Neutral Citation No: [2025] NIKB 32	*Ref:*	SCO12780
	ICOS No:	23/023856/01
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	30/05/2025

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY THE SECRETARY OF STATE FOR NORTHERN IRELAND FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE SENTENCE REVIEW COMMISSIONERS FOR NORTHERN IRELAND

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Tony McGleenan KC and David Reid (instructed by the Crown Solicitor's Office) for the Applicant
Peter Coll KC and Terence McCleave (instructed by Carson McDowell LLP) for the Respondents
Ronan Lavery KC and Michael Chambers KC (instructed by McNamee McDonnell, Solicitors) for the notice party

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SCOFFIELD J

Introduction

[1] By these proceedings the applicant, the Secretary of State for Northern Ireland (SSNI), challenges the decision of the Sentence Review Commissioners for Northern Ireland (SRC) ("the Commissioners") of 13 November 2012 to grant the application of Mr Robert Clarke for a declaration of eligibility for early release under section 3(1) of the Northern Ireland Sentences Act 1998 ("the 1998 Act").

[2] These proceedings have taken some time to progress and to come to a conclusion, for reasons discussed in further detail in my decision in the related case of *Re Clarke's Application* [2024] NIKB 110 ("the *Clarke* case"). In June 2024 a declaration was granted to the effect that the SRC's decision which is challenged in these proceedings was unlawful, having been taken in error of law. The question for this stage of the proceedings is whether further relief should be granted to the applicant – in the form of an order quashing the SRC decision and voiding the resulting life licence issued to Mr Clarke under the 1998 Act – having the effect of

mandating Mr Clarke's return to prison to serve a further portion of his sentence. A remedies hearing on that issue took place earlier this year.

[3] Mr McGleenan KC and Mr Reid appeared for the SSNI; Mr Coll KC and Mr McCleave appeared for the SRC; and Mr Lavery KC and Mr Chambers KC appeared for Mr Clarke. I am grateful to all counsel for their helpful written and oral submissions.

Factual background

Mr Clarke's sentencing

[4] Mr Alfredo Fusco and his family lived at 19 York Street, Belfast, where he owned an ice cream parlour and a fish and chip saloon. On the evening of 3 February 1973, two gunmen entered his shop. Mr Fusco was brutally murdered with two gunshot wounds to his head and one to his body. The gruesome nature of the crime was succinctly captured by McLaughlin J at para [2] of his sentencing decision in the following terms:

> "Mr Fusco was a completely innocent man working to support his wife and family in a small café business. He served the public without discrimination and gave no offence to anyone, yet he was singled out to be assassinated in a brutal and terrifying manner. He fought to save his life without a weapon or protection of any kind against you when you were armed with a sub-machine gun. You were so intent on murdering him that when your weapon jammed, and failed to fire, you left him cornered in a store, went to the door of the café, swapped weapons with an accomplice and returned to the store area. You there used the revolver which you had obtained to shoot him twice in the head: when he fell mortally wounded to the floor you fired at him again. Inhumanity of this scale to any fellow human being demands that the courts impose a sentence to mark the rejection by civilised society of such acts. The purpose of this process is to fix the minimum term of imprisonment to be served by such a killer to achieve retribution and to deter others."

[5] Although there was a police investigation at the time, no one was made accountable for the murder of Mr Fusco until a review was carried out in 2009 by the Historical Enquiries Team (HET), which led to Mr Clarke being arrested and charged.

[6] On 28 February 2011 Mr Clarke was convicted of the murder of Mr Fusco and possession of certain firearms with intent, after a full trial (conducted without a jury)

before McLaughlin J at Belfast Crown Court: see *R v Clarke* [2011] NICC 12. On 8 April 2011, Mr Clarke was sentenced by McLaughlin J to a life sentence with a minimum term of 25 years for the murder; and to 20 years' imprisonment for the offence of possession of firearms, to run concurrently with the life sentence. His 25-year tariff period is due to expire on 27 February 2036.

[7] At para [8] of his sentencing remarks, the trial judge indicated as follows:

> "I am fully conscious of the fact that the effect of the Northern Ireland (Sentences) Act 1998, which was introduced as part of the Belfast Good Friday Agreement, if applicable in your case, will result in you serving nothing like that term. I consider it essential however to mark the seriousness of this offence having regard to the statutory requirements and the need to allow the community in general, and the family of the victim in particular, to have some sense that justice has been achieved."

[8] During the sentencing it was also noted by the judge that Mr Clarke had previously been convicted of a similar indiscriminate, sectarian terrorist attack, which resulted in the murder of Mrs Margaret O'Neill, on 14 June 1975. In relation to that incident, he had pleaded 'guilty' to a charge of murder, four charges of attempted murder, and possession of firearms and ammunition with intent. He had received a life sentence in respect of the murder offence and a sentence of 25 years' imprisonment on each court of attempted murder (to run concurrently), imposed by Jones LJ at Belfast City Commission on 27 February 1976. He was released on life licence in July 1990 after having served 15 years in prison.

[9] Mr Clarke appealed against McLaughlin J's sentencing decision, but his appeal was dismissed by the Court of Appeal, which affirmed the sentence of the lower court, on 17 February 2012.

