Neutral Citation No: [2021] NIQB 118	*Ref:* **COL11703**
	ICOS No: **2021/91976/01**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **17/12/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY MICHAEL MULHOLLAND FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION MADE BY THE NORTHERN IRELAND PRISON SERVICE

Mr Sean Devine (instructed by Flynn & McGettrick Solicitors) for the Applicant
Mr Philip Henry (instructed by Departmental Solicitor's Office) for the Respondent

---

COLTON J

Introduction

[1] On 28 May 2021 the applicant was sentenced to 16 months' imprisonment at Belfast Crown Court for the offence of riotous assembly, committed on 8 August 2020.

[2] He has been in custody since the date of his sentence.

[3] The respondent has a discretionary power to release certain categories of prisoner on licence before being required to do so under Article 19 of the Criminal Justice (Northern Ireland) Order 2008 under what is known as the "Conditional Early Release Scheme" ("CERS").

[4] The applicant became eligible for consideration for release under this scheme on 28 September 2021.

[5] His application for release has been refused by the respondent. By these proceedings the applicant challenges that decision.

Chronology

[6] On 18 August 2021 the applicant completed a conditional early release application. This is done by completion of a standard from CER1 which provides basic information in relation to the applicant.

[7] On 26 August 2021 the application for CER was refused by Governor Davison. The decision is recorded in a standard form CER4(b) – Notification of Decision.

[8] The form notes that the applicant was on the enhanced regime, had an ACE score of 15, confirms there is no outstanding offender levy and includes some personal details. There is nothing recorded under "Victim Notes", "Offence Notes", or "CER Assessment Notes."

[9] Under "Governor Details" the following appears:

Governor Decision: Refusal for CER

Governor Notes:	Does not meet criteria due to offence.
Refusal Reason:	Does not meet criteria

[10] This decision was not communicated to the applicant until 20 September 2021.

[11] On 21 September 2021 the applicant's solicitors wrote to the respondent in the following terms:

> *"…*
>
> *I confirm we act on behalf of the above named who has been formally advised that he is not eligible for CER.*
>
> *We would be obliged to receive in detail the reasons for this decision. If these reasons are unreasonable we will be applying to the court for judicial review of the decision."*

[12] By letter dated 22 September 2021 the Governor replied to the applicant's solicitors in the following terms:

> *"… The decision to refuse your client's CER application may be appealed internally by Mr Mulholland stating the grounds for same on NIPS internal appeal system.*
>
> *Mr Mulholland has not formally lodged an appeal to NIPS for the decision on his CER application.*

I have this morning instructed staff to advise/assist your client of this process stating grounds for appeal …"

[13] On the same date the applicant's solicitor replied in the following terms:

"… We would obliged to have the reasons for the refusal forwarded to our office by email in order that we may prepare our papers for judicial review should Mr Mulholland be refused internally on the appeal process …"

[14] On 22 September 2021 the applicant appealed his decision. The appeal is contained in a Prison Service document headed "Request Details." The full text of the Request Details are as follows:

"I would like to appeal my CER decision (refused on 26/08) on the grounds that my charge is riot and that it is excluded from the list of charges/crimes that is refusable for CER, I have also met all other criteria needed to meet the required exceptions for CER. I am enhanced, my levy fee is paid and my ACE score is below 17. I also have an address to go to upon release. Thank you."

[15] The document is not signed or dated but the request was recorded by a custody officer on 22 September 2021.

[16] On 5 October 2021 the applicant's solicitors again wrote to the respondent in the following terms:

"Dear Sir/Madam

We refer to our email below and would be obliged for a response as a matter of urgency as judicial review proceedings will be required if our client is not released. Our client's eligibility date has now passed and there is no impediment to his release under the Conditional Early Release Scheme."

[17] On 20 October 2021 the applicant's solicitors wrote to the respondent in relation to the applicant's brother, Anthony Mulholland, in the course of which a reference was made to this applicant. The text of the email was as follows:

"Dear Sir/Madam

We understand from speaking with our client, Anthony Mulholland, this morning that his application for CER was refused on Friday, but this was not communicated to him or us.

