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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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AND IN THE MATTER OF AN APPLICATION BY ROBERT CLARKE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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

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

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SCOFFIELD J

Introduction

[1] By these proceedings the applicant, Robert Clarke, challenges the decision of the Sentence Review Commissioners for Northern Ireland (SRC) ("the Commissioners") made on 4 September 2024 by which the Commissioners refused his application for early release under section 3(1) of the Northern Ireland (Sentences) Act 1998 ("the 1998 Act").

[2] The factual background to this determination (which is summarised briefly below) is unusual. However, the issue between the parties turns on a relatively net issue of law, namely whether at the time of his recent application to the Commissioners the applicant was serving a sentence of imprisonment for the purposes of section 3(2) of the 1998 Act.

[3] Mr Lavery KC appeared for the applicant with Ms Horscroft; Mr Coll KC appeared for the Commissioners with Mr McCleave; and Mr McGleenan KC

appeared with Mr Reid for the Secretary of State for Northern Ireland ("the Secretary of State"), who was represented as a notice party in the proceedings. I am grateful to all counsel for their helpful written and oral submissions.

Factual background

[4] On 28 February 2011, the applicant was convicted at Belfast Crown Court of murder and of possession of firearms and ammunition with intent to endanger life. He was sentenced to life imprisonment, along with a further sentence of 20 years' imprisonment, on 8 April 2011. The date of the offending to which these convictions relate was 3 February 1973. His tariff period for the purposes of the life sentence was set at 25 years, meaning that his tariff expiry date is 27 February 2036.

[5] On 19 July 2012, the applicant made an application to the Commissioners for a declaration that he was eligible for release under section 3(1) of the 1998 Act in respect of the two sentences mentioned above. On 13 November 2012 the Commissioners made such a declaration. Some months later, on 27 February 2013, two years after being taken into custody, the Secretary of State issued to the applicant a licence for release, which he signed. He was released from custody. This was under the accelerated release scheme which was introduced further to the signing of the Belfast (Good Friday) Agreement.

[6] Much more recently, it came to light that the decision granting the applicant's declaration of eligibility for early release was unlawful. That is because the applicant's offending occurred at a date which *preceded* the period of offending designed to be the subject of the early release scheme set up pursuant to the Belfast Agreement and legislated for in the 1998 Act. In the words of the Act, his offences were not 'qualifying offences.' The Secretary of State therefore commenced judicial review proceedings ("the Secretary of State's case") seeking to have the decision relating to the applicant's release quashed. (The applicant's licence has not been suspended by the Secretary of State pursuant to section 9(2) of the Act in the meantime.) In those proceedings, the Commissioners essentially take a neutral stance. The applicant strongly opposes 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 well over 10 years. His opposition to the grant of intrusive relief in the Secretary of State's application is founded primarily upon the delay in those proceedings being brought and the prejudice to him arising from them having been brought at such a late stage.

[7] I made a declaration on 20 June 2024 in the Secretary of State's case to the effect that the SRC's 2012 decision granting a declaration of eligibility for release was unlawful in the circumstances described above. The issue of whether any further relief should be granted remains undetermined in those proceedings for the following reason.

[8] All parties in the Secretary of State's case considered that amendments to the early release scheme contained within the 1998 Act – by means of new provisions in the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ("the 2023 Act") – were relevant to this case and were likely to significantly alter the landscape in which the court's final determination in relation to relief in the Secretary of State's application was to be taken. As appears further below, the 2023 Act *extended* the early release scheme which is at issue in these proceedings so that, in principle, the applicant *is now eligible* to avail of it in respect of his offences committed in early 1973. When those amendments came into effect, the applicant immediately applied to the Commissioners for a further declaration of eligibility for release. (The Commissioners, understandably, were unwilling to accept and process such an application in advance of the coming into effect of the amendments made by the 2023 Act). By agreement between the parties, the issue of final relief in the Secretary of State's case has been adjourned in order to see the outcome of the applicant's further application to the SRC so that its relevance to the overall exercise of the court's discretion may be considered and, as necessary, be the subject of submissions.