The request for the exercise of the royal prerogative of mercy

[10] Meanwhile, on 21 March 2011, Mr Clarke's solicitors had written to the Crown Solicitor's Office (CSO) referring to the recent sentence of life imprisonment which had been imposed upon him a few weeks earlier. This letter was sent before the judge had set the appropriate tariff, which occurred on 8 April 2011. In the letter, Mr Clarke's solicitors indicated that he had previously served a life sentence for a separate murder between 1975 and 1990 and suggested that, in light of this, the royal prerogative of mercy (RPM) should be exercised in his favour to reduce the further sentence of imprisonment upon which he was just embarking. By way of response on 31 March 2011, the CSO indicated that the letter of 21 March 2011 did not provide sufficient grounds upon which a recommendation could be made for a grant of the RPM in favour of Mr Clarke. The CSO letter further highlighted the basic point that

the new sentence related to a different offence from that for which Mr Clarke had already served the tariff period of the previous life sentence.

[11] In response, by a further letter of 19 April 2011, Mr Clarke's solicitors reiterated the points previously made and asserted that Mr Clarke's continued detention as a sentenced prisoner for Troubles-related offences was contrary to the spirit of the early release scheme in the Belfast (Good Friday) Agreement. The CSO responded again by letter of 16 May 2011, in similar terms to its previous letter.

[12] On 9 August 2011, Mr Clarke's solicitors sent a pre-action letter to the CSO indicating an intention to challenge by way of judicial review the failure of the SSNI to exercise (or advise Her Majesty to exercise) the RPM in order to remit Mr Clarke's sentence. In this letter, they drew attention to other instances which were said to be analogous to Mr Clarke's situation, where the RPM had been exercised. The letter included the following passage (which was said to be relevant for reasons discussed in further detail below):

> "There is no question that the RPM has been used to deal with prisoners who fit within the spirit, but not the strict terms, of the early release scheme set up following the Belfast or Good Friday Agreement ("the GFA") of 10 April 1998.
>
> A 'notional' tariff was imposed upon the applicant after sentence because, under the GFA it was agreed that the scheme be created to allow prisoners to be released early who had been convicted of offences related to "the Troubles." The scheme was set out in the Northern Ireland (Sentences) Act 1998 ("the Sentences Act") which permitted the early release of prisoners who had been convicted of "qualifying offences" (scheduled offences within the meaning of the Northern Ireland (Emergency Provisions) Acts 1973, 1978, 1991 or 1996).
>
> Certain prisoners did not fall within the strict terms of the Sentences Act but it was clear that they, like the Applicant, fitted within the **spirit** of the early release scheme. This applied, for example, to prisoners whose offence, albeit connected to the Troubles, was committed before offences were "scheduled" pursuant to the relevant legislation. It also applied to prisoners who served sentences outside Northern Ireland and (as indicated below) to prisoners who had served two years in prison for some offences related to the Troubles but not for others. In order to remove these anomalies, the Respondent used the RPM to remit part of the sentences and permit release in the same

> way as would occur pursuant to the early release scheme in the Sentences Act.
>
> We had previously written to the NIO / Crown Solicitor's Office and asked that the RPM be used in the Applicant's case. He has served 2 years in Northern Ireland for "qualifying offences" as required by the Sentences Act to qualify for automatic release, he had been in prison for 16 years for a murder committed in 1975. He was therefore in custody from 1975 – 1990.
>
> The Respondent is therefore requested to use the RPM to remit the Applicant's sentence for the offences in question given the amount of time he has served for other qualifying offences."

[13] In response, by letter dated 16 August 2011 the CSO reaffirmed that the Northern Ireland Office (NIO) did not agree that an anomaly existed in relation to Mr Clarke and would not be recommending that he benefit from a grant of the RPM on the following basis:

> "The recent conviction of your client was for a separate offence committed at a different time and unrelated to the offence of which he has now been convicted. The two offences are accordingly not linked in your client could not have been charged with both offences contemporaneously."

The application to the SRC

[14] The following year, Mr Clarke's solicitors made an application on his behalf to the SRC in respect of the sentences imposed upon him by McLaughlin J. He was now represented by different solicitors (John J Rice & Co), rather than the solicitors who had earlier requested the exercise of the RPM in his favour (Kevin R Winters & Co). The application was made on 8 April 2012. There was no requirement on the application forms used by the SRC to state the date of the offence, only the date of the applicant's sentencing. However, the date of the offence was mentioned in the covering letter from the applicant's solicitors. The SRC and the CSO (on behalf of the SSNI) then corresponded with each other on 27 July 2012 and 17 August 2012 respectively; and the CSO provided the SRC with Mr Clarke's criminal record and other requested documents in order to permit them to consider the application. The criminal record disclosed the date of the relevant offending but no submission was made by the NIO in relation to this. Then a single Commissioner reviewed the submitted documentation and was satisfied that Mr Clarke's case was ready to be referred to a Panel of Commissioners.

