Neutral Citation No: [2023] NIKB 108	*Ref:* **COL12318**
	ICOS No: **23/004715/01**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **15/11/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY SHANE FRANE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS BY THE NORTHERN IRELAND PRISON SERVICE

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Ms Quinlivan KC and Mr Séamus MacGiollaCheara (instructed by Emmet J Kelly & Co Solicitors) for the Applicant
Ms Neasa Murnaghan KC and Mr Tom J Fee (instructed by Departmental Solicitor's Office) for the Respondent

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COLTON J

Introduction

[1] This case concerns the interplay between three decisions of the Northern Ireland Prison Service ("the respondent"), two of which are the subject of the applicant's challenge. The first concerns the suspension of the applicant from the pre-release testing ("PRT") scheme by the governor for the Prison Development Unit ("PDU"). This scheme permits a prisoner to be temporarily released from custody for both supervised and unsupervised periods with a view to assisting in their transition from prison to outside life. The second concerns the decision to remove the applicant from Wilson House to Braid House, with the effect of demoting him from Enhanced status to Standard Status under what is known as the Progressive Regimes and Earned Privileges Scheme ("PREPS"). The effect of the latter is that the applicant must restart PRT as it can only be undertaken by prisoners with Enhanced Status.

[2] The third decision is not being challenged in these proceedings but is a central facet of the applicant's case. It relates to the disciplinary proceedings ("the adjudication") taken against the applicant for an alleged breach of the Prison Rules.

The trigger for all three decisions was the applicant's failed drug test on 27 September 2022.

Factual background

[3] The applicant is a 35-year-old man serving an indeterminate custodial sentence with a minimum tariff of six years for nine counts on indictment, the most serious of which was a single count of manslaughter. The applicant is now 3.5 years post tariff, his tariff expiry beginning on 25 July 2019. Since 2019, he has had four separate reviews of his detention by the Parole Commissioners for Northern Ireland. Each review has determined that the applicant did not meet the test pursuant to Article 18(4)(b) of the Criminal Justice (Northern Ireland) Order 2008, which requires that the Commissioner shall not 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.

[4] The Commissioner has consistently identified a requirement for the applicant to complete a sustained period of PRT before he can be considered to be released on licence. Due to Covid-19 restrictions, the applicant was unable to avail of PRT between November 2019 and the summer of 2022. Since then, the applicant has successfully completed 2 x 8 hour Accompanied Temporary Releases ("ATRS"), 3 x 8 hours Unaccompanied Temporary Releases ("UTR") and 2 x 24 hour UTRs, including one at Burren House on 13 September 2022. The applicant also attended a case conference on 20 September 2022 to review his progress. A follow up case conference was to be scheduled for 3 months later. The applicant avers that he was scheduled to have a 48 hour UTR in November 2022 and that he expected to be moved to Burren House by Christmas 2022.

[5] On 27 September 2022, the applicant was subject to a random drugs test which returned as positive on 15 October 2022. The applicant immediately lost all privileges and was informed in writing of his temporary suspension from PRT due to a failed drug test. The letter stated that his suspension would be discussed at his next case conference but did not specify the date of the case conference or that it would be postponed due to the temporary suspension from PRT. The applicant was also moved from Wilson House to Braid House, which represents a demotion within PREPS.

[6] On the same day, the applicant was charged with an offence against prison discipline under Rule 38(19B) of the Prison Rules, which provides:

> "A prisoner shall be guilty of an offence against prison discipline, if he … is found with any substance in a sample taken under rule 48C which demonstrates that a drug has, whether in prison or while on temporary

> release under rule 27, been administered to him by himself or by another person (but subject to rule 39B)."

