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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 APPLICATIONS BY KEITH MAWHINNEY AND STEPHEN FAULKNER FOR JUDICIAL REVIEW

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

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Martin O'Rourke KC and Colm Fegan (instructed by Emmett J Kelly, Solicitors) for both applicants
Matthew Corkey (instructed by the Departmental Solicitor's Office) for the respondent in each case

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SCOFFIELD J

Introduction

[1] This is the judgment of the court in relation to two related applications for judicial review which raise similar issues. The first application was brought by Keith Mawhinney and the second by Stephen Faulkner. Both applicants were prisoners at the time of the events giving rise to the proceedings. Mr Mawhinney is a life sentence prisoner. Mr Faulkner was a prisoner subject to a sentence of imprisonment for public protection who was transferred to Northern Ireland on a restricted basis from England. He has since been released after making a successful application for habeas corpus completely unrelated to these proceedings. The common issue between the cases relates to searches by officers of the Northern Ireland Prison Service (NIPS) and seizure of the applicants' belongings, and to investigations and processes which followed these. In each case, the respondent was concerned about the illicit importation into the prison of prohibited substances after periods of unaccompanied temporary release (UTR). There is an additional aspect of Mr Faulkner's challenge which relates only to him, namely a

challenge to a restriction on his association in the Care and Supervision Unit (CSU) on two separate occasions.

[2] Mr O'Rourke KC appeared with Mr Fegan for each applicant; and Mr Corkey appeared for the respondent in both cases. I am grateful to all counsel for their helpful written and oral submissions.

Factual background in Mr Mawhinney's case

[3] Mr Mawhinney availed of a UTR from 11.00 am on Tuesday 28 June 2022 to 11.00 am on Wednesday, 29 June 2022. In advance of that release, urgent judicial review proceedings were lodged by him relating to the conditions that were due to be imposed upon his release. That case came before me on the day before the applicant was due to be released but ultimately resolved by way of agreement between the parties. However, upon his return from this UTR on 29 June 2022 the applicant was searched. The respondent says that this was simply part of the usual checks undertaken upon a prisoner's return to prison for the purpose of ensuring that unauthorised items or substances are not being transported into the prison. He was found to have a tablet and two sachets of medication in his possession. Whilst these were being checked, his bag (described as a "grip bag") was taken away to be searched. It was also tested for any indication of the presence of unauthorised substances.

[4] Whilst this testing of the applicant's bag was being carried out, the applicant was returned to his residence (at Wilson House) for 'Covid quarantine' with a number of other returning prisoners. When the results of the tests on the applicant's bag were returned, the respondent says that they indicated the presence of "illegal substances that would be dangerous to staff as well as other prisoners." The staff involved presented the results to the duty governor who then authorised the seizure of the applicant's bag and its contents and also of the clothing worn by the applicant upon his return.

[5] On foot of this, prison staff went to the applicant's cell where they discovered that he had already changed out of the clothing he had been wearing when he returned to the prison. The staff considered this to be unusual behaviour for a prisoner returning from home leave. In any event, the clothing that he had been wearing upon his return was seized. This clothing was also then tested for the presence of unauthorised substances. The respondent says that this test also resulted in readings indicating the presence of illicit substances; and that the levels of contamination indicated were such that it was unlikely to have arisen from accidental or erroneous contamination. The articles were tested and re-tested on a different piece of equipment, which produced the same results.

[6] On 4 July 2022, the applicant was provided with a communication from the Security Governor, which has been referred to in these proceedings as a 'gist' form. The relevant portion of this was in the following terms:

> "On your return, we became aware of information indicating that items in your possession were contaminated by unauthorised substances. These have the potential to cause harm and endanger the safety of you and others should they be introduced into the prison, and pose a threat to good order and discipline.
>
> You will be aware that soaking and saturation of mail, clothing and other items is a commonly used means of conveying drugs and other substances between controllers and users both in the community and in prison.
>
> Such is the extent of contamination, I do not believe it possible that this is a "contact" type contamination. Indeed, given your historical association with unauthorised articles, I have credible and legitimate concerns that this is a deliberate attempt to convey articles into the prison."

[7] The communication went on to refer to the confiscation of the applicant's clothes and other articles and to describe the processes by which these could be returned. The respondent explained that the applicant's items had been seized pursuant to rule 33 of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 ("the Prison Rules"). However, the applicant was given the option of the items being laundered, re-tested and returned to him if, upon the re-test, they no longer indicated the presence of illicit substances. The applicant was invited to respond in writing to the letter from the Security Governor should he wish. It concluded with the following statement which has been a cause of significant concern for Mr Mawhinney:

> "This process will be recorded in your file for consideration on future UTRs, Compassionate Releases etc."

[8] The applicant strongly disputes the suggestion that he was deliberately seeking to convey unauthorised substances into the prison. On the same day as he received the letter from the Security Governor, 4 July 2022, the applicant responded via PRISM. In the course of that response he refuted the allegations and claimed that they were false. Later that same day, prison staff replied to the applicant referring to the gist form which had been provided and 'closed' the applicant's complaint or query. (The applicant takes this from the dates on the relevant form recording when the issue was raised and then closed). On this basis he contends that the very limited representations he could make were dismissed out of hand in a cursory fashion.

[9] Urgent pre-action correspondence was sent on the applicant's behalf to the respondent on that same day, 4 July 2022. The following day a response to that pre-action correspondence was sent on the respondent's behalf from the Departmental Solicitor's Office (DSO). In this correspondence NIPS denied that it had acted unlawfully and repeated its view that there could not have been accidental or erroneous contamination. The letter also disclosed that the results of the NIPS analysis of Mr Mawhinney's clothing had been verified on alternative equipment.

[10] The applicant's solicitor replied again, in a more comprehensive fashion, on 7 July 2022. In this correspondence the applicant sought further and better particulars of the matters set out in the gist form, including requests for the nature and source of any information which the respondent contended that it had. The applicant's representatives protested the perceived unfairness of the procedure from his perspective and asked the respondent to confirm that the relevant record of allegations and findings would not be recorded on the applicant's prison record.

[11] On 18 July 2022 DSO again replied on behalf of the respondent. It declined to provide additional information and essentially repeated the concerns which had already been expressed about the applicant's behaviour. NIPS also contended that the gist which had been provided to the applicant was sufficient by way of disclosure. As to the applicant's solicitor's request for a copy of all of the reports and results generated by means of the testing of their client's items, the pre-action response said this:

> "This is classified as intelligence and is not being used as evidence in a disciplinary or other hearing. The Applicant has not been placed on report as part of the internal disciplinary process, nor reported to the PSNI for investigation. NIPS does not release operational intelligence reports or related information to third parties but have provided a reasonable and proportionate "gist" which permits the applicant to respond without negatively impacting on the NIPS ability to detect, disrupt and deter conveyance, control and supply of unauthorised articles into and throughout Maghaberry. This is an accepted means of providing information to persons facing allegations as regards information and/or intelligence which provides them with the means of responding without identifying sources and/or processes used which may place others at risk or denigrate the effectiveness of systems used by NIPS."

[12] There was then further correspondence between the parties relating in particular to the release or preservation of seized items. Each party maintained their position and the correspondence did not really take the matter much further. However, in relation to the applicant's continuing objection to the recording of

information arising out of the incident, DSO provided the following response on the part of NIPS:

> "NIPS cannot ignore or "unknow" information which it holds and must take into account information which may place persons at risk and/or undermine the security, good order and discipline of the prison or area within it. NIPS has many reports linking the Applicant with a long relationship with unauthorised articles and being involved the control of same within the prison. NIPS will not therefore expunge the information. NIPS has not placed the Applicant on report. As noted above, NIPS has many intelligence reports regarding the applicant's history of being linked with in the control of unauthorised articles. He arrived back into the prison with clothing contaminated with unauthorised substance [*sic*]."

[13] As appears from the above, the central feature of the factual matrix in this case is that the respondent did not charge the applicant with an offence against prison discipline or commence adjudication proceedings for that purpose. The applicant's complaint arises from the fact that the respondent advised him that a record of its "findings" (the applicant's terminology) from this incident would be recorded on his file for consideration when he applied for future periods of unaccompanied or compassionate release. The applicant is concerned about the risk of this having a negative impact upon his future release prospects both in terms of temporary release from prison (under rule 27 of the Prison Rules) or, perhaps more importantly although also more remotely, in terms of an application for release on licence being considered by the Parole Commissioners for Northern Ireland (PCNI).

[14] The above facts are the key facts for the purpose of the matters at issue in these proceedings. The respondent has also emphasised the wider context by reference to the following facts. Mr Mawhinney is a life sentence prisoner, having been convicted of murder in December 1999. He was released on life licence in March 2011 but has had his licence revoked on two occasions (in both 2014 and 2016). At the time of the incident giving rise to the present proceedings, Mr Mawhinney was also serving a determinate custodial sentence of five years (with 2½ years' custody and 2½ years on licence) for attempted robbery and possession of Class C drugs. The respondent has also noted that this applicant has a history of substance misuse and had failed six drug tests whilst in custody, including in October 2021 for abuse of medication which he had not prescribed; and in July 2022, a short period after the events giving rise to these proceedings. This applicant was suspended from the pre-release testing regime for a short period in August 2022 because he had failed that recent drug test.