[15] The Panel of Commissioners considered the application on 11 September 2012. On 26 October 2012, by way of preliminary indication, the Panel informed Mr Clarke's solicitors that they were minded to approve the application. Neither the NIO nor Mr Clarke challenged this preliminary indication. This was confirmed by correspondence from Mr Clarke's solicitors and the NIO dated 5 and 9 November 2012 respectively. Consequently, the position was affirmed by way of substantive determination granting the application for release on 13 November 2012. That is the decision under challenge in these proceedings.

[16] On 27 February 2013, two years after being taken into custody and therefore on the accelerated release day calculated in accordance with section 10 of the 1998 Act, Mr Clarke signed his life licence and was released from custody under the early release scheme.

The error comes to light

[17] Over 6½ years later, on 4 December 2019, the SRC received a query from the Public Prosecution Service (PPS) in relation to Mr Clarke's eligibility for release under the 1998 Act, which had somehow arisen in the context of a bail application on the part of another individual. The query raised an issue as to Mr Clarke's eligibility because his offending had occurred at a date prior to the period covered by the early release scheme under the 1998 Act. In other words, Mr Clarke's offending was not in respect of a "qualifying offence" for the purposes of section 3(3)(a) of the 1998 Act. That was because his offences preceded the earliest relevant emergency legislation (the Northern Ireland (Emergency Provisions) Act 1973 ("the 1973 Act")) and could not therefore have been scheduled offences *when committed*, as required by section 3(7)(b) of the 1998 Act.

[18] The result of this analysis is that, at the time when Mr Clarke applied to the SRC to be released from custody, his application should have been rejected as outside the terms of the statutory early release scheme. It seems that neither the SRC nor the NIO realised this at the relevant time. In particular, the NIO could have, but did not, challenge the preliminary indication that the SRC were minded to grant a declaration of eligibility for release in Mr Clarke's case. The SRC granted the relevant declaration but now accept that they did so in error. Nevertheless, when the error came to light, the SRC themselves had no further statutory role to exercise and felt they had no statutory basis for taking corrective action.

[19] When the issue was raised with them in December 2019 the SRC immediately contacted the NIO to draw the matter to its attention. By this time, the forms used by the SRC for applications had been amended and specifically asked applicants to show that their case met the criteria set out in section 3(7) of the 1998 Act, including as to the date of the offending.

[20] I have carefully considered the explanation provided on behalf of the applicant on affidavit (by Mr Mark Larmer, a Director (Political) at the NIO) in

relation to the period of delay from the discovery of the problem in December 2019 to the date of these proceedings being commenced in April 2022. In the first instance, there was communication between the NIO and the Chair of the SRC in early 2020 to determine what had occurred, how it had occurred, and whether other cases might have been the subject of the same error. In brief compass, it seems that the Commissioners who directed release in the applicant's case had relied upon information provided in the "Crown Book" (a record generated by the Crown Court) which had indicated that the case was a "Scheduled Case." The Panel was also aware that the case had been tried by a judge alone, sitting without a jury, which may also have led them to the view that the case was indeed scheduled. The SRC's advice to the NIO, after investigating the circumstances, was that the Commissioners had not had jurisdiction to grant Mr Clarke's application; and that it was "unlikely that the same or similar errors have been made in other cases considered by the Commissioners".

[21] The SSNI was then briefed on the issue. There followed communications between the NIO and senior police officers in the summer and autumn of 2020, which later involved both the SRC and the Northern Ireland Prison Service (NIPS). The discussions and communications culminated in a case conference held on 4 February 2021 between a wide range of interested agencies (the NIO, SRC, the Police Service of Northern Ireland (PSNI), NIPS and the Department of Justice (DoJ)). It seems that at least a significant part of the purpose of these interactions was to determine whether Mr Clarke might be considered to be unlawfully at large and therefore liable to arrest without any intervention on the part of the courts. The view which ultimately appears to have been settled upon was that Mr Clarke would not be accepted back into custody solely on foot of the original warrant of committal from the sentencing court because of the existence of the life licence which had been signed by him; and that clarity by way of further court adjudication was required.

[22] On 30 November 2021, pre-action correspondence was sent on behalf of the applicant to the SRC, copied to Mr Clarke. Mr Clarke's solicitors (now McNamee & McDonnell) responded objecting that the proposed application was out of time. The response on behalf of the SRC indicated that they accepted the substance of the challenge but, being functus officio, had no further role to play.

[23] There is little by way of explanation as to why it took from February 2021 to April 2022 to issue an application for judicial review. In essence, the applicant's case is that this was a "unique and complex" case, involving (as it did) one public authority judicially reviewing another, such that it had been "important to ensure that all relevant stakeholders have been consulted, so that the [SSNI] could make an evidence-based decision as to how to move forward." The applicant has at least recognised the need for an extension of time; applied for an order extending time; and addressed the issue of delay in its grounding affidavit evidence.

History of these proceedings

[24] After the lengthy discussions with the SRC, DoJ, NIPS, and PSNI referred to above, the SSNI commenced judicial review proceedings against the SRC in relation to the lawfulness of Mr Clarke's release on licence. Pre-action correspondence was sent, as outlined above. On 15 December 2021, Mr Clarke's solicitors responded to the CSO stating that the application for judicial review was out of time; and that, in any event, Mr Clarke would oppose the grant of any relief which would have the effect of returning him to prison after having been at liberty (without incident, he contends) for now well over 10 years. There has not been any participation in the proceedings on the part of the family of Mr Fusco, who were also put on notice.