He, like his brother Michael, has now submitted an appeal against the decision.

Both of our clients have been advised that they do not meet the criteria due to the offence. However, this is not correct.

The offences which exclude someone from CER are outlined in the NIPS Policy Document:

- *Homicide – including any offence which has contributed to or led to the death of an individual or individuals;*
- *Terrorism;*
- *Explosives;*
- *The possession or use of a firearm or an offensive weapon;*
- *Cruelty;*
- *A crime perpetrated on the grounds of race, religion or sexual orientation.*

None of these apply to either prisoner.

Both prisoners have served half of their custodial element on 20 September and are now eligible for immediate release.

We therefore ask that both appeals are adjudicated upon as a matter of urgency, and no later than Friday 22 October …"

[18] On 20 October 2021 the respondent replied as follows:

"Thank you for correspondence dated 20 October 2021 in respect of Mr Michael and Anthony Mulholland.

The decision to refuse your client's CER application is currently being reviewed through the NIPS appeal process by NIPS HQ.

When a decision is reached your clients will be informed of the outcome.

If you require any further assistance/information please do not hesitate to contact me. …"

[19] On 2 November 2021 the applicant's solicitors issued a pre-action protocol letter in respect of the applicant. The correspondence summarised the chronology set out above. It contended that contrary to the decision of 26 August 2021 the applicant's offending was not excluded by the scheme by virtue of the offences contained in the respondent's policy document for CER. The correspondence requested the respondent to either:

"(i) Release the applicant immediately;

(ii) Alternatively, adjudicate upon his appeal immediately and provide detailed reasons for refusing him such release."

[20] The Departmental Solicitor's Office replied on behalf of the respondents on 8 November 2021 indicating that in fact an appeal decision had been made on 29 October 2021 by Alan Smyth, who is Deputy Director in the Prisons Division of NIPS with responsibility for policy, legislation and estates.

[21] The response enclosed a copy of the appeal decision which refused the CER application. The court shall return to the contents of the decision later in this judgment.

History of the Proceedings

[22] On 25 November 2021 the applicant issued proceedings seeking leave to apply for judicial review.

[23] The relief sought in the Order 53 Statement was as follows:

"(a) A declaration that the decision to refuse the application (sic) released under the CER scheme was unlawful.

(b) Interim relief ordering the applicant's release until these proceedings are determined;

(c) Damages;

(d) Such further or other relief that the court may deem appropriate;

(e) Costs."

[24] Leave was granted on the papers and an expedited hearing was arranged, after a short review hearing, for Tuesday 7 December.

[25] The court is grateful to the parties for ensuring that expedition was possible and for compiling the relevant materials for the hearing. The respondent filed an affidavit from Mr Smyth which was accepted on an unsworn basis by the court and which completed the factual matrix to this application. It was not possible to obtain an affidavit from the initial decision-maker as he is currently on sick leave.

[26] It was agreed that the application would proceed with the caveat that the respondent would be permitted to file further affidavit evidence should this become necessary.

[27] I am grateful to both counsel for their written submissions, produced at short notice, which were elaborated on fully in the course of the oral hearing.

The Conditional Early Release Scheme

[28] The CER Scheme has its origins in Article 19 of the Criminal Justice (Northern Ireland) Order 2008 which states:

> *"**Power to release prisoners on licence before required to do so***
>
> *19.—(1) The Department of Justice may release on licence under this Article a fixed-term prisoner at any time during the period of 135 days ending with the day on which the prisoner will have served the requisite custodial period."*

[29] This discretionary power is exercised by the Northern Ireland Prison Service on behalf of the Department. It is designed to allow prisoners who are assessed as presenting a low likelihood of reoffending, to return to the community on a supervised and conditional licence before their custody expiry date in order to aid their rehabilitation and resettlement back into the community.

[30] If released through CER, the release licence will include those standard conditions set out in the Criminal Justice (Sentencing) (Licence Conditions) (Northern Ireland) Rules 2009. The licence will include a curfew condition and may also include other licensed conditions tailored for the particular prisoner.

