Neutral Citation No: [2026] NICA 10 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* *ICOS No:* *Delivered:*	**COL12982** **22/32075/01** **12/03/2026**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

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

Respondent

and

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

and

ROBERT CLARKE

Notice Party/Appellant

_____

Mr McGleenan KC with Mr Reid (instructed by the Crown Solicitor's Office) for the Respondent
Mr Coll KC with Mr McCleave (instructed by Carson McDowell LLP Solicitors) for the Sentence Review Commissioners
Mr Lavery KC with Mr Chambers KC (instructed by McNamee McDonnell Solicitors) for the Notice Party/Appellant

_____

24/095529/A01

BETWEEN:

ROBERT CLARKE

Appellant

and

THE SECRETARY OF STATE FOR NORTHERN IRELAND
and
SENTENCE REVIEW COMMISSIONERS FOR NORTHERN IRELAND

Respondents

_____

Mr Lavery KC with Mr Chambers KC and Ms Horscroft (instructed by McNamee McDonnell Solicitors) for the Appellant
Mr McGleenan KC with Mr Reid (instructed by the Crown Solicitor's Office) for the First-named Respondent

Mr Coll KC with Mr McCleave (instructed by Carson McDowell LLP Solicitors) for the Sentence Review Commissioners, the Second-named Respondent

---

Before: Keegan LCJ, Treacy LJ and Colton LJ

COLTON LJ (*delivering the judgment of the court*)

Introduction

[1] For reasons which will become apparent, these appeals have been heard together. They involve the outworkings of a life sentence imposed on Robert Clarke. In these proceedings he appeals two decisions of Scoffield J ("the judge") delivered on 18 September 2024 and 30 May 2025.

[2] The background is unusual. For a full understanding of the issues and the way in which the applications were dealt with it is necessary to set out the history in some detail.

Factual background

[3] The background chronology is as follows:

3 February 1973	Two gunmen entered an ice-cream parlour and a fish and chip saloon owned by Mr Alfred Fusco. He was brutally murdered with two gunshot wounds to his head and one to his body.
2 February 1976	The appellant was convicted of the murder of Margaret O'Neill (date of offence 1975). He received a life sentence in respect of that offence.
July 1990	The appellant was released on life licence having served approximately 15 years in prison for the murder of Margaret O'Neill.
28 February 2011	The appellant was convicted of the murder of Mr Fusco together with ancillary offences of possession of firearms with intent, following a trial without a jury before McLaughlin J.
21 March 2011	The appellant's solicitor wrote to the Crown Solicitor's Office ("CSO") requesting that the Royal Prerogative of Mercy (RPM) be exercised on his behalf in respect of the life sentence imposed as a result of the murder of Mr Fusco. The basis of the request was that he had previously served a life sentence for the murder of Ms O'Neill and suggested that in light of this, the prerogative

	should be exercised in his favour to reduce the further sentence of imprisonment upon which he was just embarking.
31 March 2011	The CSO replied advising that the application for the RPM contained no grounds on which a recommendation for the exercise of the prerogative could be made.
8 April 2011	The appellant was sentenced at Belfast Crown Court for the index offences to a life sentence with a minimum term of 25 years (tariff expiry date 27 February 2036).
19 April 2011	The appellant's solicitor wrote to the CSO indicating that an anomaly existed in relation to the appellant and that a Royal pardon should be granted. It was asserted that the appellant'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.
16 May 2011	The CSO responded in similar terms to its previous letter disputing that any anomaly existed.
9 August 2011	The appellant's solicitor sent a pre-action protocol ("PAP") letter in relation to the RPM.
16 August 2011	The CSO replied indicating that the Northern Ireland Office ("NIO") was not prepared to recommend that the RPM be exercised in favour of the appellant.
17 February 2012	The Court of Appeal dismissed the appellant's appeal against sentence.
19 July 2012	The appellant made an application to the Sentence Review Commissioners ("SRC") for his accelerated release pursuant to the Northern Ireland (Sentences) Act 1998 ("the 1998 Act").
13 November 2012	The SRC issued a declaration that the appellant was eligible for release under the 1998 Act.
27 February 2013	He was served with a notice of release having served two years in custody for the murder of Mr Fusco in accordance with section 10 of the 1998 Act. He signed his life licence and was released from custody under the early release scheme.
4 December 2019	The Public Prosecution Service ("PPS") raised a query with the SRC in the context of a bail application for another individual as

