justice Maguire in his judgment points out that "*the opened ended nature of the discretion which has been conferred should not be neglected*" – see paragraph 42.

[46] He goes on to say:

> *"In this case the decision maker has indicated how he went about his task. It appears to the court that it was open to*

the decision maker to determine what factors he viewed as relevant, provided his choice of particular factors is rational and not unreasonable.

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

Dr McGleenan relies on the following paragraph:

"*[45] The approach taken by the decision maker to his task, as he has averred, was to ask two questions:*

(a) Whether there was evidence that the applicant's risk had increased; and

(b) Whether the applicant could, in the decision maker's judgment be safely managed in the community.

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

[47] On closer analysis of the decision in **Rainey** it is clear from the factual background that the decision to recall the prisoner focused on the risk of the offender causing "*serious harm*". Rainey was someone who was serving an ECS. Thus, at paragraph 19 of the recommendation of the Parole Commissioner to recall the prisoner the following appears:

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

[48] In the affidavit explaining how the decision maker went about making its decision he avers the following:

"*In order to reach a decision on recall, I ask myself two questions. Firstly, is there evidence that the risk had increased? On the basis of the reported drug misuse, I*

> *concluded the risk of serious harm posed by the applicant post release had increased more than minimally. Secondly, could the increased risk be safely managed in the community? Based on the evidence available to me, particularly, the absence of approved accommodation, coupled with the reduction in PSNI staffing levels I concluded the risk could not be safely managed.*"

[49] Finally, in the decision letter from the DOJ dated 1 February 2016, the applicant was told as follows:

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

[50] It is apparent from both these decisions that the court did not consider the issue as to whether or not there was any unlawful discrimination as between DCS prisoners and ECS prisoners. Significantly it is clear that a key element of the assessment in the two cases was different. In **Foden** the assessment was based on the risk of "harm". In **Rainey** the risk was assessed on the basis of "serious harm". That this was a lawful approach in the individual case within the terms of the statute was clearly accepted by the two courts, but as I have indicated neither decision addresses the issue raised in this application.

What is the test applied by the Department?

[51] The Department contend that in fact there is no such difference as alleged by the applicant and that it applies the same test in each case.

[52] As Dr McGleenan points out in exercising the broad discretion conferred by Article 28 it is left to the Department to formulate the appropriate test to be applied. The affidavit sworn by Steven Allison sets out the approach of the Department in formulating the appropriate test to be applied. He avers that the Department's approach has been informed by the statutory purposes of the 2008 Order, including the purposes of post-release supervision on licence as set out by Article 24(8) of the 2008 Order which provides:

> *"In exercising the powers to prescribe standard conditions or other conditions referred to in paragraph (3), the Department of Justice shall have regard to the following purposes of the supervision of offenders while on licence under this Chapter –*

(a) the protection of the public;

(b) the prevention of re-offending;

(c) the rehabilitation of the offender."

In paragraph 37 of his affidavit he avers:

> *"37. In fact, the Department applies the same test in each case. Irrespective of the different language used between DCS and ECS cases on the face of decisions, the test applied by the Department in each case is whether there has been a significant increase in the risk of harm to the public which cannot be managed in the community. The Department are (sic) not required under Article 28(2), to make any distinction as to the degree of harm when considering the recall of a DCS or ECS prisoner.*
>
> *38. Each offender (whether ECS or DCS) is unique and will have their own individual risk profile. That risk profile can increase and decrease over the licence period and different behaviours will impact on risk assessment in different ways for different offenders. The Department's primary focus is always on the degree to which a particular increase in risk (for that particular individual offender) can or cannot be managed safely within the community. Management of risk is the decisive factor in every case."*

[53] In short Mr Allison says that a licence will be revoked, of whatever type, where an offender's risk to the public has increased (more than minimally) and can no longer be managed safely in the community.

[54] Mr Southey contends that this cannot be correct if the 2008 Order is to be applied lawfully and coherently. Whilst Article 28(2) does not provide a specific test for the Department when deciding to revoke and recall a prisoner it can only do so in two circumstances. Firstly, if recommended to do so by the Parole Commissioners or alternatively it can do so without such a recommendation if it appears to the Department that it is expedient in the public interest before such a recommendation is practicable.