[9] The applicant's further application was made on 1 May 2024. In their written preliminary indication dated 3 July 2024, the Panel of the Commissioners stated as follows:

> "The panel accepts the Secretary of State's submission that it is a requirement of section 3(2) that the applicant must be a prisoner in custody at the time of the application."

[10] Whether this is correct as a matter of statutory interpretation is the crux of the issue between the parties in this application. There was an oral hearing before the Commissioners held on 2 September 2024; and both the applicant and Secretary of State provided submissions. The Commissioners substantively determined that the applicant's application was refused, agreeing with the Secretary of State's submission that, to be eligible to apply, he would need to be physically serving his sentence within the jurisdiction (ie not released on licence in the community). The SRC decision, of 4 September 2024, is the decision which is impugned in these proceedings. It indicates that the Panel of Commissioners did not consider that the condition in section 3(2) of the 1998 Act that the prisoner was "serving a sentence of imprisonment in Northern Ireland" was met. The decision did not go on to examine whether or not the applicant met the remaining conditions which required to be met for a declaration to be granted.

The panel's decision

[11] The key portions of the Panel's decision are perhaps those at paras 10 and 14 of its decision, in the following terms:

"10. The Panel does not accept [the applicant's] submissions. Section 3 of the Act explicitly requires that the Commissioners shall grant the application "if (and only if)" the prisoner is serving a sentence of imprisonment, and the Panel takes the view that in ordinary language the word "imprisonment" must connote being in prison. According to the new Shorter Oxford Dictionary, for example, imprisonment is "the fact or condition of being imprisoned." Consequently, the Panel is not importing the words "in custody" into the statute. The concept of custody as a fact or condition of "imprisonment" is already in the language of the statute. In adopting an ordinary language approach, the Panel is not taking a restrictive approach towards the statute, nor is it disregarding the principle of interpretation that any interference with the liberty of the subject requires clear authority of law. It is simply giving effect to what the statute says.

…

14. Mr Kennedy [for the Secretary of State] also submitted that in interpreting the meaning to be given to the words "serving a sentence of imprisonment" in section 3(2) of the Act it is important to have regard to the totality of section 3 and to the whole context in which prisoners may apply for a declaration that they are eligible for release. The foundation of an application under section 3 of the Act is for a declaration that the prisoner is "eligible for release" in accordance with the provisions of the Act. The overall structure of the statutory scheme provides for release on licence following a declaration of eligibility. When it comes to section 3(2) therefore what has to be considered is whether or not the applicant can qualify for release from imprisonment rather than release from serving his whole sentence, which in the case of a life sentence would include the licence period as well as the custodial period. It is submitted that it is therefore a clear requirement of section 3 that the applicant must be in custody before a declaration can be granted by the Commissioners. The Panel accepts this submission."

Relevant statutory provisions

[12] Section 3(1)-(6) of the 1998 Act is in the following terms:

"(1) A prisoner may apply to Commissioners for a declaration that he is eligible for release in accordance with the provisions of this Act.

(2) The Commissioners shall grant the application if (and only if)—

(a) the prisoner is serving a sentence of imprisonment for a fixed term in Northern Ireland and the first three of the following four conditions are satisfied, or

(b) the prisoner is serving a sentence of imprisonment for life in Northern Ireland and the following four conditions are satisfied.

(3) The first condition is that the sentence—

(a) was passed in Northern Ireland for a qualifying offence, and

(b) is one of imprisonment for life or for a term of at least five years.

(4) The second condition is that the prisoner is not a supporter of a specified organisation.

(5) The third condition is that, if the prisoner were released immediately, he would not be likely—

(a) to become a supporter of a specified organisation, or

(b) to become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland.

(6) The fourth condition is that, if the prisoner were released immediately, he would not be a danger to the public."

