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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY MARK PATRICK TOAL FOR JUDICIAL REVIEW (No.2)

IN THE MATTER OF A DECISION OF THE PAROLE COMMISSIONERS FOR NORTHERN IRELAND

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Before: Morgan LCJ, Stephens LJ and Treacy LJ

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MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal from a decision of McCloskey J made on 27 November 2018 granting an Order of Certiorari to quash a finding of a panel of Parole Commissioners ("the panel") made on 9 April 2018 that it was not satisfied that it was no longer necessary for the protection of the public from serious harm that the respondent should be confined in prison. Mr Sayers appears for the appellant, Mr Southey QC with Mr Heraghty for the respondent and Mr Sands for the Department of Justice.

Background

[2] The respondent is 35 years old and prior to his arrest had been living an unstructured, transient lifestyle involving drug and alcohol misuse. On 6 July 2011 he entered a chemist's shop in Carrick Hill around 8.45 am and threatened the shop assistant with a knife telling him to open the safe. When told he could not because of a time delay safety device the respondent demanded tablets and cash from the till. He was given £40 and some boxes of co-codamol. He left the shop but was apprehended not far away by patrolling police officers. He spat at the police officers and damaged the police vehicle and radio by kicking it. He was found to have the knife concealed in his trouser leg.

[3] The pre-sentence report indicated that his father had little involvement in his upbringing after his parents separated when he was five years old. A positive relationship was noted with his mother. Behavioural problems were recorded from an early age and he was referred to the child psychology department of the Royal Victoria Hospital for assessment. At the age of nine he was referred to Foster Green Hospital where he would later claim to have been sexually abused. His mother's abusive partner had a negative impact upon him, introducing him to offending behaviour. He left school at 14 without any formal qualifications and has reported problems with literacy and self-esteem. Drugs and alcohol have played a role in this life and it was noted that at times he was addicted to Temazepam, Diazepam, Cannabis and Cocaine. He reported his predominant addiction had always been alcohol. The respondent said that he had often been homeless and had lived in hostels or at a friend's house. He reported problems with local drug dealers or with people purporting to be from paramilitary organisations.

[4] His criminal record began with convictions for disorderly behaviour and underage drinking in 1997 when he was aged 13. The criminal record printout dated 10 April 2017 disclosed 104 convictions between 1997 and the convictions for the index offences in 2012. Of particular concern were the convictions for 13 robberies, 15 thefts, 19 burglaries, two aggravated burglaries and five serious assaults. There were multiple breaches of court orders.

[5] A Risk Management Meeting ("RMM") was held by the Probation Service ("PBNI") prior to sentencing as a result of which he was assessed as meeting the criteria to represent a significant risk of serious harm. This was based on the respondent's continued misuse of drugs and alcohol, lack of stable accommodation and unstructured lifestyle. He lacked any real lasting progress in addressing those problems in recent years. He had spent significant periods of time serving prison sentences which sometimes accounted for gaps in his criminal record. He had continued offending as a result of his alcohol/drug use or in order to fund this. He had a past record for using knives in the commission of robberies albeit that the majority of the robberies were committed prior to 2005. He had a past record for assaults and assaults on police. There was an absence of many protective factors in his lifestyle and his response to probation had previously been superficial. The Crown Court judge agreed with that assessment and on 24 February 2012 the respondent was sentenced to an extended custodial sentence comprising 8 years detention and 2 years licence.

Statutory Framework

[6] The sentencing regime for offenders convicted of specified offences such as robbery who present a serious risk of serious harm is contained in the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order").

> "14.—(1) This Article applies where—
>
> (a) a person is convicted on indictment of a specified offence committed after [15th May 2008]; 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.

(4) In paragraph (3)(a) "the appropriate custodial term" means a term (not exceeding the maximum term) which—

(a) is the term that would (apart from this Article) be imposed in compliance with Article 7 (length of custodial sentences); or

(b) where the term that would be so imposed is a term of less than 12 months, is a term of 12 months….

