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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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IN THE MATTER OF APPLICATION BY MICHAEL LARKIN FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE NORTHERN IRELAND PRISON SERVICE AND THE PAROLE COMMISSIONERS FOR NORTHERN IRELAND

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Ronan Lavery QC and Malachy McGowan (instructed by Phoenix Law) for the Applicant
Tony McGleenan QC and Laura McMahon (instructed by the Departmental Solicitor's Office) for the First Respondent
Donal Sayers QC and Denise Kiley (instructed by Carson McDowell LLP) for the Second Respondent

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SCOFFIELD J

Introduction

[1] By this application for judicial review the applicant, Michael Larkin, a prisoner currently serving an extended custodial sentence (ECS), challenges decisions of the Northern Ireland Prison Service (NIPS) in relation to the non-provision of pre-release testing by way of accompanied and unaccompanied home leave during the Covid-19 pandemic and, relatedly, a decision of the Parole Commissioners for Northern Ireland ('the Commissioners') made in December 2020 by which they declined to direct his release on licence in the absence of his having undertaken pre-release testing.

[2] The application raises interesting issues as to the extent to which Article 5 ECHR avails an ECS prisoner still within their appropriate custodial term but who has served the 'relevant part' of their sentence; and the extent to which the prison authorities were entitled to alter the usual home leave arrangements (particularly

those which might have an impact on a prisoner's prospects of release on licence before the Commissioners) in light of the public health challenges arising from the pandemic.

[3] Mr Lavery QC appeared with Mr McGowan for the applicant; Mr McGleenan QC with Ms McMahon for the Department of Justice ('the Department'), of which NIPS is an agency; and Mr Sayers QC with Ms Kiley for the Commissioners. I am grateful to all counsel for their extremely helpful written and oral submissions.

Factual background

The applicant's offending and sentence

[4] The applicant was sentenced at Craigavon Crown Court on 16 December 2015 to an extended custodial sentence of 15 years, comprised of 10 years' detention and 5 years' extended licence for two counts of attempted murder, possession of an offensive weapon with intent and wounding with intent. Each of these offences had been committed whilst the applicant was detained in a mental health unit. Mr Larkin, who had just been detained under the provisions of the Mental Health (Northern Ireland) Order 1986, attacked the doctor admitting him to the relevant unit within hospital, including by cutting his throat with a Stanley knife. Two days later, whilst the applicant was under special observation, he attacked a mental health support worker with a toothbrush which had been sharpened, stabbing or slashing him a number of times, resulting in a laceration in his neck which bled. Mr Larkin had a history of mental health issues, including paranoia which gave rise to delusions by virtue of which he believed that people were trying to kill him or were secretly listening to and recording him. It was considered that, at the time of the index offences, the applicant's thought processes and perception were disturbed by the effects of acute psychotic illness. Nonetheless, the offences were plainly very serious.

[5] The applicant's parole eligibility date (PED) was 7 October 2019 and he has therefore been eligible for release since that date, subject to being assessed by the Commissioners as suitable for release. The applicant's custody expiry date (CED) is 6 October 2024, at which point he is entitled to release on licence. His ultimate sentence and licence expiry date (SLED) is 6 October 2029.

The initial consideration of the applicant's case by the Commissioners

[6] The test for release at this point in the applicant's sentence is contained in Article 18 of the Criminal Justice (Northern Ireland) Order 2008 ('the 2008 Order') which requires the Commissioners not to direct the release of a prisoner unless they are "*satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined*".

[7] The Commissioners considered the applicant's case on 3 October 2019, shortly before his PED. Their decision at that point set out a variety of recommendations of work and other steps that the applicant should undertake, including what should be done by NIPS to allow that to occur, in order to progress towards his meeting the test for release. In particular, the panel stated as follows:

> "*However the panel is not satisfied that he could be safely managed in the community until such time as his risk factors are identified and any necessary risk reduction work completed, and appropriate, comprehensive risk management strategies put in place. To put it in its most simple form, it is not possible to safely manage Mr Larkin until PBNI and those tasked to look after him are fully aware of his current diagnosis, his risk factors and treatment needs. The panel would also wish there to be a risk assessment carried out on any future accommodation. A detailed release plan would need to be put in place to take into account any identified risk factors. Mr Larkin would need to have undertaken a period of pre-release testing so as to assess his ability to cope not only with periods of release but also to assess how he would cope with the undoubted stress of release*."

[8] The panel recommended that a dynamic violence risk assessment be undertaken; that there should be a risk assessment undertaken by a psychiatrist or psychologist; that the applicant's outstanding treatment needs be identified and addressed; and, amongst other things, that he progress to pre-release testing (PRT) in due course. Progress was made on a variety of these matters. Particularly relevant to the present case is the fact that the applicant successfully completed a period of PRT on 26 February 2020. On that date the applicant, accompanied by prison staff and his mental health key worker, went shopping in Belfast and made a visit to Holywood. This accompanied temporary release (ATR) went well.

[9] Following this, however, in March 2020, as discussed further below, the NIPS suspended all periods of pre-release testing, and indeed many elements of pre-release leave, by virtue of the Covid-19 pandemic and related lockdown restrictions. The PDP Co-ordinator Report prepared in respect of the applicant in May 2020 indicates that, had PRT not been suspended in March 2020, it was anticipated that Mr Larkin would have continued to have availed of ATRs in March and April 2020.

[10] The applicant's case next came before the Commissioners in mid to late 2020. In the first instance, Mr Larkin's case was considered by a single Commissioner, who provided a determination on 25 August 2020. There were a variety of elements in the applicant's favour at that point: for instance, he had met and maintained his enhanced status within prison since August 2015, he had no adverse prison reports and no prison adjudications, and had failed no drugs tests. He had fully engaged with his personal development plan (PDP). It is clear from the single

Commissioner's provisional decision in August 2020 – and even more so from the decision of the full Panel of Commissioners in December 2020 (which is the decision under challenge in these proceedings) – that at least a very significant factor in the determinations not to direct release was the failure of the applicant to complete sufficient periods of pre-release testing. The single Commissioner was also concerned about the lack of a dynamic risk assessment. Notwithstanding the "*significant progress*" which he had made, including the commencement of PRT, the core element of the single Commissioner's reasoning was in the following paragraph:

> "*It is therefore both disappointing and frustrating that the pre-release testing programme has been interrupted in the light of the Covid 19 pandemic, along with a number of other important programmes and risk assessments through no fault of either Mr Larkin or the prison authorities. The pathway set out by the Parole Commissioners in their last hearing therefore remains incomplete.*"

[11] As noted above, the applicant had successfully completed one instance of PRT in February 2020 by way of accompanied temporary release. However, shortly after this, due to the Covid-19 pandemic NIPS suspended all pre-release testing. This meant that, until much more recently, and for a period of well over a year, the applicant was hindered in his ability to satisfy the Commissioners that he was suitable for release by means of having successfully completed further periods of release in the community.

[12] In each instance, the Probation Board did not support the applicant's release. I return to the significance of this below.

[13] The applicant has placed very significant reliance upon a psychological assessment carried out in relation to him by a Senior Forensic Psychologist, Mr McC (anonymised in light of the provision made in rule 22(3) of the Parole Commissioners' Rules (Northern Ireland) 2009), in a report dated 10 August 2020, which was before the Commissioners. Given the reliance placed upon this report by the applicant, I have set out the 'Conclusion and Opinion' section of the report in full below:

> "*Overall, Mr Larkin presents with some historical risk factors but he has completed interventions commensurate with his risk. There is evidence of some perpetuating factors though equally there is the presence of relevant protective factors.*
>
> *It is unlikely that he will act impulsively or recklessly if released and unlikely that violence would be imminent. Violence would become more likely or imminent after a sustained period of decline in his mental well-being.*

Evidence that Mr Larkin's risk is increasing would include if he resumed his use of cannabis, socially withdraws, lacks purposeful activity, displays bizarre behaviour related to themes of persecution or self-protection such as acquiring blades, hiding food, burning possessions, insomnia or stopping eating food. In terms of risk management it will be very important that Mr Larkin reports in supervision if he is experiencing any unhelpful thoughts and how he is managing those. Therefore, any disengagement with the Community Forensic Mental Health team, any non-compliance with his medication and any withdrawal from attending probation appointments should be considered an early warning sign.