Factual background in Mr Faulkner's case

[15] In Mr Faulkner's case, he relied upon essentially the same arguments as Mr Mawhinney in relation to the search and seizure of his personal belongings and the process which followed. In his case, that occurred when he returned from a UTR on 10 August 2022. He received a communication dated from the Security Governor dated 23 August 2022 which was in similar terms to that provided to Mr Mawhinney which is quoted at paras [6] and [7] above. The focus of the argument in Mr Faulkner's case was the second, and separate, aspect of his claim. He was placed in the CSU on two separate occasions – on 6 July 2022 and 10 August 2022 – pursuant to rule 32 of the Prison Rules.

[16] As to the first of these occasions, Mr Faulkner was placed on rule 32 restriction in the CSU on 6 July 2022 upon his return from temporary release. He was searched upon his return and no drugs were found. However, he was then placed in the CSU (as appears below) until the passive detection dog (PDD), also sometimes referred to as the passive drugs dog, was available the next day. In correspondence of 8 July 2022 the applicant's solicitors wrote to NIPS asking why their client had been placed in the CSU and asking what other viable alternative courses of action had been considered prior to this. No response to this enquiry was received, despite further follow-up correspondence being sent on 1 and 11 August 2022.

[17] The respondent later replied to pre-action correspondence in September 2022 and set out the following in relation to the events of 6 July:

> "The Applicant had been out on a period of Unaccompanied Temporary Release (UTR) for one day on 6 July 2022. When he returned to the prison at 18.02 on 6 July, the Applicant was searched but the Governor considered it appropriate that the PDD was also deployed. On that evening, the PDD was not available and therefore the Governor deemed it necessary for the maintenance of good order and discipline, to ensure the safety of officers, prisoners and any other person as well as in the Applicant's own interests, for him to be held on Rule 32 overnight. The PDD was then available the next morning and it is understood that the PDD did not indicate the presence of drugs so the applicant was returned to the landing. The placing of the Applicant on Rule 32 was necessary to ensure that unauthorised articles, specifically illicitly smuggled drugs, would not enter the general population of the prison. This is a proportional response to the risk to the lives of prisoners, staff and the applicant and the risk to the health of prisoners and staff at the prison."

[18] This explanation is corroborated both by the respondent's subsequent affidavit evidence and, perhaps more importantly, the contemporaneous documentation completed in relation to the rule 32 restriction on 6 July 2022. The central point of contention between the parties is whether the non-availability of the passive detection dog is an adequate basis for restricting a prisoner's association under rule 32. The respondent describes the use of the PDD as "the usual regime of investigation" upon a return to prison such as this.

[19] This applicant had a further UTR on 10 August 2022. Upon his return to the prison on this occasion, he was again placed in the CSU. Again, his solicitor promptly wrote to the respondent asking for an explanation of the basis of this restriction. A response from NIPS of 12 August 2022 stated the following:

> "I can inform you that Steven was late back from his UTR and this broke the conditions he was to follow. He was placed in the CSU on R32. I can confirm today that he had been returned to Braid House today and is in a normal residential location. It was explained to Steven the reason he was placed on R32 and he understood all the information."

[20] In these proceedings the applicant relies upon (and attacks) this justification. In his grounding affidavit he has explained the sequence of events as he saw them. He accepts that he returned late from his UTR but for the following reasons. The permitted period of release was eight hours and he was due to return to HMP Maghaberry at 6:00pm. He had returned from Belfast to Lisburn on the train but was unable to secure a taxi which would return him to the prison in time, due to the demand for taxis at that point and the associated wait time. As a result, realising that he was likely to be late for his appointed return time, he attended Lisburn Police Station around 5:40pm in order to explain the situation. The PSNI informed the prison authorities of this and brought the applicant back to the prison, at which he arrived around 6:40pm. On the applicant's case, he was sent to the CSU around 20 minutes after his arrival (around 7:00pm) and was not released back into association until around 2:30pm on Friday 12 August 2022 (the day after his solicitor had sent an email asking for the justification for the restriction of his association).

[21] However, in its response to pre-action correspondence in this case, the respondent has explained this second use of rule 32 restriction in Mr Faulkner's case in a different manner, as follows:

> "On the second occasion on 10 August, the Applicant returned late back from the period of UTR carrying with him a number of damp items of clothing. The damp clothing was taken away for analysis. However, the presentation of the Applicant (his wet clothes), in addition

> to the unsatisfactory explanation which the Applicant gave for his late return, raised concerns with the Governor. The Governor decided that further searching was required in a more controlled environment. It was deemed necessary that the Applicant was observed for up to 72 hours to discount the possibility of him showing behaviours which would indicate the presence of drugs in his system. After 2 further searches on 11 August, a cell and full body search and a full body search on 12 August 2022, the Governor felt that the risk to the Applicant and to other prisoners and staff was sufficiently minimised and permitted the Applicant to return to his normal residential area.
>
> The Applicant's stay in the CSU under Rule 32 was reviewed after 48 hours and a decision was made to send him back to the landing at that stage."

[22] This second occasion on which Mr Faulkner was placed on rule 32 restriction also gives rise to the challenge in his case which overlaps with that in Mr Mawhinney's case. The pre-action response in the Faulkner case continues:

> "In addition it should be noted that unauthorised substances were detected on the Applicant's clothes on his return albeit this was confirmed after the decision had been made to permit him to go back to the landing.
>
> The placing of the Applicant on Rule 32 on this occasion was again necessary to ensure that unauthorised articles, specifically illicitly smuggled drugs, would not enter the general population of the prison. Again, this is a proportional response to the risk to the lives of prisoners, staff and the applicant and the risk to the health of prisoners and staff at the prison."

[23] The respondent says that Mr Faulkner returned late from his UTR; that his explanation for this was deemed unsatisfactory; and that he had in his possession wet clothes. His presentation gave rise to a concern on the part of the governor that he may have been involved in the trafficking of illicit substances into the prison. In light of these matters, the governor decided that further searching was required "in a more controlled environment." For his safety and that of others, his restriction of association under rule 32 was authorised for a period of 72 hours. This was to permit him to be observed for up to 72 hours to discount the possibility of him showing behaviours which would indicate the presence of drugs in his system. He was placed in a special drug recovery cell. During this period, he was searched again (on 11 and 12 August). After around 48 hours, it was decided to end the

restriction upon his association. The respondent's evidence is that, at that point, the governor felt that the risks to the applicant and others were sufficiently minimized for him to return to his normal residential area. It says that unauthorised substances were indicated to be present on Mr Faulkner's clothes upon his return; and that testing confirmed this to be the case (albeit after the decision had been made to permit him to go back to his landing).

[24] This second rule 32 decision is addressed in an affidavit specifically filed by the governor who made the relevant decision, Governor Watton. He emphasises that it was highly unusual for the applicant to have a bag of wet clothes in his possession when he returned. In the first instance this is because, for an 8-hour UTR, a prisoner will not ordinarily bring anything out with them. Secondly, a prisoner is not allowed to bring any items into the prison on returning from a UTR unless this has been pre-arranged with the governor. There was no such arrangement in this case. The applicant would not therefore have been expected to have these items with him. Thirdly, the clothes being wet (when it had not been raining) was "extremely concerning."

[25] The governor also emphasised that being late for return is, in itself, an issue of considerable concern. Prisoners are generally highly motivated to return to the prison in time since a failure to do so can put in jeopardy future UTR or compassionate temporary release opportunities. In addition, experience has shown that late return can be an indicator that the prisoner was somehow involved in illicit activity (for example, because they were required to travel somewhere to collect a package; because they were trying to insert drugs into a body cavity; because they were engaged in a process of soaking or saturation which necessarily takes time; or because they were intoxicated or under the influence of illicit substances themselves).

Summary of the parties' positions on the common issue

[26] The applicants accept that the prevention of the smuggling of drugs into prisons is a significant issue and a legitimate aim for the respondent to pursue. The question they raise is whether the particular process which was employed by NIPS in these cases was lawful. In the applicants' submission, this involved a denial of basic procedural fairness because they did not enjoy the procedural protections inherent in a formal adjudication procedure (including a presumption of innocence) and, crucially, were not provided with a level of detail which they contend was necessary in order to discharge the requirement that they know the case against them and could make meaningful representations in respect of it. In the applicants' submission an allegation was made against each of them based upon evidence which they had not seen; and the respondent made a determination in respect of them, again based upon evidence which they had not seen and having not heard from them, and then refused to provide further particulars or specifics.

[27] The respondent relies upon the fact that prisoners are not adjudicated upon or disciplined for incidents such as this. Rather, the process is primarily directed towards preventing smuggling and intelligence-gathering. Accordingly, the fairness of the process has to be judged in the context of there being limited detriment to a prisoner from the type of procedure which has been adopted, also balancing the need not to undermine the processes in place for detecting and preventing the smuggling of illicit substances into the prison system. The respondent has emphasised that the applicants were not subject to any restriction of association on foot of the testing and that neither their security category nor their residential location was altered. Given the nature of what has occurred, the respondent contended that there was no actual "decision" in either case which the applicants were able to challenge and/or that their challenges were premature (since there had been no concrete adverse consequences for them arising from the matters of which they have complained).

Relevant provisions of the Prison Rules

[28] The respondent submits that the central provision with which this case is concerned is rule 33 of the Prison Rules. Under the heading 'Unauthorised articles', it provides as follows:

> "A governor may confiscate any article which a prisoner is not allowed to have in his possession after his reception into prison."

