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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

BEFORE A DIVISIONAL COURT

IN THE MATTER OF AN APPLICATION BY JONATHAN BOWE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF AN APPLICATION BY JONATHAN BOWE FOR HABEAS CORPUS

-v-

1. **POLICE SERVICE OF NORTHERN IRELAND**
2. **PROBATION BOARD OF NORTHERN IRELAND**
3. **DEPARTMENT OF JUSTICE**
4. **PAROLE COMMISSIONERS FOR NORTHERN IRELAND**
5. **PUBLIC PROSECUTION SERVICE**

Before: McCloskey J and McAlinden J

McCloskey J (delivering the judgment of the court)

Introduction

[1] This is the judgment of the court, to which both members have contributed. Jonathan Bowe (hereinafter "*the Applicant*"), a sentenced prisoner, is self-representing in these proceedings. He has lodged papers which, as appears from the title hereof, the court is treating as constituting separate applications, namely (a) an application for leave to apply for judicial review and (b) an application for a writ of habeas corpus ad subjiciendum. While there was some doubt as to whether this is a criminal cause or matter – see *inter alia* Re JR 27's Application [2010] NIJB 273 and R (Belhaj v Secretary of State for Foreign Affairs [2018] UKSC 33 – a divisional court was convened, with the result that the appeal provisions of section 41 of and Schedule 1 to the Judicature (NI) Act 1978 apply.

The Applicant's Criminal Record

[2] We devote a little attention to the Applicant's criminal record in an attempt to disentangle the protracted route which has brought him to the present point. Mr Bowe, who is aged 36 years, is a prolific offender. His criminality began when he was aged 15 and he has accumulated 120 convictions. As of **22 May 2009** he was subject to the following live suspended sentences:

(a) 18 months imprisonment, suspended for 3 years, imposed on 29 June 2007.

(b) 12 months imprisonment, suspended for 2 years, imposed on 20 July 2007.

(c) 18 months imprisonment, suspended for 3 years, imposed on 24 June 2008.

(d) 5 months imprisonment, suspended for 18 months, imposed on 07 April 2009.

We have outlined above only the "dominant" suspended sentences imposed on the occasions in question. There were, altogether, 10 such suspended sentences. All were alive and active on the date of the Applicant's major offending, 22 May 2009 when he was sentenced as noted in [3] *infra*.

[3] The stand out entry in the Applicant's criminal record is his convictions in respect of various firearms offences at Downpatrick Crown Court on 08 February 2011, punished by a determinate custodial sentence of 3 years and 9 months imprisonment, coupled with a licence period of the same duration. The date of the index offences was **22 May 2009**. The Court, in addition to imposing the sentence noted below, made orders activating nine of the extant suspended sentences. The effect of this it seems was to increase the Applicant's custodial term by seven years and three months. Adding this to his determinate custodial sentence of three years and 9 months (imposed in conjunction with an ensuing licence period of the same duration), produces a gross total term of 11 years.

[4] The last of the 10 suspended sentences was not activated by Downpatrick Crown Court on 08 February 2011. The explanation for this is provided by the next entry in his criminal record. On the same date, 08 February 2011, the Applicant was also summarily convicted at Ballymena Magistrates' Court of driving while disqualified and, by way of punishment, this court activated a suspended sentence of 5 months imprisonment, which it had imposed on the Applicant for the same offence (together with driving without insurance) on **26 March 2009**.

[5] Most recently:

(a) On 11 July 2018 the Applicant was convicted of two driving offences, being punished by fines totalling £450 and a driving disqualification of six months duration.

(b) On 12 October 2018 he was convicted of possession of a Class B controlled drug, punished by a fine of £75.

(c) On 08 January 2019 he pleaded guilty to the offence of criminal damage and was sentenced to two months imprisonment, suspended for three years.

First Release On Licence

[6] The sum of the Applicant's foregoing criminality resulted in a substantial period of continuous incarceration, from 08 February 2011 to 26 June 2015. On the latter date he was released from custody on licence under Article 17 of the Criminal Justice (NI) Order 2008 (the "*2008 Order*"). On 01 December 2015 the Department of Justice ("*DOJ*") revoked his licence. Following an "unlawfully at large" interlude of almost three months duration, on 15 February 2016 the Applicant's incarceration recommenced following his rearrest.

Second Release On Licence

[7] On 21 December 2016, following the statutory intervention of the Parole Commissioners for Northern Ireland ("*the Commissioners*") the Applicant was again released on licence. The next material sequence of events unfolded during the period May to August 2018. In brief compass:

(a) On 24 May 2018 the Applicant was arrested for suspected offences of assault occasioning actual bodily harm on a person whom we shall describe as "CC", with whom he had an emotional attachment, and criminal damage.

(b) Apparently on the same date a police constable completed Form SOC07/15, the so-called "Structured Outline of Case" (hereinafter "SOC version 1").

(c) On the same date the constable communicated by email to the Probation Board of Northern Ireland ("PBNI"), stating that the Applicant "*… is charged with AOABH and common assault …*" and referring without elaboration to "*the attached document*" which seems to be SOC version 1.