[55] Article 28 also requires the Department to refer any recall to the Parole Commissioners who must consider whether the prisoner should be released. At this stage Article 28(6) provides the tests to be applied by the Parole Commissioners in those circumstances, which as has been seen is different between ICS, ECS and other prisoners.

[56] This difference is reflected in the Chief Commissioner's Guidance on Summary Recall Recommendations issued by the then Chief Commissioner Peter

Smith QC on 4 April 2011. The guidance refers to the statutory test and says at paragraph 4:

> "*Thus, as far as ICS and ECS prisoners are concerned, the recommendation will turn on the issue of the protection of the public from serious harm (Article 28(6)(a)) and in DCS cases the protection of the public from harm (Article 28(6)(b)).*"

[57] In applying the test the guidance focuses on the extent to which the recommendation must turn on the prisoner's post-release conduct as opposed to a mere analysis of pre-release factors. Ultimately, the guidance is that as per paragraph 6:

> "*Has there been a post-release conduct which, if it happened, indicates that there is a risk of serious harm (ECS)/harm (DCS) posed by this prisoner which can be no longer safely managed in the community?*"

It is only risk which justifies revocation of licence and breach of licence is not of itself grounds for revocation. Such breach may evidence the risk justifying the revocation.

[58] Whilst acknowledging the broad nature of the discretion set out in Article 28(2) it seems to me that a proper interpretation of Article 28 supports Mr Southey's submission that the article envisages a different test. It is difficult to see in these circumstances how the Department can lawfully apply a different test to the Parole Commissioners. The Department may revoke and recall a prisoner on the recommendation of the Parole Commissioners under Article 28(2)(a). The recommendation of the Parole Commissioners in such circumstances is based on the Chief Commissioner's guidance referred to above. If the Department recalls a prisoner without such a recommendation it is obliged to refer the matter to the Commissioners for them to consider release. Again, the Commissioners will apply the test set out in the Commissioner's guidance. In my view it cannot be right that there are different tests pre-recall and post-recall.

[59] It is clear from the affidavit of Mr Allison that in fact the language used by the Department mirrors both the statute and the test applied by PCNI.

[60] The Department accepts that if it had been making a decision to recall an ECS prisoner the letter setting out the recall would have referred to the increase in the risk of serious harm. Indeed, this is apparent from the documentation referred to in the **Foden** and **Rainey** cases.

[61] It cannot be disputed that ultimately the decision was based on the need to protect the public and the management of risk but in coming to that conclusion what is involved is an assessment of the risk of harm.

[62] The use of the word serious in relation to harm is not a mere formality. The concept of serious harm is a fundamental element of the 2008 Order which created new public protection sentences to deal with the particular risks posed by dangerous offenders.

[63] Serious harm is given specific definition in Article 3 of the Order. It means "*death or serious personal injury, whether physical or psychological*". Article 15 of the Order sets out matters that a sentencing court must take into account in assessing whether there is a significant risk to members of the public of serious harm occasioned by the commission of the offender of further specified offences. There is a significant body of case law on how Crown Court judges are to determine whether or not a particular offender presents a risk of serious harm. (See **R v Lang** [2005] EWCA Crim 2864; **R v EB** [2010] NICA; **R v Johnston** [2006] EWCA 2486; **R v Mongan** – NICA – 5 November 2015).

[64] In my view if Article 28 is to be applied lawfully there is in fact a different test envisaged for the recall of ICS and ECS prisoners and other prisoners including DCS prisoners. It seems to me this must be right having regard to the construction and wording of the order. The fact that in practice the DOJ reflects this difference in the wording used in its recall letters supports this conclusion. The use of the different wording that is "serious harm" and "harm" depending on what type of prisoner it is considering is in my view significant and consistent with the conclusion I have reached on this issue.

Articles 5 and 14

[65] Having come to the conclusion that there is indeed a difference of treatment under the Order for offenders serving a DCS as opposed to those serving an ECS or ICS the issue to be determined is whether or not that difference is a breach of Articles 5 and 14 of the ECHR insofar as it requires a lower threshold for recall for a DCS prisoner than it does for an ECS or ICS prisoner. The applicant argues that the statute is incompatible with Articles 5 and 14.