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

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

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

15.—(1) This Article applies where—

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

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

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

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

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

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

[7] The release from custody of those serving an extended custodial sentence is provided for in Article 18 of the 2008 Order.

"18.—(1) This Article applies to a prisoner who is serving—

(a) an indeterminate custodial sentence; or

(b) an extended custodial sentence.

(2) In this Article—

"P" means a prisoner to whom this Article applies;

"relevant part of the sentence" means—

(a) in relation to a indeterminate custodial sentence, the period specified by the court under Article 13(3) as the minimum period for the purposes of this Article;

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

(3) As soon as—

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

(b) the Parole Commissioners have directed P's release under this Article,

the Department of Justice shall release P on licence under this Article.

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

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

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

The Parole Commissioners' hearing

[8] The respondent became eligible for release on parole on 24 August 2015 having served one half of his sentence taking into account the period spent on remand. His case was considered by both a single commissioner and a panel in 2015, 2016 and 2017. The decision of the last panel was challenged by way of judicial review and the learned trial judge made a declaration that the decision was unlawful and procedurally unfair as a result of which the case should be reconsidered as soon as possible. This judicial review is concerned with the decision arising from that hearing.

[9] In preparation for the hearing the Personal Development Plan ("PDP") Co-ordinator had prepared a report dated 7 December 2017. She stated that the respondent's ACE assessment score had been consistently assessed as high since his pre-sentence report in 2012 and was last assessed at 42 on 30 November 2017. The slight reduction of two points from the previous assessment of 44 in June 2017 was a reflection of the respondent's engagement with ADEPT, his passed drugs test and his general compliance with the regime since June 2016.

[10] The report noted that the respondent was no longer assessed as meeting the significant risk of serious harm criterion as a result of changes made in May 2017 to the PBNI process of assessment of what constituted a significant risk of serious harm. In the revised guidance it was stated that such a risk would materialise where there was a high likelihood that an offender would commit a further offence causing serious harm. An affidavit sworn on behalf of PBNI indicated that it was considered that too many individuals were assessed as presenting a serious risk of serious harm and resources needed to be focused on the critical few.

[11] Article 14(1)(b)(i) of the 2008 Order sets out the test for the assessment of the significant risk of serious harm to members of the public. This court has consistently followed the advice of the Court of Appeal of England and Wales in R v Lang [2006] 2 All ER 410 in its consideration of the provisions of the Criminal Justice Act 2003

relating to dangerous offenders and extended sentences. The learned trial judge properly set out the relevant passage of that judgment at [17] where Rose LJ stated:

> "In our judgement, the following factors should be borne in mind when a sentencer is assessing significant risk:
>
> (i) The risk identified must be significant. This is a higher threshold than mere possibility of occurrence and in our view can be taken to mean (as in the Oxford English Dictionary) "noteworthy, or considerable amount… or importance"."

[12] The entirety of [17] was considered by this court in R v EB [2010] NICA 40 as constituting helpful guidance to judges making assessments of dangerousness. At [18] of his judgment the learned trial judge set out the submission on behalf of the respondent that the court modified that test somewhat in R v Kubik [2016] NICA 3. We wish to make it clear that the passage in Kubik to which reference was made does not support such a conclusion. The PBNI revised test was applied by Colton J in R v McCormick [2015] NICC 15. We consider that he was wrong to do so although it may not have affected the outcome of his consideration. The guidance set out in R v EB should continue to be followed.

[13] The report noted that although the respondent was assessed as no longer meeting the significant risk of serious harm criterion under the revised policy the author's view was that the change in status of the respondent arose as a result of PBNI's Revised Risk of Serious Harm to Others policy and procedures rather than any substantial change in the risks surrounding his offending. The conclusion was that whilst the respondent had made progress in a number of areas since the last review PBNI did not then consider the respondent suitable for release as he had not completed his intervention with NIPS psychology and because more pre-release testing was necessary. PBNI also needed to see evidence that the respondent could maintain his current level of stability within prison for a sustained timescale in order to further demonstrate that his risk could be managed in the community.