Mr Larkin's behaviour in custody is encouraging and it appears that he is now ready to progress further through his sentence. Release could be considered if the right supports are in place and when Probation assess that they can manage his risk through licence in the community. In tandem with pre-release testing or release, Mr Larkin could benefit from continuing to engage with the CBT sessions and work with PBNI to help him understand some of the aspects of his personality that contribute to his risk."

The Commissioners' decision of December 2020

[14] The decision impugned in these proceedings is the determination of 7 December 2020 of a panel of Parole Commissioners ('the Panel') not to direct the applicant's release.

[15] The Panel's decision records that they considered the applicant's case on 30 October, 30 November and 3 December 2020. The Commissioners considered a range of evidence in the parole dossier. Central to the applicant's case was the psychology assessment provided by Mr McC, referred to above. The applicant contends that this assessment supported his case that he met the test for release, namely that it was no longer necessary for the protection of the public that he be confined. The applicant opted for a paper-based hearing and did not himself attend the hearing.

[16] At the time of the Commissioners' hearings and determination, it was clear that the level of pre-release testing which had been anticipated and hoped for in the applicant's case had not come to pass. In a PBNI update report of 14 October 2020 (discussed further below), the following observations were made in this respect:

"*[The Parole Commissioners] have also requested clarity on the timescale of any Pre Release Testing for Mr Larkin. At a prison Case Conference on 30.09.20 Mr Larkin was informed by the Chair Governor Deans that there are no present plans for Pre*

> *Release Testing to recommence for any prisoner. I have had further contact with Governor Deans (on 13.10.20) and have confirmed that NIPS Senior Management are presently considering the issue of Pre Release Testing on an ongoing basis at regular meetings which follow those organised by the Executive. I understand that there is presently a 3 week hold on any such progress due to the escalating situation in the community as regards Covid-19. As such, this situation remains under review."*

[17] I note in passing that this document provides contemporaneous corroboration of the case made by the Department in these proceedings that the capacity to provide PRT, and the appropriateness of providing it, was being kept under constant and continuous review by the authorities.

[18] The Panel set out in detail much of the single Commissioner's analysis of the case, highlighting that his reasons for provisionally directing that the applicant should not be released included the seriousness and violence of the index offences; that the deep roots of that offending required to be addressed; that, although the applicant had made considerable progress, the programme of work set out by the panel of commissioners in October 2019 remained incomplete, including in relation to pre-release testing (as well as other important programmes and risk assessments); and that, whilst this was through no fault of the applicant, "*the risks in Mr Larkin's case require that PRT is thorough and painstaking*" but that this had not been completed.

[19] The Panel again recognised that since March 2020 the PRT programme had been substantially, if not wholly, paused owing to the pandemic and that this was not the applicant's fault. A key portion of the Commissioners' reasoning, of which the applicant is especially critical, is in the following terms:

> "*The fact remains, however, as the Case Conference in November 2019 recorded, the risks that Mr Larkin poses require to be satisfactorily and fully tested by PRT, and that – to date – has not happened. According to the Psychology Assessment Report, to date Mr Larkin has only been able to engage in one ATR before all PRT was suspended because of the outbreak of Covid-19. The Minutes of the Case Conference of 30 September 2020 record Mr Larkin handled this one ATR "really well". Therefore, the panel has before it no objective evidence that the skills Mr Larkin has acquired to enable him to appropriately self-manage the challenges he will face in the community (in conjunction with the supports of those supervising him) have been appropriately tested on PRT. Because of this fact, there is no objective professional evidence that at this time Mr Larkin comes within the test provided by Article 18(4)(b) of the 2008 Order.*"

[20] The Panel again commented on the progress the applicant had made and noted that its decision would be frustrating and disappointing for him. However, they were concerned to read in the forensic psychologist's report that he may have some difficulty in the appropriate expression of anger and that his interest in and motivation for treatment was substantially lower than was typical in individuals being seen in treatment settings. The psychologist had also reported a concern that in the early stages of prescribed treatment, the applicant may not be experiencing sufficient distress to feel that such treatment was needed and that he may be rather defensive and reluctant to discuss personal problems and thus not willing to make a commitment to therapy. In the Panel's view this concern highlighted the need for thorough testing on the PRT programme in the applicant's case. Ultimately, the Panel considered that it could not depart from the conclusion of the psychologist when he stated that:

> "*Release could be considered if the right supports are in place* ***and*** *when Probation assess that they can manage his risk through licence in the community. In tandem with pre-release testing or release, Mr Larkin could benefit from continuing to engage with the CBT sessions and work with PBNI to understand some of the aspects of his personality that contribute to his risk*."
> [bold emphasis in Commissioners' text]

[21] The Panel further recorded that the applicant was still assessed as presenting a risk of serious harm at that time according to the PBNI update report of 14 October 2020, as a result of the risk factors they had discussed earlier in their decision. The Panel purported to 'prefer' the PBNI conclusion in its update report that "*the risks surrounding Mr Larkin cannot be managed in the community*" and that the applicant had not yet sufficiently demonstrated his ability to exercise control over himself, particularly in relation to the management of his mental and emotional health as he is re-introduced to the community and exposed to potential stressors, which ought to happen through pre-release testing.

[22] The Panel's ultimate conclusion, in my view, is expressed in the following portions of their reasoning (at paragraphs 36 to 37 of their determination):

> "*The panel is concerned that Mr Larkin continues to present as someone who has a limited degree of understanding of the pathway that led to his offending, and of how he will cope with the multiple stressors of living in the community through PRT and beyond. The panel concludes a structured approach to PRT remains necessary at this time. Given the evidence before the panel, it must apply the statutory test as it finds it. The panel cannot gamble with the public's right to be free of the risk of serious harm that Mr Larkin currently presents and which, according to the evidence presented to it by professionals*

> *involved in Mr Larkin's case, cannot be safely managed in the community at this time.*
>
> *Fully cognisant of all the positive and encouraging features in this case, the panel has concluded that although Mr Larkin has made steady progress to date he is not yet at the point where he is ready for release into the community on ECS licence. In the absence of evidence of satisfactory progress on the PRT programme, Mr Larkin does not satisfy the provisions of Article 18(4)(b) of the 2008 Order at this time*."

[23] The Panel went on to make a number of recommendations including that "*urgent consideration should be given to Mr Larkin's candidacy for PRT as soon as it becomes available*" [underlined emphasis in original]. A range of further recommendations were also included which is not necessary to set out in detail for present purposes.

Subsequent events: further consideration by the Commissioners

[24] Since the decision which is under challenge in these proceedings, the Commissioners have had occasion to consider the applicant's case again. On 27 April 2021, there was a further single Commissioner decision in relation to the applicant's case. On this occasion, the single Commissioner took the opposite approach from the Commissioners (both the single Commissioner and Panel) who had considered the applicant's case in 2020. Rather, he took the approach which the applicant's representatives had been urging in 2020, that is to say, he reached the conclusion on the basis of the evidence before him that it was no longer necessary for the protection of the public from serious harm that the applicant be confined. He therefore determined that he should make a direction that the applicant be released. Of course, any such determination by the single Commissioner is provisional in nature only.

[25] By letter dated 2 June 2021 the relevant governor of HMP Maghaberry indicated that the Department's position in respect of the applicant was that it was unable to support release at this point in time, as he has not completed PRT. The applicant then had an expedited parole hearing before a panel of Commissioners on 22 June 2021. That panel delivered their decision on 25 June and a copy of this has been provided to me in an affidavit from the applicant's solicitor which was furnished after the hearing of this application. On this occasion, the panel directed the applicant's release. I have been informed that he has since been released, is currently living in hostel accommodation and is "*doing well.*"

Subsequent events: the recommencement of PRT

[26] In addition, there has recently been a limited recommencement of the provision of PRT in the form ATRs. ATRs were recommenced in the week

commencing 3 May 2021; and the applicant availed of an ATR on 7 May 2021. In the Governor's letter of 2 June 2021 it was expected that the applicant's next ATR would be in mid-June 2021, after which, if successful, he would be ready to progress to unaccompanied temporary releases (UTRs), albeit at that time no date had been set for the recommencement of UTRs.

The applicant's challenge

[27] In summary, the applicant contends that:

(i) The Panel of Commissioners who considered his case in December 2020 ought to have directed his release, notwithstanding his failure to complete PRT, as he met the test for release by the time of the Commissioners' hearing and the Panel's conclusion to the contrary was *Wednesbury* unreasonable.