[66] Article 5 provides that:

> "*Right to liberty and security*
>
> *(1) Everyone has the right to liberty and security of person. …"*

Article 14 provides:

> "*Prohibition of discrimination*

> *The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

[67] This matter needs to be considered in the context of the decisions in **R (Clift) v Secretary of State for the Home Department** [2007] 1 AC 484, **Clift v United Kingdom** [2010] ECHR 7205/07 and **R (Stott) v Secretary of State** [2018] 3 WLR 1831 which wrestled with issues that arise in relation to the differences between similar types of sentences in England and Wales and their relationship to Articles 5 and 14 of the Convention.

[68] Clift was a prisoner who had been sentenced to eighteen years' imprisonment for, inter alia, attempted murder. He became eligible for release on parole in March 2002 and entitled to release in March 2005. Under the applicable legislation, the final decision on early release in the case of prisoners serving determinate sentences for more than fifteen years' imprisonment lay with the Secretary of State. For prisoners serving determinate sentences of less than fifteen years and for prisoners serving indeterminate (i.e. life sentences) the Secretary of State's approval following a positive recommendation of the Board was not required. In October 2002 the Secretary of State rejected the Parole Board's recommendation that the applicant be released, concluding that his release would present an unacceptable risk to the public. The applicant sought to bring judicial review proceedings in respect of that decision. His principal ground of challenge was that it was in breach of Article 5 of the ECHR taken together with Article 14 that the Secretary of State should retain the power to determine the release on parole licence of only one group of prisoners, namely those who were serving a determinate term of imprisonment of fifteen years or more.

[69] In respect of Clift (which was heard with two other appeals) the House of Lords determined that although the Convention did not require Member States to establish a scheme for the early release of prisoners, any provision in domestic law for a right to seek early release fell within the ambit of the right to liberty under Article 5. The court however determined that a prisoner serving a determinate sentence of fifteen years or more, in contrast to life sentence prisoners or long term prisoners, serving less than fifteen years, had not been recognised by Convention jurisprudence as an "other status" within Article 14. As a consequence Clift was unsuccessful in his challenge.

[70] The matter was subsequently considered by the ECtHR.

[71] In order for his complaint to be successful the applicant had to demonstrate that he enjoyed some "*other status*" for the purpose of Article 14 of the Convention.

[72] In its judgment the court reviewed its decisions in which Article 14 was considered. In its analysis it recalled that the words "other status" (and *a fortiori* the French '*toute autre situation*") have generally been given a wide meaning.

[73] In its decisions the court had consistently referred to the need for a distinction based on a "*personal*" characteristic in order to engage Article 14. The review of its case law demonstrated however that the protection conferred by that article was not limited to different treatment based on characteristics which are personal in the sense that they are innate or inherent. The court took the view that the treatment of which the applicant complained need not exist independently of the "*other status*" upon which it is based.

[74] The court at paragraph [62] of its judgment said:

> "[62] *The court has frequently emphasised the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authority (see for example* ***Cakycy v Turkey*** *[1999] ECHR 23657/94, para [104]). Where an early release scheme applies differently to prisoners depending on the length of their sentences, there is a risk that, unless the difference in treatment is objectively justified it will run counter to the very purpose of Article 5, namely to protect the individual from arbitrary detention. Accordingly, there is a need for careful scrutiny of differences of treatment in this field.*
>
> *[63] The Court accordingly concludes that, in light of all the above considerations, the applicant in the present case did enjoy 'other status' for the purposes of Article 14."*

[75] The question of the engagement of Article 14 in the context of release schemes for prisoners was extensively considered by the Supreme Court in the **Stott** case. Indeed, this application was adjourned pending the outcome of that decision. As indicated earlier, the judgment did not necessarily bring the hoped for clarity to the issues.

[76] Stott was convicted of numerous sexual offences against children including multiple counts of raping an eight year old. For the offences of rape he was sentenced to an extended determinate sentence of imprisonment under Section 226A of the Criminal Justice Act 2003, as inserted. The sentence comprised an appropriate custodial term of 21 years' imprisonment and an extended licence period of four years. Pursuant to Section 246A of the 2003 Act, as inserted, an offender serving an extended determinate sentence only became eligible for release on parole after serving two thirds of the appropriate custodial term while other prisoners serving

determinate sentences became eligible after serving half their sentence. Further, a prisoner serving discretionary life sentences became eligible for parole after serving their specified minimum term which according to the judgment is usually fixed at half the determinate sentence which they would have received had they not been subject to a life sentence.