[13] As provided for in section 3(3), to apply for early release under the scheme, the prisoner must be serving a sentence for a 'qualifying offence.' That concept was initially defined by section 3(7) and, in brief, it meant an offence committed before

10 April 1998 which, when committed, was a 'scheduled offence' (within the meaning of the Northern Ireland (Emergency Provisions) Act 1973 ("the 1973 Act") or later similar legislation) and which had not be 'de-scheduled' by the Attorney General for Northern Ireland. The applicant's offences were committed at a time before the scheduled offences regime was introduced, later in 1973. (The 1973 Act received Royal Assent on 25 July 1973 and came into force two weeks later in August 1973.) When they were committed the applicant's offences were not, therefore, and could not have been scheduled offences, as required by the first condition set out in section 3(3) of the 1998 Act.

[14] However, section 48 of, and Schedule 12 to, the 2023 Act inserted a new sub-section (7A) into the 1998 Act which extended the meaning of the term "qualifying offence." These provisions came into force on 1 May 2024. The definition of "qualifying offence" now includes an offence committed between 1 January 1966 and 8 August 1973 which arose out of any conduct forming part of the Troubles and which is certified by the Director of Public Prosecutions (DPP) as an offence which, *if* it had been committed in Northern Ireland on 8 August 1973, *would* have been a scheduled offence within the meaning of the 1973 Act. Although no such certificate has been issued by the DPP in relation to the applicant's offences, it is anticipated that such a certificate is likely to be issued.

[15] Reference is made below to a variety of other provisions of the 1998 Act. For the moment, however, it is necessary only to further mention section 12(3), which is in the following terms: "A life prisoner is a prisoner serving a sentence of imprisonment for life."

[16] In argument, reference was also made to a similar definition in the interpretation provisions of the Life Sentences (Northern Ireland) Order 2001 ("the 2001 Order"), at Article 2(2), as follows:

> ""life prisoner" means a person serving one or more life sentences;
>
> "life sentence" means either of the following imposed for an offence, whether committed before or after the appointed day, namely—
>
> (a) a sentence of imprisonment for life; …"

Summary of the parties' arguments

[17] As appears from the brief summary of the case above, the key issue in dispute is the definition of a "prisoner [who] is serving a sentence of imprisonment for life in Northern Ireland" and whether or not the applicant is such a person, given that he is presently released.

[18] The applicant contends that the Commissioners' interpretation of this phrase is a restrictive one, which is neither justified by the ordinary language in the statute nor fails to have regard to the principles discussed and applied by the Court of Appeal in *Re McGuinness's Application* [2020] NICA 54. In the *McGuinness* case in the Court of Appeal, the court applied an interpretation which gave rise to the least interference with physical liberty, in the absence of clear wording to the contrary in the statute (see para [30] of the judgment). The applicant submits that the same approach should apply to section 3(2) of the 1998 Act. He further submits that the approach adopted by the Panel involves it implying words into the statute (such as the words "physically in custody") in circumstances where this is not warranted: see, for instance, the discussion at para [39] of *Arthurs v Chief Constable of the PSNI* [2024] NICA 70. In addition, relying upon *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, particularly at para [11], he contends that provisions such as this should be interpreted to give effect to the Belfast Agreement, generously and purposefully. Whether viewed through the prism of the principles relating to statutory interpretation, the principle against doubtful penalisation or the principle that constitutional provisions should be interpreted purposively, the applicant submits that his preferred construction is the correct one.