[31] The 2008 Order excludes certain prisoners from the scheme on statutory grounds. Examples include prisoners serving an extended custodial sentence, prisoners who are subject to the notification requirements in Part 2 of the Sexual Offences Act 2003 or a prisoner who has been released on licence and has been recalled subsequently.

[32] The respondent has developed a policy document underpinning the operation of the CER Scheme *"… including how it will meet both its legislative and discretionary requirements in an effective, impartial and consistent manner."* The current version of the scheme was issued in March 2016 and is currently undergoing a general review.

[33] The policy intention is set out in paragraph 4 as follows:

> *"Public confidence in the criminal justice system is of paramount importance to the Northern Ireland Prison Service. In developing this conditional early release scheme NIPS has therefore augmented the basic statutory limitations by introducing additional requirements that will ensure that only those prisoners who can demonstrate fully that they present a low risk to the public and a low risk of reoffending, who will benefit from inclusion in this scheme in rehabilitation terms through successful integration into the community, and whose early release will not damage public confidence in the criminal justice system should be considered for early release."*

[34] In addition to the statutory criteria already referred to the policy provides for "*additional non-statutory exclusions designed to engender and underpin public confidence in the scheme*."

[35] Paragraph 6 provides:

> *"Given the discretionary nature of the power to introduce and operate a CER scheme the Minister of Justice has decided that a number of offences will deem an offender unsuitable for early release in order to ensure the public at large, and the victims of crime in particular, have maximum confidence in the scheme. These exclusions follow closely those that are already applied in England and Wales and which deem applicants to be "presumed unsuitable" for the Home Detention Curfew Scheme (which allows prisoners nearing the end of their sentence to be release early from custody). They identify those prisoners who have been convicted of a crime, the serious nature of which makes them unsuitable for consideration for early release and who, if so released, could undermine public confidence in the scheme and by implication the wider criminal justice system. While these excluded offences will not preclude an individual from applying for a CER their existence will deem the applicant unsuitable for release unless they are able to convince the governor that exceptional circumstances exist that support their release and that such release will not have an adverse effect on public confidence. Prisoners falling into the categories listed below must be considered unsuitable for release on CER:*
>
> - *Those prisoners serving a sentence for an offence involving:*
>
> - *Homicide – including any offence which has contributed to or led to the death of an individual or individuals;*
>
> - *Terrorism;*

- *Explosives;*
- *The **possession or use of a firearm or an offensive weapon;***
- *Cruelty;*
- *A crime perpetrated on the grounds of race, religion or sexual orientation."*

[36] The policy goes on to indicate that similar "presumed unsuitable" exclusions had been tested on at least two occasions in the courts in England and Wales and were considered lawful. Relevant decisions were *PA v The Governor of HMP Lewes* (C0/363/2011) and *Young v (i) The Governor of HMP Highdown and (ii) The Secretary of State of Justice* (C0/9819/2010).

The decision to refuse CER of 29 October 2021

[37] The decision of Mr Smyth is a reasoned written decision running to 20 paragraphs. Mr Smyth indicates at the outset that he approached the appeal from Governor Davison as a "fresh decision." The decision sets out the statutory scheme and the policy behind the scheme. It is confirmed that the applicant satisfies the statutory criteria in terms of being eligible to apply for release under the scheme in terms of the requisite custodial period served by him. He confirms that the applicant is not excluded from the scheme as a result of any of the statutory criteria under Article 19.

[38] He goes on to set out the non-statutory criteria under which a prisoner will be deemed to be "presumed unsuitable" for early release and considers the policy behind the presumption. He points out that while this type of offending will not preclude an individual from applying for a CER, they will be presumed unsuitable and must be able to prove exceptional circumstances sufficient to rebut the presumption that public confidence will be damaged by their release.