[77] Stott sought judicial review of the early release provisions in Section 246A on the grounds that they constituted discrimination in the enjoyment of his right to liberty contrary to Articles 5 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

[78] The Divisional Court of the Queen's Bench Division held that it was bound by existing House of Lords authority to reject the claim on the grounds that the claimant did not have an "*other status*" for the purpose of a discrimination claim under Article 14 but that, had it not been so constrained, it would have found that "*other status*" was established, and would then have gone on to find Section 246A of the 2003 Act incompatible with Article 14. Consequently, the Divisional Court issued a certificate pursuant to Section 12 of the Administration of Justice Act 1969 permitting the claimant to apply directly to the Supreme Court for permission to appeal which was subsequently granted.

[79] On the appeal, which was heard by five justices, it was held that (Lord Carnwath dissenting), having regard to the jurisprudence of the ECtHR, the difference in the treatment of extended determinate sentence prisoners in relation to early release was a difference on the ground of "*other status*" within the scope of Article 14 of the Convention.

[80] The appeal however was dismissed (Baroness Hale and Lord Mance dissenting). The majority held that there was no breach of Stott's rights because (a) he was not in an analogous position to other prisoners serving different sentences and (b) the difference in treatment was proportionate and justified anyway.

[81] The complexity of the issues raised is demonstrated by the fact that each member of the court gave a separate judgment. The basic approach adopted by all of the justices is set out in paragraph [8] of the leading judgment of Lady Black as follows:

> "***The Approach to an Article 14 Claim***
>
> *8. In order to establish that different treatment amounts to a violation of article 14, it is necessary to establish four elements. First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in Article 14 or 'other status'. Thirdly, the claimant and the person who has been*

treated differently must be in analogous situations. Fourthly, objective justification for the different treatment will be lacking. It is not always easy to keep the third and the fourth elements entirely separate, and it is not uncommon to see judgments concentrate upon the question of justification, rather than upon whether the people in question are in analogous situations. Lord Nicholls of Birkenhead captured the point at para 3 of R ***(Carson) v Secretary of State for Work and Pensions*** *[2006] 1 AC 173. He observed that once the first two elements are satisfied:*

> *'The essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact'."*

[82] In light of **Stott** it is necessary therefore to consider the four issues raised and apply them to the circumstances of this case.

[83] There is a difference in the factual situation compared with both **Clift** and **Stott**. Those cases dealt with issues concerning the release of prisoners whereas this case involves decisions to recall those who have been released on licence. Whilst the factual difference needs to be considered it seems that the basic principles set out in *Stott* can be applied to this case.

[84] Turning to the issues sequentially firstly, do the circumstances fall within the ambit of a Convention right? On the authority of **Clift** both in the House of Lords and in the ECtHR and on a reading of the article it seems to me that decisions regarding recall readily come within the ambit of Article 5. The applicant meets the first hurdle.

[85] In relation to the second matter is the differential treatment complained of on a ground potentially prohibited by Article 14? In this case the applicant does not

seek to rely on any of the characteristics listed in Article 14 but relies on "*other status*".

[86] The jurisprudence as to what are the precise boundaries of "*other status*" is not clear. The authorities suggest that the court should take a "*relatively broad view*" of what constitutes "*other status*". As Lord Hodge said at paragraph [185] of the judgment in **Stott**:

> *"First, the opening words of the relevant phrase, 'on any ground such as', are clearly indicative of a broad approach to status. Secondly, there is ample authority in the ECtHR, the House of Lords and the Supreme Court to support the view that the words 'any other status' should not be interpreted narrowly. Thus, in* ***R (Clift) v Secretary of State for the Home Department*** *[2007] 1 AC 484, para [48], Lord Hope of Craighead stated that 'a generous meaning' should be given to the words 'or other status' while recognising that 'the proscribed grounds are not unlimited'. Similarly, in* ***R (RJM) v Secretary of State for Work and Pensions*** *[2009] AC 311, Lord Neuberger of Abbotsbury at para [42] spoke of 'a liberal approach' to the grounds on which discrimination was prohibited. In* ***Clift v The United Kingdom*** *… paragraphs 55-56, the ECtHR spoke of the listed examples of status as being 'illustrative and not exhaustive' and suggested that a wide meaning be given to the words 'other status'."*