[7] At the adjudication on 2 November 2022, the applicant maintained his innocence, claiming that a fellow inmate had slipped the substance into a cup of coffee the applicant was drinking without his knowledge. The inmate in question accepted that he had done this in separate adjudication proceedings. After a full hearing, the adjudicating Governor did not accept the applicant's version of events, finding him guilty of a breach of Prison Rule 39(19B) and imposed a sanction of 28 days loss of evening association, earnings, access to tuckshop and television.

[8] The applicant's solicitors wrote to the respondent on 3 November 2022 seeking contemporaneous documentation and a recording of the hearing. The respondent replied on 15 November 2022 explaining that the applicant retained all the paperwork relevant to the case and could provide it to his solicitor. This prompted the applicant's representatives to send a Pre-Action ("PAP") letter to the respondent seeking to challenge the adjudication decision. A PAP response was received on 23 December 2022 stating that the adjudication had been "withdrawn and removed from NIPS records."

[9] According to the affidavit provided on behalf of NIPS by Governor McIlwaine (who is a governor in the PDU), the decision to expunge the applicant's adjudication was based solely on procedural grounds and was not related to the substantive finding that the applicant was guilty. These grounds have been described as follows: "the delay in the charge being laid, per Rule 35(1) of the 1995 Rules and the prisoner being informed per Rule 35(2); and a failure to authorise or sign Form 1126, by a governor, but rather by a 'Duty Manager' which was dated 17 October 2022."

[10] On 6 January 2023, the applicant's legal representatives requested an update on the steps taken by the respondent "to rectify the applicant's situation" in relation to PRT following the withdrawn adjudication. The applicant received no reply and subsequently issued judicial review proceedings on 18 January 2023. The applicant sought an emergency hearing, but this proved unnecessary as the situation within the prison changed.

[11] Following the withdrawal of the adjudication and the issuing of these proceedings, the respondent did, however, arrange for the applicant to be returned to ATR (as opposed to UTR) on 26 January 2023. A case conference was held on 2 February 2023, during which the respondent mapped out an expedited PRT plan which involved the following: A return to UTR, starting with 1 x 8-hour UTR, 1 x 24-hour UTR and progressing to 2 x 48-hour UTRs. As a good will gesture the applicant was also allowed to select the date of a UTR (16 February 2023) to enable him to meet with his brother; an upgrade to Enhanced Status 3 weeks early; and finally, a commitment to eventually move the applicant to Burren House by late spring

subject to the applicant's successful completion of the prescribed PRT and good behaviour.

[12] The applicant was due for review before the Single Commissioner on 1 February 2023. To assist with this review, the PCNI had requested on 12 December 2022 that certain information be provided by the PDU co-ordinator and the Department of Justice on the subject of the applicant's release. This information was not provided until 20 January 2023. Thus, the Single Commissioner's Review was delayed until 21 February 2023.

[13] The Single Commissioner directed that Mr Frane should not be released. In his reasons, the Commissioner addressed the failed drug test and acknowledged the applicant's submission that he was "spiked" by another inmate. Accordingly, the Commissioner did not consider the drug fail in his assessment of the risk posed by the applicant to the public. However, the Commissioner underlined the fact that a significant consequence of the drug fail was that Mr Frane had been removed from PRT, which is "vital in order to demonstrate that he is able to comply with the requirements and conditions of testing…Mr Frane has yet to complete a sustained period of being tested in the community and has yet to be tested in the more challenging circumstances provided by the Pre-Release Scheme via the Working Out unit at Burren House. This is important to demonstrate that he can comply with any licence conditions that may be established to manage his risk and that he can manage his risk in the community."

Relevant provisions

[14] The power to order periods of temporary release, including PRT is provided for in Rule 27 of the Prison and Young Offenders' Centre Rules (Northern Ireland) 1995 ("the 1995 Rules") stipulates:

> "**Temporary release 27**
>
> (1) A prisoner to whom this rule applies may be temporarily released for any period or periods and subject to any conditions.
>
> (2) A prisoner may be temporarily released under this rule for any special purpose or to enable him to have health care, to engage in employment, to receive instruction or training or to assist him in his transition from prison to outside life.
>
> (3) A prisoner released under this rule may be recalled to prison at any time whether the conditions of his release have been broken or not.