	to whether the appellant was, in fact, eligible for release under the 1998 Act.
5 December 2019	The SRC contacted the NIO by telephone advising that an issue had come to their attention in relation to a prisoner released under the 1998 Act in November 2012 followed up by a note.
4 February 2020	Mr Larmour (Director (Political NIO)) met with Ms McGrory (Chair of the SRC) to discuss the case.
17 February 2020	Mr Larmour wrote to Ms McGrory indicating that the NIO had sought legal advice and asked for the full facts of the appellant's case.
19 February 2020	Ms McGrory wrote to Mr Larmour providing more details of the sequence of events and advising that there was no statutory basis upon which the SRC could take any further action.
9 July 2020	Mr Larmour wrote to Deputy Chief Constable Hamilton advising that the appellant was unlawfully at large.
29 July 2020	The Deputy Chief Constable replied requesting additional information.
11 September 2020	Mr Larmour wrote again to the Deputy Chief Constable.
20 October 2020	Detective Chief Superintendent Rowan Moore wrote to Mr Larmour requesting further information.
27 October 2020	Mr Lamour wrote to Ms McGrory to request that she share information with the PSNI.
30 October 2020	Ms McGrory replied agreeing to share information with the PSNI on a confidential basis.
10 November 2020	Mr Larmour replied to DCS Moore's letter providing additional information.
11 December 2020	DCS Moore sought NIO permission to share the SRC report with the Northern Ireland Prison Service ("NIPS").
15 December 2020	The SRC chair indicated she was not comfortable sharing correspondence with NIPS.
18 January 2021	The NIO discussed the case with NIPS/Department of Justice ("DoJ").

4 February 2021	A case conference was held with representatives from NIO, SRC, PSNI, NIPS and DoJ.
30 November 2021	A PAP letter on behalf of the Secretary of State for Northern Ireland ("SSNI") was served on the SRC. Mr Larmour also wrote to the appellant attaching a copy of the PAP letter. The correspondence asserted that the SRC did not have the power to grant the appellant's early release and that the SSNI intended to bring the matter before the High Court to seek a determination on the status of his licence. The letter was also forwarded to the next of kin of the deceased, Mr Fusco.
15 December 2021	The appellant's solicitors wrote to the CSO indicating that the application for judicial review was out of time.
21 December 2021	A response was sent on behalf of SRC by their solicitors. Correspondence indicated that they agreed that the appellant was not eligible to apply to the SRC for a release under the 1998 Act and accepted that it did not have the power to grant his application. This was because the offence for which the appellant had been convicted was not a "qualifying offence" for the purposes of the 1998 Act. The SRC also indicated that it was now "functus officio" and that any relief sought in connection with the appellant's case was a matter for the SSNI to pursue.
14 April 2022	Judicial review proceedings were issued by the SSNI. By the application he sought to apply for judicial review of the decision of the SRC dated 13 November 2012 that the appellant was eligible under the Northern Ireland (Sentences) Act 1998 to be released on life licence on 27 February 2013.
1 May 2024	The appellant made a further application to the SRC to be released under the 1998 Act which had been amended by the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ("the 2023 Act"). As a result of the amendment the offence for which he had been convicted was now a qualifying offence for the purposes of the 1998 Act.
20 June 2024	The judge granted a declaration in respect of the SSNI's judicial review to the effect that the SRC decision was unlawful, having been taken in error of law. The proceedings had been repeatedly adjourned by consent of all parties in anticipation that the 2023 Act might radically alter the landscape in which the question of relief fell to be determined. The declaration made on 20 June 2024 was made with the agreement of all the

	parties. An issue remained between the parties as to whether the court should grant additional relief quashing the decision to release the appellant. It was agreed that the court would await the outcome of the appellant's new application to the SRC before deciding the question of additional relief.
3 July 2024	An SRC panel gave a written preliminary indication 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.
2 September 2024	An oral hearing of the SRC took place.
4 September 2024	The SRC determined that the applicant's application should be refused on the basis that he was not a prisoner in custody as required under section 3(2) of the 1998 Act at the time of the application and was, therefore, not eligible to apply.
9 September 2024	The appellant issued pre-action correspondence challenging the SRC decision.
3 October 2024	SRC responded maintaining its position.
31 October 2024	The appellant issued judicial review proceedings against the SSNI and the SRC challenging the lawfulness of the decision on eligibility.
18 December 2024	The judge dismissed the appellant's application for judicial review in respect of the 4 September 2024 decision whereby the SRC refused to make a declaration that the appellant was eligible for release under section 3(1) of the 1998 Act.
30 May 2025	After a remedies hearing in relation to the original judicial review application brought by the SSNI, the court granted an order of certiorari quashing the SRC decision whereby it granted Mr Clarke a declaration that he was eligible for release in accordance with the provisions of the 1998 Act and, further, to quash the licence upon which Mr Clarke had been released.

[4] The combined effect of the judge's decisions is that the appellant must return to prison at which stage he can apply to the SRC for release under the 1998 Act as amended by the 2023 Act.

[5] The appellant, Mr Clarke, has appealed both decisions of the judge.

APPEAL AGAINST THE DECISION OF 30 MAY 2025 – SSNI AND SRC

[6] This section of the judgment deals with the appeal against the decision of the judge on 30 May 2025 to grant an order of certiorari quashing the SRC decision declaring that Mr Clarke was eligible for release under the 1998 Act.