Whilst acknowledging the opinion of the dissenting judgment of Lord Carnwath that both the domestic courts and the ECtHR had for a long time been struggling to find a rational criterion for defining and limiting the scope of "status" in Article 14 on the basis of the decision in **Stott** it seems to me that the applicant in this case does enjoy "other status" within the definition of Article 14.

[87] As was said in paragraph [60] of the ECtHR judgment in **Clift**:

> *"The question whether there is a difference of treatment based on a personal or identifiable characteristic in any given case is a matter to be assessed taking into consideration all of the circumstances of the case and bearing in mind that the aim of the Convention is to guarantee not rights that are theoretical or illusory but rights that are practical and effective. … It should be recalled in this regard that the general purpose of Article 14 is to ensure that where a State provides for rights falling within the ambit of the Convention which go beyond the minimum guarantees set out therein, those supplementary rights are applied fairly and consistently to all those within*

> *its jurisdiction unless a difference of treatment is objectively justified."*

[88] I have already referred to paragraph [62] of the court's judgment which focused on the need for securing the right of individuals in a democracy to be free from arbitrary detention and the requirement for careful scrutiny of differences of treatment in this field.

[89] Whilst this case deals not with early release but rather recall of those who are on early release it seems to me that this difference is not crucial in terms of principle. What the court is concerned with is protection from arbitrary detention. Self-evidently decisions in terms of recall of prisoners on licence has significant legal effects and consequences for offenders.

[90] In all the circumstances of this case, applying the principles to which I have referred above, I have come to the conclusion that the difference in treatment which I have identified is a difference within the scope of Article 14 and the applicant meets the threshold necessary to establish "*other status*".

[91] I turn now to the third and fourth elements namely whether "*the others*", that is ICS and ECS prisoners, are in analogous situation to DCS prisoners and whether the differential treatment is justified.

[92] Whilst these are separate questions what I take from the majority decision in the **Stott** case is that there is a degree of overlap on these issues. As Lady Black said in **Stott** it is not at all easy to separate these two questions into watertight compartments. Thus, at paragraph [138] of her judgment she says:

> "*In determining whether groups are in a relevantly analogous situation for article 14, regard has to be had to the particular nature of the complaint that is being made, see for example paragraph [66] of* ***Clift v United Kingdom*** *…"*

At paragraph [148] she goes on to say:

> "*Recognising that there are valid arguments both ways in relation to Issue 2A (*whether the others are in an analogous situation - my insertion*) it seems appropriate to act on the wise suggestion of Lord Nicholls of Birkenhead, in* ***R (Carson) v Secretary of State for Work and Pensions*** *[2006] 1 AC 173, that sometimes, lacking an obvious answer to the question whether the claimant is in an analogous situation, it may be best to turn to a consideration of whether the differential treatment has a legitimate aim, and whether the method chosen to*

achieve the aim is appropriate and not disproportionate in its adverse impact (Issue 2B), although I will in fact return to Issue 2A again thereafter."

Baroness Hale adopted a similar approach in her consideration of the matter at paragraph [213].

[93] It seems to me this is the proper approach to adopt in the circumstances of this case. The Strasbourg jurisprudence demonstrates a tendency to move almost seamlessly into consideration of whether the applicant is in an analogous situation and/or whether the difference is justified. They should not necessarily be considered as freestanding questions but looked at in a holistic way.

[94] The 2008 Order introduced significant changes to sentencing regimes in this jurisdiction. The Order redefined the nature of imprisonment in Northern Ireland. It removed automatic 50% remission of sentence and introduced the concept of a sentence of imprisonment being comprised of two distinct parts; a custodial part set by the court to be served in prison; and a licence part, comprising the remaining period of the overall sentence of imprisonment imposed, to be served on supervised licence in the community. The Order created new public protection sentences to deal with the particular risks posed by dangerous offenders and made provision for new sentences to deal with such offenders, in particular, the indeterminate custodial sentence and extended custodial sentence. Each sentencing regime has different features. They are tailored to a particular category of offender and address a particular combination of offending and risk in respect of each offender.