(4) This rule applies to prisoners other than persons:

(a) remanded in custody by any court; or

(b) committed in custody for trial; or

(c) committed to be sentenced or otherwise dealt with before or by the Crown Court.

(5) In considering any application for temporary release under this rule previous applications, including any fraudulent applications, may be taken into account."

[15] It is clear that by its nature the power to order temporary release is a very broad discretionary one. It engages a wide range of considerations including issues such as risk and public safety. The court must respect that the respondent has been identified by the legislature as the appropriate decision-maker and has an expertise in managing offenders and risk. As was said in the case of *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531, by Lord Mustill:

> "The court must constantly bear in mind that it is to the decision maker, not the court, that Parliament has entrusted not only the making of the decision but also the choice as to how the decision is made."

[16] It is also important to highlight that the power to order temporary release and the correlative power to suspend PRT is vested with the Governor of the Prison Development Unit (PDU). This is confirmed by Rule 39 which prescribes the sanctions to be imposed for offences against prison discipline. Notably, Rule 39 does not include a suspension of PRT as punishment which can be imposed by an adjudicating Governor. In this way, decisions taken in relation to temporary release, including the suspension of PRT are separate from adjudication decisions.

Summary of the parties' submissions

[17] The applicant seeks to challenge the respondent's decision to suspend his PRT and to remove him from Wilson House ("the impugned decision") on two main grounds.

[18] The first, is that of irrationality. More specifically, the applicant contends that the respondent failed to take account of the following material considerations:

(a) His positive pre-release testing history;

(b) His drug test passes;

(c) His good behaviour;

(d) His negative search for drugs whilst placed on Rule 32 in June 2022;

(e) The applicant's status as a significantly post-tariff prisoner;

(f) The imminence of his review before the PCNI;

(g) The presumption of innocence;

(h) The applicant's defence to the charge as advanced at his adjudication;

(i) The decision to expunge his adjudication.

[19] The second ground is based on procedural unfairness. This focuses on a failure to engage with the applicant and have regard to his substantive defence to the allegation. It is argued that the governor in charge of PDU should have engaged with the applicant following the adjudication on 2 November 2022. The applicant further argues that the respondent failed to react appropriately to the decision to expunge the adjudication by failing to return the applicant to the position he would have been in but for the adjudication.

[20] In addition to the two primary grounds of challenge, the applicant alleges a breach of Article 5 of the European Convention of Human Rights ("ECHR") insofar as the respondent has failed in its duty to provide the applicant with reasonable opportunity to demonstrate his suitability for release.

[21] In the original Order 53 Statement the applicant sought a range of orders including declarations of illegality, orders quashing the impugned decisions and an order of mandamus to compel the respondent to ensure that information provided to the Parole Commissioners is accurate and an order of mandamus to compel the respondent to return the applicant to the position he would have been in but for the adjudication and a declaration that there has been a breach of his article 5 ECHR rights.

[22] The primary submission on behalf of the respondent is that the central relief sought by the applicant has in fact been obtained, thus rendering the case entirely academic.

[23] In the alternative, the respondent maintains that the PRT scheme, the PREPS regime and the adjudication process are separate but parallel processes with fundamentally different aims and considerations. In particular, the respondent points out that the decision to suspend PRT is not a punishment, as such. Rather, it is based upon a risk assessment, which requires an ongoing evaluation of the danger posed to the public by temporary release. By contrast, an adjudication is a disciplinary proceeding concerned with the alleged breach of prison rules by a

prisoner. Accordingly, the decision to suspend the applicant's PRT and remove him from Wilson house was within the broad remit afforded to the Governor and reasonable given the potential risk posed to the public by the nature of the alleged breach of his temporary release conditions.