[25] The SRC have adopted a neutral stance on the issue of relief. They accepted at the pre-action stage that Mr Clarke had not been eligible to apply for a declaration under section 3 of the 1998 Act and that they did not have the power to grant Mr Clarke's application in those circumstances (albeit that not all of the proposed grounds of challenge were conceded). The SRC response also noted, however, that the SRC were now functus officio regarding Mr Clarke's case, such that the SSNI should pursue any relief in relation to his release in court.

[26] After the proceedings were commenced and leave granted, they were repeatedly adjourned, by consent of all parties (including the SSNI), on the basis that the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ("the Legacy Act") may well radically alter the landscape against which the question of relief fell to be determined. That is because that Act was intended to amend, and has now amended, the 1998 Act to widen eligibility for early release, such that (in principle) persons in the position of Mr Clarke are now eligible for release under the Act.

[27] On 20 June 2024, I made a declaration in the course of these proceedings to the effect that the SRC's decision of 13 November 2012 to grant Mr Clarke's application for early release under section 3 of the 1998 Act was unlawful, as he did not fulfil the statutory requirements for eligibility for release on life licence under the Act. This reflected an agreed position and neither the SRC, nor Mr Clarke, objected to the making of this declaration. The primary issue remaining was whether the court should grant additional relief effectively requiring Mr Clarke's return to prison. By this time, amendments had been made to the 1998 Act and Mr Clarke had made a further application to the SRC, which all parties then considered should take its course before these proceedings were concluded.

[28] The fresh application to the SRC was made on 1 May 2024, in light of the amendment of the 1998 Act which had just then come into effect. A Panel of Commissioners gave a written preliminary indication on 3 July 2024, accepting a submission made by the SSNI that it was a requirement under section 3(2) of the 1998 Act that the prisoner must be in custody at the time of the application. An oral hearing took place on 2 September 2024; and on 4 September the SRC determined that the applicant's application should be refused on the above basis. Mr Clarke challenged this by way of judicial review, giving rise to my judgment in the *Clarke* case (referred to above), which dismissed his application for judicial review.

Accordingly, the amendment of the 1998 Act has not (yet) availed Mr Clarke. In view of these developments, I expressed the view that the approach earlier adopted in these proceedings, to await the outcome of a further application to the SRC, was, with the benefit of hindsight, an unnecessary complication.

[29] This application was therefore listed for argument on final remedy, since that would have an effect on whether, and if so how, the applicant would wish to pursue a further application to the SRC (and, relatedly, whether any appeal against the decision in the *Clarke* case would or would not be academic).

[30] The applicant therefore now seeks an order quashing the SRC's decision dated 13 November 2012 and a declaration that the life licence Mr Clarke signed on 27 February 2013 is of no legal force or effect. In advancing this argument, the SSNI contends that, if such relief is granted, Mr Clarke could be returned to prison and would then be free to make a fresh application for release to the SRC on the basis of the new section 3(7A) of the 1998 Act. Unsurprisingly the notice party opposes this course. He invites the court to conclude that mandating his return to prison now would be for essentially administrative reasons and unfair in all of the circumstances.

The merits of the challenge

[31] It is unnecessary to spend much time on the merits of the challenge since, as is reflected in the declaration which has already been granted, the applicant's claim must succeed. The SSNI relied upon four grounds of challenge in his Order 53 Statement, namely (i) illegality; (ii) the taking into account of immaterial considerations; (iii) the leaving out of account of material considerations; and (iv) irrationality. In truth, they were all aspects of the same basic point, namely that the applicant was not eligible for release under the 1998 Act at the time when he was released in February 2013. That is because, at that time, the offences for which he was serving sentences were not "qualifying" offences satisfying the requirements of section 3(7)(b). The offences were not, nor could they have been, scheduled offences when committed, within the meaning of the relevant emergency provisions legislation. The earliest such legislation which is relevant for these purposes was the 1973 Act, which was granted Royal Assent on 25 July 1973 and came into effect several weeks later in August 1973. Mr Clarke committed the relevant offences in February 1973, some six months before the 1973 Act came into force.

[32] The applicant submits that the SRC failed to appropriately take into account the date of the commission of offences; or took into account a mistaken view that the offences were (or could have been) scheduled offences and therefore qualifying offences, perhaps on the basis of the date of Mr Clarke's sentencing. The SRC dispute that they simply looked at the date of sentence and have explained the error which arose on the basis set out at para [20] above. The sentencing judge having referred to the possible effect of the 1998 Act in the course of his sentencing remarks, albeit in conditional terms, may have been a further factor tending towards the view

that the offending was within the scope of the early release scheme. Nonetheless, however one classifies the public law wrong, it is clear – and not disputed – that Mr Clarke should not have been granted a declaration for release under the 1998 Act in November 2012. It is unnecessary to go beyond the finding of illegality which is reflected in the earlier declaration insofar as the merits of the case are concerned.