(ii) In any event, since the sole factor (on the applicant's case) which led to the Commissioners' refusal to direct his release was the failure to complete sufficient periods of PRT, it was unlawful for the Commissioners to refuse to direct his release. This is because he had been *unable* to complete PRT due to the 'refusal' of the Prison Service to permit him access to PRT from March 2020 until May 2021. In those circumstances, his imprisonment was arbitrary and in violation of Article 5 ECHR. The Commissioners ought to have given effect to the applicant's Article 5 rights by directing his release, disapplying any provisions of subordinate legislation in the 2008 Order which stood in their way.

(iii) In the further alternative, it was unlawful for NIPS to deny the applicant access to PRT from March 2020 to May 2021 either on the basis of this being *Wednesbury* unreasonable or in breach of Article 5 ECHR. The Court should grant a declaration accordingly and, as necessary, grant mandatory relief to require him to be provided with PRT opportunities.

The nature of the applicant's sentence

[28] Before turning to consider the application of Article 5 ECHR in the present context, it is necessary to consider the nature of the applicant's sentence and, in particular, that portion of it which he is presently serving. Extended custodial sentences are provided for in the 2008 Order and, in particular, in Article 14 of that Order.

[29] Article 14 applies where a person is convicted on indictment of a specified offence and 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 it is required by Article 13 to impose a life sentence or an indeterminate custodial sentence. Where those conditions are met, by virtue of Article 14(2), "*the court shall impose on the offender an extended custodial sentence*."

[30] Where, as here, the offender is aged 21 or over, Article 14(3) makes the following provision:

> "*… 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."*

[31] The basic anatomy of an ECS, therefore, is that it comprises of two parts: the "*appropriate custodial term*" and "*the extension period*". Article 14(4) defines the appropriate custodial term:

> "*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.*"

[32] As its name suggests, the appropriate custodial term is the length of time for which the court considers it to be appropriate that the offender be committed to custody. That follows from the reference to Article 7, the relevant part of which provides that:

> "*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.*"

[33] By virtue of Article 14(8), the 'extension period' added on to the end of the appropriate custodial term, during which the offender is subject to licence, shall not

exceed five years in the case of a specified violent offence and eight years in the case of a specified sexual offence. The purpose of this additional licence period, which is apparent from Article 14(3)(b) set out above, is purely that of public protection.

[34] On the face of Article 14, therefore, the ECS may be seen as being split into two parts: the first, the appropriate custodial term, being similar to a determinate custodial sentence (DCS), that is to say a fixed period of imprisonment determined by reference to the seriousness of the offence; and the second, the licence period, being for public protection, with the offender having a right to release (see Article 18(8)), subject to compliance with his licence conditions which will be designed to manage the risk of reoffending.

[35] The situation is complicated, however, by the provisions of Article 18 of the 2008 Order which make clear that the appropriate custodial term is itself to be split into two parts. By virtue of Article 18(3), a prisoner serving an ECS is entitled to release on licence as soon as he "*has served the relevant part of the sentence*" and "*the Parole Commissioners have directed [his] release*" under Article 18. The Commissioners shall not so direct unless the Department has referred the prisoner's case to them and "*they are satisfied that it is no longer necessary for the protection of the public from serious harm that [the prisoner] should be confined*". Accordingly, there is a prospect of release after the relevant part of the sentence has been served. By virtue of Article 18(2), in relation to an ECS the relevant part of the sentence means "*one-half of the period determined by the court as the appropriate custodial term under Article 14.*"

[36] Accordingly, reading the statutory scheme as a whole, an ECS has the following three components:

(a) The first part of the appropriate custodial term ('the relevant part'), during which the offender must be detained;

(b) The second part of the appropriate custodial term (after expiry of the relevant part), during which the offender is liable to be detained pursuant to the sentence of the court *unless and until* the Commissioners are persuaded that he is suitable for release (applying the test in Article 18(4)(b)); and

(c) The extension period, during which the offender is entitled to release on licence but liable to be recalled to prison if he breaches the conditions of his licence.

[37] This case concerns the second part of the appropriate custodial term.

Article 5 ECHR in this context

[38] What are the applicant's rights under Article 5 ECHR during the second part of his appropriate custodial term?

[39] Mr Sayers for the Commissioners relied heavily on the decision of the UK Supreme Court in *R (Whiston) v Secretary of State for Justice* [2015] AC 176. In that case, the claimant was serving a determinate custodial sentence of 18 months and was entitled to release on licence after having served half of that term. However, after he had served only 4½ months, the Secretary of State released him on licence pursuant to a home detention curfew scheme, under which a prisoner could be released during the custodial period. Shortly after this, the Secretary of State recalled the claimant to prison as his licence conditions could no longer be complied with. The claimant sought judicial review on the grounds that, since the Secretary of State's relevant recall power could not be reviewed by the Parole Board or any other judicial body, the recall decision breached his rights under Article 5(4) ECHR, namely the right to have the lawfulness of one's detention speedily determined by a court. The Supreme Court held that, once a person had been lawfully sentenced by a competent court to a determinate term of imprisonment he could not, in the absence of unusual circumstances, challenge his loss of liberty during that term on the ground that it infringed Article 5(4) because, for the duration of the sentence period, the lawfulness of his detention had been decided by the court which had sentenced him to that term. This meant that he had been deprived of his liberty in a way permitted by Article 5(1)(a) for the term of the sentence; and the Article 5(4) requirement was satisfied by the original sentencing decision.

[40] In my judgment, the analogy drawn between the present case and the circumstances in *Whiston* is well-founded. In *Whiston*, the claimant was released during the 'requisite custodial period' of his sentence. He had no automatic entitlement to release under the scheme under which he was released (although he might well have had a legitimate expectation of release if he met the relevant terms of the scheme). During the requisite custodial period, he could perfectly well expect to be detained in prison. That was the default position. Moreover, it had been authorised as the default position by the sentencing court, having regard to the circumstances of his offending. So too in the present case, Mr Larkin is currently within the 'appropriate custodial term' of his sentence. He has a hope and expectation of earlier release if certain conditions are met; but the default position is that he should be confined to prison during the custodial term because that is what the sentencing court considered his offending to warrant.

[41] Although the *Whiston* case concerned the protections of Article 5(4) ECHR, the Supreme Court noted that that provision and the prohibition on arbitrary detention under Article 5(1) had a "*close relationship*": see paragraph [17] of Lord Neuberger's judgment. The former aspect of Article 5 is a means of vindicating the latter. Having cited a number of Strasbourg decisions where an Article 5(4) complaint had been dismissed because the supervision of the lawfulness of the detention had been incorporated in the original trial process – including a UK case where the applicant had been released and recalled – Lord Neuberger observed (at paragraph [25] of his judgment) that, whereas those cases referred to a sentence having been passed for the purposes of punishment, "*… the reference to punishment cannot have been intended to mean <u>solely</u> for punishment…*" [my underlined emphasis]. That was because

"*determinate prison sentences are imposed for a mixture of reasons, each of which should, at least normally, be treated as applicable to the whole of the sentence period*".

[42] The present case is one where the lawfulness of the applicant's continued detention until the end of the appropriate custodial term – in both its parts – has been determined by the sentencing court. It is not a case where, at this stage of his sentence, the applicant is detained merely as a matter of executive discretion or, as in some of the relevant cases, *solely* because of the risk he poses to the public. Instead, the appropriate custodial term is analogous to a determinate sentence. During the appropriate custodial term, an ECS prisoner is plainly still serving the 'punishment' part of his sentence, even if other sentencing objectives may also be in play. In my view, that is the inescapable conclusion to be drawn from the statutory language used and analysed in paragraphs [30]-[36] above.

[43] Lady Hale dissented in the *Whiston* case as to part of the majority's reasoning, although not the result. However, even applying the principled distinction which she emphasised (in paragraph [51] of her judgment) between those prisoners who had reached a point in their sentence where they were *entitled* to release on licence and those who had not reached such a point but were subject to discretionary release, this would not avail the applicant in the present case. During the second part of his appropriate custodial term, his release on licence is discretionary, in that it is not required unless and until he is in a position to persuade the Parole Commissioners that he meets the test for release.