[24] In response to the challenge on procedural grounds, the respondent relies on the fact that the applicant did not internally challenge the impugned decision. The position with regard to PRT and PREPS was reviewed at a case conference within the PDU Scheme and appropriate decisions were taken after the temporary suspension had been imposed.

Is the case academic?

[25] The original Order 53 Statement challenged the adjudication which has now been expunged. As such that issue is academic. The focus of the remaining issues relate to the suspension of the applicant from the PRT Scheme. In this regard the applicant seeks declarations that this decision was unlawful, an order of certiorari to quash the decision and an order of mandamus to compel the respondent to return him to the position he would have been in but for the suspension (in the Order 53 Statement the applicant erroneously refers to the adjudication).

[26] Ms Murnaghan points out that as a result of the case conference, which was held on 2 February 2023, the applicant has recommenced UTR, having successfully resumed ATR on 23 January 2023. Insofar as it has been possible to do so, the applicant has been returned to his pre-suspension status.

[27] She argues, therefore, that the only remaining potential form of relief which might be granted to the applicant would be declaratory in nature. She argues there is no obvious relief that could or should be afforded to the applicant. Any such relief would be of no utility she argues.

[28] Leaving aside for a moment the merits of the applicant's case there can be no doubt that the decision to suspend the applicant from the PRT Scheme has resulted in a significant detriment to him. This is readily apparent from the decision of the single commissioner referred to at para [13] above in which he explained that the failure of the applicant to complete a sustained period of PRT was vital in assessing whether the applicant could comply with licence conditions that may be established to manage his risk should he be released from prison. Absent the suspension it was anticipated that the applicant would have been released on further UTR and potentially moved to Burren House prior to the end of 2022.

[29] In the event that this detriment was due to any unlawfulness on behalf of the respondent, it seems to the court that the matter is not truly academic between the parties.

[30] In addition, the application does raise issues about the link between the PDU process and the adjudication process which may arise in future situations within the prison.

[31] In those circumstances, the court takes the view that the matter is not academic between the parties and that there is utility in considering the issues raised in this application.

Irrationality – failure to take account of material considerations

[32] Turing to the substance of the application, as has been properly accepted by Ms Quinlivan on behalf of the applicant, the original decision to suspend the applicant from PRT and the consequential demotion under the PREPS Scheme could in no way be considered irrational.

[33] The original decision was based on a legitimate risk based approach. The question that arises in this case is whether the maintenance of the impugned decision strayed into irrationality in the *Wednesbury* sense insofar as the respondent failed to take into account material facts or factors. Whilst the Order 53 Statement identified a series of material factors it was alleged were not taken into account, the Amended Order 53 Statement identified three factors which, in effect, form the basis of the argument before this court, namely:

> "…
> (g) The presumption of innocence.
>
> (h) The applicant's defence to the charge as advanced at his adjudication.
>
> (i) The decision to expunge his adjudication."

[34] On this issue the applicant relies on two decisions of this court. In *Re Hayes* [2017] NIQB 115, the applicant was a detained prisoner serving a sentence of life imprisonment with a tariff element of 17 years following his conviction for murder in 2002. He challenged decisions of the Northern Ireland Prison Service whereby he was effectively withdrawn from PRT and a further decision which maintained the revision of his security categorisation from Level D to Level B.

[35] He had been carrying out authorised groundsman duties beyond and adjacent to the security perimeter of Maghaberry prison, working alone and unsupervised. He came into possession of cannabis which was exposed when he re-entered the prison. He asserted that he was acting under duress. As a result he was withdrawn from the PRT. A disciplinary charge arising out of the incident did not proceed. He was also charged with the offence of possessing a Class B drug and was prosecuted summarily. The magistrates' court acceded to an application to stay

the prosecution as an abuse of process, based on failures by the prosecution to make necessary disclosure.