The decision by the SRC to declare the appellant eligible for release under the 1998 Act dated 30 November 2012 and his subsequent release on 27 February 2013

[7] The 1998 Act was enacted to fulfil that part of the Belfast (Good Friday) Agreement 1998 which dealt with prisoners. Essentially under that Agreement the British and Irish governments agreed to put in place "mechanisms to provide for an accelerated programme for the release of prisoners, including transferred prisoners, convicted of scheduled offences in Northern Ireland or, in the case of those sentenced outside Northern Ireland, similar offences (referred to hereinafter as qualifying prisoners)." Such release was linked to prisoners affiliated to organisations maintaining a complete and unequivocal ceasefire.

[8] Section 3 of the Northern Ireland (Sentences) Act 1998 (as amended) currently provides as follows:

> "**3 Applications.**
>
> (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.

(6A) An offence is a qualifying offence if –

(a) Sub-section (7) or (7A) applies to the offence, and

(b) The prisoner was convicted of the offence:

(i) before the day on which section 19(1) of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 came into force, or

(ii) on or after that day by virtue of a public prosecution begun before that day.

(6B) For the purposes of subsection (6A) -

(a) 'Public prosecution' means any prosecution other than a private prosecution;

(b) A public prosecution of a person for an offence is "begun" when a prosecutor makes the decision to prosecute that person with that offence.

(7) This subsection applies to an offence which –

(a) was committed on or after 8 August 1973 and before 10 April 1998;

(b) was when committed a scheduled offence when the meaning of the Northern Ireland (Emergency Provisions) Act 1973, 1978, 1991 or 1996; and

(c) was not the subject of a certificate of the Attorney General for Northern Ireland that it was not to be treated as a schedule offence in the case concerned.

(7A) This subsection applies to an offence which –

(a) was committed on or after 1 January 1966 and before 8 August 1973;

(b) arose out of any conduct forming part of the Troubles; and

(c) is certified by the Director of Public Prosecutions for Northern Ireland as an offence which, if it had been committed in Northern Ireland on 8 August 1973, would have been a schedule offence within the meaning of the Northern Ireland (Emergency Provisions) Act 1973.

(7B) In deciding whether an offence would have been a scheduled offence, the Director of Public Prosecutions for Northern Ireland must ignore the possibility of a certificate by the Attorney General for Northern Ireland if the offence was not to be treated as a scheduled offence.
…"

[9] At the time the applicant originally applied for release under the 1998 Act, he was not eligible to do so as his offending was not in respect of a "qualifying offence" for the purposes of section 3(3)(a) of the 1998 Act. This was because his offending preceded the earliest relevant emergency legislation (Northern Ireland (Emergency Provisions) Act 1973 ("the 1973 Act") and could not therefore have been a scheduled offence when committed, as required by section 3(7)(b) of the 1998 Act. Thus, his release was granted in error of law.

[10] Subsection (7A) was introduced as a result of the 2023 Act. The effect of the amendment was that the index offence became a "qualifying offence" under the Act. It extended the early release scheme so that the appellant is no longer barred from applying for release on the grounds that his offence was not a "qualifying offence." It appears to us that the purpose of the amendment was to align the definition of "the Troubles" in the Northern Ireland (Sentences) Act 1998 with section 1(1) of the 2023 Act which provides:

> "1. Meaning of 'the Troubles' and other key expressions.
>
> (1) In this Act 'the Troubles' means the events and conduct that related to Northern Ireland affairs and occurred during the period –
>
> (a) beginning with 1 January 1966, and
>
> (b) ending with 10 April 1998."

[11] The amendments therefore aligned the temporal scope of the 1998 Act with the 2023 Act to include the period 1 January 1966 to 10 April 1998 (and particularly relevant to these cases the period between 1 January 1966 to 8 August 1973).

[12] As to why the error was made, it was noted that there was no requirement on the application forms used by the SRC to state the date of the offence, only the date of sentencing. However, the date of the offence was referred to in the covering letter from Mr Clarke's solicitors. The SRC and 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.

[13] 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 they were minded to approve the application. Neither the NIO nor Mr Clarke challenged this preliminary indication.

[14] It is also apparent from the comments of the sentencing judge, McLaughlin J, when he imposed a life sentence that he anticipated that the 1998 Act applied to Mr Clarke.

[15] Whilst these factors may provide an explanation it is trite to say that it most regrettable that this error was made.

Legal principles

[16] Before analysing the grounds of appeal it is useful to remember some basic legal principles which apply.

[17] Firstly, the remedies that are available when an applicant has succeeded on one or more grounds for judicial review have always been discretionary in nature. They do not issue automatically where an argument of illegality has succeeded. As highlighted by *Anthony, Judicial Review in Northern Ireland, 3rd ed, part 3.74*:

> "… The starting point at common law is that the High Court may decide not to grant one or other of the remedies sought by the applicant or, indeed, any remedy at all."

[18] There are ample authorities which set out the factors which should, or may, be taken into account when considering whether to grant a remedy and, if so, the nature of the remedy.

[19] At issue in this appeal is the remedy of certiorari which serves to quash the decision which has been challenged.