[19] In its decision, the Panel drew a distinction between life sentence prisoners serving their tariff period and those on licence. It considered that an applicant could not qualify for release under the 1998 Act where they were on licence, as the scheme is structured *to release* a successful applicant upon licence. In response, the applicant accepts that he has not been released on a valid licence (as indicated by the declaration already made by the court and referred to at para [7] above). However, he also relies on para [22] of the Court of Appeal's decision in the *McGuinness* case (supra) in which the court observed: "Once convicted the prisoner is always serving his life sentence whether in custody or on licence." In that case, the court concluded that a period of release on licence (under the 1998 Act) still constituted serving the sentence for the purposes of tariff expiry under the 2001 Order. The applicant also relies upon the Supreme Court decision in *Morgan and others v Ministry of Justice* [2023] UKSC 14, in which the custodial period and licence periods of a sentence were each viewed as separate manners of execution of the sentence (see para [114] of the judgment of Lord Stephens).

[20] For their part, the Commissioners distinguish the *McGuinness* decision upon which the applicant relies on the basis that it concerned the operation of the 2001 Order and, crucially, was not concerned with the meaning or effect of section 3 of the 1998 Act. In the respondents' submission, *McGuinness* does not assist in this case at all. Looking at the matter from first principle, the Commissioners say that the applicant has not identified any lawful basis for his absence from prison. The decision giving rise to his release has been declared unlawful but, as yet, neither that decision nor the consequent licence have been set aside. The Commissioners' somewhat laconic submission as a result is that, "This necessarily gives rise to a conceptual difficulty…" They submit that the applicant cannot be eligible to apply for release under the 1998 Act when he is ostensibly *already* released on licence under

that Act. In any event, the Commissioners submit that their conclusion is entirely consistent with the wording used in section 3(2) and with both the overarching scheme and provisions of the 1998 Act.

[21] The Secretary of State, who appears in this case as an interested or notice party, supports the position of the SRC (which accords with the case he presented to the Panel at the oral hearing in the applicant's case). He argues that the Panel reached their decision on the basis of the ordinary language of the statute; properly distinguishing the *McGuinness* case which deals only with the 2001 Order; and construing section 3 in the full context of the 1998 Act. He further submits that the Panel was right to do so.

Is the applicant a prisoner serving a sentence of imprisonment?

[22] The Secretary of State's submissions before the SRC drew attention to the fact that section 3(2)(b) of the 1998 Act uses the term "prisoner"; and that this is to be contrasted with, for example, sections 9 and 11 of the Act which use the term "person" in relation to someone who had been released on licence. In addition, rule 17(1) of the Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998 (SI 1998/1859) ("the SRC Rules") indicates that "hearings shall be held at the prison where the person concerned is detained." The information in Part 1 of Schedule 3 to the SRC Rules also states that the Secretary of State must provide details of the "prison" in which the person concerned is detained.

[23] Reliance upon the provisions of the SRC Rules to which reference has been made cannot be determinative. I was sympathetic to Mr Lavery's submission that the Rules cannot fundamentally alter the meaning and effect of the parent Act under which they are made. Nonetheless, sometimes secondary legislation can shed light on the meaning of, or intention behind, its enabling legislation. *Bennion on Statutory Interpretation* (7th edn, LexisNexis) ("*Bennion*") notes at section 24.18 that:

> "Delegated legislation made under an Act may be taken into account as persuasive authority on the legal meaning of the Act's provisions, especially where the delegated legislation is roughly contemporaneous with the Act."

[24] In this case, the Act was passed on 28 July 1998 and the SRC Rules were made and laid before Parliament on 30 July 1998, coming into force the next day. The provisions of the Rules certainly support the respondents' position. However, it is undoubtedly the case that, in the vast majority of instances where release is sought under the 1998 Act, the applicant for a declaration will be (or will have been) incarcerated at the point of the application to the SRC. It is unsurprising, therefore, that the standard procedural provisions assume that to be the position. Whilst the Rules lend some persuasive weight to the respondents' construction, they cannot be determinative of the legal question whether section 3(2) allows for a different scenario, which is likely to be highly unusual (as are the facts of this case).