The court's discretion on remedy and a summary of the parties' arguments

[33] The focus is therefore upon the appropriate remedy. The parties' submissions addressed a range of well-known authorities referring to the relatively wide discretion available to the High Court in determining whether to grant a remedy, and which remedy to grant, on an application for judicial review. A number of the authorities also helpfully illuminate some of the factors which should, or may, be taken into account and which may point towards the grant, or withholding, of such a remedy. A number of these authorities are mentioned, non-exhaustively, below.

[34] In *Credit Suisse v Allerdale Borough Council* [1997] QB 306, Hobhouse LJ, giving judgment in the English Court of Appeal, said (at 355D):

> "The discretion of the court in deciding whether to grant any remedy is a wide one. It can take into account many considerations, including the needs of good administration, delay, the effect on third parties, the utility of granting the relevant remedy. The discretion can be exercised so as partially to uphold and partially quash the relevant administrative decision or act …"

[35] In the earlier case of *Nichol v Gateshead Metropolitan BC* [1988] 87 LGR 43, Taylor LJ had offered some observations on how the court should exercise its discretion, including as follows:

> "The court has an overall discretion as to whether to grant relief or not. In considering how that discretion should be exercised, the court is entitled to have regard to such matters as the following:
>
> (1) The nature and importance of the flaw in the challenged decision.
>
> (2) The conduct of the applicant.
>
> (3) The effect on administration of granting relief."

[36] The SSNI refers to these cases to highlight that an important consideration may be the upholding of principles of good administration.

[37] In this jurisdiction, *Re Russell's Application* [1990] NI 188 addressed the question of relief in the context of a prison judicial review where the applicant challenged being confined to his cell whilst prison searches were being undertaken. Dismissing the application Hutton LCJ, at 199, held that there was a principle that, in considering whether to exercise the court's discretion to grant the remedy sought by an applicant, "the court is entitled in some cases to have regard to the harmful consequences which would ensue if the relief sought were granted… and to balance those consequences against the harm which would be suffered by the applicant if the remedy were withheld." Accordingly, a balancing exercise may be appropriate in at least some cases, whether between competing interests or competing consequences depending upon whether the claimed relief is granted or withheld.

[38] Of course, in the present proceedings, each party relies on this case and suggests that the balance falls in their favour:

(a) The applicant contends that the net effect of granting the remedy he seeks would be in the public interest. Mr Clarke should be subject to the custodial sentence lawfully imposed upon him unless and until that sentence is set aside or varied, or he is validly released on licence. It is in the public interest to return Mr Clarke to custody because he should not have been released in the first place and was only released in error. This would also be in the interests of the family of the victim of the crime; and would promote fairness and legal certainty by ensuring that Mr Clarke was treated similarly to those who were correctly considered not to have been eligible for release because their offences were committed at too early a time.

(b) In contrast, the notice party submits that material harm will be caused to him if he is returned to prison. He says there would be little or no impact at all on the SSNI, or on the administration of justice, if he is not returned to prison. He relies heavily on the period of delay in bringing these proceedings and the fact that, on his case, he has lived a blameless life in the community for many years. He further contends that, if he was to be returned to prison, he could re-apply to the SRC for release on licence (relying on *Re McGuinness' Application (No 3)* [2020] NICA 53) and that this application is highly likely to be successful, rendering the whole exercise somewhat pointless.

[39] The notice party therefore asks the court not to grant any further relief over and above the declaration already granted. Such an approach would leave the consequences of the SRC's unlawful decision intact. Although it is relatively unusual for an act to be held to be unlawful yet, by reason of the withholding of a more assertive remedy, to have to be treated as having continuing legal force, this is a result which is open to the court in exercise of its discretion. (See, by way of example, Weir J's discussion of the effect of the decision and order of the Court of Appeal in the *McBride* litigation: *Re McBride's Application* [2005] NIQB 54, particularly in addressing the respondent's argument at paras [10]-[11] and in his conclusion at para [19]).

[40] In advancing this position, Mr Clarke also relies upon a number of additional factors. He contends that the court should consider whether the breach in this case was technical in nature; and also relies upon a number of cases where relief was refused on the basis that the respondent's decision, absent the legal error, would inevitably have been the same (for instance, *R v Chief Constable of Thames Valley Police, ex parte Cotton* [1990] IRLR 64). In this vein, section 18(5) of the Judicature (Northern Ireland) Act 1978 provides that:

> "… where, on an application for judicial review, the court finds that—
>
> (a) the sole ground of relief established is a defect in form or a technical irregularity; and
>
> (b) no substantial wrong and no miscarriage of justice has occurred, or no remedial advantage could accrue to the applicant,
>
> the court may refuse relief and, where a lower deciding authority has exercised jurisdiction, may make an order, having effect from such time and on such terms as the court thinks just, validating any decision or determination of the lower deciding authority or any act done in consequence thereof notwithstanding that defect or irregularity."

[41] For reasons given below, I do not consider that these additional arguments assist Mr Clarke. Another major strand of his case on remedy, however, related to the issue of delay, to which I now separately turn.