[20] Secondly, and relatedly, on appeal, this court is assessing the first instance judge's judgment on the exercise of his discretion to provide, in this case, the remedy of certiorari. Referring to *De Smith, Judicial Review, 9th ed*, this court said in *Re Brown's Application* [2025] NICA 16 at [29]:

> "Where the exercise of discretion as to remedy by a judge at first instance is challenged on appeal, the Court of Appeal will normally intervene only if the judge below proceeded on the basis of the wrong principles." (See De Smith, Judicial Review, 9th edn, para 18-049, page 909.)

The appellant's grounds of appeal

[21] Bearing these principles in mind, the court turns to the judgment under appeal and the appellant's grounds of appeal.

[22] The appellant's core propositions can be summarised as follows:

(a) The judge was wrong to grant the remedy of certiorari.

(b) The judge failed to place adequate weight on the following factors:

(i) Culpable delay on the part of the SSNI and SRC in bringing the proceedings.

(ii) The fact that the breach was technical in nature and caused by a statutory lacuna which has now been remedied.

(iii) The appellant is now aged 73 and in ill health.

(iv) The fact that the appellant was (albeit technically illegally) released by the SRC and that there is no reason to suggest that any alternative conclusion would now be reached.

[23] Turning to the judge's decision, it is clear that he was cognisant of the relevant principles to be applied in determining whether to grant a remedy.

[24] Thus, in his judgment he refers to the decision in *Credit Suisse v Allerdale Borough Council* [1997] QB 306, where Hobson 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."

[25] He also refers to the earlier case of *Nichol v Gateshead Metropolitan BC* [1988] 87 LGR 43, where Taylor LJ (not Sir John Donaldson MR) indicated:

> "The court has an overall discretion as to whether to grant a remedy or not. In considering how that discretion should be exercised, the court is entitled to have regard to such matters as the following:
>
> (i) The nature and importance of the flaw that challenges the decision;
>
> (ii) The conduct of the claimant; and
>
> (iii) The effect on administration of granting relief."

[26] He referred to the decision of Hutton LCJ in this jurisdiction in the case of *In Re Russell's Application* [1990] NI 188, in which it was indicated that where the court was considering whether to exercise its discretion to grant the remedy sought

by an applicant it should conduct a balancing exercise of the respective consequences of granting, or not granting, the relief sought. Hutton LJ said:

> "I would also have had to take into account the principle that when considering whether to exercise its 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 (in this case a restriction on the ability of the prison authorities to carry out an exhaustive search to guard against the risk of an escape from the prison) and to balance those consequences against the harm which would be suffered by the applicant if the remedy were withheld."

[27] We consider that the judge was correct when he said at para [48] of his judgment that:

> "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'; … 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 (Mr Clarke) could avoid the grant of relief which the SSNI seeks."

[28] We say this because we consider that there is an overriding public interest in ensuring that full effect is given to sentences imposed by the criminal courts. This is particularly so in the context of such a heinous crime. Cases such as *Re McGuinness's Application (No 1)* [2020] NI 54 have made it clear that the scheme for an early release under the 1998 Act was an exceptional departure from the normal demands of criminal justice. Parliament in enacting the 1998 Act made a deliberate choice to confine eligibility for this exceptional departure to those convicted of offences after the introduction of the 1973 Act. We have no hesitation in saying that had this error

come to light shortly after it was made the court would have granted an order quashing the release. It could not turn a blind eye to the clear illegality identified.

[29] In the context of this case and the public interest argument it is important that those who are released on life licences are subject to validly granted licences. It is difficult to see how the court could countenance someone being released on a life licence which it found to be unlawful. Such a scenario could raise questions about the enforceability of any such licence should any alleged breach arise. Furthermore, from the point of view of consistency and legal certainty it is important that the appellant is treated in the same way as any other offender who committed offences which did not qualify for release under the 1998 Act.

[30] Having identified, in our view correctly, the starting point the judge went on to consider the consequences of the inordinate delay in this case for the remedy sought by the SSNI.

[31] Before analysing the consequences of delay in this case the judge at the outset rejected the applicant's suggestion, repeated on appeal, that the legal error on the part of the respondents was merely "technical" in nature. On this issue he said at para [27] of his judgment:

> "… 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. Reliance on cases where the legal error was entirely technical or would have made no difference to the outcome does not assist the applicant. …"

[32] We agree. The error related to a fundamental issue namely whether the appellant was eligible for release. This disposes of Ground (ii) of the appellant's grounds of appeal.

[33] As to whether if he were to apply to the SRC now, he would inevitably be granted a fresh declaration the judge dealt with this issue when analysing the impact of delay and prejudice to the appellant, which we discuss further below.

Delay

[34] The question of delay looms large in this case. Broadly speaking there are two significant periods of delay. The first relates to the period between the appellant's release on licence on 27 February 2013 to the realisation on 4 December 2019 that an error had been made in respect of his eligibility for release under the 1998 Act.

[35] The second relates to the delay between 4 December 2019 and the issue of proceedings in this case on 14 April 2022.