[44] The correctness of this analysis has been confirmed by later decisions of high authority, principally the decision of the Supreme Court in *Brown v Parole Board for Scotland* [2018] 1 AC 1. The same territory was also addressed more recently by the Court of Appeal of England and Wales in *R (Youngsam) v Parole Board* [2020] QB 387. That case involved a DCS prisoner. Having been released on licence, the claimant was recalled to prison, later re-released, and then recalled again. The Court of Appeal held that Article 5(4) of the Convention did not apply to any fixed-term prisoner during the currency of his sentence, whether he was entitled to be released on licence or not, since the necessary supervision of the lawfulness of the detention of such a prisoner following conviction by a competent court was incorporated in the original trial and any appeal procedure in respect of conviction and sentence. Accordingly, Article 5(4) did not apply to the claimant's recall from licence.

[45] In the course of her judgment, Nicola Davies LJ addressed the question of whether the House of Lords' decision in *R (West) v Parole Board* [2005] 1 WLR 350, which had proceeded on the basis that Article 5(4) was applicable to DCS prisoners who had been released at the half-way point of their sentences, was to be followed in preference to the reasoning in *Whiston*. In *Whiston*, Lord Neuberger had expressed the view that the *West* decision was "*unsatisfactory*" in relation to Article 5(4). Nonetheless, in *Youngsam* the claimant argued that *West* was binding on inferior courts as to the engagement of Article 5(4) and that the comments in *Whiston* to the

contrary were merely *obiter*. The conclusion on this issue is set out in paragraph [18] of Nicola Davies LJ's decision, as follows:

> "*It is clear from the above that in Whiston [2015] AC 176 Lord Neuberger PSC was holding that:*
>
> *(i) Article 5.4 does not apply to any fixed-term prisoner during the currency of his sentence, whether he is entitled to be released on licence or not; the reasoning being that the necessary supervision of the lawfulness of the detention of such a prisoner following conviction by a competent court is incorporated at the outset in the original trial and any appeal procedure in respect of conviction and sentence.*
>
> *(ii) West was per incuriam in relation to article 5.4 because of the failure to consider Giles, Brown and Ganusauskas.*
>
> *(iii) Lord Brown's observations in Black that article 5.4 would apply at the point of recall mandatory release were obiter and wrong.*"

[46] The Supreme Court's decision in *Brown* is also particularly pertinent since it involved a prisoner detained pursuant to an extended sentence of ten years' imprisonment comprising a custodial period of seven years and an extended licence period of three years. The sentence in that case was therefore similar in nature to the ECS imposed on the applicant in this case under the 2008 Order, save in one significant respect. The petitioner in *Brown* was released on licence, as he was *entitled* to be under the relevant Scottish provisions (this being the significant distinction referred to above), after serving two thirds of the custodial term. He was then recalled to custody after committing a further offence and thereafter, subject to periodic review by the Parole Board, remained in custody until his extension period had expired. The issue before the Supreme Court – which has obvious relevance to the issues in this case – was whether there had been any breach of the duty under Article 5 ECHR to provide a reasonable opportunity for rehabilitation to Mr Brown ('the rehabilitation duty'), a duty recognised by the ECtHR in *James v United Kingdom* (2012) 56 EHRR 12 and domestically by the Supreme Court in *R (Kaiyam) v Secretary of State for Justice* [2015] AC 1344. On the facts of the case, the Supreme Court held that there had been no breach of this duty. However, it also examined the question of principle as to whether, and to what extent, the duty arose in relation to an ECS prisoner.

[47] In summary, the Supreme Court decided that the duty to provide a reasonable opportunity for rehabilitation does not apply to extended sentence prisoners during their custodial term, although it does apply to them during the extension period. As Nicola Davies LJ observed at paragraph [27] of her judgment in *Youngsam*:

> "*In summary this was because: (i) during the custodial period there is no risk of detention becoming arbitrary and thus in breach of article 5.1 since the detention had already been authorised by a court; and (ii) by contrast during the extension period the risk of arbitrary detention does arise*."

[48] For present purposes, the core of the reasoning of the Supreme Court in *Brown* is set out in paragraph [58] of the decision of Lord Reed:

> "*Prisoners who are detained during the custodial term, or during a period ordered to be served under section 16 of the 1993 Act (as explained in para 55 above), are during that period in an analogous position to prisoners serving determinate sentences. They are serving a period of imprisonment of a term of years which the court has stipulated as appropriate for the offence committed. If they are released on licence and then recalled during that period, they continue to serve the period of imprisonment imposed by the court. It follows, according to the Strasbourg jurisprudence relating to determinate sentences, and the majority view in Whiston [2015] AC 176, that the order of the court imposing that period of imprisonment is sufficient to render their detention during the custodial term 'lawful' for the purposes of article 5.1(a), and the judicial supervision required by article 5.4 is incorporated in the original sentence.*"

[49] Lord Reed went on to explain that prisoners who are detained during the extension period are generally in a different position to those detained during the appropriate custodial term. First, no court has ordered that the prisoner should be detained during the extension period. Rather, the intention of the sentencing court was that he should be subject to compulsory detention in the community during that period. Second, the purpose of detention during the extension period is materially different, since the punitive aspect of the sentence has been dealt with by service of the custodial term. Third, recall during the extension period depends on recall by the executive, which must therefore be subject to supervision by a judicial body other than the original sentencing court.

[50] Drawing these strands together, it seems to me to be clear that Article 5(4) has no purchase where a prisoner is serving a determinate custodial term or (as here) a defined period of imprisonment which has been set by the court as appropriate in the light of his offending which is analogous to a determinate custodial sentence. Further incarceration during that period cannot be arbitrary as it has been authorised by the sentencing court in accordance with Article 5(1). Until the appropriate custodial term has ended, the applicant has not served out the measure of his punishment. Albeit the statutory scheme permits him hope of an earlier release, and both public protection and rehabilitation may be objects of the custodial

term, the dominant objective of the appropriate custodial term is punishment, coupled with deterrence. During that period the applicant is certainly not detained solely for the purposes of the public protection such that his detention may become arbitrary under Article 5(1) if he is not provided with reasonable opportunities for rehabilitation.

[51] The majority of cases relied upon by the applicant (concerning indeterminate sentences for public protection (IPPs) or life sentences in the post-tariff period) are in a separate category and cannot avail him given the nature of his sentence and the stage of that sentence which he is currently serving. An exception to this was the case of *Re Tadas Lapas' Application* [2013] NIQB 118, which involved an ECS prisoner in the second part of his appropriate custodial term. Insofar as the conclusions expressed above are inconsistent with the view of Treacy J (as he then was) at paragraph [40] of *Tadas Lapas*, where he considered that an ECS was analogous to the IPP regime during the second part of the appropriate custodial term, I must disagree with that view. *Tadas Lapas* was reached before the decisions in *Whiston*, *Brown* and *Youngsam* which are discussed above were available and it would now be decided differently on that issue. Indeed, that can confidently be asserted in light of the decision of the Northern Ireland Court of Appeal, with Treacy LJ giving the judgment of the court, in *Re Rainey's Application* [2019] NICA 76. At first instance in that case ([2017] NIQB 98, at paragraph [69]), Maguire J had treated the entirety of an ECS as analogous to a DCS, rejecting the argument that Article 5(4) ECHR was engaged where the applicant was released after having served his appropriate custodial term and then immediately recalled at the start of his extension period. On appeal, and after the Supreme Court had given its decision in *Brown*, the Court of Appeal (at paragraph [103]) accepted that there was a distinction to be drawn between prisoners who were released as a matter of discretion, in respect of whom the findings in *Whiston* applied, and prisoners released mandatorily (as in *Brown* and *Rainey* itself) where the applicable principles were different. I should make clear, however, that I consider Treacy J's conclusion that the Prison Service in the *Tadas Lapas* case was in breach of a duty towards the applicant in public law to be correct. Close consideration of the judgment suggests Treacy J found no substantive breach of Article 5, although he did feel that the treatment afforded to the applicant was discriminatory in breach of Article 14. The concluding section of the judgment, however, suggests that the learned judge was persuaded that the Prison Service's failure to provide access to the available courses in Mr Lapas' language was irrational in the *Wednesbury* sense. That conclusion was plainly available to the judge on domestic principles of public law whether or not he considered that the ancillary duty of rehabilitation under Article 5(1) of the Convention was engaged.