[42] It is accepted that the application for judicial review in this instance was made long after the impugned decision which is under challenge. Leave to apply for judicial review was granted but expressly without prejudice to the notice party's ability to raise the issue of delay again in the context of relief (as envisaged in *Re Laverty's Application* [2015] NICA 75, at para [21](iv) and (vi)). How ought the delay to affect the exercise of the court's discretion in relation to remedy? Again, there are arguments on both sides.

[43] The applicant relies upon the *Laverty* case (supra) and, in particular, the following passage at para [21](iii):

> "The Court may extend time for good reason. Although not stated in the legislation in this jurisdiction, consideration of good reason would include consideration of the likelihood of substantial hardship to, or substantial

> prejudice to the rights of, any person and detriment to good administration. Also included would be whether there was a public interest in the matter proceeding."

[44] As to detriment to good administration and the public interest, the SSNI further relies upon *Re Gibson's Application* [2017] NICA 77, in which Gillen LJ said the following (at paras [26]-[28] of his judgment):

> "[26] There is no doubt that courts do and should take into account in the exercise of discretion in this area the principle of legality which requires that administrators act in accordance with the law and within their powers. When they do things they are not empowered to do, this principle points towards the striking down of their illegal action even if the application in raising the point is out of time (see Schiemann LJ in *Corbett v Restormel Borough Council* [2001] EWCA Civ 330 at paragraphs [15]-[17]).
>
> [27] In particular in *Corbett's* case we note that Sedley LJ said at paragraph 32:
>
> > "How, one wonders, is good administration ever assisted by upholding an unlawful decision? If there are reasons for not interfering with an unlawful decision, as there are here, they operate not in the interests of good administration but in defiance of it."
>
> [28] Hence courts should be slow to ignore unlawfulness, for example, in the granting of a planning consent if that is proved to be the case; (see also *Corbo Properties' Application* [2012] NIQB 107)."

[45] The SSNI contends that some decisions which are unlawful should be overturned notwithstanding that the challenge to them arose very late in the day; that delay itself should not be determinative; and that this is one such case. Although time limits are designed to ensure legal certainty and promote good administration, it should also be recognized that allowing an unlawful decision to stand is itself prima facie contrary to the principle of good administration. The matter therefore needs to be looked at in the round on a case-by-case basis.

[46] For his part, the notice party relies upon authorities (such as *Re Aitken's Application* [1995] NI 49, at 56c-d) which indicate that the court will expect a cogent explanation to be presented dealing with the entire period of delay before it will permit a delayed judicial review to proceed. He contends that there are unexplained

periods of delay in this case. He further contends that he has been prejudiced by the delay: firstly, because he may have pursued other remedies open to him if the issue had been raised at an earlier time (namely, a judicial review challenge to the refusal to exercise the RPM in his favour); and, secondly, because he may now have to face a return to prison when he is old and infirm.

Consideration

[47] I firstly reject any suggestion that the legal error on the part of the respondents in the present case was merely "technical" in nature or immaterial to the outcome for Mr Clarke. On the contrary, the clear position is that the SRC (albeit unwittingly and inadvertently) acted contrary to the statutory scheme which governed both their functions and Mr Clarke's eligibility for release. In doing so, they granted a declaration which they were not legally entitled to grant; and to which Mr Clarke (at that time) had no legal entitlement. The reliance on cases where the legal error was entirely technical or would have made no difference to the outcome does not assist the applicant. In truth, the nub of this argument on his behalf is that, if he were to apply again to the SRC now, he would inevitably be granted a fresh declaration; but that is a separate point, to which I return below.

[48] In light of the legal error which occurred in this case, the starting point (subject to the discussion of delay and prejudice below) is that the clear illegality which has been identified should be remedied. That arises not only from first principles of public law, but also of criminal law. As to the former, the usual course when an ultra vires act has been identified in a judicial review challenge is the quashing of that act: see, for instance, the observation of Lord Hoffman in *R (Edwards) v Environment Agency* [2008] UKHL 22, at para [63], that the discretion in relation to remedy is to be exercised judicially "and in most cases in which a decision has been found to be flawed, it would not be a proper exercise of the discretion to refuse to quash it"; and the further cases to similar effect cited in Fordham, *Judicial Review Handbook* (7th edition, 2020, Hart) at sections 24.3.14 and 24.3.15. As to the latter, there is also a compelling public interest in the sentences passed by the criminal courts being given effect. In this case, the lengthy tariff imposed upon Mr Clarke, which (absent the early release scheme provided for in the 1998 Act) he would be required to serve before being eligible for release on licence, was the period which the court deemed appropriate to satisfy the demands of retribution and deterrence in the particular circumstances of the heinous crime of which he had been convicted. The courts have recognized that the early release scheme provided for in the 1998 Act is an extraordinary departure from the normal demands of criminal justice (see, for instance, *Re McGuinness' Application (No 1)* [2020] NICA 54, at para [32]). For that reason, I consider that it is to be strictly applied. Absent the delay which is present in this case, the very clear starting point for the court's consideration would be that something particularly exceptional would be required before the notice party could avoid the grant of relief which the SSNI seeks.