(d) On the same date PBNI compiled its "Recall Report to the PCNI". This contains the following material passage:

> "*PBNI received notification from police on 25/05/2018 that Mr Bowe had been arrested and charged with AOABH and common assault against* [CC] *on 24 May 2018. See attached outline of case …*"

The documents attached were (evidently) SOC version 1, the Applicant's criminal record, a pre-sentence report and "*Amended DCS Licence 11/05/2018.*" The Probation Officer author recommended the recall of the Applicant under Article 28(2)(a) of the 2008 Order.

(e) On 26 May 2018 the Applicant was remanded in custody by a Magistrates' Court.

(f) On the same date SOC version 1 was apparently transmitted by the police to the Probation Board of Northern Ireland ("PBNI").

(g) In a report compiled on 30 May 2018 a single Commissioner recommended to the Department of Justice ("DOJ") that the Applicant's licence be revoked.

(h) On 01 June 2018 a DOJ official (who has sworn two affidavits) revoked the Applicant's licence.

SOC Version 1

[8] This pro-forma, the full title whereof is "Structured Outline of Case" and which we shall describe as "SOC Version 1", has the following self-proclaimed function:

> "*The purpose of this document is to set out the case against the Defendant based on the evidence currently available.*"

In the first section the Applicant's name is inserted and under the heading "*Motivation*" the entry is "*None*". In the second section, "*Case Outline*", there is the following printed text:

> "*Police received a call from* [CC] *stating that at 14.30 hours on 24 May 2018 she was in the Defendant's car and an argument began. The couple arrived at* [address]. *While at the address the injured party claimed that she was hit about the head and face by the Defendant. She also alleged that he grabbed her wrist. Police noted bruising to her right wrist and extensive swelling, bruising to the right side of her forehead. The Defendant was in the house and was subsequently arrested on suspicion of assault occasioning actual bodily harm.*"

This is followed by section 3, "Suspect Interview – a brief account of key questions and answers during the interview should be set out here". It is appropriate to interpose that according to the police affidavit evidence the Applicant was interviewed by two police officers following his admission to custody. This section is completed in manuscript in these terms:

> "*Jonathan is charged this date with AOABH and common assault*
> *To Newtownards MC*
> *On Saturday 26/5/18*
> *Signed*
> *Constable Michael Reardon*
> *21157.*"

Section 4 of the pro-forma entitled "Key evidence available", contains no entries.

SOC Version 2

[9] It is asserted that "SOC Version 2" was completed on the evening of 26 May 2018 by one of the interviewing police officers (not the police deponent). It differs from SOC version 1 in two significant respects. First, in the "Case outline" section the following is added, in printed text:

> "*Police noted that the IP had alcohol taken and this is why a written statement of complaint was not recorded. The IP's verbal complaint was recorded on BWV ….*
>
> [The Applicant] *made no reply to caution and was conveyed to Musgrave custody.*"

Second, in the "Suspect interview" section the manuscript entry reproduced above is deleted and the following printed text appears:

> "*During interview the Defendant stated that he collected the IP from a bar in Belfast, he said she was very drunk and when she got into this car she started hitting him whilst he was driving. The Defendant stated that he stopped the car, tried to get the IP out but she wouldn't get out. He said that in trying to defend himself from her attacking him while he was driving he has pushed his left arm against the side of her face and this could have caused some bruising. He also stated that she was very drunk and could have fell in the bar she was in. when they got home … she started to go crazy again. He alleges that she grabbed a knife and tried stabbing her stomach. He stated that the bruising to her right wrist could be caused from him trying to get the knife off her.*"

[In passing, one adds to the above that CC was evidently pregnant at the time.] SOC version 2 has no further content.

The Single Commissioner's Recommendation

[10] We interpose here an observation. Although the PBNI "Recall Report to the PCNI" purported to attach what appears to be SOC version 1, this is not included among the materials listed as having been considered by the Single Commissioner who, by a written report dated 30 May 2018, recommended that DOJ exercise its statutory power to revoke the Applicant's licence. He lists these materials as the aforementioned recall report, the pre-sentence report, the Applicant's licence and his criminal record. While it has proved possible for the court to deduce with reasonable confidence that SOC version 1 was included among the materials furnished to the Single Commission, both the need to make this deduction and the absence of any affidavit from the Single Commissioner confirming that this item was read and considered in the exercise of formulating his revocation recommendation were but two of many unsatisfactory aspects of the piecemeal and reluctant evidential contributions from the various Respondent agencies as the proceedings advanced.

[11] In his decision the single Commissioner notes the assessment in the PBNI Recall Report that –

> "…. [The Applicant] *is assessed as posing a high risk of reoffending. He is not assessed as posing a significant risk of serious harm.*"

The decision continues:

> "*According to the Recall Report, Mr Bowe at first abided by his licence conditions and made reasonable progress. However, on 14/03/18 he was arrested for assaulting his pregnant partner. She subsequently withdrew the allegations ….*
>
> *In May 2018 Mr Bowe failed a drugs test because he had consumed cocaine. On 24/05/18 he was arrested and charged with assault occasioning actual bodily harm against his partner. An outline of case from PSNI stated that Mr Bowe's partner phoned police to allege that Mr Bowe had assaulted her. When police saw her they noted she had injuries consistent with her account. Mr Bowe was in the house with her when he was arrested.*"