[25] The use of the word "prisoner" and the phrase "serving a sentence" are also insufficient of themselves to resolve the issue which arises in this case. I accept Mr Coll's submission that, in their ordinary and natural meaning, these would be understood to refer to a person who was actually in prison on foot of a sentence of imprisonment. However, the words are capable of having a less literal meaning than that, as the discussion in the *McGuinness* case shows. For instance, it is clear that an offender may be said to be serving a sentence in certain circumstances where he or she is not confined within the four walls of one of His Majesty's prisons, perhaps because they are benefiting from a temporary release scheme or even because they have been released on licence.

[26] On the other hand, the *McGuinness* case is not on all fours with the present situation. In that case, the Court of Appeal found that release on licence under the 1998 Act did not stop the tariff period running for the purpose of calculation of the prisoner's tariff expiry. Even though the prisoner there (Michael Stone) had been released under the 1998 Act, he was still serving his life sentence, albeit not confined to prison during that period. The question in that case was whether, whilst released on licence, Mr Stone was still serving part of his sentence *for the purposes of Article 5(1) of the 2001 Order*.

[27] The Court of Appeal also considered that the same rationale would apply where the prisoner was conditionally released from prison for some other reason (see para [26] of the judgment). In the same way, I consider that a prisoner who was released on licence pursuant to a temporary release scheme under rule 27 of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 ("the 1995 Rules") would not be excluded from applying for a section 3 declaration from the SRC under the 1998 Act. That might arise, for example, where the prisoner had been released for medical treatment or some other exceptional reason under rule 27. He or she would still be serving their sentence in those circumstances.

[28] Mr Coll's answer to that point, however, was persuasive. First, he made the prosaic point that Mr Clarke is not in that situation, so it need not trouble the court on the facts of this case. Insofar as the analysis might shed light on the key issue of construction in this case, Mr Coll secondly distinguished a case where the individual was released on licence, as of right, so long as he or she abides (and remains likely to abide) by the conditions of his licence from temporary release under rule 27 of the 1995 Rules. In the latter case, the prisoner may be recalled to prison *at any time* whether the conditions of his release have been broken *or not* (see rule 27(3)). For those reasons, the prisoner remains subject to the control of the prison governor. Indeed, he can be disciplined for an offence against prison discipline for failing to comply with a condition of his temporary release (see rule 38(11)). For these reasons such a person may be viewed as still being in detention in prison, or at least in a materially different situation from a prisoner released on licence. Mr Coll was therefore inclined to accept that the Panel may have gone further than necessary in the expression of its reasoning as to why the applicant did not fall within the

purview of the statutory scheme. It may not be necessary for an applicant to be physically confined in prison (although that need not be decided in this case) but, as Mr Coll submitted, someone ostensibly released on licence under the 1998 Act cannot apply for *another* licence under the same scheme whilst released.

[29] Returning to the wording of section 3(2), a significant point made by the SRC and Secretary of State is that not only is the word "prisoner" used there but, in addition, it is specifically used in contradistinction to a "person" (who is not detained) which is the term used in other provisions of the Act. This is another persuasive point in the respondents' favour, which indicates an intention to use the word "prisoner" in the ordinary, literal sense referred to at para [25] above.

[30] In the 2001 Order, it is clear that someone on life licence may still be a "life *prisoner*" (see the definition provisions set out at para [16] above). Although they have been released into the community they can properly still be so called because they have been subject to a sentence of life imprisonment and are liable to recall to prison. Put another way, they are a prisoner conditionally released (for the time being and subject to good behaviour and compliance with their licence terms).

[31] I was initially unattracted to the suggestion (accepted by the Panel at para 13 of its decision) that there was a distinction to be drawn between the definition of "life prisoner" in the 2001 Order and that of a "life prisoner" in the 1998 Act. However, there are some differences in the two provisions. Section 12(3) of the 1998 Act refers to a "prisoner serving a sentence of imprisonment for life." Mr Coll submitted that the addition of the words "of imprisonment" emphasises the need for incarceration under the 1998 Act in order to qualify. He further submitted that the definitions in Article 2(2) of the 2001 Order used the word "person", which was absent from the 1998 Act save in circumstances where it was clear that the individual had already been released on licence, so indicating that the definition in the 2001 Order was somewhat looser than that in the 1998 Act. Again, there may be some indicators in these modest differences which point towards the SRC's construction being the correct one; but none of them is sufficient to put the matter beyond doubt or ambiguity.