[39] The key passage of the decision is as follows:

> *"I note at this point that Governor Davison refused Mr Mulholland's application for a CER as a result of his view that his offending engaged one of the non-statutory exclusions set out above, namely he is serving a sentence for an offence involving the use of an offensive weapon. In this case Governor Davison interpreted the missiles which Mr Mulholland threw in the direction of police during the riot in which he was convicted of taking part in as offensive weapons. I note from the Structured Outline of Case that Mr Mulholland was seen throwing approximately 20 missiles at police and that these*

> *items consisted of pallets, masonry and part of a steel trolley. I further note that an offensive weapon can be an article neither made nor adapted to injure but one which is intended by the person to be used to injure. In this case I have decided that Mr Mulholland threw missiles at police officers with the intention of causing them injury and that this is a reasonable conclusion for me to arrive at. Indeed, I note from a police report that as a result of this riot 29 police officers sustained injury with a number of them being seriously injured and requiring hospital treatment. Finally, I note that the CER policy does not require an individual to be convicted of using an offensive weapon in order to be presumed unsuitable for CER. Rather the policy states a prisoner is presumed unsuitable if they are serving a sentence for an offence involving the use of an offensive weapon. [Emphasis added] It is my view that Mr Mulholland's offending did involve the use of offensive weapons i.e. he used articles not adapted to injure but ones which he intended to use to injure.*
>
> *16. It is therefore my assessment that Mr Mulholland is excluded from the scheme because he is serving a sentence for an offence involving the use of an offensive weapon."*

[40] The decision-maker then goes on to consider the issue of exceptionality which is not relevant for the purposes of this application.

Grounds of Challenge

[41] The applicant complains that the entire process suffers from procedural unfairness. Procedural fairness is one of the cornerstones of judicial review. The purpose of procedural fairness is to provide an opportunity for individuals to participate in decisions that affect them and to promote the quality and legitimacy of decisions made by public authorities. It is axiomatic that what procedural fairness requires is context driven. It is not possible to lay down rigid rules. Everything depends on the subject matter. As was famously said by Lord Mustill in *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531:

> *"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."*

[42] With this in mind the court accepts that the applicant is serving a sentence lawfully imposed by the Crown Court with an identified release date under the 2008 Order.

[43] The respondents on behalf of the Department are exercising a discretionary power, there is no entitlement to early release.

[44] The court recognises that what is involved is an administrative decision and not a judicial one. This is not a scenario where the full panoply of procedural safeguards can be expected. The decision-maker in this case is exercising a discretion pursuant to a public facing policy which has been exercised for years.

[45] That said, it is important to recognise that the implications of the decision have the potential to impact on the liberty of the subject and in those circumstances a high level of procedural protection is to be expected.

[46] Turning to the procedure which led to the decision in this challenge the court has considerable concerns about what took place.

[47] Firstly, the applicant should have been told about the governor's decision shortly after it was made on 26 August and certainly before 20 September 2021. The court can see no reasonable basis for any delay. It has to be remembered that the applicant qualified for potential early release on 28 September 2021.

[48] Secondly, it does not appear that the applicant was informed that he had any right of appeal. He was only informed of this after his solicitor sought reasons for the decision and raised the possibility of a judicial review.

[49] Thirdly, the reasons for the original decision of 26 August are plainly inadequate. I make it clear that the court fully recognises that the decision-maker is not a lawyer or a judge and the applicant cannot expect a fully reasoned lengthy decision. At the very least, however, the reasons provided should enable the applicant to understand the basis for the decision. All that he was provided with by way of reasons was that "he does meet the criteria due to offence." It is not clear from this decision whether or not the criteria relate to the statutory exclusions provided under Article 19 of the 2008 Order. If the decision referred to the criteria relating to presumed exclusion it would have been very easy to set this out in a couple of sentences. The absence of notes does not vitiate the decision in any way but rather it may suggest a lack of detailed consideration. If the decision had been based on the analysis of the offence then one would have expected this to appear in the offence notes.

[50] Fourthly, the applicant is critical of the delay between the date of his appeal and the decision of Mr Smyth which was a gap of approximately five weeks. Mr Smyth points out that the policy indicates that decisions will normally be made within four weeks. Mr Smyth has dealt with the delay in his affidavit and I consider that a reasonable explanation has been provided. One could certainly argue that an earlier decision would have been preferable, particularly in light of the previous correspondence from the applicant's solicitors and the date of 28 September 2021 to which I have already referred.