[14] Evidence was given by the PDP Co-ordinator who had become responsible for engagement with the respondent since February 2018. He provided an update on progress since the report of December 2017. The respondent had guilty adjudications on 10 January 2018 for throwing a cup of tea over the walls of his cell and pouring liquid onto the landing and on 17 January 2018 for possession of a package containing tobacco and a clear patch concealed between his buttocks. He had a further adjudication of 24 January 2018 for receiving an article thrown over the fence. He was suspended from the pre-release scheme following an unaccompanied temporary release ("UTR") in December 2017 when there were concerns that he returned to custody in possession of drugs. He had been on standard regime and spent time in the Care and Support Unit from December 2017 until March 2018.

[15] The PDP Co-ordinator had concerns about the respondent's recent behaviour in custody which he considered to parallel the circumstances in 2010/11 leading up to the index offences. The respondent expressed a desire not to return to prison as a motivating factor to avoid offending on release but had a lack of awareness as to how he could create the conditions to avoid offending. He had expressed an interest in undertaking alcohol rehabilitation in the community but there was a waiting list and an admission process so that the respondent may not meet the criteria for intervention. The respondent had not undertaken the recommended work with NIPS Psychology. PBNI considered that he needed to undertake pre-release testing. He should also have demonstrated stability in custody. He had eight guilty adjudications in the previous 12 months which was concerning as he was at the stage when he should have been adhering to the prison regime. That all suggested a lack of insight and a degree of impulsivity. He said that he had been pressured to take drugs into prison when returning from the UTR which suggested that he was susceptible to the influence of others.

[16] The PBNI Area Manager gave evidence about the May 2017 revision to PBNI's assessment of significant risk of serious harm procedures. She explained that the change in PBNI policy in May 2017 created an elevated benchmark so that PBNI had fewer cases assessed as a significant risk of serious harm thereby enabling it to concentrate resources on more serious cases. She accepted that a prisoner could remain assessed as presenting a high level of risk of serious harm but might no longer meet PBNI criteria for significant risk of serious harm. She also said that the PBNI assessment is not aligned to the dangerousness assessment considered by the sentencing court. She said that it was clear from the RMM minutes that there were ongoing concerns about the respondent's risk factors. She stated that the respondent did continue in her opinion to pose a risk of serious harm.

[17] The respondent gave oral evidence about his recent work with a psychologist, his issues with drugs and alcohol and his motivation to avoid a return to custody following release on licence. He said that he would be willing to reside in a hostel and would like to attend a rehabilitation programme. Throughout the hearing he presented as appropriate and appeared to attend to all aspects of the proceedings. The panel assessed that he tended to minimise his responsibility for his recent adjudications by attributing his behaviour to lack of opportunities within the custodial setting and his self-diagnosis of ADHD. He was unable to articulate any significant changes or progress he had made with reference to work he had already undertaken within custody. He presented with poor insight into his risk factors and the means of managing same. His future planning was general, idealised and superficial in nature. He did not appear aware of the concrete, specific and realistic plans required to provide him with the necessary structure, activity and support required to maintain him within the community.

The Parole Commissioners' Assessment

[18] It was submitted on behalf of the respondent that the wording of the test in Article 18(4)(b) of the 2008 Order related back to Article 14(1)(b)(i) which applied when imposing an Extended Custodial Sentence on the basis of a significant risk to

members of the public of serious harm. There could not be a lower standard applied at the release stage. The word "significant" was not incorporated in Article 18 but its presence was implied. In any event it was no longer necessary for the protection of the public to detain the respondent primarily because the last two PBNI assessments concluded that he was no longer assessed as posing a significant risk of serious harm.

[19] The panel rejected the submission that it should read anything into the words setting out the test prescribed by Article 18 of the 2008 Order. The different wording recognised that the test at sentencing was not identical to that at the release stage. The panel also rejected the suggestion that PBNI's assessment of significant risk of serious harm following on the publication of its procedure document in May 2017 was determinative of the Article 18 test. It was one piece of evidence to be considered in the overall assessment of the risks posed by the prisoner and it was the role of the commissioners to take all evidence into account in considering whether it was necessary for the protection of the public from serious harm for the prisoner to be confined.