The approach of the Prison Service

[52] The applicant has challenged the actions of the Prison Service in making PRT opportunities unavailable to him for a period both on common law and Convention grounds. In the course of these proceedings an extremely detailed affidavit was filed on behalf of the Prison Service from Mr Paul Doran, the NIPS Director of

Rehabilitation. This affidavit explains the circumstances relating to the suspension of PRT by NIPS during the Covid-19 pandemic. Mr Doran's affidavit begins by emphasising the alarm and concern which arose in early 2020 as a result of news of the spread of coronavirus in Italy and elsewhere, and the scale of the challenge faced by prison authorities here as they sought to maintain the safety and health of prisoners and staff, whilst also carrying out their core functions of maintaining prisons as places of detention and rehabilitation. The NIPS evidence emphasises that its decision-making was continually informed by its primary concern of protecting the health and well-being of all prisoners and staff in enclosed prison environments, while still trying to operate in a way which both provided a semblance of normality and delivered the prison system's key criminal justice objectives.

[53] The affidavit also makes clear that the actions of the NIPS were intrinsically linked with broader decision-making within the Northern Ireland administration regarding the overall coordinated response to coronavirus. These decisions (principally made by the Northern Ireland Executive) were in turn driven by complex multifactorial decision-making processes which took into account matters such as the availability and allocation of resources, logistics, and constantly evolving medical and scientific advice from a range of public bodies. From the start of the pandemic, NIPS maintained "*a continual line of communication and agreement with the Minister of Justice in relation to all measures contemplated and actioned.*"

[54] The Department emphasises – which is perhaps an obvious point – that prison environments are particularly vulnerable to widespread outbreaks of the virus should it gain access. I was referred to a contribution in the *Lancet Journal of Respiratory Medicine* which supported the view that institutional settings such as prisons are high risk environments for infectious disease outbreaks. The close proximity of prisoners, the physical layout of prisons, and the need to maintain operational functionality come what may meant that, once the virus entered the prison undetected, the potential for rapid spread throughout the prison population was extremely high. This was also supported by interim guidance published by the World Health Organisation (WHO) on 15 March 2020 entitled '*Preparedness, prevention and control of Covid-19 in prisons and other places of detention.*' One of this document's recommendations as to the general approach to be adopted to risk management was that, "*Prison/detention management should consider implementing measures to limit the mobility of people within the prison/detention system and/or to limit access of non-essential staff and visitors to prisons and other places of detention, depending on the level of risk in the specific country/area.*" It is also consistent with a report prepared on behalf of the SAGE EMG Transmission Group which highlighted that, despite stringent infection prevention and control measures in prisons, there was ongoing evidence of frequent large-scale Covid-19 outbreaks across the prison sector, higher levels of infection in prison than in the general population, higher rates of hospitalisations and higher associated mortality in prisoners and prison officers.

[55] It was against this background that NIPS took the unprecedented steps, amongst others, of pausing all forms of PRT in March 2020, and indeed other temporary release schemes such as the Resettlement and Home Leave Scheme. The Department's evidence is that this step was not taken lightly but having carefully assessed the risks and benefits of this approach. It was also in a context of individuals throughout society being told to stay at home and stay indoors unless it was necessary to leave; and in circumstances where contact with others – such as those with whom prisoners would stay during leave periods or prison or probation officers accompanying them – was to be limited as much as possible.

[56] One point made on behalf of the Prison Service is that, during this period, a key objective of the home leave system, namely to facilitate prisoners' familiarisation with society and rehabilitation into society, was not possible, since society had "*effectively shut down*." In these circumstances, NIPS was concerned that the value of pre-release leave would be compromised and that the unusual societal circumstances may be frightening for prisoners or require that they avail of additional supervision and support. Insofar as overnight UTRs were concerned, it was also relevant that all approved premises (*i.e.* hostels) in Northern Ireland had decided to suspend admissions during this period given the restrictions on contact between households. Both ATRs and UTRs posed potential problems. In UTRs, the steps taken by the prisoner to minimise the risk of infection and transmission (in terms of mask-wearing, social distancing, hygiene, *etc.*) could not be effectively monitored. In ATRs, the risk of viral transmission between the relevant staff and the prisoner would be increased and, in addition, the Prison Service was at the same time subject to staffing pressures arising from the pandemic. (Since May 2020 to the time of Mr Doran's affidavit, almost 4,500 working days had been lost as a result of staff having to self-isolate).

[57] The applicant is critical of the stringency of the response on the part of the prison authorities to the risks posed by coronavirus. In particular, his evidence states that: "*It seems entirely possible to permit periods of pre-release testing in a manner consistent with the requirements of the current Covid-19 pandemic.*" He suggests, for instance, that pre-release leave could proceed with those participating wearing masks and complying with social distancing requirements; that leave could largely take place outdoors; that testing of those involved could be used to limit the risk; and that those returning from leave could be placed in isolation upon their return to custody (as occurs at the moment when prisoners enter or return to custody generally).

[58] Although prisoners returning from temporary release could be required to self-isolate, this is a period in complete lock-up away from the general prison population with a separate set of prison staff *per* prisoner. Not only is this far from ideal for the prisoner himself or herself, but it also raises staffing considerations for the Prison Service which has had to deal with many new committals into the prison system during the pandemic through the normal operation of the criminal justice system. The Department's evidence is that this has placed significant demands on it

in relation to staff deployment and use of PPE; and that the provision of isolation for that cohort who would be considered as part of the PRT scheme would have had a significant impact on the overall operation of HMP Maghaberry. There are also issues with testing, including that it must be conducted on a voluntary basis, and the Department's evidence indicated that a significant number of prisoners have refused to be tested (for example, on committal).

[59] Some of the considerations discussed above relate particularly to pre-release testing; but the evidence provided by the Department shows that all temporary release was paused in March 2020 because "*the need to apply a unified approach to virus containment and management meant that all ingress and egress by prisoners for the purposes of [temporary release] had to be paused due to the significant threat to the prison population…*" Indeed, the approach of NIPS appears to have been to restrict access to prisons to "*the absolute core staff who were key workers*", namely essential prison staff and health and social care staff. Other ancillary and partnership staff were not permitted access to prison establishments in the overall coordinated efforts to reduce footfall into and out of the prison establishments in order to combat the risk of viral transmission.

[60] Considerable additional detail has been provided to the court in Mr Doran's evidence about other measures put in place by NIPS to seek to minimise viral transmission during the pandemic. It is unnecessary to rehearse this for present purposes. It suffices to note, however, that other measures introduced included the suspension of all in-person domestic and legal prison visits; the suspension of the operation of the 'working out' units; and the introduction of a house-based regime, including closing the learning and skills facilities, chapels, gyms, *etc.* at prison establishments. The liberties and privileges of everyday life were curtailed in prisons in much the same way as they were for the general public on the outside. On the other hand, the Prison Service's focus on keeping prisons in Northern Ireland Covid-free has also meant that prisoners here have been able to maintain a more normal routine than those in prison regimes in the Republic of Ireland or the rest of the United Kingdom, where confinement to cells for 23 hours *per* day has been much more prevalent. In contrast, the evidence in this case suggests that there was no impact on the residential routine of the establishments in terms of time out of cells and exercise.

[61] As already noted above, the measures adopted by NIPS were implemented in consultation with a variety of other relevant agencies and were constantly kept under review. NIPS, the relevant trust (the South Eastern HSC Trust), the Public Health Agency (PHA) and the Health and Social Care Board (HSCB) began weekly joint meetings in April 2020. The NIPS Pandemic Plan and Procedures V1.0, produced in June 2020, informed the Service's pandemic response and planning. This document was itself revised and updated in July, October and December 2020, reflecting changes in PHA guidance and decision-making. The NIPS response was also coordinated by the NIPS Executive Forum, which is chaired by the Director General and comprises of Senior Directors and Governing Governors. The relevant

minutes of the Executive Forum have been provided to the court. It has met every three to four weeks since the start of the pandemic to keep the measures adopted by NIPS under review in light of the prevailing circumstances and changing guidance and regulations from the Northern Ireland Executive. A system of both formal and informal review of the operational necessity and appropriateness of the measures adopted to combat the spread of the virus, including the suspension of temporary release, was established. Mr Doran's sworn evidence is that, despite these reviews, "*it was not possible to lessen the [temporary release] suspension as currently operated given the fluctuating threat from the virus and advice to the public*."