[51] Fifthly, the applicant complains about not having access to the documentation relied upon by the respondent. In particular, he complains that the respondent has based its decision on what is described as the Structured Outline of Case document. That document summarises the nature of the applicant's offending and his responses in interview. It is the same document provided to the probation officer before compiling the pre-sentence report for sentencing, something which was available to the applicant. In any event, as will be seen later, the difference between the outline of case document and the agreed facts upon which the applicant was sentenced relate to the fact that the Outline of Case document suggests the applicant threw 20 missiles at the police in the course of the riot as opposed to the agreed position that he threw 8 such missiles.

[52] The real issue that arises for determination by the court is the impact of any of these procedural defects and whether the court should grant any relief in respect of them. The respondent contends that any procedural defects have been remedied by the subsequent appeal. It is pointed out that Mr Smyth approached the appeal as a fresh decision. That decision was made on the merits, after the applicant had an opportunity to make representations, including a consultation with his solicitor. The original decision has been superseded and the applicant has been provided with a fully reasoned decision. The procedural issues identified have been rectified and the appeal process has worked. The respondent argues that it has ensured the applicant's application has been properly considered in accordance with the policy.

[53] In assessing the overall approach to the application it is necessary to consider the substance of the final decision in the matter.

The Substantial Decision

[54] The applicant contends that irrespective of the procedural fairness issues raised the final decision itself is unlawful.

[55] The applicant does not challenge the policy itself but rather he argues that the respondent has clearly misconstrued the policy. Put another way it is argued that the respondent has misdirected itself in applying the policy. In support of this argument Mr Devine focuses on the decision in the *Young* case which is referred to in the respondent's policy document. That was a case decided by Deputy Judge Lord Carlile QC. In that case he was dealing with challenges involving decisions under the English and Welsh scheme which is largely similar to the scheme in this jurisdiction. The claimant had been convicted of two offences, namely robbery and possession of a sharp bladed instrument (a knife). The background to the offending was that the claimant entered an off-licence wearing a motor cycling helmet and carrying a knife. He demanded money from the till and left with £300. The claimant challenged a refusal to release him on the HDC scheme which is the applicable scheme in England and Wales. He made multiple complaints but the fundamental issue considered by Lord Carlile was a claim that there had been a breach of the

applicant's rights under Article 14 taken with Article 8 based on discrimination on the grounds of irrational and unfair differentiation between one group of prisoners and another. It was asserted that a relevant comparator group consisted of other prisoners convicted of equally serious offences involving weapons but who happen not to have been charged separately with the weapons offence.

[56] This assertion was rejected comprehensively by Lord Carlile. There was much discussion in the case about the policy of the CPS in respect of charging defendants with a separate charge of a weapons offence when it was used to commit a more serious charge such as robbery. The policy in England and Wales was to the effect that:

> *"Where there is sufficient evidence to provide an offence of carrying an offensive weapon or bladed or pointed article in a public place or school in addition to another offence it is good practice to charge both offences, even where the knife or weapon has been used during the commission of the other offence. This will ensure that the prosecution case on the basis of any pleas are clear. It will also allow an offender to be brought to justice for an offence of possession, and allow the court to order the forfeiture and destruction of the weapon if the defendant is acquitted of the other offence."*

[57] The applicant focuses on two passages of Lord Carlile's judgment as follows:

> *"38. I agree with the defendant's submissions that the principal goal of the policy contained in PSI 31/2003 (**the equivalent of the policy in this jurisdiction**) – [my emphasis] is to maintain public confidence in the HDC scheme. This has been accepted as a legitimate goal for the defendant when setting policies on the release of prisoners: see Re Findlay above and R (Cross) v Governor of HMYOI Thorn Cross [2004] EWHC 149 (Admin) at [20]. Public confidence is particularly important, in relation to HDC, because that scheme operates to release prisoners before the end of the custodial period of their sentences at a time when the public might expect them to be imprisoned. Public confidence in the HDC system could be undermined if those convicted of offences which the public considered particularly serious or anti-social were released early.*
>
> *39. In order to achieve that goal it is necessary to have a workable and clear policy on which kinds of offender should not generally be allowed out on HDC. PSI 31/2003 is clear and workable – Governors are to look at the offences of which the prisoner has actually been convicted. This is a fair way of selecting those prisoners whom the public would not expect to*