[36] It appears that the consequences of delay were not determined at the leave stage. Leave was granted but expressly without prejudice to the appellant's ability to raise the issue of delay in the context of relief (as envisaged in *Re Laverty's Application* [2015] NICA 75 at para [21](iv) and (vi)]). The question, therefore, for the judge was how the delay should affect the exercise of his discretion in relation to remedy.

[37] The court does have a discretion to extend time "for good reason" (Order 53, rule 1) of the Rules of the Supreme Court (Northern Ireland) 1980. In *Laverty*, this court said at para [21]:

> "The court may extend time for good reason. Although not stated in legislation in this jurisdiction, consideration of good reason would include consideration of the likelihood of substantive 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."

What was at issue at first instance was not whether to exercise the discretion to extend time, but what impact the delay had on the remedy.

[38] In relation to the first period of delay identified above, the judge recognised some of the factors which contributed to the error but, ultimately, took the view that the SSNI could not reasonably have been expected to act when he was unaware of the issue giving rise to these proceedings.

[39] He correctly describes the delay from December 2019 until the initiation of the proceedings as "more problematic." In his judgment, he carefully analyses the affidavit of Mr Larmour explaining the reason for the relevant delay. He accepts that due to the unique and complex nature of the case, and the unusual nature of one public body judicially reviewing another, it was important and reasonable to ensure that all relevant stakeholders had been consulted, including the SRC, so that the SSNI could make an evidenced based decision as to how to move forward. Officials at the NIO consulted closely with the SRC, DoJ, NIPS and PSNI. That said, he points out that there was little by way of explanation as to why it took from February 2021 to April 2022 to issue an application for judicial review.

[40] Having done so, a primary focus of his approach to the question of delay was that of good administration and the principle of upholding the rule of law. He refers to the judgment of Gillen LJ in *Re Gibson's Application* [2017] NICA 77, where it was noted that:

> "[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 para [15]-[17]).
>
> [27] In particular in *Corbett's* case we note that Sedley LJ said at para [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)."

[41] In considering the consequences of the delay in this case it should be remembered that the judge was considering the issue in the context of having refused the appellant's judicial review challenging the decision of the SRC not to consider his renewed application under the 2023 Act (*Clarke v SSNI and SRC* [2024] NIKB 110). Therefore, the implications of granting certiorari meant that the appellant would be compelled to return to prison at which stage the SRC would consider an application for his release.

[42] Both parties argued that good administration supported their case. The SSNI contended that the factors referred to in paragraphs [27]-[29] above remain as true today as they would have at the time the error was made.

[43] In contrast the appellant argues that good administration requires judicial review applications to be brought expeditiously in the public interest and in the interests of legal certainty. He argues that it is not in the interests of the administration of justice if he is to be returned to prison in circumstances where he says a fresh application to the SRC will inevitably result in his release. He says that this renders the entire exercise pointless. We consider this issue further in the context of the judicial review brought by the appellant against the SRC.

[44] On the question of delay the appellant focusses on the prejudice which it has caused him and argues that the judge erred in failing to place sufficient and proper weight upon that prejudice. The prejudice he identifies is that he lost an opportunity to apply for the RPM when he was granted release on licence. This issue is somewhat clouded in the sense that the appellant's initial application for RPM was based not on any flaw in the 1998 Act as it applied to him, but rather on the basis that he should serve no time at all because of the life sentence he had served for the murder of Margaret O'Neill.

[45] It is asserted by the appellant that the judge misunderstood this point. It is clear from the judgment that he did not do so. He expressly addressed this issue and indeed found in favour of the appellant in the sense that he rejected the suggestion that the appellant was aware when he made the application for the RPM that he was not entitled for release under the 1998 Act.

[46] He referred to the case of *McGeough* [2013] NI 143 to reject the suggestion by the appellant that the RPM would have been exercised. Mr McGeough was also seeking the exercise of the RPM on the grounds that he too should not serve any sentence. The judge was correct to refer to the comments of Hart J emphasising the fact that the decision-maker in such circumstances "should be afforded a wide degree of latitude within which to make his decision, and that it is only in the clearest of cases that the court should interfere and should only do so where the applicant surmounts a high factual threshold."

[47] The best that can be said is that the outcome of any application for the exercise of the RPM would be speculative.

[48] More importantly, for the purposes of this case, it remains open for the appellant to make such an application if he feels it has merit.

[49] The court has already dealt with Ground (ii). In relation to Grounds (i), (iii) and (iv) it is clear that the judge did take into account all the matters raised by the appellant in exercising his discretion on the delay issue.

[50] An important issue raised by the appellant was that his release was inevitable as a result of the amendment introduced by the 2023 Act.

[51] It should be noted that as conceded by the appellant he received a sentence of two years' imprisonment in 2016 for revenue offences relating to fuel; and in 2020 received a suspended sentence for a money laundering offence connected to the original revenue offence. That said it is correct 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 point remains that it is the function of the SRC, and not this court, to determine whether the appellant should be released under the 1998 Act (as amended). The judge dealt with the point in this way at para [58] of his judgment:

> "… Mr Clarke contends that he therefore is (or will be) immediately entitled to further release under the 1998 Act. However, the court cannot reasonably 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's 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 which the SRC's judgment and skill is critical (see *Re McGuinness's Application (No 1)* (Supra), at para [20])."