[49] The delay in bringing the proceedings undoubtedly complicates the matter, since the onus shifts to the applicant to justify an extension of time. As noted above (see paras [43]-[44]), since the principle of good administration is itself a factor in the consideration of whether time should be extended, the court's approach to delay can be a finely balanced decision where – as here – there is significant delay but also an unanswerable case of unlawfulness in respect of the challenged act, which may be said to have unfairly advantaged the beneficiary at the expense of the public interest.

[50] Mr Clarke relies upon two periods of delay on the part of the SSNI in the bringing of these proceedings as having no adequate explanation and having given rise to prejudice on his part: first, the delay between his release on life licence in February 2013 and the error coming to light in December 2019; and, second, the delay from that point until proceedings were initiated in April 2022.

[51] I am not particularly troubled by the delay from February 2013 to December 2019. Although an onus rested on the NIO to conscientiously represent the public interest when making its submissions to the SRC as to the applicant's eligibility and suitability for release, it is clear that this issue was simply missed. A share of the responsibility for this error must also be apportioned to both the SRC and to the applicant and his representatives at the time who advanced his application. Several factors (see para [20] above) may have contributed to the failure to correctly assess the issue of eligibility. The SSNI could not reasonably have been expected to act when he was unaware of the issue giving rise to these proceedings.

[52] The delay from December 2019 until the initiation of the proceedings is more problematic for the applicant. I accept the thrust of the point made at para [23] above, namely that the situation was highly unusual and potentially sensitive and that the SSNI therefore wished, appropriately, to consult with a range of other bodies, to take advice, and to explore a range of avenues before initiating legal proceedings which might be prolonged and costly. In principle, I consider that the SSNI had good reason not to rush to court (although, I am bound to say, I consider that that was the almost inevitable outcome of the process of discussion and engagement upon which he then set out). The key issue in this case is therefore the issue of prejudice.

[53] In my view there is no significant, or indeed any, prejudice to third parties *other* than Mr Clarke which has arisen as a result of the delay in bringing the proceedings. In relation to Mr Clarke, I consider that there is considerable force in the SSNI's point that the delay has in fact worked in his favour, rather than prejudicing him. Mr Clarke has been at liberty for many years when he ought not to have been. If the error on the part of the SRC had been identified at a much earlier stage, Mr Clarke would either not have been released at all (unless the RPM was exercised in his favour) or would have had his release challenged and been returned to prison at a time when it was not open to him to make a further application to the SRC. He now has that facility available to him.

[54] In terms of prejudice to him, the notice party contends that he has been prejudiced because, had the challenge to his early release been intimated earlier, he would have pursued judicial review of the refusal of the RPM in relation to his case in 2011. I find this argument difficult to follow because the application for the RPM was made *before* the application for early release (because the applicant wished not to have to serve even the two years of his sentence usually required under the 1998 Act before reaching his accelerated release day: see section 10(5)). I also have significant doubts about the prospects of success of any challenge to the non-exercise of the RPM in Mr Clarke's favour by Her Majesty. (A similar type of challenge was rejected in *Re McGeough's Application* [2012] NICA 28, in which Hart J, giving the judgment of the Court of Appeal, emphasized at para [14] that the decision-maker "should be afforded a wide degree of latitude" in making a decision on the grant of the RPM and "that it is only in the clearest of cases that the courts should interfere, and should only do so where the applicant surmounts a high factual threshold.") However, in any event it remained, and remains, open to the applicant to request the exercise of the RPM in his favour (on a different basis from previously) and to seek to challenge any further refusal. Such prejudice as this factor presents, if any, is therefore minimal.

[55] For the avoidance of doubt, I should resolve one further issue which arose between the parties. The applicant contended that the pre-action correspondence sent on 9 August 2011 by Mr Clarke's legal representatives to the CSO indicated a contemporaneous awareness of his ineligibility for release by the SRC because they relied upon the fact that his case fitted "within the spirit but not the strict terms" of the early release scheme established under the Belfast Agreement. The applicant therefore asserted that the notice party's legal advisers in 2011 "appear to have been aware that Mr Clarke was not eligible for release by the SRC." Had I been persuaded that this was correct – essentially that the applicant had knowingly applied to the SRC on a false basis – it would be a factor which could appropriately weigh heavily against any exercise of discretion in his favour at this stage.

[56] However, I have not been persuaded that the 2011 correspondence can bear the weight placed upon it in the SSNI's submissions. The much better reading of the exchanges is that an exercise of the RPM was being sought *not* because the applicant or his legal representatives had realised that his offending pre-dated those offences which qualified for the early release scheme but, rather, on the basis of an argument that the applicant had already served more than two years in prison for other Troubles-related offending (the murder of Ms O'Neill) and therefore should not be required to serve a further two years for additional, historic Troubles-related offending. This scenario was also referred to in the correspondence and, reading it as a whole, it seems relatively clear to me that this is the alleged 'anomaly' which was being advanced in the applicant's behalf.