[29] Rule 16 is also potentially relevant. It contains the power to search a prisoner upon their return to the prison. Rule 16(1) requires a prisoner to be searched on their initial reception to prison. Rule 16(2) provides as follows:

> "A prisoner may be searched before or following a visit, on any occasion on which the prisoner has come into contact with, or is likely to come into contact with, persons from outside the prison, or when his cell or property is searched."

[30] There is an additional power under rule 16(4) for a governor to direct that a prisoner be searched at such other times as is considered necessary for the safety and security of the prison. The rule contains additional provisions in relation to full searches which are not relevant for present purposes. However, rule 16(10) makes clear that a search of a prisoner under the rule may include a search of his cell and property.

[31] Rule 27 is the rule which deals with temporary release and which provides the power to release sentenced prisoners for compassionate and other purposes, including pre-release home or work leave. The power to release a prisoner on a temporary basis for any period and subject to any conditions is set out in rule 27(1).

Rule 27(2) provides that a prisoner may be temporarily released under the rule "for any special purpose" or, inter alia, to assist him in his transition from prison to outside life. Where a prisoner is so released, they may be recalled to prison at any time, whether the conditions of their release have been broken or not, under rule 27(3). Rule 27(5) operates in the expectation that prisoners will make an application for temporary release, which will then be considered by the prison authorities. The authorities may take into account any previous applications on the part of the prisoner, including any fraudulent applications. In my view it goes without saying that, in considering whether to grant temporary release, the prison authorities are entitled to take into account the behaviour of a prisoner during and upon return from any previous period of temporary release.

[32] Rule 32 of the Prison Rules is also relevant in relation to the discrete challenge in relation to restriction of association in Mr Faulkner's case. It is contained within Part IV of the Prison Rules, which is concerned with 'Discipline and Control.' The key provision, rule 32(1), provides as follows:

> "Where it is necessary for the maintenance of good order or discipline, or to ensure the safety of officers, prisoners or any other person or in his own interests that the association permitted to a prisoner should be restricted, either generally or for particular purposes, the governor may arrange for the restriction of his association."

[33] Rule 32(1A) is also potentially relevant in this case:

> "Where a prisoner's association is restricted to ensure the safety of officers, prisoners or any other person, the prisoner may be accommodated in a cell equipped to aid the retrieval of any unauthorized or prohibited article which he may have in his possession."

[34] Rule 32(2) provides that a prisoner's association under the rule may not be restricted under it for a period of more than 72 hours without the agreement of the Department of Justice ("the Department").

The problem of drugs within the prison estate

[35] The problem of drugs within the prison estate in this jurisdiction is well known to the courts from judicial review litigation relating to prison life, as well as other court business before them (such as bail applications). Nonetheless, it has been addressed again in the affidavit evidence filed on behalf of the respondent in these proceedings. NIPS's evidence is that the difficulties with the proliferation of drugs in prisons are well known and that the prison authorities do their utmost to prevent illegal substances from entering the prison population. The methods and systems

employed for testing for such substances have, it is averred, saved "an untold number of lives."

[36] The availability of illegal drugs within the prison system – or prescription drugs or legal highs which are capable of being abused – has a range of deleterious effects. It undermines attempts to rehabilitate offenders and to deal with addiction issues. It promotes a black market in unauthorised articles or substances, which in turn leads to risk-taking and/or coercive behaviour. It undermines good order, discipline and respect for the Prison Rules. It can cause or encourage further offending or violent behaviour towards staff or other prisoners when an individual is under the influence of drugs. It can also pose a serious risk to the lives of prisoners taking such drugs, either by way of promoting addiction, overdose or consuming a dangerous substance. It is understandable, therefore, that NIPS wishes to do all it can to address this issue.

[37] The respondent has provided a range of evidence about steps it takes to try to combat the bringing of drugs into the prison system, with the aim of creating an effective barrier to their entrance. One such measure is that all prisoners returning from UTR, for whatever reason, must be searched. There are a number of search options available, of which the PDD is but one, which can be deployed on its own or along with other search options depending on the circumstances. The authorities indicate that, despite their best efforts, drugs still enter the prison estate and that those involved in the trafficking of drugs are using ever more inventive means to do so. NIPS has therefore had to react accordingly and develop methods and systems for the detection of a wide variety of illicit substances in various different forms.

[38] The respondent says that it has increasingly become aware of persons seeking to smuggle illicit substances into the prison estate by soaking clothing or paper in a liquid form of the drug concerned. Soaking or saturation are now commonly used means of conveying unauthorised substances into prisons including spice, heroin and cocaine. NIPS is aware of mail, reading materials and clothing being used for this purpose. For instance, the authorities are aware of art and letters which have purportedly been provided by prisoners' children and loved ones being used in this fashion.

[39] In response, the respondent uses a number of methods and systems for the testing of items to identify the presence of illicit substances, including both drugs and explosives. It avers that the prevention of the smuggling of such items is essential for the protection of the lives of both prisoners and staff. The respondent's evidence is also that it is essential for the preservation of the effectiveness of these methods and systems that they remain confidential. Its case is that if it was to be known precisely what chemical compounds for which NIPS has the capacity to test, there would be scope for circumventing the systems which are in place. Relatedly, if it became known what equipment and techniques were being used to identify illicit substances upon committal or return to custody, there would be much greater scope for evading the systems.

[40] To similar effect, the respondent has averred that the only way to ensure the continued effectiveness of many of these methods of intelligence collection is to maintain a high degree of secrecy about the methods. For example, the testing which occurred in the instant cases does not occur in front of the prisoner; and the items are taken away to another area so that the prisoners cannot see what tests are being undertaken or how those tests were undertaken. Prisoners are also not aware of what a particular passive detection dog is trained to detect. The respondent further says that these methods and systems are employed on a daily basis and that they consistently yield results in terms of identifying the presence of drugs.

[41] The prison authorities' fight against the importation and use of drugs in the prison system is multi-factored. In relation to the particular type of testing which is at issue in these cases, the respondent has emphasised that this does not result in a prisoner being subject to an adjudication. The purpose of the systems engaged in these cases is to prevent illicit substances entering the prison system and to gather intelligence with regard to the smuggling of drugs into the prison estate. There may well be cases where prisoners could be prosecuted for their possession or intended supply of illegal drugs. There will also be cases where this may be the subject of prison disciplinary proceedings. In the present type of case, however, the respondent accepts that if it were to seek to formally charge prisoners with an offence against prison discipline on foot of the findings of the tests undertaken, it would have to reveal information about these testing methods and systems that would be highly detrimental to their effectiveness.

[42] In light of this, a positive indication in respect of clothing or paper which may have been saturated as a means of conveying illicit substance typically does not result in an adjudication. In cases such as the present, where illicit substances are indicated in clothing, the items will tend to be seized and the prisoner then offered the return of the items once they have been laundered and have passed further drugs tests. That is what happened in the present cases. Information gleaned from such test is also "certainly not a bar" to the grant of a further UTR compassionate release, it has been averred on behalf of the respondent. It is merely one element of the multifactorial decision-making process.

[43] The respondent's evidence also indicates that in the past prisoners have attempted to smuggle illicit substances into the prison by hiding them internally. Where packages of drugs have burst inside a prisoner's digestive system they have, as a result, suffered life-threatening conditions. Due to the nature of the substances concerned, relatively small amounts can present a danger to prisoners and staff. They can be hidden under a person's clothes or in their shoes; but can also be hidden internally in the mouth, stomach or anal cavity. They can be in solid, liquid or powder form.

[44] The evidence also makes clear that there have been many instances of prisoners who have no history with drugs or drug-related convictions nonetheless

seeking to smuggle illicit substances into the prison. (This is relevant in Mr Faulkner's case.) There can be many reasons for this. First, the prisoner may be seeking to traffic illegal drugs into the prison for their own financial gain. Second, the prisoner may have been coerced by other prisoners to traffic the drugs. Third, the prisoner may have been coerced by paramilitaries or other organised crime groups outside of the prison to traffic the drugs. In this case, it may not only be the prisoner themself who has been subject to intimidation or coercion but this may have been directed towards their family or associates on the outside.

[45] It is also clear that the illicit substances which the prison authorities seek to prevent from entering the prison are not limited to illegal drugs. For example, explosives (or components of explosives) can be secreted internally and the respondent's evidence notes that there have been efforts in the past to smuggle explosives into HMP Maghaberry. The concerns about undermining the effectiveness of systems in place therefore goes wider than simply concerns about the drugs trade.

[46] In addition to the various search and testing procedures which are available, the use of close supervision under rule 32 is also a tool in the prison authorities' armoury in the fight against drugs within the prison system. In certain circumstances, the prison authorities will place a prisoner on rule 32 where there is a concern that they may have concealed drugs internally. The use of the procedure, and the specialist cells available in the CSU referred to in rule 32(1A) of the Prison Rules, mean that the prisoner can be closely supervised by prison officers and if there is any change in their presentation appropriate steps can be taken to preserve their well-being. In the event that the prisoner has secreted drugs upon their person they will be prevented from passing those drugs to any third parties and it is more likely that those drugs will be discovered by means of the facilities available in the special cell. The prisoner is also in an environment where they can make disclosures to prison officers without the risk of being intimidated by other prisoners (for example, if they wish to inform an officer that they have been coerced into smuggling drugs). Further searching of the prisoner can also take place. The respondent's evidence is that a prisoner being placed on rule 32 restriction in circumstances where there is a concern that the prisoner might have drugs hidden internally is as much about protecting the life and well-being of that prisoner as it is about protecting the prison staff and population.