[52] We consider that this reasoning is unimpeachable.

[53] Finally, in relation to Ground (iv) the appellant stressed the prejudice arising from his personal mitigation and ill-health. Mr Lavery described these as powerful factors. It is argued that he has been on release for a significant number of years during which time there has been no application to recall him from his licence. To return him to prison (if that is the outcome) clearly is prejudicial, in particular having regard to his ill-health. Again, it is clear from the judge's judgment that he fully took this matter into account.

[54] He agreed with the submission on behalf of the SSNI that in fact it could be argued his early release has been to his advantage. He has been at liberty in circumstances where he should not have been. Had the error been identified or had he not been released on licence he would have been compelled to serve a further period of imprisonment until such times as either he successfully brought an application for the exercise of the RPM or brought an application under the 2023 Act.

[55] On this issue we find no valid criticism or error on behalf of the judge. He weighed all relevant factors and, in our view, correctly concluded that there was no significant prejudice to the appellant which outweighed the public interest in quashing the unlawful decision in this case.

[56] The judge carried out a balancing exercise between the competing interests and competing consequences of granting the remedy in the context of the undoubted

delay in the application. Having carried out that exercise he concluded at para [62] of his judgment:

> "[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."

We agree with this conclusion.

[57] For these reasons we dismiss the appeal against the quashing order made by the judge on 30 May 2025.

[58] We will return to the consequences of granting *certiorari* after we have dealt with the other appeal relating to the SRC's decision.

Appeal against the decision of 18 December 2024 – Clarke v SSNI and SRC

The decision of the judge to dismiss the appellant's application for judicial review in respect of the SRC's decision of 4 September 2024 – Clarke v SSNI and SRC [2024] NIKB 110

[59] By these proceedings the appellant challenges the decision of the SRC made on 4 September 2024 by which they refused his application for early release under section 3(1) of the 1998 Act.

[60] The background has been set out in the chronological section in this judgment. The case turns on a point of statutory construction namely, whether at the time of his application to the commissioners the appellant was a prisoner serving a sentence of imprisonment for life for the purposes of section 3(2) of the 1998 Act.

The relevant statutory provisions

[61] The court has already set out the relevant parts of section 3 of the 1998 Act in para [8] relating to the related appeal. For ease of reading they are set out here again:

"**3 Applications.**

(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.

(6A) An offence is a qualifying offence if –

(c) Sub-section (7) or (7A) applies to the offence, and

(d) The prisoner was convicted of the offence:

(iii) before the day on which section 19(1) of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 came into force, or

(iv) on or after that day by virtue of a public prosecution begun before that day.

(6B) For the purposes of subsection (6A) -

(c) 'Public prosecution' means any prosecution other than a private prosecution;

(d) A public prosecution of a person for an offence is "begun" when a prosecutor makes the decision to prosecute that person with that offence.

(7) This subsection applies to an offence which –

(d) was committed on or after 8 August 1973 and before 10 April 1998;

(e) was when committed a scheduled offence when the meaning of the Northern Ireland (Emergency Provisions) Act 1973, 1978, 1991 or 1996; and

(f) was not the subject of a certificate of the Attorney General for Northern Ireland that it was not to be treated as a schedule offence in the case concerned.

(7A) This subsection applies to an offence which –

(d) was committed on or after 1 January 1966 and before 8 August 1973;

(e) arose out of any conduct forming part of the Troubles; and

(f) is certified by the Director of Public Prosecutions for Northern Ireland as an offence which, if it had been committed in Northern Ireland on 8 August 1973, would have been a schedule offence within the meaning of the Northern Ireland (Emergency Provisions) Act 1973.

(7B) In deciding whether an offence would have been a scheduled offence, the Director of Public Prosecutions for Northern Ireland must ignore the possibility of a certificate by the Attorney General for Northern Ireland if the offence was not to be treated as a scheduled offence.
…"

[62] As is apparent from the earlier passages in the judgment the sentence which the appellant was subject is now a qualifying offence within the Act as a result of the amendment introduced by the 2023 Act.

[63] The key issue in dispute is whether the appellant meets the requirement in section 3(2)(b) that is, is he a prisoner who is serving a sentence of imprisonment for life in Northern Ireland? He can only be granted release if (and only if) he meets that requirement. To meet the requirement must he be in custody? Is he such a person given that he is presently released on licence, albeit, as the court has determined as the result of a legal error?

[64] In the course of addressing this question the court will refer to further provisions of the 1998 Act and some of the provisions in the Life Sentences (Northern Ireland) Order 2001 ("the 2001 Order").

[65] At this stage the court refers to section 12(3) of the 1998 Act which provides:

"A life prisoner is a prisoner serving a sentence of imprisonment for life."