[57] I am not unsympathetic to a number of points made on Mr Clarke's behalf. He is now relatively elderly (aged 73) and is suffering, or has suffered, from a number of health difficulties which I have taken into account but do not need to set

out here. He contends that, had he served out his tariff at an earlier age, imprisonment would not have been as hard on him as it would be now. Of course, it is also possible to posit an alternative interpretation, namely that he has had the benefit of having his liberty in the later prime of his life when he ought properly to have been serving a sentence for his crimes. Indeed, his tariff is only due to expire in 2036; and he was sentenced at age 59 when the sentencing judge would have been aware that he would be of an advanced age when he became eligible for release on parole. Age and infirmity are also not reasons why a sentence of imprisonment should not be given effect. The criminal courts in this jurisdiction regularly sentence individuals around the age of the applicant to custodial terms (often for historic offences); and there are a significant number of life and determinate custodial sentence prisoners of similar age in prison. The applicant's health issues are not sufficiently acute to render this a particularly significant issue in this case; and the prison system has in place arrangements and procedures to cope with a variety of health issues where necessary or appropriate.

[58] The final issue relates to the notice party's claim that he can and will inevitably be released by the SRC in the event of making a further application in light of the amendments made to the 1998 Act by the Legacy Act. Mr Clarke contends that he therefore is (or will be) immediately entitled to further release under the 1998 Act. However, the court cannot necessarily assume this to be correct. It might well be the case that the SRC, if and when properly seized of a further application from Mr Clarke, may consider it appropriate to grant a declaration of eligibility for release at this time. But for me to assume this to be so would be to usurp the proper function of the Commissioners and to do so on a scant evidential basis. Mr Clarke avers that any concerns on the part of the SSNI as to his representing a danger to the public are "fanciful." However, the onus is not on the SSNI to show that Mr Clarke is dangerous. Rather, the onus is on him to show that he qualifies for release under the 1998 Act (see *Re McGuinness' Application (No 3)* (supra), at para [17]) in a scheme that has at its heart the protection of the public as a fundamental consideration and in which the SRC's judgment and skill is critical (see *Re McGuinness' Application (No 1)* (supra), at para [20]).

[59] It is right that the SSNI has not taken steps to suspend Mr Clarke's licence under section 9(2) of the 1998 Act on the basis that he has broken or is likely to break a condition imposed under section 9(1). However, the applicant has not conceded that Mr Clarke has been of good character in the period since his release and, indeed, the papers disclose that some concern has arisen in respect of the commission of offences prosecuted by His Majesty's Revenue and Customs. Mr Clarke's affidavit confirms that in 2016 he received a sentence of two years' imprisonment for revenue offences relating to fuel; and in 2020 received a suspended sentence for a money laundering offence connected to the original revenue offence. Whether, and the basis upon which, an objection may be made to a further application (which could be on the basis of closed material of which this court is not aware) are matters of speculation. If there is a proper basis for a further application to be refused, Mr

Clarke should not be at liberty. If there is not, he may well be released in short order as he hopes. That, however, is a judgment for the Commissioners.

[60] Despite the fact that I have rejected the argument on behalf of the SSNI referred to at para [55] above, nonetheless in view of the factors mentioned at paras [51]-[54] above I would not consider that an order of certiorari should be refused on the grounds of delay or prejudice. Insofar as necessary, I am also prepared to further extend time for the purpose of the applicant's claim for certiorari. Ultimately, I consider that this case falls into the category – such as did *Re Corbo Properties' Application* and a number of the cases cited by Horner J in his judgment in that case – where it is not fatal to the grant of a quashing order that there has been a substantial delay in the institution of the proceedings; and the public interest requires an effective remedy to nonetheless be granted.

[61] The notice party has been convicted, on two occasions, of the most vile sectarian attacks, robbing innocent citizens of their lives, without thought for their dignity or the pain and hardship which would be caused to their loved ones. He now seeks to avoid – indeed, further avoid – the duly imposed punishment for some of his crimes, in the absence of having legitimately and validly availed of the extraordinary scheme provided by Parliament to facilitate early release only in certain circumstances and under certain conditions.

[62] In the exercise of the court's discretion, I accede to the applicant's claim for additional relief. This appears to me to be the appropriate course as a matter of principle to reflect society's abhorrence of the notice party's offending; in view of the advantage (rather than prejudice) which has accrued to him during the period when the SRC's error went undetected or unremedied; and to give appropriate effect to the order of the sentencing court, subject only to the correct operation of the 1998 Act (as amended) which is properly a matter for the SRC to determine.

Conclusion

[63] For the reasons given above, I have concluded that it is appropriate to grant an order of certiorari to quash the SRC's decision granting Mr Clarke a declaration that he was eligible for relief in accordance with the provisions of the 1998 Act; and, further, to quash the licence upon which the applicant was released, which was predicated upon the SRC's declaration. The effect of this will be that the applicant no longer has a right to be released and is liable to be returned to prison. I would also intend, therefore, to give directions as to the applicant's surrender to custody.

[64] However, I will refrain from making the final order in this case for a short period of time:

(1) to permit the SSNI to make enquiries as to the practical arrangements to be incorporated in such directions as are mentioned above; and

(2) to enable the notice party:

(a) to put his affairs in order; and/or

(b) as I anticipate might be likely, to make an application for a stay of the order of this court, pending consideration and/or prosecution of an appeal (in relation to this decision and/or the judgment in the earlier *Clarke* case). In principle, I am sympathetic to the grant of a stay in the circumstances.