The procedural fairness issue

[47] Against that background I turn to consider the key issue, which is common to both cases, namely where there has been a breach of the requirements of procedural fairness in terms of the respondent's consideration of test results obtained in relation to wet articles in the possession of each applicant upon their return to the prison on 29 June and 10 August 2022 respectively.

[48] The general principles in relation procedural fairness in decision-making which is subject to the supervisory jurisdiction of the High Court on judicial review are well known. When assessing such a challenge, the court must determine for itself whether the procedure which was followed was fair, rather than the question being simply whether the decision-makers acted reasonably (see, for instance, paragraph[65] of Lord Reed's judgment in *Osborn v The Parole Board* [2013] UKSC 61 and paragraph [46] of *Balajigari v Secretary of State for the Home Department* [2019] EWCA Civ 673). A core aspect of the duty to act in a procedurally fair manner is the need to ensure that the person affected by a decision has an effective opportunity to make representations, usually (although not invariably) before the decision has been taken. As a seminal decision in this area (*R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531) makes clear, the requirements of procedural fairness are not immutable and depend upon the particular context. This is evident, for instance, in Lord Mustill's observation (at 560) that "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…" [italicised emphasis added].

[49] The values served by the requirements of procedural fairness have also been addressed in a number of authorities. They include the making of better decisions, as a result of the decision-maker being better informed; the avoidance of a sense of injustice on the part of the subject of the decision; promotion of observance of legal standards; and the saving of costs which might otherwise arise from challenges to decisions.

The use to which the 'findings' may be put

[50] Since context is all-important in determining what procedural fairness requires in a particular case at common law – and given that the parties in these proceedings approach this issue from essentially diametrically opposed standpoints – it is appropriate to begin by examining precisely what is at issue.

[51] In his affidavit filed in the course of these proceedings on behalf of NIPS, Governor Armour has confirmed that the information which is recorded on the applicant's files will be considered when making future decisions about UTRs or compassionate releases in this passage of his evidence:

> "… NIPS does not use a positive indication in respect of clothing or paper to ground an adjudication. However, NIPS cannot blind itself to the information gathered from such testing when it makes decisions with regard to the management of the prison. This obligation is particularly acute when such decisions may impact the safety of the public or the prison population. Therefore, as stated in the correspondence to the Applicant, such information

will be considered when making determinations about future UTR or compassionate release."

[52] There is an obvious discrepancy in the language used by each party in this case which is indicative of a key underlying difference in their analyses. The applicants repeatedly refer to "findings" having been made against them. The respondent, on the other hand, almost invariably uses more neutral language such as "the information gleaned" from testing or "information gathered."

[53] Mr O'Rourke was correct to submit that the respondent was careful not to suggest that the incidents would not, or could not, have *any* negative consequence for the applicants. At the same time, it is not the case that the 'findings' arising from the contentious incidents mean that the applicants have been unable to progress with pre-release testing. In Mr Mawhinney's case, his next scheduled period of UTR after the incident was scheduled to go ahead. In the event, it did not proceed; but that was for reasons unconnected with these proceedings, namely the fact that he failed a drugs test on 8 July 2022 and was then subject to an adjudication in respect of that. Notwithstanding this, Mr Mawhinney had re-commenced onto pre-release testing within a number of months and had a further 8-hour UTR which took place on 23 November 2022. In Mr Faulkner's case, he was afforded a further UTR on 12 October 2022 which did in fact go ahead. This bore out the respondent's evidence that the recording of this information is certainly not a bar to further periods of release. Each applicant was able to continue with periods of release immediately after the incidents which gave rise to these proceedings.

[54] In the above circumstances, the respondent contends that the applicants' complaints boil down to an objection of information being recorded in their prison file. As noted above, the respondent's case, set out in sworn averments from Governor Armour, is that the purpose of the testing and confiscation was for the prevention of illicit substances entering the prison and for intelligence-gathering. On this basis, the respondent submits that the actions complained of by the applicants have "not resulted in disciplinary or other consequences" for the applicants "other than the Prison authorities being aware of the incident."

[55] After some enquiries on the part of the court in relation to precisely how the information in these cases would be dealt with, this was addressed specifically in a further affidavit from Governor McCready, a governor within the Security Department. He provided evidence about the Security Department's receipt of Security Information Reports (SIRs) on a daily basis with regard to a multitude of issues which affect the security of the prison. These reports remain confidential as they contain intelligence and their dissemination could serve to undermine intelligence-gathering methods or to prejudice sources of intelligence. They are not generally available to personnel outside of the Security Department and are not generally disclosed to prisoners or third parties. However, the Security Department holds information on file with a view to building up an effective and up-to-date intelligence picture of (inter alia) how unauthorised articles may be conveyed into

the prison including what, where, and by whom. This is designed to strengthen the authorities' ability to prevent unauthorised articles entering the prison estate and to thereby protect the lives of prisoners and staff.

[56] The information deriving from the tests of the applicants' wet clothing would initially be treated as intelligence information by the Security Department. However, it is recognised that governors outside of that department have occasion to make decisions which involve a degree of risk management, in respect of which information held by it may be relevant. In those circumstances, where such a governor seeks input from the Security Department, that department will prepare a gist of the relevant information held by it. In the preparation of any such gist the personnel in the Security Department will be aware of the balancing exercise which needs to be undertaken between protecting intelligence-gathering methods and sources on the one hand and, on the other, the rights of the individual prisoner affected to be able to engage with and respond to the gist.

[57] In this case a copy of the letters (or 'gist' forms) which were sent to the applicants explaining to them the concerns held by the Security Department would be kept on the file which is available to all governors. It is this which would be "held on file", not any more detailed information to which the Security Department had been privy. As to the PCNI, about which the applicants expressed significant concern, should the Commissioners seek a report from the Security Department in relation to a prisoner whose case they were considering, then a process would be undertaken to produce a gist of relevant information held. Whether or not there would be specific reference in such a gist to a particular incident, such as the incidents in question in these proceedings, would be a matter for the member of the Security Department who was undertaking the preparation of the gist. This element of the applicants' case was one which Mr Corkey criticised as being premature; since it was unclear whether the concerns raised in relation to each applicant would make their way to the PCNI and, if so, what weight (if any) the PCNI would give to them after having heard evidence and/or submissions from the applicants and their representatives.

[58] Governor McCready specifically disavowed that information contained on a prisoner's file was analogous to the accumulation of penalty points on a driving licence (an analogy which had been drawn on the applicants' behalf). Firstly, he made the point that intelligence itself is subject to careful scrutiny and analysis. Secondly, that any governor making a decision about the prisoner would compare and contrast any gist provided by the Security Department with other information held by the prison authorities, in order to determine whether it was undermined or corroborated and what weight (if any) should be attributed to it. Thirdly, unlike a penalty points system, there is no point at which the accumulation of information becomes determinative and results in a prisoner being disqualified from some benefit.

[59] Overall, the respondent emphasised strongly that neither applicant had been barred or deterred from seeking or receiving further UTRs as a result of the incidents; that neither had been placed on rule 32 restriction as a result of the test results (in Mr Faulkner's case that was imposed before the relevant result was available in August 2022); that there was no change in either applicant's security categorisation as a result; and that neither applicant had a change in his residential location within the prison. In short, the respondent contends that there was no discernible or practical detriment to the applicants at all.

The level of disclosure provided

[60] Proper consideration of whether the requirements of fairness have been discharged in these cases also requires an examination of the information which has been provided to the applicants. They complain that, even after receipt of the respondent's affidavit evidence in this case, there are unaware of which precise substances they are alleged to have tried to smuggle into the prison; the level or extent of those substances; and the precise method used by the respondent to identify those substances. They observe that the respondent's affidavit evidence does not exhibit any documentation or test results shedding light on these matters but, rather, emphasises the respondent's concern for secrecy around these issues. Governor Armour does recognise that if the respondent wished to formally adjudicate upon a prisoner and charge them with an offence against prison discipline, then more information (of the nature which the applicants seek) would have to be disclosed to the prisoner as a matter of fairness in that forum.

[61] The applicants accept that, in certain circumstances, it is permissible for a public authority to disclose only a gist of certain information as an alternative to full disclosure. They submit that the present case does not fall within such a category because the respondent's actions amount to reliance on serious allegations without these being backed up by evidence so that the allegation is effectively immune from challenge. The applicants also accept that authorities which deal specifically with decision-making in the context of prisons often emphasise the very specific needs and constraints of decision-making in that environment. Nonetheless, they contend that the process in the present cases fell clearly on the wrong side of the procedural fairness line.