The decision continues:

> "*The recall has been initiated because PBNI is of the view that Mr Bowe's behaviour has deteriorated to such an extent that he can no longer be managed under licence.*"

This sentence is readily linked to the following passage in the PBNI report:

> "*Mr Bowe is assessed by PBNI as presenting a high likelihood of reoffending. He is not assessed at this juncture as posing a significant risk of serious harm to others. However, this does not negate concerns to partners within a domestic context. Despite attempts to safely manage Mr Bowe in the community including issuing a pre-recall warning, imposing electronic monitoring and seeking his commitment to engage in respectful relationships intervention he has now been charged with a further alleged assault against his pregnant partner. It is PBNI's assessment that he cannot therefore be safely managed in the community at present and we request that his licence be revoked.*"

[12] Next the Commissioner formulates the following test:

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

The Commissioner concluded that this test was satisfied, reasoning as follows:

> "*There is credible evidence from the PBNI in the papers before me which (albeit based on hearsay evidence) I accept establishes on the balance of probabilities that Mr Bowe's behaviour has deteriorated to such an extent that his risk of causing harm has increased significantly and it can no longer be managed under licence …*
>
> *The evidence which I have weighed carefully bearing in mind its nature and origin establishes that Mr Bowe has been arrested and charged in connection with an alleged offence of violence against his partner …*
>
> *Mr Bowe is of course entitled to the presumption of innocence in relation to the criminal allegations against*

him and it will be for the criminal courts to determine the matter in due course. However, I must decide this case on the balance of probabilities and consider risk to the public. I am not conducting a criminal trial …

In my judgment all the above information taken as a whole constitutes evidence which establishes on the balance of probabilities that Mr Bowe was involved in a situation where risk taking and potentially harmful activity was taking place which resulted in his being arrested and charged with a serious criminal offence. I am satisfied that he was involved in behaviour which significantly elevated his risk of causing harm to the public."

The passages which follow in substance repeat those reproduced immediately above.

The Post-Revocation Phase

[13] This can be summarised via a chronological table:

(a) On 03 July 2018 SOC version 2 was received by DOJ from the police.

(b) On 06 and 07 July 2018 the Applicant submitted a complaint to the Police Ombudsman and transmitted a PAP letter.

(c) On 23 July 2018 a different single Commissioner made a formal direction to DOJ to provide further information.

(d) On 01 August 2018 DOJ, responding to this direction, provided this Commissioner with SOC version 2.

(e) On 28 August 2018 this Commissioner referred the Applicant's case for an oral hearing before a panel of Commissioners.

(f) On 23 October 2018, following an oral hearing, the panel of Commissioners determined that the Applicant should not be released.

(g) On 01 November 2018 the Police Ombudsman apparently made a decision dismissing the Applicant's complaint (there is an evidential void relating to this discrete issue).

[14] The current state of play is as follows. The DOJ decision of 01 June 2018 was that the Applicant's licence would be revoked for a finite period of one year, expiring on 29 May 2019. The Commissioners, having decided in October 2018 that the Applicant should not be released, will be giving no further consideration to his

case. The intervention of the court, therefore, occurs at a stage when approximately one third of the Applicant's licence revocation period remains outstanding.

The Applicant's Case

[15] We distil from written and oral representations the following core contention on behalf of the Applicant: the revocation of his licence on 01 July 2018 was unlawful on the ground that the two key agencies involved, namely the single Commissioner and DOJ, failed to consider the additional material in SOC version 2 documenting the intoxicated state of CC, the absence of any written statement of complaint from her and, most important, his case i.e. the Applicant's account of events provided during his police interview. The Applicant makes the case, in substance, that he has been unlawfully detained in consequence. In his written and oral submissions the Applicant alleges a failure by DOJ to properly consider the available evidence (the court's summary) and an associated failure to expose "*corruption*" and "*bad faith*" on the part of the Police Service. He further asserts a breach of Article 5 ECHR.

The Framework of Legal Principle

[16] Nothing of special significance turns on the meaning of the statutory provisions governing the Applicant's release on licence, the licence revocation on 01 June 2018 and his subsequence detention, which continues. The main provision is Article 28 of the Criminal Justice (NI) Order 2008. This provides:

> "28.—(1) In this Article "P" means a prisoner who has been released on licence under Article 17, 18 or 20.
>
> (2) The Department of Justice or the Secretary of State may revoke P's licence and recall P to prison—
>
> (a) if recommended to do so by the Parole Commissioners; or
>
> (b) without such a recommendation if it appears to the Department of Justice or (as the case may be) the Secretary of State that it is expedient in the public interest to recall P before such a recommendation is practicable.
>
> (3) P—
>
> (a) shall, on returning to prison, be informed of the reasons for the recall and of the right conferred by sub-paragraph (b); and

(b) may make representations in writing with respect to the recall.

(4) The Department of Justice or (as the case may be) the Secretary of State shall refer P's recall under paragraph (2) to the Parole Commissioners.

(5) Where on a reference under paragraph (4) the Parole Commissioners direct P's immediate release on licence under this Chapter, the Department of Justice shall give effect to the direction.