[95] As is clear from what has been set out earlier in this judgment each sentence has its own detailed criteria and set of rules which relate to when a particular sentence is appropriate, the setting of a custodial term, early release provisions, licence provisions and recall/revocation provisions.

[96] When imposing an ECS or an ICS sentence the court has regard to both the gravity of the offending and the risk presented by the offender. As is clear from the decisions in **Foden** and **Rainey** there is no basis for arguing that the individual sentence regimes are unlawful in any way. Of course, this court is not considering whether the individual regimes are lawful but whether or not any differences in the regimes are unlawful. The issue is whether any difference in treatment can withstand scrutiny. A prisoner who is released on licence having served the appropriate custodial tariff under an ICS remains on licence for an indeterminate basis (subject to the potential for the parole commissioners to direct the expiry of a licence where the prisoner has been released on licence for a period of at least 10 years). It will be seen therefore that such a prisoner serving the licence period of the sentence is in a very different position from a prisoner serving a DCS portion of the licence which has a fixed and definite term. Equally, the prisoner who is serving the extended period of his licence under an ECS is in a very different position from a prisoner serving the licence period under a DCS. In both cases the sentences

imposed on an ICS and ECS offender is more severe than the one imposed on a DCS, to reflect the gravity of their offending and the risk they pose. In **Stott** Lady Black quoted from the judgment of Lord Reed in the case of **Brown v Parole Board for Scotland** [2018] AC 1 at paragraph 60 when he said:

> *"The purpose of detention during the extension period is materially different from that of a determinate sentence. In terms of section 210A(2)(b) of the 1995 Act, the extension period is "of such length as the court considers necessary for the purpose mentioned in subsection (1)(b)", namely "protecting the public from serious harm from the offender": … The punitive aspect of the sentence has already been dealt with by the custodial term, which is "the term of imprisonment ... which the court would have passed on the offender otherwise than by virtue of this section": section 210A(2)(a). Where a prisoner serving an extended sentence is detained during the extension period, other than by virtue of an order made under section 16 or another sentence, his continued detention is therefore justified solely by the need to protect the public from serious harm."*

[97] Thus, it seems to me that a prisoner serving the licence period under a DCS is clearly in a different position from a person serving the licence period under an ICS and a prisoner serving the licence period that is part of the extended custodial sentence. In this regard I do not consider that a DCS prisoner can be regarded as analogous to those prisoners under ICS or ECS.

[98] Another difference between the respective prisoners will be reflected in the licence conditions imposed on their release.

[99] What is more challenging to explain is the situation where an ECS prisoner is serving the period of licence immediately after his release having served one half of the period determined by the court as the appropriate custodial term under Article 14 (Article 18(2)(b)). Taken in isolation it can be argued that such a prisoner is in an analogous situation to DCS offender on licence. The answer it seems to me lies in the desirability of looking at the individual regimes as a whole. As Lord Carnwath said at paragraph 180 in the judgment in **Stott**:

> *"180. … In particular I agree that the EDS regime must be looked at as a whole and cannot be treated as analogous to regimes which have different purposes and different characteristics. It is wrong to isolate the particular feature of the provisions for release on parole, and to compare it with other release provisions without regard to their context."*

[100] It would be artificial for the legislation to provide for a different test for recall of an ECS prisoner whilst serving the initial licence period and imposing a different test when serving the extended licence period. In any event as noted above an ECS offender will usually have more stringent licence conditions during the entirety of his licence period which distinguishes him from the DCS offender. In any event the decision by the legislator not to make such a distinction cannot be considered unreasonable or irrational in my view. It is well within the margin of appreciation afforded to the legislator. When one looks at each of the individual sentencing regimes as complete regimes I have come to the conclusion that they are not in fact analogous. They are distinctive and separate sentencing regimes.