> *be released. Given the CPS policy, the use of convictions as the basic criteria is a fairer and more certain methodology than an attempt by prison governors to determine facts from what may well be incomplete material."*

[58] Mr Devine suggests that the court should apply this reasoning. He says that it means that the respondent should not go beyond a consideration of the "offence" for which the applicant was sentenced.

[59] I make a number of comments on this submission. Firstly, the context of Lord Carlile's dicta has to be considered. He was looking at the question of whether or not the applicant could establish relevant comparators. Because of the CPS policy he was satisfied that the basic criteria should indeed be the actual offence for which the applicant was convicted. Mr Devine places emphasis on the reference to the important considerations of fairness and certainty to assist prisoner governors in making decisions. He further relies on the caution against attempts by prison governors to determine facts from what may well be incomplete material.

[60] However, it must be clear on reading the policy that governors cannot make a decision solely on the basis of the offence for which an applicant has been convicted. The examples given do not actually refer to offences. Rather they refer to types of offences. The policy does not include a schedule of specific offences which would result in "presumed exclusion." What the decision-maker has to do is to look at whether or not the offence involves offences of the type set out in the policy. The court agrees with Lord Carlile that the basic starting point should be the offence itself. However, in order to apply the policy it will be necessary for a decision-maker to look at the circumstances of the offence. There is no other way in which the policy can be applied. There is no offence known as "cruelty." To establish whether or not a prisoner was serving an offence involving cruelty it will be necessary to consider the offence and the circumstances in which the offence was committed.

[61] Some examples will illustrate the point. Considering the *Young* scenario, suppose a prisoner is convicted of robbery in the course of which he uses a knife but for whatever reason was not charged with the offence of using an offensive weapon. If a decision-maker were confronted with such a situation if he is to apply the policy he would be entitled to say that the particular offence of robbery involved "the use of an offensive weapon" and was therefore presumed unsuitable. Take another example of a prisoner who has been convicted of an assault in circumstances where it was established that the assault was motivated by the race of the victim. The offence of assault is not referred to in the list of offences but clearly in those circumstances it would constitute an offence involving a crime perpetrated on the grounds of race and would result in the person being presumed unsuitable. To use an example closer to this case what of a prisoner who has been convicted of an affray in the course of which he had brandished a weapon? Again, although affray is not included as one of the offences in the policy, clearly such a scenario would involve a

prisoner who had been sentenced for an offence involving the use of an offensive weapon.

[62] If the prison governor in this case simply looked at the offence of riot and decided on that basis alone the prisoner was deemed unsuitable then he would not be applying the policy lawfully. The obligation to consider whether or not an offence involves one of the examples requires further consideration of the offence. The offence of riotous assembly can cover a wide range of offending.

[63] The court concludes that it is simply not sustainable to say that a governor can only look at the offence for which the applicant has been charged.

[64] A stronger substantive ground for the applicant is the second limb of his argument to the effect that it was not open to the decision-maker to determine that the offence the applicant committed did involve the use of an offensive weapon.

[65] It is necessary to consider the reasoning of Mr Smyth. In his decision he said:

> *"I further note that an offensive weapon can be an article neither made nor adapted to injure but one which is intended by the person to be used to injure. In this case I have decided that Mr Mulholland threw missiles at police officers with the intention to causing them injury and that this is a reasonable conclusion for me to arrive at …"*

[66] Mr Devine points out that an intention to cause injury is not a constituent of the offence of riotous assembly. The gravamen of the offence relates to an involvement in a mass disturbance. In those circumstances he argues that it was wrong of the respondent to even embark on consideration of the applicant's intent and to infer an intent to injure.