(6) The Parole Commissioners shall not give a direction under paragraph (5) with respect to P unless they are satisfied that—

(a) where P is serving an indeterminate custodial sentence or an extended custodial sentence, it is no longer necessary for the protection of the public from serious harm that P should be confined;

(b) in any other case, it is no longer necessary for the protection of the public that P should be confined.

(7) On the revocation of P's licence, P shall be—

(a) liable to be detained in pursuance of P's sentence; and

(b) if at large, treated as being unlawfully at large.

(8) The Secretary of State may revoke P's licence and recall P to prison under paragraph (2) only if his decision to revoke P's licence and recall P to prison is arrived at (wholly or partly) on the basis of protected information."

[17] Article 28 was considered in Re Hegarty's Application [2018] NIQB 20 at [10]. The following passages in Hegarty have an obvious resonance in the present context:

"*[16] At the heart of the broader framework of legal principle in play lies the axiom that the common law has always been zealous in protecting the liberty of the citizen.*

Sir Thomas Bingham MR in Re S-C [1996] 1 All ER 532, at 534G/H:

> *'As we are all well aware, no adult citizen of the United Kingdom is liable to be confined in any institution against his will, save by the authority of law. That is a fundamental constitutional principle, traceable back to chapter 29 of Magna Carta 1297 ….'"*

Per Robert Goff LJ in Collins v Wilcock [1984] 1 WLR 1172 at 1177*:*

> "*The fundamental principle, plain and incontestable, is that every person's body is inviolate.*"

Further, Lord Atkins stated memorably in Eleko v Government of Nigeria [1931] AC 662, at page 670:

> "*In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive.*"

[18] In Hegarty the court also gave consideration to the application of the "Tameside" principle to licence revocation decision making:

> "*[17] I consider that the "Tameside" principle must also have some purchase in the context of executive decisions entailing deprivation of liberty. In a passage familiar to all judicial review practitioners, Lord Diplock stated:*
>
> > *'The question for the Court is did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?'*
>
> *(Secretary of State for Education and Science v Tameside MBC [1977] AC 104 at 1065B.) Similarly, in R v Secretary of State for the Home Department, Ex parte Venables [1998] AC 407, the Court of Appeal, having emphasised the "essential" requirement that the decision maker be "fully informed of all the material facts and circumstances", at 455G, considered that he "… did not*

adequately inform himself of the full facts and circumstances of the case" (at 456E). And in Naraynsingh v Commissioner of Police [2004] UKPC 20, the Privy Council highlighted, at [21], that:

> *'Substantially more in the way of investigation was required than was undertaken here'."*

[19] As the court in Hegarty further noted at [32], the requirements of a procedurally fair decision making process also fall to be considered. This was not contested by any of the Respondent agencies. In Naraynsingh the Privy Council held that the decision making process was vitiated by unfairness occasioned by the failure of the decision making agency to pursue further enquiries with a view to obtaining additional material information. This must surely be in close alignment with the present case, which concerns a failure to ensure that the DOJ decision maker was equipped with information which was both material and readily available.

[20] We turn to consider the code of procedural fairness principles devised by Bingham LJ in R v Chief Constable of Thames Valley Police, ex parte Cotton [1990] IRLR 344, at 60:

> *"While cases may no doubt arise in which it can properly be held that denying the subject of a decision an adequate opportunity to put his case is not in all the circumstances unfair, I would expect these cases to be of great rarity. There are a number of reasons for this:*
>
> *1. Unless the subject of the decision has had an opportunity to put his case it may not be easy to know what case he could or would have put if he had had the chance.*
>
> *2. As memorably pointed out by Megarry J in John v Rees [1970] Ch 345 at p.402, experience shows that that which is confidently expected is by no means always that which happens.*
>
> *3. It is generally desirable that decision-makers should be reasonably receptive to argument, and it would therefore be unfortunate if the complainant's position became weaker as the decision-maker's mind became more closed.*
>
> *4. In considering whether the complainant's representations would have made any difference to the outcome the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making*

process into the forbidden territory of evaluating the substantial merits of a decision.

5. This is a field in which appearances are generally thought to matter.

6. Where a decision-maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard, and rights are not to be lightly denied. Accordingly if, in the present case, I had concluded that Mr Cotton had been treated unfairly in being denied an adequate opportunity to put his case to the acting chief constable, I would not for my part have been willing to dismiss this appeal on the basis that it would have made no difference if he had had such an opportunity (although the court's discretion as to what, if any, relief it should grant would of course have remained)."

In passing, the surprisingly limited coverage and attention which this enlightening passage has received – it is not mentioned, for example, in Doody v Secretary of State for the Home Department [1994] 1 AC 531 - may be partly due to the publication of the judgment in a minority series of law reports. Furthermore the judgment is not available on BAILII.