[62] In July 2020, a five stage recovery plan was initiated by NIPS, with a view to incrementally and gradually relaxing the restrictions on normal operations which had been adopted in March 2020. At that point, the Executive Forum agreed that some PRT could commence again in August 2020, some four months after its suspension. On 31 July 2020, therefore, NIPS announced that, given the low level of transmission of the virus in the community at that time, it was going to commence plans for the phased reintroduction of the PRT schemes. The first step in this phased re-opening was to re-open the two 'working out' units, which re-opened in August and September 2020 respectively, albeit with some changes to their previous operation. This involved them operating only as residential facilities with plans for daily external activity having to be shelved until April of this year due to a rise in community infections.

[63] The next phase of this element of the recovery plan would have seen ATRs and UTRs being recommenced. This was in active planning by October 2020. However, Mr Doran avers that:

> "*further progress on the reintroduction of this phase of PRT had to be paused due to the sudden rapid and alarming rise in infection rate in the community at the time and the NI Executive announcement on 14th October 2020 which reintroduced a number of restrictive measures to reduce transmission rates in the community for 4 weeks*."

The reverse in the direction of travel which the Northern Ireland Executive's announcement entailed at that time was mirrored in the adoption of a range of additional precautionary measures by the NIPS Executive Forum at an exceptional meeting on the same date, 14 October 2020. It is evident from the NIPS Executive Forum minutes and other materials produced to the court that consideration was being given to seeking to re-introduce PRT by way of ATRs and UTRs in early autumn 2020 but that, after the change of approach from the Northern Ireland Executive in mid-October 2020, it was then considered by NIPS that "*no further progress on PRT was possible given the context*".

[64] Most of the NIPS precautionary measures remained in place throughout October 2020 and into 2021. Although there was an effort to maximise visits over the

Christmas period and reintroduce some in-person visits at that time, the Christmas Home Leave Scheme was suspended for 2020 in light of the assessed need to continue to minimise ingress and egress from the prisons. On 21 December 2020, the Northern Ireland Executive agreed and announced a further series of significant Covid-19 restrictions which would apply from 26 December 2020, following a brief relaxation of restrictions over the Christmas period. In the event, these remained in place until well into March 2021. Throughout this period, NIPS mirrored the cautious approach taken by the Northern Ireland Executive.

[65] A revised operational recovery pathway was then adopted in March 2021, which superseded the July 2020 recovery plan. This reflected the fact that, on 2 March 2021, the Executive published a planned pathway out of Covid-19 restrictions. Given this, on 16 March, the NIPS Executive Forum discussed options for a phased reintroduction of PRT. In line with the new recovery pathway, in-person visits were reintroduced from 4 May 2021 and, as noted above (see paragraph [26]), ATRs were reintroduced from 26 April 2021. This was preceded by significant discussion and planning in relation to how PRT should be resumed and which prisoners should be prioritised for it. At its meeting on 20 April 2021 the NIPS Executive Forum agreed, *inter alia*, that stage 2 of the PRT recovery (which involved limited ATRs) could commence with effect from the week beginning 26 April 2021.

[66] The respondent's evidence establishes that it kept the appropriateness of re-commencing PRT under continual review, in line with guidance from the PHA and the Executive. NIPS was also in close contact with Her Majesty's Prison and Probation Service in England, as well as the Irish Prison Service, and has averred that the decisions it took were in line with decisions made in other jurisdictions taking account of the prevailing community restrictions. Indeed, it appears that temporary release from closed conditions in England, Wales and Scotland and in the Republic of Ireland were suspended completely and that only in April 2021 were arrangements being made for their phased reintroduction. This is in contrast to the position in Northern Ireland where, as discussed above, some phased reintroduction of PRT took place during late summer and early autumn 2020 as soon as this was deemed operationally viable. Although this was not able to progress as a result of an increase in virus transmission rates and changes to public health advice, it indicates that NIPS was seeking to re-commence these programmes in a phased way when deemed safe.

[67] In *R (Dolan and others) v Secretary of State for Health and Social Care and another* [2020] EWCA Civ 1605, the Court of Appeal of England and Wales examined the legality of 'lockdown' restrictions imposed by law as part of the public health response to the Covid-19 pandemic. Although the principal issue in the proceedings was a challenge to the *vires* of the relevant public health regulations, the judgment contains a helpful summary contextualising the actions of public authorities at the start of the pandemic (see, in particular, paragraphs [3]-[10]), as well as some observations on the standard of review of actions taken to meet or combat the public

health risk. In rejecting the claimant's case under Article 8 ECHR, which the judge below (Lewis J) had held to be unarguable, the court said at paragraph [97]:

> "*In this context, as in the case of the other qualified rights, we consider that a wide margin of judgement must be afforded to the Government and to Parliament. This is on the well-established grounds both of democratic accountability and institutional competence. We bear in mind that the Secretary of State had access to expert advice which was particularly important in the context of a new virus and where scientific knowledge was inevitably developing at a fast pace. The fact that others may disagree with some of those expert views is neither here nor there. The Government was entitled to proceed on the basis of the advice which it was receiving and balance the public health advice with other matters.*"

[68] More recently, in *R (Manchester Airports Holdings Ltd) v Secretary of State for Transport and Another* [2021] EWHC 2031, an unsuccessful challenge to the operation of the travel list system adopted as part of the Government's defence against the spread of coronavirus, a Divisional Court of the High Court of England and Wales (Lewis LJ and Swift J) said this at paragraph [38]:

> *"… [Counsel for the claimant's] premise assumes a level of legal scrutiny that at common law does not and never has existed. In the context of a pandemic, deciding what measures should be applied for the protection of public health is self-evidently a matter of assessment for which the executive has primary responsibility. The role of judicial review is limited to determining the lawfulness of the approach of the executive to the decision-making process. It is not for a court to make, or assess the correctness of, such assessments of what measures should be adopted to address the public health problems posed by coronavirus. Any legal obligation to give reasons or provide other information relevant to decisions taken must be framed with this legal reality well in mind."*

[69] Although the present case is plainly not on all fours with the issues in either *Dolan* or the *Manchester Airports* case, the same type of considerations are in play. One might well disagree with the approach taken by NIPS (and prisoners such as the applicant plainly do, for understandable reasons) but that is neither here nor there. The evidence filed on behalf of the Prison Service establishes that it was acting in step with the Northern Ireland Executive, which was relying on expert advice and scientific knowledge in a situation where a new and unknown virus was developing at a fast pace. NIPS has an institutional competence which this court does not. Insofar as it was relying on the formal public health advice given to or issued by the Northern Ireland Executive, there is a further element of institutional competence in play which the court does not share. Both the public health authorities in

Northern Ireland and the Prison Service are democratically accountable through their respective responsible ministers in the Northern Ireland Assembly, the Minister for Health and the Minister for Justice. In the circumstances, I consider that a rationality audit by the court of the detailed operational measures taken by NIPS to combat the public health risk within prisons is an area where the court ought to exercise a light-touch review.

[70] In addition, in *Re Kelly's Application* [2017] NIQB 99 – albeit arising in a different context from the above case (namely a decision of the prison authorities not to grant compassionate temporary release for a prisoner to attend his child's holy confirmation) – Maguire J made clear that the prison authorities ought to be granted a considerable degree of latitude in terms of the intensity of the court's review generally of their decisions in relation to temporary release schemes: see paragraphs [28]-[30]. The power to grant release has been invested by law in the Department of Justice, which has experience in dealing with prisoners on a day-to-day basis and an accumulated expertise in terms of both penal policy and the assessment of risk: see section 13(1)(c) of the Prison Act (Northern Ireland) 1953 and rule 27 of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995.

[71] Moreover, the strictness of the measures adopted by NIPS appears to have successfully limited the effects of the virus. Mr Doran's evidence explains that, at the time of his affidavit, in England and Wales sadly some 150 prisoners had died due to Covid-19 and approximately 30 deaths had been reported of prison staff due to Covid-19. In contrast, in Northern Ireland, since the onset of the pandemic there had been no Covid-19 related deaths of any prisoners or prison staff. NIPS attribute this success to the "*difficult but decisive decisions*" it had made.