[32] I also bear in mind the fundamental point made by the respondents that the 1998 Act and 2001 Order are separate statutory schemes, made for separate and distinct purposes, which overlap but do not interlock. In particular, the 1998 Act pre-dated the 2001 Order and should be construed on its own terms. The approach taken in the 2001 Order may therefore be of limited, if any, relevance to the issue of construction which arises in this case in relation to the 1998 Act.

[33] In the final analysis, I consider that when one construes the key phrase in section 3(2) in light of the purpose and context of the statutory scheme of the 1998 Act as a whole, it is ultimately clear that the respondents' construction is the correct one. That is for the following reasons [with italicised emphasis added to quoted provisions of the Act]:

(a) The 1998 Act is quintessentially about the accelerated *release* of prisoners. That is clear, initially, from the provisions of the Belfast Agreement which underpin it (paras 1 to 5 of the section entitled, 'Prisoners'). The agreement envisaged "an accelerated programme for the *release* of prisoners" which would provide for the bringing forward of "*release* dates of qualifying prisoners", subject to a backstop of release for any qualifying prisoners "who *remained in custody* two years after the commencement of the scheme."

(b) This purpose is reflected in the long title of the 1998 Act, which is "An Act to make provision about the *release* on licence of certain persons serving sentences of imprisonment in Northern Ireland."

(c) The application to be made under section 3(1) is for a declaration that the prisoner "is eligible for *release in accordance with the provisions* of this Act."

(d) Very significantly, the third condition to be satisfied before granting a declaration, set out in section 3(5), is that "*if* the prisoner were *released immediately*" he would not be likely to become a supporter of the specified organisation or become involved in terrorism.

(e) In the case of life sentence prisoners, the fourth condition similarly requires an assessment of the danger he might pose to the public if he "were *released immediately*."

(f) The respondents also laid emphasis on the phrase "serving a sentence of imprisonment … *in Northern Ireland*" in section 3(2)(a) and (b). This must add something to the condition that the sentence was passed in Northern Ireland (set out in section 3(3)(a)). That is more consistent with the prisoner being in a prison within Northern Ireland rather than simply residing within the jurisdiction.

(g) In addition to the indications within section 3 itself that all that the Act contemplates is the release of persons currently in detention in prison, there are other provisions of the Act which are consistent with this. For instance:

    (i) Section 4(4) provides that if a fixed term prisoner is released on licence under that section, his sentence shall expire (and the licence shall lapse) at the time when it would have done had he not been released. Mr Coll submitted that this provision is only necessary if, in its absence, the individual would not be viewed as serving his sentence for the purposes of the 1998 Act once he had been released. (I accept that the absence of a similar provision in section 6 in relation to the custodial period for life prisoners appears anomalous but that may simply be because a life sentence can never be said to expire in the same way in which a determinative custodial sentence can).

(ii) Section 6, which deals with life prisoners, refers, in section 6(2), to the prisoner's "right to be *released* on licence" and makes further practical arrangements for that in section 6(3).

(iii) Section 8 makes provision for the Secretary of State to apply to the SRC for the revocation of a declaration granted under section 3(1) in certain circumstances *after* the grant of that declaration but *before* the prisoner is actually released. Again, this proceeds on the basis that the declaration will be granted to someone currently in custody.

(iv) Section 10 makes provision for accelerated release where a declaration has been granted but the day on which the prisoner has a right to be released falls after the "accelerated release day" (set as the day two years after the Act comes into force for sentences which pre-date the Act and as two years after the sentence commenced for sentences which post-date the Act). This is very clearly predicated on the situation of prisoners who are actually detained walking free.