[67] On this issue the court notes that it was an agreed basis of the applicant's plea that the applicant was involved in a riot which varied in size but included up to 60 people. The crowd attacked the police with missiles including paint, masonry, bricks, pieces of metal and parts of pallets. A total of 29 officers were injured, one was hospitalised and required three weeks off work. In the course of this riot the applicant threw approximately 8 missiles at police, including pieces of wood, parts of a metal trolley and a burnt part of a pallet which was broken off from the bonfire.

[68] It is correct that the decision-maker, relying on the Outline of Case document, was working on the basis that the applicant had thrown 20 missiles rather than 8 but he avers that this would not have made any difference to his ultimate decision.

[69] In his affidavit in support of this application the applicant avers that it was not his intention to injure anyone. He avers that the things he threw were intended to make contact with the shields that every single officer was carrying. He points

out that some other individuals who were involved in the riot also pleaded guilty to attempted section 18 assaults. Mr Devine refers to a specific example of such a participant who received a sentence of 27 months in custody.

[70] When interviewed, the applicant, apologised for his conduct if he hurt anyone and said he was ashamed of himself.

[71] Essentially there are two elements to his challenge. The first is whether or not the decision-maker was entitled to consider the facts of the offence in circumstances where use of a weapon is not an ingredient of the offence itself. For the reasons set out already it seems to the court that the decision-maker was entitled to do this since the policy refers to an offence "involving" certain examples.

[72] The second issue is whether or not the decision-maker was entitled to come to the conclusion that the applicant intended to cause injury when he threw the missiles in the course of the riot.

[73] In addressing this argument it must be remembered that the court is exercising a supervisory role. It is not an appellate court and it must assess the decision made by the decision-maker on public law grounds. It seems to the court that the conclusion reached by the decision-maker in this case could not be described as irrational in any sense. It was open to him to come to the conclusion that when throwing the missiles the applicant did intend to injure police officers and in those circumstances was entitled to conclude that the applicant had been convicted of an offence involving the use of offensive weapons. Whilst the court agrees that the decision maker ought to be careful in analysing the circumstances giving rise to an offence and should avoid, in the words of Lord Carlile, determining facts from what may well be incomplete material, it could not be said that Mr Smyth has gone beyond what is permissible in analysing this particular offence. It could not be said, in the court's view that he has gone beyond what is permissible in applying the policy by inferring an intent to injure on behalf of the applicant when he threw the missiles in the course of the riot.

[74] There is no public law error in the reasoning of the decision maker in the court's view.

[75] In that event the court returns to the procedural unfairness identified in the earlier part of this judgment. What consequences should flow from this? The greatest concern the court has relates to the plainly inadequate reasons given for the original decision. The concern is that this has had an adverse impact on the applicant's ability to set out the grounds of his appeal. It is clear that he was alive to the issue of whether the offence excluded him from the scheme. In addition, he did have the benefit of advice from his solicitor, who also was working from inadequate reasons. In those circumstances the court fails to understand how Mr Smyth can assert so confidently in his decision the basis upon which Governor Davison refused Mr Mulholland's application.

[76] Ultimately, the court has to review the decision of 29 October 2021 which it considers is a reasoned, lawful and rational one. It has had the effect of superseding and correcting the procedural unfairness identified in relation to the original decision. The court has carefully considered whether Mr Smyth might have come to a different conclusion had he been aware of the averments contained in the applicant's affidavit, to the effect that he did not intend to injure anyone when he threw the missiles in the course of the riot. It has concluded that it would not have made any difference.

Conclusion

[77] The court is critical of the manner in which the original decision was made in this case. The court expects the criticisms outlined in this judgment will be conveyed to the respondent and taken on board. They should not be repeated.

[78] The court has concluded that the ultimate decision taken by the respondent was a lawful and rational one, which has had the effect of superseding and correcting the original decision-making process. I conclude that there are no public law grounds upon which the final decision can be impugned.

[79] Accordingly, the court dismisses the application for judicial review.