[36] In relation to his claim of duress, the applicant pointed out that the Prison Service had failed to take into account two critical pieces of evidence, which were written statements from the search officers at the time he was apprehended who referred to the fact that the applicant may have been acting under duress. In his judgment, McCloskey J, was critical of this failure. He observed:

> "[14] This failure is unmistakable. It shines like a beacon. There is no acknowledgement of, or engagement with, these self-evidently critical pieces of evidence either expressly or obliquely in the extensive deliberations documented in the evidence. This failure is the obvious explanation for the various recorded descriptions, or summaries, of the incident which are manifestly irreconcilable with the witness accounts of the two officers concerned. This failure plainly infects all of the impugned decisions and its materiality is beyond peradventure. On this ground alone, none of the impugned decisions can withstand challenge."

He continues at para [16]:

> "[16] <u>There was a consistent and clearly demonstrated failure on the part of the decision makers to either explore the contours of the defence of duress or to acknowledge the possibility that duress could provide the applicant with an acceptable explanation of and justification for his undisputed conduct</u> and, linked to this, a failure to examine the consequences of this from the perspectives of his placement in the pre-release testing programme and the re-classification of the Applicant's security level.
>
> [17] <u>I consider that there was a further manifest failure on the part of the Prison Service decision makers to engage with the outcome of the criminal proceedings against the Applicant</u>. This is manifested most clearly in the dismissive statement in the security report - see [12] supra - that the charge against him was "thrown out on a technicality." I acknowledge the desirability of considering a linguistic formulation of this kind fairly and in bonam partum (*Secretary of State for Education and Science v Tameside MBC*) [1977] AC 1014, per Lord Wilberforce).

> [18] However, considered in tandem with all the other evidence, in my judgement this I consider to be indicative of the deep-seated view of the Prison Service officials concerned that the applicant, who had not been the subject of any of any adverse verdict or adjudication in any due process forum, was guilty of the offence of possession unauthorized articles. This is the readily discernible undercurrent in the evidence of the Prison Service and the other materials highlighted above. It is unsustainable in law. One searches in vain for a clear acknowledgement that the applicant was entitled to the presumption of innocence. On the contrary, the persistent undercurrent was one of a presumption of guilt. This may be viewed through the alternative public prisms of taking into account an improper consideration (one facet of the Wednesbury principle), irrationality and appearance of bias.
>
> [19] Furthermore, I agree with Ms Herdman's submission that the materials documenting the impugned decision-making processes of the Prison Service evidence a clearly identifiable pre-determination that the applicant had, in substance, committed the offence – disciplinary and/or criminal – of unlawful possession of the unauthorized articles. The decision-making agencies, in substance, assumed the role of the criminal court or adjudicating governor and found the applicant guilty. This is unsustainable as the applicant had none of the due process protections which a full criminal or adjudication process would have provided.
>
> [20] My analysis above impels inexorably to the conclusion that the applicant's challenge on the *Wednesbury* ground must succeed."

[37] In *Whittle* [2022] NIQB 5, the applicant's PRT was suspended following an allegation that he attempted to conceal medication. The applicant vehemently denied these allegations. It was not possible to deal with the issue under formal adjudication because of a delay in reporting the matter. Nevertheless, the decision to suspend PRT was taken by the relevant prison governor without providing the applicant the opportunity to convey his side of the story. In that case the court found against the respondent but on the basis of procedural fairness rather than *Wednesbury* irrationality. At para [34] I stated:

> "Although the applicant has pleaded a breach of Article 6 ECHR, and irrationality in his Order 53 Statement the real issue in this case relates to procedural fairness. There is ample authority that Article 6 is not engaged in the decision involved in this case, something which Mr Wilson realistically accepted in the course of his submissions. Properly analysed the court does not consider that irrationality in the *Wednesbury* sense arises here. The court's focus is on procedural fairness. In short form the applicant's case is that at no stage was he consulted about Governor Nicholl's decision. He was suspended without being approached for his version of events. Governor Nicholl from the outset clearly accepted that the applicant had attempted to conceal drugs. This acceptance by him resulted in the suspension and, indeed, the continuation of the suspension without any opportunity for the applicant to participate in the decision-making process."