(v) I have already mentioned above the fact that the word "prisoner" is consistently used in the 1998 Act to refer to someone not yet released on licence, whereas the word "person" is used in sections 9 and 11 to refer to someone who has then been released on licence. The consistency in relation to this is striking and in this instance is sufficient to displace the suggestion that the word "prisoner" has a more technical or artificial meaning than its ordinary and natural meaning in this context.

[34] There is a further point which is, in substance, addressed in para 14 of the Commissioners' decision. Where a life prisoner had been released on life licence, there would be no need for him to apply to the SRC for an accelerated release licence under the 1998 Act. Moreover, were he to do so, and be granted such a licence, he would not be "released" from anything in any meaningful sense. He would not need to be released from custody, as he was already at liberty. Significantly, however, I do not believe that he could thereby secure release from the terms of his life licence (assuming these to be more onerous than the basic, and exclusive, list of conditions contained in section 9(1) of the 1998 Act). As the Commissioners said, the applicant is not seeking "release from serving his whole sentence." There is nothing in the 1998 Act to suggest that it would have this effect.

[35] For these reasons I have been convinced that the proper construction of the critical phrase in section 3 is as the Commissioners have found it for the purposes of the Mr Clarke's application. The key to that is construing the phrase in its full statutory context. Such an approach is further supported by the persuasive indicators mentioned at paras [24], [25], [29] and [31] above.

[36] I have also considered whether any of the submissions made by the applicant should lead to a contrary result or lead the court to give a different construction to the critical phrase. I have not been persuaded that this is either necessary or appropriate for the reasons briefly outlined below.

[37] I accept the respondents' submission that the *McGuinness* case is not of particular assistance for present purposes. It relates to tariff expiry for the purposes of the 2001 Order. The 2001 Order post-dated the 1998 Act and, whilst both measures are concerned with criminal justice, they are only loosely related and could not be said to form part of the same statutory scheme. As emphasised in *Re McClean's Application* [2005] UKHL 46; [2005] NI 490, at para [5] of the opinion of Lord Bingham, the 1998 Act is an extraordinary scheme. It stands alone.

[38] I do not accept the applicant's submission that the Commissioners' approach requires words to be read or implied into the 1998 Act. The notion of confinement or detention (giving rise to the need for release) is inherent within the words used both in their ordinary meaning and when interpreted in their full context. Although similar words can be read in a wider sense in a different statutory context (as in *McGuinness*) the meaning adopted by the Commissioners does not require any additional implication.

[39] I further do not consider that the principle against doubtful penalisation is engaged in this case, when properly analysed. A 'penalty' is not being imposed upon the applicant by the Commissioners. They are simply applying the provisions of the statute under which the applicant can apply for a benefit. Any relevant penalty in this case arises from the lawful sentences of the Crown Court. On one view, the applicant has been the subject of a windfall, having been released from serving those sentences in circumstances where, at the time of his release, he had not been convicted of a qualifying offence for the purpose of the 1998 early release scheme. The principle against doubtful penalisation does not mean that one simply adopts the most favourable possible construction of a provision to the individual in all circumstances and at all costs. The applicant has chosen to apply (again) for a declaration. He did not need to do so at this point. It is not in my view contrary to the principle against doubtful penalisation to adopt the construction which the Commissioners contend is correct. That is, firstly, because in its full statutory context the provision is not in fact ambiguous or doubtful; and, secondly, because to insist on the applicant meeting the conditions of the scheme before benefitting from it is not, in fact, to subject him to any penalty. He cannot presently apply because he does not presently require release.