[62] In Mr Corkey's submission, the information provided to each applicant – in the correspondence of 4 July 2022 in Mr Mawhinney's case and that of 23 August 2022 in Mr Faulkner's – was significant in nature and amount. Inter alia, it included (i) the date of the search; (ii) a schedule of the items confiscated; (iii) the fact that items had been indicated as contaminated with unauthorised substances; (iv) the fact that those substances had the potential to cause harm and endanger the safety of the applicant and others; (v) a description of the concern which had arisen with regard to soaking or saturation as a method of conveying drugs into the prison; (vi) the concerns associated with the extent of the contamination; (vii) the rule under which the confiscation was taking place; and (viii) NIPS's proposals for returning the

clothing to the applicant under certain circumstances. The respondent contends that this was plainly sufficient to explain the reasons for confiscation of the applicant's belongings (the clothes in question) and to put them on notice of the substance of the authorities' concerns arising from the testing of those items. In addition, the correspondence afforded the applicants the opportunity to respond; and identified that the incident would be recorded on the applicant's file for consideration upon future applications for temporary release.

[63] The specific information which was omitted from the correspondence was the precise method of analysis and which drugs have been found to be present. The reason for this is, the respondent submits, clearly set out in the affidavit of Governor Armour in the following terms:

> "It is essential for the preservation of the effectiveness of those methods and systems that they remain confidential. If it was to be known precisely what chemical compounds NIPS has the capability to test for there would be scope for circumventing the systems that are in place. Further, if it became known what equipment/techniques were being used to identify illicit substances in committal/return to custody there would be much greater scope for evading said systems."

Consideration of relevant authorities

[64] For my part, I consider that the applicants' case has two significant frailties. First, it fails to recognise the obvious fact that the process with which these proceedings is concerned was not in any sense a judicial process. Second, it underplays the emphasis which has been placed by the higher courts in this jurisdiction on the context-specific needs and constraints of decision-making in the prison environment. Those matters are addressed in cases such as *Re Conlon's Application* [2002] NIJB 35; *Re McAree's and Watson's Applications* [2010] NIQB 79; and *Re Davidson's Application* [2011] NICA 39.

[65] In particular, in the *McAree and Watson* case Treacy J cited authority indicating that there are exceptions to the presumptive requirement of sufficient disclosure where disclosure of certain material would be injurious to the public interest. He indicated that this would be likely to arise, and had arisen in the past, where decisions were made concerning prison management. Those decisions could significantly affect individual prisoners, such as whether a restriction upon their association should be imposed or as to where they should be placed or moved within the prison estate.

[66] In that case Treacy J noted – in a passage of the judgment relied upon by the applicants (at paragraph [37]) – that it is difficult for a prisoner to respond in any detailed or meaningful way to allegations that he has been involved in drugs when

the information which is relied upon cannot be disclosed to them. However, he went on to note that where this handicap arises, the court should consider whether there are countervailing safeguards available and also whether (or not) fairness requires deployment of those safeguards. He continued: "In answering that question the court must be careful not to over judicialise administrative procedures connected with prison management." Accordingly, he considered that cases dealing with adversarial rights were not of much assistance in this context. Even in cases involving rule 32 restrictions, "the decisive role of such undisclosed material does not of itself render the decision unfair." Treacy J went on to cite a number of cases – including *Re Thompson's Application* [2007] NIQB 8 and *Re Hart's Application* [2010] NIJB 106, involving de-selection from a resettlement unit and rule 32 restriction respectively – where fairness did not require more than a gist of the concern upon which a decision had been based to be disclosed to the prisoner, if even that was required.

[67] In the present case, the issue is whether the nature of the decisions at issue and the decision-making employed is such that, notwithstanding the absence of full disclosure, the process overall meets the requirements of procedural fairness in the circumstances. In turn, that requires consideration of the extent of the disclosure and whether any countervailing safeguards (usually in the form of heightened scrutiny of the underlying materials) were then required.

[68] In this regard, the respondent submits that the context of the decision-making is highly relevant to the requirements of fairness in the circumstances, particularly in relation to the level of disclosure of information which will be required. This proposition is supported by the *McCormick* decision (see below), at paragraph [30]; and also, by way of further example, *Re Patterson's Application* [2017] NIQB 112, at para [9] *per* Keegan J. Mr Corkey made a powerful point that all of the authorities to which I was referred which dealt with these matters related to concrete decisions with an immediate impact upon a prisoner's situation or status, such as (a) a decision to place the prisoner on rule 32 restriction (*Conlon*; *Hart*; and *Brockwell*); (b) a decision to alter the prisoner's security categorisation (*Wilson*); (c) a decision to place the prisoner in the Harm Reduction Unit (*McAree and Watson*); or (d) a decision to suspend or withdraw the prisoner from the pre-release testing regime (*Davidson*; *Hayes*; and *Whittle*).

[69] In the *Hart* case, at paragraph [12], Weatherup J said this:

> "The starting point is the provision of sufficient information to enable the prisoner to understand the reasons for removal, if so required. Where such disclosure is subject to constraints by reason of other interests the decision-maker is required to make a judgement as to the extent to which the provision of information should be limited in order to protect the rights of others. The decision-maker must be accorded a discretionary area of

> judgment in relation to the extent to which the release of information should be limited. If an applicant requires information or further information in order to understand the reasons for removal then that should be requested."

[70] In the *Wilson* case (*Re Wilson's Application* [2009] NIQB 60), it was accepted (see paragraphs [22] to [24]) that there was a variety of bases upon which it may be appropriate to withhold information which would otherwise be disclosed. These include cases where disclosure is liable to reveal the identity of a source or cause significant damage to the prison security or information-gathering systems. The court recognised that ultimately some, or in certain cases all, information may have to be withheld from prisoners. The overriding consideration is to ensure that all information is disclosed "unless reasons of substance exist to justify it being withheld."

[71] The applicants relied upon the decision in *Re Hayes' Application* [2017] NIQB 115, in which McCloskey J quashed a decision withdrawing the applicant from pre-release testing in prison on foot of a possible drugs importation incident. In that case, however, the main ground of challenge was failing to take into account witness statements by the two officers who conducted the search of the applicant. Relatedly, there was a failure to explore at all a case made by the prisoner that he had been acting under duress from third parties in relation to his "undisputed conduct." The facts of the case therefore are far from on all fours with the present.

[72] The applicants may gain more assistance from the judgment in *Hayes* in terms of McCloskey J's concern about the Prison Service officials having a deep-seated view of the applicant's guilt without any adverse verdict or adjudication which afforded him due process or respected the presumption of innocence (see paragraphs [18]-[19] of the judgment). However, these were not treated as free-standing grounds upon which the decision was quashed but, rather, simply as an aspect of the *Wednesbury* challenge (see para [20]). McCloskey J did find for the applicant in *Hayes* on the basis of procedural unfairness; but that was again related to the witness statements of the two search officers, which had not been disclosed to him (see para [21]).

[73] For its part, the respondent has relied heavily upon the judgment in *Re McCormick's Application* [2017] NIQB 65. That was a challenge by a prisoner detained in HMP Maghaberry to a decision on the part of the prison authorities to increase his security status. This was on foot of intelligence which had come to light with regards to his alleged involvement in the smuggling of drugs into the prison. In that case the applicant was provided with a gist of the intelligence in advance of his security category review. Nonetheless, he submitted (as the applicants do in the present case) that the gist was so inadequate as to render the entire process completely unfair. In paragraph [34] of his judgment, Colton J made the following observations:

> "This is precisely the type of information which it may not be possible to disclose to a prisoner. Withholding of the detail of such information can be justified on the basis of protecting sources of information, the methods of gathering information and for ensuring the integrity of an ongoing live investigation."

[74] In that case, having reviewed a number of relevant authorities, and having considered the nature of the decision-making at issue – which did not involve a rule 32 restriction on association – Colton J quoted paras [11]-[12] from the judgment of Weatherup J in *Hart* judgment. At paragraph [11], Weatherup J indicated that "the prisoner should be given sufficient information to permit him to understand why" it had been decided that he should be removed from association. He recognised that "in some cases it may not be possible to disclose to the prisoner the information upon which the decision is based"; and that "that may arise where all or some of the information relied on is based on intelligence". In most such cases, the gist of the reasons for removal from association could be given. In paragraph [12] of his judgment, therefore, Weatherup J went on to consider what would be required by way of gist. The relevant portion is set out at paragraph [69] above. The gist should comprise "*sufficient* information, *subject to the requirement to protect* sources and *processes*, to enable the applicant to understand *the nature of the allegations* and to respond" [italicised emphasis added].

Conclusion on procedural fairness

[75] As in a number of the cases mentioned above, in the present case the applicants were each given sufficient information to understand the *nature* of the allegations against them. A balance has to be struck between the right on the part of the applicants to know and respond and, on the other hand, the public interest in preventing prisoners from undermining or circumventing the systems now in place to detect and prevent the illicit importation of drugs into the prison estate. The applicants each know the *reason* why the respondent has concern in relation to them; the *nature* of that concern; and *some details* of how that concern has arisen. Although the authorities establish that it is a question of law for the court whether the overall process was fair, they also suggest that on the particular issue of how much information can safely be released the prison authorities enjoy a discretionary of judgment and a measure of expertise which should be given due weight by the court (see, for instance, paragraph [12] of *Hart*; and paragraph [39] of *McAree and Watson*). Albeit that there were limitations in relation to the information provided to the applicants, they were in a position to make representations in relation to that information which would be, and which were, taken into account.

[76] This was not a case where the level of information provided by the respondent amounted simply to "bare assertions" (as was the case in the *Wilson* authority upon which the applicants relied: *Re Wilson's Application* [2009] NIQB 60). In *Wilson*, more information than had previously been provided to the prisoner was

capable of being safely provided to him in the course of the judicial review proceedings themselves. It is perhaps unsurprising, therefore, that McLaughlin J considered that more disclosure ought to have been provided contemporaneously to the impugned decision. In the present case, by way of contrast, the respondent has consistently maintained that it is impossible to safely provide more information than was provided to the applicants shortly after the issue arose in their respective cases.