[72] Assessing all of the above, it is clear to me that the NIPS approach cannot be condemned as irrational. The extent to which pre-release leave schemes, including pre-release testing, could and should be maintained during the currency of the pandemic is classically a decision for the relevant authorities. Although other approaches might have been taken, it is not for this court to seek to second guess on their merits the measures adopted by the NIPS, nor to seek to micro-manage its response to the risks presented by the pandemic. The suspension of PRT which was implemented by the Prison Service, as part of a wider package of measures to seek to combat coronavirus, was within the range of responses rationally available to it.

[73] Even assuming I were to be wrong in my conclusion above that the rehabilitation duty under Article 5 ECHR does not apply to the applicant at this stage of his sentence, I would nevertheless have dismissed his claim against the Prison Service for breach of the ancillary duty to provide opportunities for rehabilitation. That is because the rehabilitation duty is not absolute. In *James v United Kingdom* (2013) 56 EHRR 12, where the duty plainly applied to the IPP prisoners involved, the Strasbourg Court said this (at paragraph [194]):

> "*However, in assessing whether the place and conditions of detention are appropriate, it would be unrealistic, and too rigid an approach, to expect the authorities to ensure that relevant treatment or facilities be available immediately: for reasons linked to the efficient management of public funds, a certain friction between available and required treatment and facilities is inevitable and must be regarded as acceptable. Accordingly, a reasonable balance must be struck between the competing interests involved. In striking this balance, particular weight should be given to the applicant's right to liberty, bearing in mind that a significant delay in access to treatment is likely to result in a prolongation of the detention. In the Brand case itself, the Court found that even a delay of six months in the admission of the applicant to a custodial clinic could not be regarded as acceptable in the absence of evidence of an exceptional and unforeseen situation on the part of the authorities.*"

[74] Of course, in the present case, the pandemic represents an exceptional and unforeseen situation with which the authorities have had to deal. However, even in the absence of such circumstances, the European Court of Human Rights (ECtHR) has accepted that delivery of rehabilitation opportunities involves striking a balance between the prisoner's interests and those of the community and others, both in terms of resources and timing. In paragraph [218] of the decision in *James* the ECtHR again emphasised that the rehabilitation duty inherent in Article 5 required that prisoners be provided with "*reasonable opportunities*" to undertake courses to address their offending behaviour and the risks they posed. It continued by explaining that Article 5 "*does not impose any absolute requirement*" in this regard; but "*any restrictions or delays encountered as a result of resource considerations must be reasonable in all the circumstances of the case.*" The evidence establishes that a variety of other opportunities and interventions remained available to the applicant and other prisoners throughout the pandemic. PRT is but one element of an overall system allowing prisoners to work towards rehabilitation (or, perhaps more accurately in the case of PRT, to allow prisoners to demonstrate the progress they have made in this regard). In light of the challenges presented by the pandemic, I do not consider that NIPS has failed to provide reasonable opportunities for rehabilitation. The ability of the panel of Parole Commissioners who most recently considered the applicant's case to direct his release is also supportive of this view.

[75] For completeness, I would also add that the Prisoner Ombudsman for Northern Ireland ('the Ombudsman') has reached a similar conclusion on foot of a complaint from the applicant in this case. In November 2020 the applicant lodged a complaint that the prison authorities had refused to permit PRT which had rendered his sentence arbitrary and unlawful and which was in breach of his rights. He complained that there were other options which could have been adopted by NIPS which would have been sufficient to mitigate against the risk posed by Covid-19 but which would nonetheless have permitted him to avail of PRT. Having gone through

the NIPS internal complaints process, the applicant's complaint was referred to the Ombudsman who appointed an investigating officer to investigate the complaint and who considered issues under the European Convention, assessed the situation with regard to the provision of PRT and considered both how NIPS had made its decisions during the pandemic and the longer term impact of these on the applicant and his release.

[76] The Ombudsman concluded that NIPS was right to consider that protecting the lives and health of those involved in the prison system should be its primary focus. She noted that NIPS had placed PRT at an early stage of its recovery plans and considered that NIPS had struck the right balance in the circumstances of the pandemic and had "*acted reasonably by suspending pre-release testing due to Covid-19.*" Although the Ombudsman's views are clearly not determinative in these proceedings, particularly in respect of any matter of law, they are to be afforded a degree of respect in light of the expertise which the Ombudsman has in relation to prison operations and her independent role. The Ombudsman's determination in the applicant's case supports the conclusion reached above that NIPS' actions of which the applicant complains cannot be considered unreasonable.

[77] The applicant has also pleaded a breach of Article 8 ECHR on the part of NIPS, although this was not pursued in his skeleton argument. In any event, for essentially the same reasons as discussed above, I would hold such interference as there has been with his Article 8 rights to be justified. Indeed, in my view, such interference is limited. The applicant's Article 8 rights are engaged but PRT is not generally designed to further prisoners' family relationships. A variety of other schemes and mechanisms are provided by NIPS with this primary purpose. The ATRs and UTRs of which the applicant was 'deprived' were likely to be limited in number. His chief complaint in relation to Article 8 is that his release has been delayed by the absence of PRT; but the principal cause of the limitations on his Article 8 rights during his incarceration is his sentence of imprisonment. The prison authorities have still permitted compassionate temporary release in exceptional cases throughout the pandemic where they judge that Article 8 considerations require this. The applicant complains that this shows that PRT could and should have similarly been made available. In my view, however, it demonstrates that the authorities have been flexible in their approach where exceptionally judged to be necessary on Article 8 grounds.

[78] Finally in respect of the challenge to NIPS, the applicant pleaded that NIPS had acted *ultra vires* Article 18 of the 2008 Order by failing to act in compliance with the statutory aims and purpose of the parole system by depriving the applicant of opportunities for PRT. I do not consider this ground, which was not pressed at the hearing, to add anything material to the applicant's other complaints. Article 18 of the 2008 Order does not impose any obligations on the Department or NIPS. Their powers in respect of the grant of temporary release are set out in the 1953 Act and 1995 Rules. Those powers must be exercised in conformity with relevant public law duties and any requirements of the Convention, which I have addressed above.

The Commissioners' decision

[79] The conclusions reached above dispense with several of the strands of the applicant's case against the Commissioners. If there was, and could be, no breach of the applicant's Article 5 rights at this stage of his sentence by reason of any shortcomings in the provision of PRT opportunities to him by NIPS, the Commissioners cannot be criticised for failing to so find. That conclusion also means that it is unnecessary to enter into the interesting debate about whether, since the Commissioners' responsibilities in Northern Ireland are governed by secondary legislation (the 2008 Order), rather than an Act of the Westminster Parliament, there would have been more scope for the Commissioners in this jurisdiction to dis-apply the statutory regime and direct release on Article 5(1) grounds (notwithstanding that they were not persuaded that the test in Article 18(4)(b) of the 2008 Order was met) than the English authorities countenance. However, the applicant also maintains his case on ordinary public law principles that, on the evidence before them, the Panel considering his case in December 2020 could not rationally have concluded that he did *not* meet the test for release, particularly in light of the conclusions in Mr McC's report.

[80] In short, he contends that any increase in his risk to others would have been as a result of a gradual, rather than rapid, deterioration in his condition and that this could readily have been picked up and managed before he caused any serious harm. This case is mounted principally on the basis of Mr McC's conclusions set out at paragraph [13] above. The applicant contends that both the PBNI, which did not support his release, and the Panel itself, failed to properly understand or give appropriate weight to Mr McC's conclusions. In the former's case, there was a suggestion that the PBNI position may have been adopted without a proper appreciation of the psychologist's views.

[81] However, the evidence shows that there had been engagement between the Probation Board and the relevant psychologist. For instance, the Commissioners were provided with a minute of a case conference of 30 September 2020 at which both PBNI and Psychology were represented. At this meeting it is noted that '[*name*] from Psychology' (that is, Mr McC) stated that all work had been completed with the applicant and that they considered his behaviour stable. Psychology would support the applicant and considered him ready to continue his progression for PRT whenever it returned. Mr Sayers relied on this passage to indicate that the PBNI assessment, upon which the Panel principally relied, was not provided in a manner which was ignorant of or failed to engage with Psychology's views; and also that the relevant psychologist himself was not clearly supporting release but, rather, was content with awaiting further PRT once that became available.