[21] At this juncture it is appropriate to consider the "Doody" principles. The context of the decision in Doody is of some resonance in these proceedings given that it concerned the liberty of a convicted prisoner. In all four conjoined appeals the penal element, or tariff, of the prisoners' sentence of life imprisonment had been increased by the Executive, beyond the term recommended by the judiciary. The judicial review challenges of the prisoners were successful in establishing their central contention, namely that the impugned decisions were the product of a procedurally unfair decision making process. Lord Mustill, in his seminal speech, formulated the following code:

"*(1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the*

> *decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."*

[22] The decision of the House of Lords in R (Smith) v Parole Board [2005] UKHL 1 represented a further development in this line of authority. In each of the conjoined appeals (Smith and West) the prisoner's licence had been revoked. This triggered the involvement of the Parole Board which, in due course, declined to direct the release of either. The prisoner's essential complaint was that the facility for making written representations did not deliver procedural fairness. They contended that an oral hearing was necessary for this purpose. Lord Bingham identified the two competing interests in play as the safety of the public (on the one hand) and the liberty of the prisoners (on the other). The House held that while an oral hearing is not an essential requirement in every case, the failure to provide one was unlawful in the case of the two prisoners, being in breach of Article 5(4) ECHR, contrary to section 6 of the Human Rights Act 1998. Lord Slynn observed at [55]:

> *"… recall, even of someone who has only a condition right to his freedom under licence ('more circumscribed in law and more precarious than the freedom enjoyed by the ordinary citizen': Weeks v – United Kingdom [1988] 10 EHRR 293), is a new deprivation of liberty by detention. The prisoner is therefore entitled to take proceedings by which the lawfulness of that detention can be decided speedily by a court under Article 5(4)."*

That, we observe, is precisely the present case. Lord Slynn continued at [56]:

> *"Recall of a prisoner on licence is not a punishment. It is primarily to protect the public against further offences …"*

Their Lordships thus decided unanimously and, in doing so, considered *inter alia* the Doody decision: see especially at [27] per Lord Bingham.

[23] There is a further discrete compartment of high judicial authority which may be conveniently considered at this stage. This relates to the legal threshold applicable to licence revocation decisions. In Smith (*supra*) Lord Bingham identified four "*uncontroversial but fundamental and relevant principles upon which the sentencing, licencing and recall regimes rest*": see [22]. The fourth of these, outlined at [25], is couched in these terms:

> "*It is accordingly very desirable that the process of transition should be professionally supervised, to maximise the chances of the ex-prisoner's successful reintegration into the community and minimise the chances of his relapse into criminal activity.*"

This is followed by:

> "*But of course there will be cases in which such professional supervision may not be, or appear to be, effective. If a prisoner is released, subject to conditions, before the expiry date of the sentence imposed by the court and he does not comply,* ***or appears not to comply,*** *with the conditions to which his release was subject, a question will arise whether, in the interests of society as a whole, he should continue to enjoy the advantages of release.*"

The emphasised words draw attention to one of the submissions advanced to this court by the Respondent agencies.

[24] Lord Bingham's formulation was considered by the Court of Appeal in R (Gulliver) v Parole Board [2008] 1 WLR 116. In that case the relevant Minister revoked the claimant's licence and recalled him to prison one week after his licenced release. Thereafter the Parole Board became seized of the prisoner's case. It found that while it had not been proved that he had been in breach of his licence conditions, there had been evidence on which the Minister could reasonably have thus concluded. Its substantive decision was to decline to recommend his release.

[25] The prisoner's ensuing judicial review challenge was dismissed and an appeal followed. The main judgment of the Court of Appeal, which dismissed the appeal, was that of Sir Anthony Clarke MR. This, in the context of referring to Smith and West at [25], includes the following at [26]:

> "*I see nothing in [25] to assist Mr Fitzgerald's argument. On the contrary, Lord Bingham says in [25] that when a prisoner –*
>
> > *'Does not comply,* ***or appears not to comply****, with the conditions to which his release is subject, a question will arise, whether, in the interests of society as a whole, he should continue to enjoy the advantage of release.'*
> >
> > [Emphasis added.]

> *The reference to 'appears to comply' shows that Lord Bingham had in mind a case just like this, where the prisoner appears not to comply with the condition. He contemplated that this was one of the cases in which a question would arise, in the interest of society as a whole, whether the prisoner should continue to enjoy the advantages of release.*"

[26] The concurring judgment of Sir Igor Judge P *inter alia* points up the distinction between the initial licence revocation decision, which is "*made on the basis of the information available to*" the executive and the later decision of the Parole Board, which is "*made on the material available to it*": see [43]. The President then emphasised that, in making its independent decision informed by all of the available evidence, the Board is not reviewing the sustainability in law of the revocation decision:

> "*… whatever its view of that decision, or the circumstances in which it was reached, it is with public safety in mind that the Parole Board must address and decide whether to recommend the release of the prisoner. It is not divested of that responsibility merely because of reservations about the original decision by the Secretary of State.*"

The President then commented further on the initial revocation decision, at [44]:

> "*The supervisory responsibility* (of the Parole Board) *provides a valuable check on the original decision making process. The recall order is examined by an independent body, the Parole Board. This provides a discouragement for the slovenly or the cavalier or the corrupt. It may very well be that in such cases, if they arise, the very fact that the process has been so characterised may lead the Parole Board to conclude that the risk to public safety is not established. Nevertheless, in the end the decision required of the Parole Board must depend on its assessment of public safety.*"

The President added, at [45]:

> "*There may, of course, be exceptional cases where the revocation decision process is so subverted that the prisoner may seek a different or separate remedy, by way of judicial review or, indeed, habius corpus. In such cases the court may be satisfied that the Parole Board may not be able to provide an adequate or sufficient remedy. If so, it will deal with the application accordingly.*"