[20] The panel noted that the PDP Coordinator had identified the main risk factors presented by the respondent as follows:

(i) His preparedness to engage in risk-taking behaviour as evidenced by his adjudications. The PDP Co-ordinator said that it is not clear whether the respondent's actions were motivated by fear of harm from others, as for example when he brought drugs into prison under what he says was pressure from others, but his actions still demonstrated risk-taking behaviour;

(ii) The planned nature of this risk-taking behaviour;

(iii) The respondent's preparedness to use implements to threaten in the index offence and the planned nature of that offence;

(iv) The respondent's lack of impulse control;

(v) His external locus of control, attributing his difficulties to factors outside of himself;

(vi) Issues around his unresolved trauma;

(vii) His lack of problem-solving skills;

(viii) Lack of insight into his own risk and offending; and

(ix) Lack of protective factors.

[21] The panel concluded that the respondent's inability to provide any real understanding of his risk, needs and completed work beyond the superficial was reflective of his poverty of insight. That was of concern because of his ongoing high level of risk. It was concluded that the respondent had significant work to do to develop demonstrable insight into his risks, underlying needs, necessary supports

and behavioural and attitudinal change required so as to be considered eligible for safe management within the community. There was little evidence of a reduction in the respondent's risks. The panel concluded that the respondent posed a risk of serious harm to the public and that the risk he posed could not be safely managed in the community at that time. Accordingly it was not satisfied that it was no longer necessary for the protection of the public from serious harm that he should be confined. The panel made a number of recommendations about the work he should undertake in preparation for release on licence.

The learned trial judge's decision

[22] In the interests of ensuring expedition in the determination of this matter the learned trial judge decided that he should deal with the application by way of a rolled up hearing. He asked each of the parties to formulate their co-contentions. The respondent contended that the panel's finding on risk of serious harm constituted no more than a determination that the respondent presented a mere possibility of risk of serious harm to the public. Such a determination could not lawfully ground the finding that the release test was not satisfied. The appellant submitted that the finding of a risk of serious harm to the public that could not be safely managed in the community at this time was an express and orthodox application of the statutory test to be applied by the panel.

[23] The learned trial judge stated that the challenge was to the conclusion of the panel set out at [38] of its decision:

> "Having considered all of the evidence the Panel concludes that Mr Toal poses a Risk of Serious Harm to the public and that the risk he poses cannot be safely managed in the community at this time. Accordingly we are not satisfied that it is no longer necessary for the protection of the public from serious harm that he should be confined."

The essence of the respondent's case in this passage was that the panel failed to apply the correct legal test and/or misdirected themselves in law.

[24] The learned trial judge accepted the respondent's submission and set out five reasons for doing so.

(i) The terminology "significant risk of serious harm" was used by the panel where it appeared in the pre-sentence report and subsequent PBNI reports but was not the panel's phraseology.

(ii) The panel robustly and unambiguously rejected the submission that it had to be satisfied that there was a significant risk of serious harm before continuing detention. He also noted that in the pre-action protocol letter the panel had wrongly asserted that Article 14 of the 2008 Order made no reference to "protection of the public". He noted the submission that this error was not serious or material.

(iii) Thirdly, the appellant's counsel had expressed unambiguously the panel's acceptance that the risk of serious harm to which Article 18(4)(b) of the 2008 Order is directed must be of significance.

(iv) Fourthly, there was no attempt to engage with relevant jurisprudence including R v McCormick and R(Brooks) v The Parole Board [2004] EWCA Civ 80 where Kennedy LJ stated at [28] that the Parole Board is concerned with the assessment of a risk, and more than minimal risk, of further grave offences being committed in the future.

(v) Finally, the decision was one of a judicialised tribunal and it must be capable of withstanding penetrating scrutiny.