[66] Article 2(2) of the 2001 Order provides:

"'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; …"

The SRC panel's decision

[67] The key portions of the panel's decision for the court's consideration are 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."

The competing arguments

[68] In short, the appellant argues that he does meet the requirements of section 3(2)(b). He argues that the respondent's interpretation is a restrictive one which is not justified by the ordinary language in the statute.

[69] Alternatively, he argues for a purposive interpretation of the section and relies on the interpretation placed on a "life prisoner" in the case of *Re McGuinness' Application for Judicial Review (No 1)* [2020] NICA 54 ("*McGuinness No 1"*) decision. He refers the court to the intention behind the 1998 Act as part of the implementation of the Belfast (Good Friday) Agreement 1998 which calls for a purposive interpretation.

[70] It is argued on his behalf that the requirement for him to be "released" should be interpreted to mean not necessarily that he should be confined in custody. "Released" in the context of his case means that he be "released" from his obligation to return to prison, having regard to the fact that he has been released on an invalid licence.

[71] The respondent's position is summarised in its decision set out above. It is argued that a proper interpretation of section 3(2)(b) requires a person seeking release to be a person detained in prison, with the need for release. Such an interpretation is also consistent with the wording of the Act as a whole having regard to its purpose and context.

[72] Much of the focus is on the issue of "release." The respondent and the notice party say that someone ostensibly released on licence under the 1998 Act cannot apply for another licence under the same scheme whilst released.

[73] They say that the appellant's reliance on *McGuinness (No 1)* (and other cases discussed below) is misplaced. Those cases were not concerned with the operation of the 1998 Act and did not establish any general principles which are of assistance in the context of this appeal.

[74] In conclusion it is argued that the scope, purpose and architecture of the 1998 Act are entirely consistent with, and supportive of, the decision of the SRC.

Legal principles on statutory construction

[75] Before analysing the statute and the arguments of the parties it is useful to set out the well-established principles as to how the court should approach a question of statutory construction.

[76] There is much judicial dicta on the appropriate principles to be applied. They have been discussed in three recent Supreme Court cases.

[77] In *R(O) v Home Secretary (SC (E))* [2023] AC 255, Lord Hodge identified the relevant principles in paras 29-31 of the judgment. In para 31, he observed:

> "31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme* [2001] 2 AC 349, 396, in an important passage stated:
>
> > 'The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. … Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.'"

[78] In *R (PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] 1 WLR 2594, Lord Sales described the relevant interpretative principles in the following way:

> "40. The basic task for the court in interpreting a statutory provision is clear. As Lord Nicholls put it in *Spath Holme*, at p 396, 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.'
>
> 41. As was pointed out by this court in *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2021]

UKSC 16; [2022] AC 690, para 10 (Lord Briggs and Lord Leggatt), there are numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose. The examples given there are *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687 and *Bloomsbury International Ltd v Department for the Environment, Food and Rural Affairs* [2011] UKSC 25, [2011] 1 WLR 1546. In the first, Lord Bingham of Cornhill said (para 8):

> 'Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.'

In the second, Lord Mance said (para 10):

> 'In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance … In this area as in the area of contractual construction, 'the notion of words having a natural meaning' is not always very helpful (*Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 391C, per Lord Hoffmann), and certainly not as a starting point, before identifying the legislative purpose and scheme.'

The purpose and scheme of an Act of Parliament provide the basic frame of orientation for the use of the language employed in it.

42. It is legitimate to refer to explanatory notes which accompanied a Bill in its passage through Parliament and which, under current practice, are reproduced for ease of reference when the Act is promulgated; but external aids

> to interpretation such as these play a secondary role, as it is the words of the provision itself read in the context of the section as a whole and in the wider context of a group of sections of which it forms part and of the statute as a whole which are the primary means by which Parliament's meaning is to be ascertained: *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255, paras 29-30 (Lord Hodge). Reference to the explanatory notes may inform the assessment of the overall purpose of the legislation and may also provide assistance to resolve any specific ambiguity in the words used in a provision in that legislation. Whether and to what extent they do so very much depends on the circumstances and the nature of the issue of interpretation which has arisen."

[79] Most recently, in *For Women Scotland v Scottish Ministers* [2025] UKSC 16, the Supreme Court quoted the passage from Lord Hodge DPSC in *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, and went on to say:

> "10. In *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687, Lord Bingham of Cornhill warned against giving a literal interpretation to a particular statutory provision without regard to the context of the provision in the statute and the purpose of the statute. He stated (para 8):
>
> > 'The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.'
>
> 11. The general approach of focussing on the words which Parliament has used in a provision is justified by the principle that those are the words which Parliament has chosen to express the purpose of the legislation and by the expertise which the drafters of legislation bring to their task. But where there is sufficient doubt about the specific meaning of the words used which the court must resolve, the indicators of the legislature's purpose outside the provision in question, including the external aids described in para 30 of *R (O)* quoted above, must be given