[38] There are obvious factual differences between these cases and the applicant's case, although important relevant principles emerge from the decisions.

[39] I return to the material considerations identified by the applicant. The first relates to the presumption of innocence. In this regard, the respondent points out that the applicant did not challenge the suspension, nor did he exercise a right of appeal, something which he had availed of on a previous occasion.

[40] The court is cognisant of the nature of the decision that was taken by Governor McIlwaine in relation to suspending PRT. As has already been indicated, this is a very different decision from a finding of a breach of prison rules under the adjudication process. Manifestly it is very different from a criminal charge as occurred in the case of *Hayes*. Ms Murnaghan was at pains to point out that there are separate procedures involved here. That said, there remains an obligation on the respondent to engage with the applicant in circumstances where a suspension of PRT is imposed. The proper forum for doing so is via the case conference system. The applicant was due to have a case conference within three months of 20 September 2022 – say 20 December 2022. However, that case conference was suspended at the same time PRT was suspended. No reason was given for this, nor was the applicant given an indication of when a new case conference would be convened.

[41] Turning to the second material factor identified, namely the applicant's defence to the charge as advanced at his adjudication, it seems to me that this is linked to the first factor identified. It was in the adjudication process that the applicant first identified to the prison authorities his explanation for the failed drug test. Given that the matter was the subject of a formal adjudication process, I do not

consider that Governor McIlwaine could be criticised for failing to engage with this issue pending the adjudication decision. Indeed, to do so, might arguably have been prejudicial to the applicant. Ms McIlwaine avers in her affidavit at para [7]:

> "The applicant did not provide any explanation in response to the initial suspension from PRT that is recorded in any prison records. When a prisoner fails a drug test it is usual practice that the PRT and PREPS do not usually make efforts to obtain the prisoner's version of events, prior to the adjudication process, as the integrity of the test results are prima facie treated as sufficient evidence on which to base the assessment of risk sufficient to suspend their entitlement under PREPS and inclusion on the PRT Scheme."

[42] However, the applicant argues that when the adjudication decision was made this was a material consideration which should have been considered by the respondent, in the context of the PRT Scheme. The adjudication decision was made on 2 November 2022. Ms Quinlivan describes this as the "pivotal date." When that decision was made, she argues that there was an obligation on the respondent to consider the outcome of the adjudication and assess whether in light of the decision the applicant could be assessed as appropriate for re-admittance to the PRT Scheme. Two observations might be made here. Firstly, as explained by Governor McIlwaine she was simply unaware that an adjudication process had taken place. Secondly, it might be argued this is a rather academic point since the outcome would in all probability have reinforced the respondent's decision rather than result in a reappraisal. Ms Quinlivan argues, and I accept, that this is not necessarily so, given that different considerations applied. Indeed, when the matter was reviewed in February 2022, the applicant was admitted to the PRT Scheme, although as discussed below, at that stage the adjudication decision had been expunged.

[43] The applicant further relies on the decision to expunge his adjudication as a material factor which should have been taken into account.

Procedural fairness

[44] I turn now to the question of procedural fairness. The applicant contends that the impugned decisions were procedurally unfair because the respondent took no steps, at any time, to ascertain the applicant's representations in response to the allegation, either before, or after the adjudication had been expunged. The respondent failed to have any regard to the defence advanced by the applicant in the course of the adjudication. Relatedly, the respondent has presumed the applicant's guilt throughout the process.