[27] In the Northern Irish jurisprudence there is no difference of approach as the decision in Re Mullan's Application [2007] NICA 47 demonstrates. Addressing the distinctions between the initial decision i.e. that of the Secretary of State to revoke the prisoner's licence and the later decision, namely that of the Commissioners, Kerr LCJ stated at [34]:

> "*The nature of the decision under article 9 (1) is quite different from that to be taken under article 9 (4). The latter involves a careful sifting of the evidence, with relevant material being provided to the prisoner so that informed representations can be made about it. A review decision under article 9 (4) will often be based on expert opinion obtained after the prisoner's recall to prison and which deals with the risk that the prisoner presents at that time. By contrast, the decision whether to recall is directed to the question whether there is sufficient immediate cause to revoke the licence and recall the prisoner. That decision is taken in the knowledge that there will thereafter be a review of his continued detention. Of its nature it is a more peremptory decision than that involved in the later review. While one should naturally aspire to a high standard of decision making, the need to ensure that there is an exhaustive and conclusive appraisal of the facts is self-evidently not as great at the recall stage as it will be at the review stage. The need for a full panel to take the decision on recommendation is not obvious, therefore.*"

In the passage which follows, at [35], the Lord Chief Justice applied a readily identifiable Wednesbury standard to the initial ministerial revocation decision:

> "*On the basis of the material available to him and the advice that he had been given, we find it impossible to say that the Minister's decision to exercise his powers under Article 9(2) fell outside the range of reasonable conclusions that might be reached.*"

[28] It is appropriate to identify another long established principle at this juncture. The zealous protection of the liberty of the citizen which has long been a hallmark of the common law is reflected in *inter alia* the principle that where a detained person challenges the legality of his detention the onus rests on the relevant agency of the executive to establish lawful justification. This derives from the venerable authority of Liversidge v Anderson [1942] AC 206, at 245 (per Lord Atkin), subsequently confirmed in a series of leading cases such as R v Home Secretary, ex parte Khawaja [1984] AC 74 (especially at 105 and 110,per Lords Wilberforce and Scarman respectively). The hallowed importance of the liberty to the citizen is reflected in yet another cornerstone principle of the common law:

> "*The law attaches supreme importance to the liberty of the individual and if he suffers a wrongful interference with that liberty it should remain actionable even without proof of special damage.*"

[Murray v Ministry of Defence [1988] 1 WLR 693 at 703 – 704, per Lord Griffiths.]

[29] A brief exposition of the remedy of *habeas corpus* and its relationship with the judicial review jurisdiction of the High Court is appropriate at this juncture. Habeas corpus is considered to be the most renowned contribution of the common law to the protection of individual liberty (De Smith's Judicial Review, 7th Edition, paragraph 15-044). Historically, the right of personal liberty developed as one of constitutional stature. In the modern legal system it finds expression in Article 5 ECHR, guaranteed by section 6 of the Human Rights Act 1998. It is generally accepted that the practical potency of the writ of *habeas corpus* has declined in recent years. This is probably attributable to the combined impact of judicial review and the advent of the Human Rights Act. In reality it appears correct that the large majority of claims for the writ of *habeas corpus* can be subsumed within an application for judicial review seeking appropriate remedies, in particular *certiorari* and *mandamus*. However, as the authors of De Smith observe, at paragraph 17-008:

> "*Among the strengths of the remedy is that it is available as of right and, in contrast to the remedies available in judicial review, a remedy may not be withheld on grounds of public policy.*"

This was made clear by the Supreme Court in Rahmatullah v Secretary of State for Defence and Secretary of State for Foreign and Commonwealth Affairs [2012] UKSC 48 at [41] and [71] – [74].

[30] In modern jurisprudence the tendency has been to emasculate the technical and formal distinction between applications for judicial review and applications for the writ of *habeas corpus*. This is expressed with particular clarity in Ex parte Khawaja *supra* at 99 (per Lord Wilberforce) and 111 (per Lord Scarman). The present case is a not untypical example of a litigant invoking both forms of legal challenge

Conclusions

[31] We begin with what is beyond plausible doubt the most important feature of the underlying factual framework which has emerged clearly from the evidential contributions of all parties. Lying at the heart of these proceedings is the indelible fact that the Applicant's case, made during police interview in response to the allegations of CC was not considered by PBNI when recommending revocation of his licence or the Single Commissioner when endorsing such recommendation or the DOJ decision maker who, acceding to these recommendations, determined that the Applicant's licence must be revoked. Nor did any of these agencies give

consideration to three related facts: CC's complaint to the police was purely verbal and she had made no written statement on account of the assessment that she was considered too intoxicated to do so.

[32] We consider that in a context such as the present an enquiry by the court into why the material information was not supplied to the decision maker is not necessary or appropriate for the simple reason that this is irrelevant. The key relevant fact is that the decision maker did not have it. How this came about does not matter: issues relating to blameworthy conduct and/or reasonable explanations are not relevant. There was, correctly in our view, no argument to the contrary.