[77] There is considerable force in the submission that the principal power exercised in this case by the respondent was simply the power contained within rule 33 of the Prison Rules to confiscate articles. The letters which the applicants complain contain "findings" in relation to them were explaining what had happened to property which had been searched and then confiscated and how it could be returned to them. (Put another way, the letters explained why the seized items were considered to be unauthorised articles in their contaminated state.) There is no requirement under rule 33 to initiate adjudication proceedings or indeed any other process when exercising this power. It is undoubtedly the case that, where articles are confiscated, a prisoner should be given an opportunity to make representations about the propriety of this action and about potential return of the articles. In my view, however, it does not follow that such representations must be made before the article has been confiscated, certainly in circumstances where (in the authorising governor's view, providing that is rational and genuinely held) it would defeat the purpose of the exercise of the power to allow the prisoner to retain the article pending some form of participation in the authorisation process.

[78] Although I do not accept the respondent's case that there was and is nothing in these cases for the applicants to legitimately challenge by way of invocation of the High Court's supervisory jurisdiction, there is still a very powerful point that the requirements of fairness have to be shaped by what is actually at issue for the applicants. There has been nothing by way of penalty imposed upon them; nor any adverse impact by way of decisions relating to prison or prisoner management made by the respondent. There has been no restriction of association; no withdrawal of privileges; no change to the applicants' categorisation; and no change to their residential wing. The incidents have also not, of themselves, posed any bar to the applicants continuing to avail of periods of temporary release.

[79] All of this led Mr Corkey to submit that there had in fact been "no decision" at all, in either case. For his part, Mr O'Rourke repeatedly referred to "findings" having been made against the applicants, as if these were formal findings in criminal or disciplinary proceedings, which were "recorded" on their prison records. The correct position, in my view is much closer to the end of the spectrum for which Mr Corkey contends.

[80] At the same time, a significant amount of information has been provided. As noted above, the key pieces of information withheld are the precise nature of the substance or substances detected and the precise method of scientific analysis. I accept the respondent's submission that the provision of these two pieces of

information would add little to the applicants' ability to make representations in light of the case they were each making, namely one of total innocence and ignorance. (I do not need to decide whether some additional information might have been required to be provided in the event that either applicant had made a detailed, positive case which would have explained the presence of some substance or other on their belongings.) I also give considerable weight to the respondent's expert view that it would not be possible to routinely provide these details without significantly undermining the effectiveness of the testing regime which is designed to combat the importation of illicit substances into the prison.

[81] In light of those factors – including the limited detriment to the applicants and the nature and purpose of the communication provided to them – I do not consider that the respondent has breached the requirements of procedural fairness in this case.

[82] The applicants' chief concern, other than possible impact on periods of temporary release, appears to be the use which may be made of (or the weight which may be placed on) the record of the incident when they came to make their case for release before the PCNI. I do not consider that this requires a different approach than that already set out above in relation to the procedural fairness issue for two reasons:

(i) First, it is unclear if the Parole Commissioners will be provided with information of this sort in any individual case. (In Mr Faulkner's case, after the hearing, it became clear that information was provided to PCNI by NIPS, in response to a request for a security report, which made reference to the incident on 10 August 2022. The matter was expressed in relatively neutral terms: "Subsequently clothing he returned back with tested positive (on two different pieces of equipment) for unauthorised articles. The items involved were seized, and Faulkner given the option of having them laundered and returned. He refused this and continues to challenge this through the courts." It should also be added, perhaps, that this reference was far from the most problematic aspect of that lengthy report in terms of Mr Faulkner's prospects of release.

(ii) Second, and most importantly, where such information is provided, the Commissioners will have to make their own assessment of the relevance (if any) of the information provided and the weight (if any) to be ascribed to it at the time of their consideration of the statutory test applicable to release. In my view, this is too remote to require the full panoply of procedural protections at the time of the detection on the part of the prison authorities which is at issue in these proceedings. Before the Parole Commissioners the applicants and others in a similar situation will be entitled to advance whatever case they wish about these matters, including with the benefit of legal advice and representation. The Commissioners will also, of course, be aware of the prisoner's case in relation to this; to the fact that they are faced

only with a gist (as was the prisoner) which does not set out the full details; and that the prison authorities did not themselves consider the issue determinative in terms of ongoing periods of unaccompanied pre-release leave. The Commissioners are more than familiar with the task of weighing up contested allegations in the context of discharging their statutory functions.

[83] In Mr Mawhinney's case he faces the difficulty that he failed a drugs test shortly after the incident which gave rise to these proceedings. Although there may be a difference between importing illicit substances into the prison and possessing or consuming them whilst within the prison, this is not a case where the applicant enjoys an unblemished record in respect of drugs issues but for this one aberrant finding. Furthermore, he has nonetheless availed of UTR even despite this bump in the road. One UTR was cancelled but he was provided with the opportunity of another in November 2022.

[84] The case of *Re Kelly's Application* [2017] NIQB 99 related to the respondent's decision-making and consideration of the exercise of its power to grant a prisoner temporary release. In the course of his judgment Maguire J made clear that NIPS was entitled to a considerable degree of latitude in making such determinations on the basis that the relevant decision-making had been conferred by the legislature on that agency and that it enjoyed both experience and expertise in dealing with prisoners and assessing the risks which they posed (see para [28] of the judgment). In reaching such decisions, NIPS is entitled (and indeed obliged) to consider the question of the risk which the prisoner may represent if released. This highly relevant issue must be weighed against other relevant factors in order for the decision-maker to reach a rounded judgment (see paragraph [21] of Maguire J's judgment in *Kelly*). Where information is gleaned from tests conducted upon a prisoner's clothes or possessions which *may* later be taken into account in such decisions relating to him, it is appropriate that he is made aware of this and that the information is disclosed, or gisted, as far as the prison authorities consider it can be. That is what happened in this case. The respondent is nonetheless correct to say that it cannot entirely close its eyes to this information in future.

[85] Contrary to the warning given by Treacy J in *McAree and Watson*, the applicants' case has in my view sought to over-judicialise what happened in these cases to a very significant extent. The respondent has made a conscious choice that the effectiveness of its systems and methodology are to be prioritised over taking formal action against prisoners where detections of this type are made. The outworkings of that choice are reflected in the limited repercussions for prisoners when this occurs, as demonstrated in these cases; and, indeed, in the authorities' recognition that incidents of this nature should not therefore be considered a bar to further temporary release. The tests are used to manage risk in a fashion which, the respondent accepts, limits its ability to initiate or pursue more draconian consequences for a prisoner. Provided, as in these cases, the authorities properly

recognise the limitations inherent in the choices they have made in this regard, unfairness is unlikely to result.

[86] The above analysis is also dispositive of the applicants' remaining complaints about procedural unfairness, including bias and predetermination. They contend that their guilt was predetermined because the gist form indicated that a view had been taken against them which would be recorded on their files (as a black mark) before they had even had an opportunity to provide a response. The invitation to provide their version of events came *after* "the conclusions" set out in the gist form had been reached and this represented an unlawful predetermination, the applicants submitted. The applicants complained in particular about the statements within the correspondence sent to each of them noting that the Security Governor did "not believe it is possible that this is a "contact" type contamination" and that he had "credible and legitimate concerns that this [was] a deliberate attempt to convey articles into the prison."

[87] The reason for these *beliefs* were spelt out in each case. In Mr Mawhinney's case it was because of the *extent* of the contamination, allied with his "historical association with unauthorised articles." In Mr Faulkner's case it was because only some of the items were contaminated, rather than all, which gave rise to the belief that this was not accidental. In each case, the governor said he had *concerns* that this was a deliberate attempt to convey articles into the prison. This appears to me to be an appropriate expression of the concern arising in light of the outcome of the testing which had been undertaken. The applicants were each invited to respond. I do not consider that this gives rise to any issue of bias or predetermination such as would arise in the context of a judicial or adjudicative proceeding, given the nature of the exercise described above.

The challenge to the respondent's affidavit evidence

[88] The applicants have also taken issue with the admissibility of certain parts of the affidavit evidence sworn by Governor Armour on behalf of the respondent. They contend that it is "defective and inadmissible" in certain respects because (a) it makes a number of statements of information which were not within the deponent's own knowledge but without identifying the source of the information provided to him; and (b) it refers to information which was obtained from documents, records or tests but does not give any further information about these, nor exhibit the relevant documents. The applicants complain that this is in breach of RCJ Order 41, rule 5 and relevant provisions of the Judicial Review Practice Direction, as well as being contrary to the approach to disclosure in judicial review described in *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53 and other authorities.

[89] The respondent rightly complained that these issues were not raised in advance of the filing of the applicant's skeleton argument. In the event that a party wishes to challenge the admissibility of affidavit evidence filed in judicial review proceedings or wishes to apply for discovery of documents referred to in (or

underlying) averments in an affidavit, this should generally be raised in advance of the full hearing and by way of a formal application under the court rules.