[45] It is well-established that the requirements of procedural fairness are very much dependent on context. The principles of what is required by procedural

fairness have been authoritatively set out in the case of *Doody* (see above) to the effect that whether a procedure is deemed to be fair depends on the context on the particular facts of the case. As Lord Mustill said in that case:

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained 13 what is essentially an intuitive judgment. They are far too well known. From them, I derive that:
>
> 1. Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.
>
> 2. The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.
>
> 3. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.
>
> 4. An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.
>
> 5. Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.
>
> 6. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness

> will very often require that he is informed of the gist of the case which he has to answer."

What then does procedural fairness require in this case?

[46] I have made it clear that the original decision to suspend was a rational and fair one. Arising from that decision it seems to the court that the respondent was under an obligation to engage with the applicant as to the reasons and circumstances in which the drugs test failure occurred. The right of an appeal is obviously one important procedural factor, although this was not spelt out in the letter informing him of the suspension. It seems to me that the obligation to engage with the applicant should be facilitated through the case conference process, applicable to the PRT Scheme.

[47] In this regard, the original conference scheduled for 20 September 2022 was also suspended. The applicant was not given any date for a new case conference. Given the imminence of parole commission hearings and the importance of this issue to the applicant, I am critical of the failure to conduct a case conference on the originally anticipated date or to provide the applicant with a new date at the time of the suspension. This is not something which should have been left open-ended.

[48] Furthermore, I consider that it ought to be possible to have a procedure in place whereby Governor McIlwaine, as part of the PDU, is aware of the ongoing adjudication process. Indeed, from the contents of para [7] of her affidavit, quoted above, it appears she anticipated an adjudication process would take place. The charge was actually laid on the same day as the decision to suspend. Having been made aware of such a process it would be incumbent upon her to consider any defence made by the applicant in relation to the alleged offence. Further, the decision of the adjudicating panel would clearly be a material factor to be considered.

[49] I fully agree with Ms Murnaghan's suggestion that it would be wrong to impose onerous architecture on the prison authorities in relation to consideration of a prisoner's entitlement under the PRT Scheme. Nonetheless, it clearly is something of considerable significance and importance to a prisoner. At a very minimum engagement with the prisoner is essential. The requirement for such engagement is enhanced, as here, when the applicant is making a positive defence in respect of the matter which gave rise to the original suspension. I do not consider that it is too demanding or exacting an obligation on the respondent to ensure communication between the PDU and those responsible for enforcing the prison rules by way of the adjudication process. It appears that Governor McIlwaine only became aware of the expunged adjudication decision when the respondent received the PAP correspondence.

[50] It does appear that there was some engagement with the applicant which resulted in him being released on ATR on 26 January 2023. However, it appears that

the first substantive consideration of his case took place at the case conference on 2 February 2023.

[51] It is therefore clear, that once this matter was revisited by the respondent, it was deemed appropriate to reintroduce the applicant to the PRT Scheme. It is also clear that the Governor McIlwaine took a commendably positive and facilitative approach to the applicant in this regard.

The court's consideration

[52] I consider that the adjudication decision was a material consideration to be taken into account by the respondent in assessing the appropriateness of the applicant's ongoing suspension from the PRT Scheme. I accept that the adjudication decision and the suspension decision give rise to different considerations and one is not determinative of the other. Nonetheless, it seems to me that it was plainly a relevant factor. This is particularly so in this case because the applicant raised a defence or provided an explanation for the adverse drugs test which gave rise to the suspension. Ultimately, it would be a matter for the decision maker, in this case, Governor McIlwaine, as to what consideration or weight she should give to the explanation or the adjudication decision. However, I consider that the applicant's explanation and the adjudication decision, were obviously material and should have been taken into account.

[53] I accept that because of the way in which these decisions are made Governor McIlwaine was unaware of the adjudication decision. In my view, she should have been. I do not consider that it would be unduly exacting or onerous on the respondents to ensure that she was made aware of the decision. For this reason, I consider that there has been a failure to take into account a material consideration.