Submissions

[25] The essence of the case made on behalf of the respondent at first instance was that in order to make the statutory assessment required by Article 18(4)(b) of the 2008 Order dealing with release the panel first had to be satisfied that the significant risk of serious harm test prescribed in Article 14 (1)(b)(i) at the sentencing stage had to be satisfied. Mr Sayers submitted in this court that such an approach was inconsistent with the decision of the Supreme Court in R(Sturnham) v Parole Board (No2) [2013] AC 254. Although this case had been referred to in a footnote on another point its significance in relation to the central issue in the case was not drawn to the attention of the learned trial judge who had conducted the case with commendable expedition. It followed, therefore, that his submission was made for the first time in this form on appeal.

[26] Mr Sands submitted that the variation in the PBNI test for a significant risk of serious harm had given rise to practical difficulties. If the imposition of the test was a reflection of limited resources available to probation services the answer was to obtain further resources from the Department. The purpose of the release test was to protect the public from serious harm for as long as is necessary. That was different from the sentencing test. The panel had considered all the relevant factors in their decision.

[27] Mr Southey submitted that the issue in this case was narrow. The appellant accepted that the risk of serious harm had to be of significance. That reflected the necessity test in Article 18. He accepted that the appropriate test for concluding that there was a significant risk of serious harm at the sentencing stage was that set out in R v Lang. He submitted that the panel was required to answer two questions in carrying out its obligations under Article 18 of the 2008 Order. The first was whether or not there was a significant risk of serious harm, in other words the same test as in Article 14. The second was whether or not the risk could be managed so that it was no longer necessary to detain the prisoner. The test of significance was ultimately effectively covered by asking whether the risk was such that society did not have to bear it.

Consideration

[28] We consider that the issues of principle arising in this case have been addressed by the Supreme Court in Sturnham. In that case the trial court imposed a sentence of imprisonment for public protection ("IPP") pursuant to section 225(1)(b) of the Criminal Justice Act 2003 which required the court to be "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". Where it was of that opinion the court was required to specify a minimum period after the expiry of which the prisoner was eligible for review by the Parole Board who could direct his release. The Parole Board was required by section 28(6)(b) of the Crime (Sentences) Act 1997 not to direct release unless "satisfied that it is no longer necessary for the protection of the public that the prisoners should be confined". The test for the imposition of an IPP was, therefore, precisely the same as that for the imposition of an extended custodial sentence under Article 14(1)(b)(i) in the 2008 Order and the test for release was different from that set out in Article 18(4)(b) only by the addition of the words "from serious harm" after "public" in the 2008 Order. That distinction is of no materiality in this case since this provision has been consistently applied in England and Wales by reference to the risk of serious injury (see R v Parole Board Ex parte Watson [1996] 1 WLR 906).

[29] The appeal in Sturnham related to the release of the prisoner. It was advanced on the basis that for the Parole Board to be satisfied that the prisoner's confinement was no longer necessary for the protection of the public it should construe the test in conformity with the statutory test for imposing the sentence so that the Board had only to be satisfied that confinement was no longer necessary for the protection of the public against a significant risk of serious harm from the commission of further specified offences.

[30] The Supreme Court rejected that submission. Lord Mance delivered the judgment with which all other members of the court agreed. He set out a number of reasons for the decision but four, in particular, are relevant in this case:

> "41. First, the two tests are, both in their terms and in their default position, substantially different. Imposition depends on the court being positively satisfied of "a significant risk to members of the public of serious harm occasioned by the commission of further specified offences". Release depends on the Parole Board being "satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined."
>
> 42. Second, the test for release applied under the 2003 Act to a sentence of IPP was the test for discretionary life sentences encapsulated in statutory form first in section 34(4)(b) of the 1991 Act, and later in section 28(6)(b) of the 1997 Act, and since also

applied to mandatory life sentences. Those drafting and enacting the 1991 Act must be taken to have been aware of the decision in Ex p Bradley (decided on 4 April 1990). Those drafting and enacting the 1997 Act must be taken to have been aware of and accepted the line of authority consisting of Ex p Bradley, *Ex p Wilson [1992] QB 740* and Ex p Lodomez 26 BMLR 162. Parliament therefore accepted a difference in the tests for imposing and for release from a discretionary life sentence. In introducing a sentence of IPP into the same framework for release as applies to discretionary life sentences, Parliament must on the face of it have intended to apply to sentences of IPP the same test for release as for discretionary life sentences, again even though that differed from the test for imposition.