[90] In any event, when considering the portions of the affidavits of which the applicants complain, it is clear that they fall into two broad categories. First, there are averments where the governor is describing actions undertaken by a range of prison staff upon the applicants' respective returns to prison (eg what staff saw upon the applicant's return, the conduct of searches, the undertaking of testing, what was found when staff attended the applicant's cell, etc). Second, there are averments relating to the details of the testing carried out on the applicants' belongings and the results which were obtained.

[91] In the first category of averments, the governor was plainly seeking to provide a narrative on behalf of the respondent without many separate affidavits having to be sworn by each and every member of staff who had some involvement with each of the applicants during the events in question, particularly in relation to events which were peripheral to the key issues in dispute. Paragraph 2 of each of his affidavits makes clear that, in preparing the affidavit, he had reviewed prison records in relation to each applicant and had discussed the case with NIPS colleagues. I found nothing objectionable in this approach, which is relatively common where a large number of staff may have been involved and where the court is not undertaking an intense fact-finding inquiry. In these cases it was neither necessary, nor would it have been proportionate, in terms of time or cost to the public purse, for every member of staff to have been required to swear a separate affidavit. In the circumstances, identification of the particular staff member who had provided the information was not, in my view, necessary.

[92] In the second category of averments, it is plain that the governor was seeking to avoid disclosure of sensitive information or documentation, which had not been deemed appropriate for disclosure to the applicants previously, simply because the respondent was now in the course of defending the judicial review claims. If this were to have been required, it would essentially have overtaken the determination of a key issue in the proceedings, namely whether it had been procedurally fair to withhold these details from the applicants. Disclosure of the relevant documents may also have had or contributed to some of the harmful effects referred to at paragraph[39] above. It is understandable that the test results were not disclosed in this way. It may have been preferable if the respondent's affidavits had explained the rationale for this approach on their face; but it was clearly implicit in any event. Had the applicants wished to pursue a discovery application, which would have brought this issue to a head, they could have done. That might have resulted in a claim for public interest immunity but would undoubtedly have given rise to an objection to the disclosure sought. Again, I did not discern any impropriety in the approach which was adopted.

The rule 32 issue in the Faulkner case

[93] Finally, I turn to the challenge in Mr Faulkner's case to the use of rule 32 of the Prison Rules on the two identified occasions. Although rule 32(1) is drafted in relatively broad terms and makes clear that a governor has a discretion in relation to the arrangement of restriction of association, the applicant submits that this discretion is certainly not unfettered. That is plainly correct. It is subject to judicial review on normal public law grounds. The governor must lawfully form the view that it is "necessary" to restrict the prisoner's association for one of the specified purposes.

[94] The exercise of rule 32 powers by governors within the prison system in this jurisdiction has been considered by the courts on a number of occasions, including in the cases of *Re Conlon's Application* [2001] NICA 49; *Re Cordon's Application* [2004] NIQB 44; *Re O'Dalaigh's Application* [2007] NIQB 112; *Re Hart's Application* [2009] NIQB 57; *Re Brockwell's Application* [2017] NIQB 53; and *Re O'Neill's Application* [2017] NIQB 68. Understandably, there is some difference in emphasis between the cases depending upon the factual circumstances and decision-making which gave rise to the particular challenge. On my reading, however, the following basic principles can be drawn from these authorities:

(a) The governor must consider that restriction of association is *necessary* for one of the specified purposes set out in the rule, so that rule 32 restriction should be viewed as a measure of last resort given the relative extremity of the measure, to be used where other available options have been rejected (*Cordon*, [9]; *O'Dalaigh*, [12]-[13]; *Brockwell*, [61], [68] and [70]; and *O'Neill*, [66]).

(b) This involves a matter of *judgment* on the part of the governor concerned as to whether rule 32 restriction is necessary (*Cordon*, [9]; and *O'Dalaigh*, [12]-[13]) and, following upon that judgment, an exercise of discretion (*O'Dalaigh*, [14]).

(c) It is recognised that the use of the rule 32 power will often be necessary as a response to an urgent or emergency situation, where a quick decision may be required, even without the benefit of full information. In those cases the court will be slow to place obstacles in the way of the prison authorities taking such a step where it is justified on the information before them (*Brockwell*, [69]).

(d) Restriction of association under rule 32 is not to be used as a punishment (*Cordon*, [9]; and *O'Dalaigh*, [12]).

(e) At an early stage – although not necessarily before the removal of the prisoner from association – the governor should provide him (or her), where possible and necessary, with sufficient reasons for having taken that course and afford the prisoner the opportunity to make representations about its justification (*O'Dalaigh*, [14], quoting *Conlon*).

(f) It follows from the nature of the rule and from the effects of segregation, that rule 32 restriction should also not endure longer than remains necessary, which entails making reasonable efforts to find another way of dealing with the issue giving rise to the segregation (*Brockwell*, [61]).

(g) The longer a prisoner is subject to rule 32 restriction, the greater the risk of harm to him (or her) and the more compelling the justification for the use of the power must be (*Brockwell*, [61]).

(h) Where a challenge is made to the exercise of the rule 32 power of restriction, it is for the prison authorities to objectively justify its use (*Brockwell*, [68]).

[95] As to the court's role, this may differ slightly depending upon whether the challenge is made at common law or on Convention grounds. Provided relevant considerations have been taken into account (including the possibility of other alternative solutions) and irrelevant considerations have been left out of account, and provided the relevant governor has correctly directed himself or herself that they must consider the restriction necessary for one of the specified purposes, at common law the court will only upset that determination on *Wednesbury* grounds, although it will apply a high intensity of review. The court's role is likely to be more searching in determining whether there has been a breach of the prisoner's rights under Article 8 ECHR since, in such a challenge, the court must decide for itself whether the restriction was proportionate to a legitimate aim, albeit respecting a margin of discretion on the part of the expert decision-maker in this field.

The respondent's case that this issue is academic

[96] The respondent contends that the rule 32 issue in the Faulkner case is academic. It concerns two periods of restricted association which, by the time the proceedings had been brought, had long since ended. At the time these proceedings commenced, the applicant was not subject to rule 32 restriction, nor had he been since the end of the second period about which he complains. Moreover, the applicant enjoyed a further period of UTR after that (on 12 October 2022) after which he was *not* placed on rule 32 restriction upon his return to prison.

[97] In these circumstances, the respondent submits that the applicant's case is of no utility. It is not a case, like some others which have been considered by the courts, where the applicant had been on restricted association for a considerable period of time because of some protracted issue and brought the challenge in order to bring this to an end. This applicant's complaint is a purely historic one. Since rule 32 restriction is not imposed as a punitive or disciplinary measure, the respondent asserts that this is not a matter which would be 'held against' the applicant in any way in any decision concerning his case on the part of the PCNI. In any event, he would be able to make whatever points he wished about the circumstances in any consideration of his case by the PCNI. As a separate but related point, if the

applicant wished to secure redress in relation to an unlawful period of restriction of association which has now ended, he could do so by way of a civil action.

[98] I have been persuaded that the respondent's objection in this regard is made out. Whether a case is (or is not) academic between the parties is an intensely practical question: see *Re Bryson's Application* [2022] NICA 38. This aspect of Mr Faulkner's case – in contrast to the first issue which was concerned (as he saw it) with clearing his record – would not and could not give rise to any practical benefit to him, since the short periods of restriction about which he complains are in the past. In light of the fact that this element of his case is academic, the starting point is that the court should not proceed to determine it unless there is some exceptional reason why, in the public interest, the case should be determined: see the summary of principles at para [22] of *Re Cahill and Others' Applications* [2024] NIKB 59. In the present case, there is no issue of statutory construction. The correct approach to rule 32 decision-making has been addressed in a variety of cases (summarised above). The issue is simply the application of those principles to the particular facts of this case.

[99] In light of this, I do not consider that the court should adjudicate upon the legality of the second period of rule 32 restriction imposed upon Mr Faulkner. In the exercise of the court's discretion, I consider it proper to do so in respect of the first such period, since there has been a suggestion that there is a point of principle at issue there which is likely to arise again and that the legality of a NIPS policy or practice is at stake (although the respondent denies that there is such a policy).

The first rule 32 restriction

[100] Mr Faulkner contends that the principles set out at para [94] above, particularly that at sub-paragraph (a), were simply not considered or applied. Rather, he contends, prisoners are sent to the CSU under rule 32 as a matter of standard practice or policy when the PDD is not available. In his particular case, he contends that he has no history of drug involvement and that there was therefore no basis for considering that he posed any material risk of smuggling drugs into the prison requiring the use of the PDD (or, in its absence, the restriction of his association pending the dog being available). This was a mere resource issue. Part of the applicant's case is that his specific circumstances (including the absence of any history on his part of involvement with drugs and the absence of his presentation giving rise to any cause for concern) were not taken into account; and nor were any other search or detection methods, of which the PDD is but one. The applicant is also critical of the respondent's reliance in his case on *all three* of the bases upon which rule 32 restriction might be imposed, namely on the basis (i) of maintaining good order or discipline; (ii) of ensuring the safety of officers, prisoners or others; *and* (iii) in the applicant's own interests.