[40] This is not a case where, as in *McGuinness*, the question is whether the applicant's tariff period is being served whilst at liberty for the purpose of sentence calculation. That is a separate issue. Rather, the issue here is simply whether the applicant presently meets the conditions to make an application under section 3. There was some debate about whether section 3(2) imposes a "condition" upon the applicant. It is not so described in the same way that the first to fourth conditions set

out in section 3(3)-(6) are so described. However, the provision that the SRC shall "grant the application *if (and only if)* … the prisoner is serving a sentence of imprisonment …" clearly sets a requirement or prerequisite which must be satisfied before a declaration may be made. This might be called a 'pre-condition.' Nonetheless, it is clear that it requires to be met before an application can succeed.

[41] Finally, the applicant prayed in aid the interpretative approach adopted in the *Robinson* case. Again, I do not consider that this assists him. Even assuming (which is far from clear) that the 1998 Act is to be viewed in a similar light as the Northern Ireland Act 1998, that is to say as a constitutional statute which attracts the purposive approach mentioned by the House of Lords in *Robinson*, as discussed above the Belfast Agreement makes plain that the accelerated release scheme was designed to secure the release of those who were incarcerated. It does not speak to the specific circumstances of this case; and the relevant interpretative principle, even if it applied, does not simply require the court to adopt an interpretation which is the most favourable to the individual in every case. For my own part, given the exceptional nature of the early release scheme established by the 1998 Act, I would think it just as appropriate to interpret it in a restrictive way, given its departure from the norms of criminal justice. The benefit to prisoners is in the grant of early release, where they satisfy the strict conditions to qualify for that benefit. A purposive approach does not require the court to artificially widen the conditions for qualification.

[42] For completeness, I should mention the case of *R v Orpwood* [1981] 1 WLR 1048, which was raised in the applicant's submissions. In that case it was held that a young person released on licence is not "serving a sentence of imprisonment" for the purposes of the Criminal Justice Act 1961. At first blush, that would appear to support the SRC's approach. The applicant contends that this result was reached on the basis that, unlike in the present case, the relevant statutory scheme (the 1961 Act, at section 3(2)) expressly excluded those on licence. That does not appear to me to be entirely correct. Section 3(2) of the 1961 Act treated those who had been released on licence but who had been recalled or returned to prison and not re-released as "serving the sentence." From this, the Court of Appeal considered it clear that, when released on licence and *not recalled*, a person such as the appellant was not serving a sentence of imprisonment. I consider this case to be broadly supportive of the Commissioners' position but also that it is so far removed from the circumstances and provisions at issue in the present case as to be of extremely limited assistance, if any.

Conclusion

[43] This case lies within something of a grey area. The applicant was released on licence by the Secretary of State further to an unlawful (as now acknowledged) grant of a declaration of eligibility by the SRC. As yet, given the lateness of the Secretary of State's challenge to this issue many years later, the decision made by the SRC and the licence so issued have not been quashed and (for now) enjoy the presumption of

legality. In these circumstances, it is not the case that the applicant has been released on licence in a normal fashion; nor is it the case that he is unlawfully at large as that term is usually understood. However, the more important point is that, having carefully considered the terms of the 1998 Act, I consider that the Commissioners were correct to construe it as they have. It applies to prisoners who are currently detained (with the possible limited exception mentioned at para [28] above, which is not relevant for present purposes) and who are seeking release from that detention. The applicant is not in such a position; and was not at the time of his recent application to the Commissioners.

[44] I grant the applicant leave to apply for judicial review but dismiss the full application. I will hear the parties on the issue of costs and the terms of the final order.

[45] I will also hear the parties in the Secretary of State's case as to further directions which should now be given in that case. All parties acquiesced in the suggestion that the SRC should consider the applicant's case afresh, once the 1998 Act had been amended, before the Secretary of State's case was finally concluded. In light of the Commissioners' decision which was the subject of these proceedings, and with the benefit of hindsight, that course was perhaps an unnecessary complication. Whether a further application is likely to be pursued by the applicant before the Commissioners will depend, in large measure, upon the final order in the Secretary of State's case. For that reason, it provisionally appears to me that the best course would be to proceed to finally determine the question of the relief to be granted in that case as expeditiously as possible.