[54] In terms of the procedural duty, I consider that the respondent was under an obligation to engage with the applicant on the issue of the failed drugs test. This requirement would have been satisfied by taking into account the adjudication decision on 2 November 2022. The procedural fairness could readily have been achieved through the existing case conference procedure. In my view, the failure to convene such a conference until 2 February 2023 was procedurally unfair.

[55] An original case conference had been anticipated on or about 20 December 2022. I see no reason why this could not have proceeded. After 2 November 2022 and prior to a case conference, the respondent should have engaged with the applicant as to his explanation for the failed drug test. Had it done so, the respondent would have been in a position to deal with the applicant's answer to the charge and would have been in a position to assess whether it was appropriate to continue with PRT testing, but also would have provided the respondent with an opportunity to consider the consequences arising from the adjudication.

[56] I accept that the delay in ultimately reviewing the suspension was not gross. Equally, I accept that had the respondent engaged with the applicant after 2 November 2022 there was no guarantee that the suspension would have been removed. When the matter was reviewed the respondent demonstrated a positive attitude towards the applicant.

[57] However, as explained, the length of the suspension in this case has had a detrimental impact on the applicant.

Article 5 ECHR

[58] The alleged breach of Article 5 ECHR was not raised at the hearing.

[59] The obligation under article 5 is an ancillary duty to "provide opportunity reasonable in all the circumstances for such a prisoner to rehabilitate himself and to demonstrate he no longer presents an acceptable danger to the public." - see *Haney and others* [2014] UKSC 66 at para [36].

[60] Despite the court's finding on the impugned measure, I reject the contention there has been a breach of Article 5 in this case.

[61] Whilst the applicant is required to complete a period of sustained PRT, his release on licence is not solely contingent upon this factor. Ms Murnaghan drew the court's attention to the Parole Commissioner's assessment of the applicant's case on 21 February 2023. In his report, the Parole Commissioner referred to the Mr Frane's ACE score assessed 11 January 2023 as 48 and that he represents a high likelihood of re-offending. The report notes:

> "The factors that influence this assessment include: alcohol and drug misuse; poor decision-making skills; poor consequential thinking skills; poor conflict resolution skills; unemployment and lack of structure/purpose; capacity for violence and aggression; impulsivity; risk taking; poor self-control; anti-social lifestyle; negative peer associations; unstable accommodation; lack of family support; and, lack of responsibility for his actions."

[62] The Commissioner ultimately concurred with this assessment (see para [36] of his report). Thus, it is clear that further steps need to be taken by the applicant in order to obtain release on licence.

[63] The finding in the applicant's favour on the related issues of failure to take into account material consideration and procedural unfairness does not inevitably result in a breach of article 5. As the Supreme Court said in *Haney* at [60]:

> "... Article 5 does not create an obligation to maximise the coursework or other provision made to the prisoner, nor does it entitle the court to substitute, with hindsight, its own view of the quality of the management of a single prisoner and to characterise as arbitrary detention (in the particular sense of *James v UK*) any case which it concludes might have been better managed. It requires that an opportunity must be afforded to the prisoner, which is reasonable in all the circumstances, taking into account, among all those circumstances, his history and prognosis, the risks he presents, the competing needs of other prisoners, the resources available and the use which has been made of such rehabilitative opportunity as there has been. …"

[64] In my view the applicant falls short of the threshold required for a finding of a breach of Article 5.

Conclusion

[65] The court therefore concludes that the continuation of the applicant's suspension from PRT and his demotion from enhanced status to standard status after 2 November 2022 was unlawful. This unlawfulness is based on a failure to take into account material considerations, namely the applicant's account of the circumstances which give rise to the impugned decision, the adjudication decision and the subsequent expungement of the adjudication decision.

[66] Furthermore, the continuation of the suspension after 2 November 2002 was procedurally unfair in that the respondent failed to adequately engage with the applicant as to the circumstances giving rise to the adjudication process.

[67] The court will hear the parties as to the appropriate remedy.