[101] In his submissions, Mr Corkey presented the events of that 6 July as falling within the category of an urgent situation. The applicant returned to custody shortly

after 6:00pm and lockdown in the prison occurs at 8:00pm. The applicant needed to be accommodated but also needed to be prevented from going into the general population before he had been subject to proper investigation. In the absence of the PDD, the authorities took the view that it was necessary to use rule 32 to prevent the applicant simply entering the prison population without being subject to an appropriate level of investigation to counter the importation of illicit substances. Both the Security Governor and the governor who made the decision have provided sworn evidence setting out their view that this was necessary. In particular, Governor Deans, the governor who made the decision to place the applicant in the CSU on 6 July 2022, has sworn a detailed affidavit explaining his actions and rationale.

[102] The respondent also points to the fact that the period of time spent in the CSU was limited, with Mr Faulkner being released from rule 32 restriction the following morning when the PDD was available. Indeed, that was the firm expectation of the relevant governor when the restriction was imposed (subject to the PDD later indicating a concern about the applicant having had contact with drugs). In the meantime, the applicant would have been locked in his own cell overnight in any event. The actual restriction upon his association therefore was minimal. That is plainly to be distinguished from a number of authorities the court has considered (for example, the *Bourgass*, *Hussain* and *Brockwell* cases) where periods of many months of restriction of association were at issue.

[103] Passive detection dogs are a finite resource. There are only a certain number of dogs with the specialist training required. Their handlers also have specialist training. In Governor Deans' affidavit he has averred that, in light of the non-availability of the PDD on that occasion, he considered how best to manage the situation but took the view that unfortunately there was no method of scanning or other investigative method available at that time which would offset the risk posed by the lack of availability of the PDD. In particular, he has averred that he does not believe that there was another investigative tool or technique (including the searching of the applicant by the use of metal detectors, such as the 'Boss chair' or wand device) which could have been used at that time to determine whether the applicant was smuggling drugs internally. At the time of making the decision the governor was aware that the applicant had not been subject to the full regime of investigation upon return; that the PDD would be available in the morning and that therefore the period that the applicant would be subject to rule 32 was likely to be relatively short (provided the PDD did not provide a positive indication); and of the risks to the health of the applicant and others. The governor was also aware that prisoners who do not take drugs and have no known drug associations are often pressured when on UTR to bring drugs back into the prison (see para [44] above). He further took into consideration that the applicant was not in bad health. Had he been, for example if he was much more frail or in a bad state of mental or physical health, this would have been a factor which would have militated against the use of rule 32.

[104] The applicant has expressed concerns about what may have happened if the PDD was not available for a matter of days. There is no evidence of this having occurred and the respondent's evidence is that the applicant's concern in this regard is entirely hypothetical. Governor Deans has averred that he is not aware of a situation at HMP Maghaberry where there has been no PDD provision for a number of days. Although the resource is finite, NIPS has a number of PDDs and a number of handlers capable of undertaking the specialist role. The situation where the PDD will not be available is only very occasional on the respondent's evidence. In those circumstances, the prison authorities can and do give careful consideration to alternative means of managing the risk of illicit substances entering the prison estate.

[105] The respondent's evidence is also that it is neither a policy nor inevitable that a prisoner will be placed on rule 32 restriction when there is no PDD available. In each case where rule 32 may be deployed, the governor making the determination will consider the competing factors that mitigate against its use. Governor Deans has provided an example in his evidence of a situation where a prisoner could not be searched by the PDD due to its non-availability but, because the prisoner had a medical condition which would mean that placement in the CSU would be particularly unpleasant for them, the use of rule 32 may not be appropriate. There is no hard and fast rule; although it does seem that rule 32 may well be used if the PDD is not available in light of the inability of other search techniques to replicate its effectiveness.

[106] In light of the detailed evidence which has been filed by the respondent in relation to the relevant decision, including first-hand evidence from the governor who made the decision, I am satisfied that he considered it necessary to use rule 32 on this occasion. I am also satisfied that he did so having considered all relevant considerations and having addressed his mind to the possibility of alternatives. In particular, he was aware that the applicant had no previous record of involvement with drugs; but that is not determinative. Indeed, if it was known that prisoners with no drugs history were subject to a lesser regime of checks than others, that would simply increase the likelihood of their being used as drugs mules, whether by coercion or otherwise. The other search methods available would not be as effective as the PDD in addressing the particular risk of internal secretion of drugs. The governor rationally formed the view that it was necessary to isolate the applicant until the appropriate level of search had taken place. Moreover, in light of the risks which the importation of drugs poses, particularly when internally secreted, there was nothing wrong with reliance on each of bases set out in rule 32 for the action undertaken, namely protection of the applicant himself, others within the prison and for the maintenance of good order and discipline (see further paras [36] and [46] above).

[107] I also do not consider the imposition of rule 32 restriction on this occasion to have been in breach of the applicant's Article 8 rights. For the reasons given above, the decision was lawful and therefore the restriction was in accordance with law. It was plainly taken for a legitimate aim. The practical restriction on the applicant's

interactions with others was short-lived and relatively minor given that he would in any event have been returned to his cell for overnight lockdown shortly after his return to the prison. The governor's expectation, which came to pass, was that the PDD would be available the next morning. In light of the significant problems posed by the importation of drugs into prisons, the approach in this case was proportionate.

[108] In summary, provided there is no exceptional feature, I do not consider it unlawful for a prisoner's association to be restricted for a short period in the manner which occurred in this case on occasions where the PDD is not available and it is judged necessary for the prisoner to be subject to a PDD search upon their return to prison. That is not to say that the prison authorities should routinely plan for such an eventuality. Plainly, the better situation is that the appropriate range of search facilities is available on each occasion a prisoner returns to prison from unaccompanied leave. The position may also be different if the restriction on association was longer than was expected and transpired in this case.

The second rule 32 restriction

[109] I have already concluded that it is unnecessary and inappropriate to adjudicate upon the legality of Mr Faulkner's second period of rule 32 restriction (see para [99] above). There is, however, one issue which it is appropriate to address briefly in respect of this.

[110] In relation to the applicant's segregation on 10 August 2022 a major issue of contention is whether the respondent should be entitled to rely upon the fuller justification provided in its pre-action response and affidavit evidence filed in this case (see paras [21]-[25] above); or whether it should properly be restricted to the more contemporaneous justification provided in the response to the applicant's solicitor of 12 August 2022 and the paperwork completed at the time of the restriction. In the case of the latter, reference is made simply to the applicant being late back from his UTR and there is no mention of any concern about drugs or the importation of illicit substances into the prison. A relatively clear feature of the paperwork is reliance upon the applicant having returned late. In contrast, in Governor Watton's affidavit he has averred in some detail about his consideration of this case and the fact that he remembers speaking to the applicant when he placed him on rule 32 restriction. The governor has indicated that he does not remember this conversation word-for-word but that he does remember the issues that he raised with the applicant and his response. He says he informed Mr Faulkner that he was concerned about his late return and the wet clothing in his possession; and that he specifically said to him that he had put himself in a position where he was suspected of trafficking drugs into the prison. Governor Watton's averment, which appears to me to have the ring of truth, is that he recalls the applicant "vociferously reacting to that statement." Although returning late was one factor which gave rise to a cause for concern about the applicant's behaviour, the governor has sworn on oath that this was merely one factor taken into consideration and that placement on rule 32

was not a punishment for returning late. Much more emphasis is now placed upon a variety of factors which gave rise to suspicion of having been involved with drugs in some way during the UTR (which suspicion was heightened when the results of the tests of the applicant's belongings were later available).

[111] In light of my conclusion on the academic nature of the issue and the alternative remedy available if the applicant simply wished to seek redress for a historic wrong, I do not need to resolve this issue. Indeed, an alternative remedy better equipped to find facts, including by means of oral evidence and cross-examination, would plainly be better suited to a resolution of this issue than the present forum, where the applicant has simply urged me to find facts on the affidavit evidence and exhibits applying case-law which cautions against the admission of *ex post facto* reasoning in certain circumstances. In this case, there was significant scope for debate about whether the later reasoning was consistent with and elaborative of the contemporaneous documents or whether it went well beyond that.

[112] I can nonetheless confidently express the court's view that this situation should not have arisen. The NIPS guidance in relation to the application of rule 32, published in 2016, makes clear that all information gathered and recorded as part of the initial process (and any subsequent extension) must be recorded and included within the case paperwork. It also notes that procedural fairness dictates that the information provided to the prisoner must be of sufficient detail to allow them to make meaningful representations that will inform the decision-maker in arriving at the decision to invoke (or not revoke) a rule 32 restriction. It follows that the correct or real reason for the imposition of the restriction should be disclosed to the prisoner. As discussed above, that can involve gisting of information where appropriate. The guidance itself makes clear that where SIRs form part of the consideration, the gist of this information should be provided to the prisoner. A further passage of the guidance emphasises that the considerations taken into account must be recorded on the pro forma generated by the PRISM information management system, which will then form part of the written record that must be included in the papers presented to the Department should there be a request for an extension. Relevant records must be accurate throughout the process.

[113] Having reviewed the paperwork which has been provided to the court, the governor who made the decision has indicated that he "could have included in the paperwork a more fulsome explanation of the reasons for placing the applicant in rule 32 that included a specific reference to the wet clothing and concern about the smuggling of illicit substances." He has averred that this is something that he has now reflected upon and that his future practice will be informed by this. In my view that is an appropriate response; and it may also be appropriate for the respondent to emphasise more generally the importance of accurate recording of the matters taken into account when imposing a restriction under rule 32 in future.

Conclusion

[114] For the reasons given above, none of the applicants' grounds for judicial review are made out, and I dismiss each application accordingly.