[33] The key decision maker in the overall matrix was undoubtedly the DOJ official who, at the beginning of the nine month period which has elapsed to date, determined that the Applicant's licence should be revoked. This official did not consider any of the evidence summarised in [15] and [31] above. The materiality of all of this evidence is, in our view, unmistakable. It follows that, in orthodox public law terms, the licence revocation decision was made without taking into account all material considerations. This is the first public law misdemeanour and it is readily diagnosed.

[34] Next, continuing the public law barometer, we turn to consider the procedural fairness of the DOJ's decision making process. This is conveniently undertaken through the prism of Lord Mustill's Doody code. This exercise, which focuses particular attention on the six day phase commencing with the Applicant's arrest on suspicion of having assaulted CC and ending with the DOJ licence revocation decision, is a quite straightforward one. This phase was procedurally fair vis-à-vis the Applicant to begin with: via his arrest and the ensuing police interview he was alerted to the essence of the case against him, was given the opportunity to reply and did so. This promising beginning, however, failed to flourish.

[35] The next agency involved, PBNI, did not receive from the police the document containing the evidence outlined in [15] and [31] above (SOC version 2). Nor did it receive this evidence via any other medium. Most important of all, DOJ, the licence revocation agency, found itself in precisely the same position. From the perspective of common law fairness, the purpose of the police interview of the Applicant was to afford him the opportunity "*… to make representations on his own behalf … with a view to producing a favourable result …*". The Applicant seized this opportunity. The Doody code does not spell out, kindergarten style, that where the prisoner concerned chooses to put his case this must be considered by the decision making agency. Happily this court received no argument that there is no such duty. It suffices to say that the existence of this duty courses through the views of the Doody code.

[36] The foregoing analysis yields the further conclusion that the licence revocation decision of DOJ was the product of a procedurally unfair decision making process.

[37] The main question for this court therefore becomes: given that the licence revocation decision maker (DOJ) failed to take into account material evidence and engaged in a procedurally unfair decision making process, should the court order a writ of *habeas corpus* and/or any of the discretionary public law remedies?

[38] In circumstances where none of the decisions of higher courts considered above speaks directly to the present case, the court has not found this an altogether easy question to determine. If one applies an orthodox public law analysis, the decision of DOJ was unlawful being contaminated by the two public law misdemeanours diagnosed above. Neither of these vitiating factors was remedied by DOJ at any stage. Thus there is no question of any subsequent rectification by this key decision maker. It would follow from this analysis that the Applicant's initial detention beginning on the date of the licence revocation decision was unlawful.

[39] Pausing at this juncture, we pose the question of whether the foregoing analysis is in any way defective. The main competing argument developed on behalf of DOJ by Dr McGleenan QC, with Mr Terence McCleave of counsel, had two main components. First, the DOJ decision was made in the context of an overarching statutory imperative to ensure the safety of the public. Second, there was a sufficient evidential basis for the DOJ assessment that the Article 28 recall criteria had been met.

[40] True it is that when PBNI set in motion the recall machinery the application which it made to the first Single Commissioner was not based solely on the allegation that the Applicant had assaulted CC causing her actual bodily harm. Rather this report documented two further negative elements of his conduct. First, a drug test conducted some two weeks previously disclosed that he had taken cocaine. Second, it was noted that he had been charged with common assault on CC on 14 March 2018, following which he was released on police bail and culminating in a withdrawal of both the assault complaint and the charge around one month later. On 14 May 2018 his licence was amended by the incorporation of an electronic monitoring provision and (apparently) some adjustments of his supervision plan. Thus, carefully – but fairly – analysed the PBNI licence revocation application had four components. However, as appears from the passage reproduced in [11] above, it had a notable emphasis on the most recent alleged incident: the Applicant had "*now*" been charged with the assault offence, giving rise to the assessment of PBNI that he could not "*therefore*" be safely managed in the community at that time.

[41] It is necessary to juxtapose the PBNI report with the ensuing decision of the Single Commissioner, which followed five days later. The Commissioner noted the threefold factors of the first complaint of assault subsequently withdrawn, the single instance of cocaine consumption and the most recent assault allegation. The Commissioner based his recall recommendation on "*all the above information taken as a whole*". As appears from the passage reproduced in [12] above, the most recent

allegation of assault clearly had a significant influence in the Commissioner's licence revocation recommendation to DOJ.

[42] Our evaluation of the PBNI and Single Commissioner's reports set forth above has involved no microscopic parsing of their respective texts or the application of any inappropriate tool of analysis. We have read both reports fairly and *in bonam partum*, aware that they are not to be assessed in the manner appropriate to the exercise of construing a statute, contract or other legal instrument. Simultaneously, we consider that as reports of this kind can result in deprivation of a person's liberty, the judicial duty is to study them scrupulously. The exercise, as so often, is one of striking the appropriate balance. Furthermore, having regard to the principles enunciated in ex parte Cotton (*supra*), we consider that the court must approach with caution any suggestion that disregarded evidence of obvious materiality would, had it been considered, have made no difference to the DOJ decision.

[43] Giving effect to the foregoing reasoning we reject the main DOJ argument. While it was further highlighted on behalf of DOJ that there are no indications of wilful concealment or bad faith – which we accept - this does not operate to undermine our conclusion.