[82] Moreover, in an update report from the relevant probation officer of 14 October 2020, and considering the various risk factors which arose in the applicant's case (many of which, it is accepted, were static rather than dynamic), the probation officer noted that the applicant's "*present progress has only been monitored*

within the controlled environment of the prison" and that "*evidence that he can manage outside the prison is required*". In addition, this update report also referred to a variety of protective factors which were considered in the assessment. Unsurprisingly, most of these were in the applicant's favour. However, in the course of the discussion within that report, reference was made to "*the 1-1 work with NIPS Psychology and subsequent Psychological Assessment (dated 10.08.20) [which] appears to have had a positive impact with regard to Mr Larkin's understanding of himself."* The report also noted that no further treatment needs had been identified by NIPS Psychology at that stage. Again, Mr Sayers relied on this document to undermine the submissions advanced on behalf of the applicant that the PBNI position was adopted in ignorance of, or without proper regard to, Mr McC's psychological assessment.

[83] The essential conclusion of the PBNI update report of October 2020 was as follows:

> "*Despite the noted protective factors, it remains the opinion of PBNI that the risks surrounding Mr Larkin cannot be managed in the community. Given the context of the index offence it will be important for Mr Larkin to demonstrate the ability to exercise control over himself, particularly in relation to the management of his mental and emotional health as he is reintroduced to the community via pre-release testing and exposed to potential stressors through this process. PBNI need to see that Mr Larkin's current progress is sustained and evidenced consistently as the external controls surrounding him are reduced before further consideration can be given to the current assessment changing in any way."*

[84] The applicant has understandably focused on those portions of Mr McC's report which are highly favourable towards him. However, there are also portions of that report which sounded a variety of notes of caution. For instance:

(a) The psychologist comments that:

> "*The reasonably low stress environment and the intact social support system are both favourable prognostic signs for future adjustment but the fact that he is in a custodial setting with staff support and the structure of the prison regime needs to be acknowledged.*"

(b) The report also goes on to comment, albeit in a passage which I found to be somewhat ambiguous, that:

> "*With respect to anger management, he describes himself as a very meek and unassertive person who has difficulty standing up for himself, even when assertiveness is warranted. Thus, he*

may have some difficulty in the appropriate expression of anger."

It was unclear to me whether the reference to the applicant's difficulty in the appropriate expression of anger meant simply that he was unable to express anger appropriately, when it would be justified to do so; or whether he was liable to 'bottle up' his anger and then explode at some later point. Mr Sayers' submission was that, in either event, the Panel was entitled to take into account the psychologist's view that there may be difficulty in the appropriate expression of anger and that, in light of more general concerns about the applicant's response to (actual or perceived) stressors, it was right to be concerned with this.

(c) In addition, the psychologist also noted that the applicant's interest in, and motivation for, treatment was somewhat below average in comparison to adults who were not being seen in a therapeutic setting and substantially lower than was typical of individuals being seen in treatment settings. Although it was noted that this may well reflect the fact that the applicant had engaged in a number of programmes of treatment and was compliant with his medication, it could also potentially have been because he underestimated the support he would need.

(d) The report also noted, in respect of risk management factors, that, "*Over the next 12 months it is anticipated that Mr Larkin **could** transition to community living*" [underlined and bold emphasis added]. In addition, the risk factor relating to coping with stressful circumstances was identified as being present.

(e) Finally, Mr McC concluded that:

> "*Release could be considered if the right supports are in place **and** when Probation assess that they can manage his risk through licence in the community. In tandem with pre-release testing or release, Mr Larkin could benefit from continuing to engage with the CBT sessions and work with PBNI to help him understand some of the aspects of his personality that contribute to his risk.*"
> [underlined and bold emphasis added]

Although the applicant is right that this report should not be read and construed as a statutory provision might, it seems clear to me that Mr McC was deferring to some degree to PBNI's assessment of the applicant's readiness for release in light of the package of support that they would be able to provide in the community; and that he was not pushing for release in the teeth of PBNI objections.

[85] The reference to these factors is not designed to give the impression that the psychologist's report was otherwise than generally favourable to the applicant and his prospects for release, but simply to make the point that there were residual issues of concern to the psychologist; and that he was not clearly recommending release, much less unequivocally so.

[86] Set against that, PBNI was not recommending release at that time, in light of the variety of factors which were highlighted in their update report of October 2020.

[87] I recently had cause to consider the role of the Parole Commissioners, and the role of the court in a rationality challenge to their assessment of risk, in the case of *Re Maughan's Application* [2021] NIQB 7: see paragraphs [19]-[21], [49]-[51] and [56]. In short, the court must avoid merits review and accord an appropriate measure of respect to the experience and expertise of the Commissioners who have been tasked by the legislature with the assessment of risk. As case-law has repeatedly confirmed, the parole authorities cannot gamble with public safety.

[88] Having regard to the Panel's conclusions and reasoning, and in light of the significant array of information and reports available to them, including the PBNI recommendation that the applicant should not be released, I am not persuaded that the Panel was irrational in concluding that they were not satisfied that the test for release had been met on the basis summarised at paragraphs [19]-[23] above. A different panel of Commissioners may have been prepared to direct release in the circumstances; but that is not a mark of irrationality.

[89] In my view there is some force in the forensic criticisms made by Mr Lavery of the Panel's observations that "*the panel has before it no objective evidence that the skills Mr Larkin has acquired to enable him to appropriately self-manage the challenges he will face in the community (in conjunction with the supports of those supervising him) have been appropriately tested on PRT*" and that "*because of this fact, there is no objective professional evidence that at this time Mr Larkin comes within the test provided by Article 18(4)(b) of the 2008 Order*" [underlined emphasis added]. There was plainly *some* objective evidence in Mr McC's report which could be read as being supportive of release; and the one ATR which had been completed successfully by Mr Larkin provided some evidence of successful testing by way of PRT. However, I must be cautious not to read the Panel's determination in an excessively legalistic way. Reading it fairly and as a whole, it is clear that the Panel was both aware of, and conscientiously took into account, the applicant's successful ATR and the positive aspects of Mr McC's report. The above extracts do not do justice to the Panel's fuller consideration of the evidence which is displayed throughout its written determination. Notwithstanding the positive aspects of the evidence for the applicant, which the Panel acknowledged, they still had concerns which led them to rationally conclude that they should not direct release.

[90] The fact that, earlier this year, a single Commissioner was prepared to recommend release and that, more recently, a different panel of Commissioners has

directed the applicant's release does not alter this conclusion. I have been provided with a copy of the recent decision directing the applicant's release which was made on the basis of new and different information than that available to the Commissioners whose decision is impugned in these proceedings. Although it was assessed that the applicant still presented a risk of serious harm, there were a range of additional features in his favour. Unlike at the hearing in December 2020, the Commissioners who dealt with his case in June this year heard evidence directly from the applicant and from his father, which appears to have been persuasive. There had been a change in his medication regime, to which he appears to have responded well. There had been a further period of time during which his mental state had been stable and during which he had been well behaved and exhibited further progress. He has been undertaking additional therapy since February 2021 and this appears to have been a further significant protective factor. In addition, further to the recommencement of PRT, he had availed of a number of further successful ATRs. A robust plan for support if he were to be released had now been put in place. In all of these circumstances, PBNI, unlike the position in December 2020, now felt able to support the applicant's release.

[91] The fact that a different panel of Commissioners, in light of these significant developments, considered that the statutory test for release was met does not in my view undermine the rationality of the earlier Panel, at a different time and on different evidence, considering that the applicant was not ready for release at that time. Indeed, it might be thought to support the view of the December 2020 Panel that some further reassurance was still required, which has now been provided.

Conclusion

[92] For the reasons given above, the applicant's challenge must fail. The Parole Commissioners' decision of December 2020 not to direct release was not irrational, nor should it be interfered with given the limitations of the court's role in cases such as this and the expertise of the Commissioners. I am also not persuaded that the Prison Service's response to the pandemic – insofar as it involved the suspension of PRT – can be said to have been unlawful, particularly given the margin of discretion which the courts should allow to the executive in making difficult decisions in relation to the control of the pandemic. In relation to Article 5 ECHR, I accept the submissions made by the respondents that Article 5(4) and Article 5(1) rights are not engaged in the way suggested by the applicant because of the type of sentence he is serving and the current stage of that sentence (namely, that he is still serving the appropriate custodial term). Even if I were to be wrong in that, I would still hold that there had been no breach of the rehabilitation duty ancillary to Article 5(1) in the circumstances of this case because of the extenuating circumstances of the pandemic.

[93] Accordingly, the application for judicial review against both respondents will be dismissed.