[102] Having reached the conclusion that the various sentencing regimes are not analogous for the purposes of Article 14 it is not strictly necessary to consider the issue of justification. However, given the way I have analysed the issue of analogous situation I consider that I should deal with the issue of justification. Does the differential treatment have a legitimate aim, and is the method chosen to achieve it appropriate and not disproportionate in its adverse impact? The consideration of this issue can be resolved by reference to the matters identified in the discussion on analogous situation. The fundamental legitimate aim of the test for recall is to ensure the protection of the public. That aim must be balanced against the offender's rights and the need to avoid arbitrary detention.

[103] The 2008 Order seeks to enhance the protection of the public by the introduction of mandatory post-release management of offenders. Offenders who receive different sentences are subject to different release/licence conditions when they serve the custodial element of their sentence. The difference is reflected in the length of the potential licence period and on the licence conditions to which they are subjected on release. The more dangerous offenders (ECS and ICS) are on licence for a longer period of time and subject to stricter licence conditions than a less serious offender (DCS). It seems to me this is an entirely appropriate and proportionate method of achieving the legitimate aim of protecting the public. The answer in respect of proportionality or unfairness must be viewed in analysing the sentencing package as a whole. The DCS will be on licence for a shorter period of time and will invariably be subject to less stringent licence conditions. Reflecting their status as dangerous offenders an ICS prisoner is likely to spend a longer time in custody before being released and will invariably be subject to more stringent licence conditions and for a longer period than a DCS. An ECS prisoner will be on licence for a longer period of time than a DCS and will be subject to more stringent licence conditions. There is an arguable anomaly for the period during which an ECS is on licence in respect of the appropriate custodial element but I consider that this anomaly, if it is one, can be justified in the overall context of the sentencing regimes. It is clear from the Supreme Court decision in **Stott** that the courts are tolerant of different release provisions.

[104] In terms of the disproportionate impact I am comforted by the statistics which are set out in the affidavit of Steven Allison filed on behalf of the respondent. In his affidavit he avers as follows:

> *"41. If the applicant were correct in their core assertion then one would expect for the statistical data to show that more DCS than ECS prisoners have been recalled over the years. In fact, from 2010 to the end of 2016, the statistics show that only 27.4% of prisoners released on a DCS licence were subject to recall. This can be contrasted with the fact that 92.4% of prisoners released on ECS licence were subject to recall. …*
>
> *42. The reality – reflected by the statistics – is that, in general, ECS prisoners will, upon release on licence be subject to more stringent licence conditions, in comparison to DCS prisoners. Licence conditions will be applied proportionate to the risk assessment at point of release. The greater the risk, the more stringent will be the licence conditions."*

[105] He also exhibits some relevant statistics in relation to recommendations and decisions not to revoke a licence.

[106] At paragraph 43 he states:

> *"43. … for example, in 2012, the Commissioners recommended that a licence should not be revoked for some 23 DCS offenders in contrast with only one ECS prisoner. In the same year it can also be seen that the Department did not accept the Commissioners recommendations to revoke in one case involving an ECS offender as opposed to three cases involving a DCS offender. These statistics again reflect the reality of the margin of safe management of a DCS offender within the community as significantly wider than for an ECS offender, before the need to recall arises.*
>
> *44. In general, ECS prisoners will present with a significantly higher risk profile than for DCS prisoners. This is reflected in the more stringent and particular licence conditions imposed. This means that it is **relatively** easier for PBNI to manage the risk of DCS prisoners in the community, than for ECS prisoners. This is because there is usually much more scope to vary licence conditions for a DCS prisoner to enable continued management of risk on the community, which reduces the chance of having to resort to recall in a DCS case. In contrast, if there is an increase in risk for an ECS prisoner, there are less options available to manage that risk, before resort to recall is required."*

[107] Mr Southey urges the court to be wary of the statistics and says that they are not surprising given that ECS prisoners by definition are more dangerous than DCS prisoners. Nonetheless, the figures are striking. In my view they strongly support the conclusion that the differences identified in the test for recall are appropriate and not in any way disproportionate in their adverse impact.

[108] In conclusion I consider that for the purposes of this application DCS prisoners are not in an analogous situation to ECS and ICS prisoners. If they are in an analogous situation I consider that the difference of treatment identified in this judgment is justified. The application for judicial review is therefore refused.