[44] The conclusion that the DOJ licence revocation decision was unlawful on account of the two vitiating factors identified above seems to us inescapable. We are satisfied that this is not precluded by any of the three decisions of higher courts examined above, namely those in Smith, Gulliver and Mullan. We can identify nothing in either the *ratio decidendi* or any of the formulations of legal principle in these cases to preclude this conclusion. In particular we consider that none of these decisions purports to prescribe an exhaustive code of the legal principles to be applied in the instant case. Furthermore the learned President's observations in [44] of Gulliver concerning "*the slovenly or the cavalier or the corrupt*" were clearly not designed to constitute a comprehensive lexicon of the legal thresholds to be overcome in the event of a challenge by judicial review or *habeas corpus* eventuating.

[45] Nor do we consider the test of whether the Commissioners, at the later stage of their intervention, "*.. may not be* [or, in this case, were not] *able to provide an adequate or sufficient remedy*" to be exclusive. (Gulliver at [45].) Rather we consider that this ranks as one of the factors which this court of supervisory superintendence may reckon in deciding whether a case for a writ of *habeas corpus* or, alternatively, a judicial review remedy has been established and, in the latter instance, selection of the appropriate discretionary remedy. We are reinforced in our view by the well-established principle that statutory provisions such as those engaged in the present case will normally attract a construction which is most consistent with the area of law to which the enactment relates, in this case public law. (See Bennion on Statutory Interpretation, 7th Edition, Section 25.3.)

[46] The second main submission canvassed by Mr McGleenan QC was based on a factual premise which the court accepts, namely that both the Single Commissioner who made the "panel referral" decision on 28 August 2018 and the panel of Commissioners which subsequently made the "non-release" decision on 23 October 2018 did consider the evidence which had been excluded from the preceding decision making processes and ensuing decisions. Based on this premise Mr McGleenan submitted, in terms, that the deficiencies in the initial DOJ licence revocation decision had been remedied.

[47] We consider Mr McGleenan's submission to be in substance correct. In our view the prism to be applied to this submission is that of the legality of the Applicant's detention. We consider that the Applicant was unlawfully detained between the date of the licence revocation decision (01 June 2018) and the date when the second of the Single Commissioners involved made the panel referral decision (on 28 August 2018) – *insofar as the licence revocation decision was responsible for his detention during this period*. We must add: this conclusion purposefully leaves open the question of whether his detention during this period was lawful on some other basis, such as remand in custody orders, an issue on which this court was neither requested nor evidentially equipped to adjudicate. We decline to venture beyond merely noting the indication in the last item of evidence provided by DOJ that the Applicant was remanded in custody during all but some two weeks of this period.

[48] We recognise that having regard to the court's analysis and conclusions the Applicant should not have been in custody on the date of the third Single Commissioner's decision. However the indelible, unalterable historical fact is that he was and there had been no judicial intervention to contrary effect. The *omnia praesumuntur* principle (or the principle of presumptive regulatory) must have purchase in this discrete context. Its effect was that the Applicant was presumptively in lawful detention as of 28 August 2018. This assessment is neither undermined nor reversed by this court's later *ex post facto* review of the legality of his detention during this initial three month period. This analysis applies equally to the non-release decision of the panel of Commissioners on 23 October 2018 and the Applicant's continued detention thereafter.

[49] The Applicant has, therefore, made good his case against DOJ. As regards the other four Respondent agencies, in brief compass:

(i) Neither PSNI nor PBNI made any decision or committed any act having legal effects and consequences, irreversible or otherwise.

(ii) As our analysis and conclusions above make clear, no illegality or other public law misdemeanour has been demonstrated vis-à-vis the Parole Commissioners.

(iii) Precisely the same conclusion applies to the PPS.

Remedy and Order

[50] There is no basis for ordering a writ of *habeas corpus*, which would issue against the governing governor of the prison in which the Applicant is incarcerated and in whose shoes DOJ legally stands, given our conclusion that the Applicant has been lawfully detained since 28 August 2018. As regards discretionary judicial review remedies, the only Respondent agency against which the Applicant has established his case is DOJ. To make an order of *certiorari* quashing the DOJ licence revocation decision of 01 June 2018 would, in the memorable words of Lord MacDermott CJ "*beat the air*" in light of our assessment that the legal deficiencies in this decision were subsequently rectified, to the extent that initially unlawful detention was transformed into the lawful (McPherson v Ministry of Education [1979] NI) – again subject to the qualification in [47] above.

[51] Furthermore, having regard to the non-release decision of the Parole Commissioners made on 23 October 2018 we consider it inevitable that any fresh decision by DOJ at this stage would replicate the initial one. Taking into account the serious nature of the legal deficiencies in the DOJ decision which the Applicant has exposed, shortcomings which readily attract the appellations of the "*slovenly*" and the "*cavalier*" espoused by Sir Igor Judge P in Gulliver, while not treating these as legal gateways for judicial intervention, we conclude without hesitation that the exercise of the court's remedial discretion impels firmly to the grant of a suitable remedy. Thus the court makes the following declaration:

THE COURT DECLARES that the DOJ licence revocation decision of 01 June 2018 was unlawful on account of (a) a failure to consider all material available evidence and (b) a procedurally unfair decision making process.

[52] Any more expansive declaration is contraindicated by the qualifications expressed in [47] above.