43. Third, the phrase "no longer necessary for the protection of the public" in the test for release does not import any reference to the threshold risk justifying the imposition of the sentence. The sentence imposed will itself operate as a complete protection of the public against any real risk during the tariff period. The phrase does no more than raise the question whether continued detention, after the tariff period, is any longer necessary to achieve that protection.

44. Fourth, I see no inconsistency or incongruity in a scheme involving a higher initial threshold of risk for the imposition of a life sentence or a sentence of IPP, but requiring a somewhat lower risk to be established in order for the convicted offender to be eligible for release. This is so even if a sentencing judge deciding whether to impose a sentence of IPP was not engaged in the predictive exercise held in Ex p Bradley to be required when a court considers whether to impose a discretionary life sentence. Those who cross the initial threshold have notice from the case law that they are at peril of being held to protect the public against a more general and lesser level of risk. The threshold consists of the commission of a serious offence coupled with the existence of a significant risk of the commission of further specified offences. A person who has not committed a serious offence cannot be detained, even if he presents a significant risk of the commission of specified

> offences: that is because the threshold has not been crossed. But where the threshold is crossed, it does not follow that the objective of detention beyond the tariff period is confined to the elimination of any significant risk (whether that means whatever significant risk was identified when the sentence of IPP was imposed or any significant risk which may at the end of the tariff period be thought to exist). The objective may well be the more general protection of the public for as long as necessary. This, on the face of it, is also what the statutory test for release under section 28(6)(b) states."

[31] These four reasons also apply in this case. The first reason needs no further elaboration. The second reason applies because the legislation in this jurisdiction is copied almost word for word from the Westminster legislation. The statutory history is, therefore, relevant for both jurisdictions. Although the discussion in this section is concerned with the imposition of an IPP, exactly the same statutory provisions apply to an Extended Custodial Sentence. There is no basis for giving those provisions an altered meaning when dealing with release as a result of such a sentence. The third reason again needs no further elaboration as does the fourth.

[32] Turning then to the factors upon which the learned trial judge relied it is clear that the first three reasons are directly affected by the Supreme Court decision in Sturnham. We entirely accept the learned trial judge's criticism of the error in respect of the wording of Article 14 in the pre-action protocol letter but we do not consider that it was material to the outcome of the case. The fourth reason relates to the consideration of the relevant jurisprudence and it is extremely disappointing that the parties in this case did not draw to the attention of the learned trial judge the central importance of the approach taken by the Supreme Court in Sturnham. As a result the case argued below omitted crucial guidance in this area. Against this background we do not consider that the fifth ground is of any significance.

Conclusion

[33] For the reasons given we do not consider that there is equivalence between the test for dangerousness applied by the sentencing court in Article 14 of the 2008 Order and the test for release in Article 18 applied by the Parole Commissioners. It follows that the respondent's submission that the Parole Commissioners should first ask whether the test for significant risk of serious harm in Article 14 is satisfied before proceeding to apply the statutory test in Article 18 is wrong. The test in Article 18 is a predictive evaluative judgment by an expert tribunal but we accept that it must be capable of withstanding proper scrutiny. Had the learned trial judge been referred to the relevant portion of the decision in Sturnham we are satisfied that it would have altered his view decisively. It is disappointing that it was not until the hearing of the appeal that this was corrected.

[34] We are satisfied that the panel asked the question required by Article 18 of the 2008 Order. In doing so it applied the correct test and its decision is not susceptible to challenge.

[35] For those reasons we allow the appeal.