> significant weight. As Lord Sales has stated in an extra-judicial writing, 'sometimes the purpose for which legislative intervention was required may be the very prominent focus for the legislative activity which follows from it, and thus may frame in a particularly strong way the context in which that activity takes place' (see "The role of purpose in legislative interpretation: inescapable but problematic necessity", Presentation at the Oxford University and University of Notre Dame Seminar on Public Law Theory: Topics in Legal Interpretation, 19 September 2024). Such aids can explain the meaning of a statutory provision which is open to doubt and can themselves alert the court to ambiguity in the provision, but they cannot displace the meanings conveyed by the clear and unambiguous words of a provision construed in the context of the statute as a whole.
>
> 12. Lord Nicholls' important constitutional insight in *Spath Holme*, that citizens with the help of their advisers should be able to understand statutes, points towards an interpretation that is clear and predictable. As Lord Hope DPSC stated in *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61; 2013 SC (UKSC) 153, at para 14:
>
> > 'The best way of ensuring that a coherent, stable and workable outcome is achieved is to adopt an approach to the meaning of a statute that is constant and predictable. This will be achieved if the legislation is construed according to the ordinary meaning of the words used.'"

[80] In summary the authorities say that the judicial approach to interpretation of a statute is to ascertain the meaning of the words used in light of their context and the purpose of the statutory provision.

The 1998 Act analysed

[81] The starting point is the words themselves.

[82] There can be no doubt, nor is there any dispute, that the appellant is serving a sentence of imprisonment for life. But is he a prisoner serving a sentence of imprisonment for life for the purposes of the Act?

[83] The interpretation provision in section 12 of the 1998 Act does not really advance the matter one way or the other. It describes a life prisoner as "a prisoner serving a sentence of imprisonment for life."

The focus on "release"

[84] Section 3 should be read in the context of the purpose of the 1998 Act itself which is about the accelerated *release* of prisoners. The long title of the 1998 Act provides that it is "an Act to make provision about the *release* on licence of certain persons serving sentences of imprisonment in Northern Ireland." The Act itself was set up to implement the provisions of the Belfast (Good Friday) Agreement. 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 2 years after the commencement of the scheme."

[85] Further assistance can be gleaned from the rest of the provisions of section 3. Thus, an application made under section 3(1) is for a declaration that the prisoner "is eligible for *release* in accordance with the provisions of this Act."

[86] Section 3(5) provides that the third condition to be satisfied before granting a declaration, is that "if the prisoner were *released* immediately" he would not be likely to become a supporter of a specified organisation or become involved in terrorism.

[87] In similar vein section 3(6) provides that the fourth condition requires an assessment of the danger he might pose to the public if he "were *released* immediately."

[88] In our view it is noteworthy that section 6 provides that:

> "The prisoner has a right to be *released* on licence …"

Section 8 provides for invoking a declaration at any time "before the prisoner is *released* …"

Section 10 which deals with accelerated release again refers to the prisoner's "… right to be *released* …"

[89] At the hearing Mr Lavery sought to address the focus of the respondents on the question of "release." When asked what the appellant was seeking release from his response was "released from his current obligation to return to prison." Given the court's finding that he has been unlawfully released, he is in effect "unlawfully at large" – subject to the stay which has been imposed by the court pending the resolution of these appeals. In our view the words of the statute having regard to their context and purpose could not reasonably be read in this way. We are fortified in this view by our analysis in the following paragraphs.

[90] In our view the focus on release supports the interpretation adopted by the respondent in this case. The purpose of the Act and the specific provisions of section 3 contemplate the release of persons currently in detention in prison.

"Prisoners" v "Persons"

[91] Other provisions of the statute support this interpretation.

[92] The use of the word "prisoner" stands in contradistinction with the use of the word "person" elsewhere in the Act.

[93] Section 9 of the 1998 Act deals with licence conditions.

[94] Section 9(1) in relation to such conditions provides that:

> "A 'person's' licence under section 4 or 6 is subject only to the conditions - …"

Section 9(2) provides that the Secretary of State may suspend a licence under section 4 or 6 if he believes "the person" concerned has broken or is likely to break a condition imposed by this section.

Section 9(3) provides:

> "Where a 'person's' licence is suspended - …"

Section 9(4) provides:

> "On consideration of a 'person's' case – …"

Section 9(5) provides:

> "Where a 'person's' licence is confirmed - …"

[95] Section 11 refers to "notice of decisions."

[96] Importantly, under that heading it provides that when commissioners refuse an application under section 3, they must give notice of their decision and the reasons for it to "the prisoner."

[97] Equally, if they grant an application, they must give notice of their decision to the "prisoner." A notice must include a statement of the day specified under section 6(1) if the "prisoner" is a "life prisoner." (This refers to the obligation to specify a day which the commissioners believe marks the completion of about two-thirds of

the period which the "prisoner" would have been likely to spend in prison under the sentence.)

[98] Section 11(3) provides that if the commissioners revoke a declaration under section 8, they must give notice of the revocation and the reasons for it to the "prisoner." Section 8 relates to a decision to revoke a declaration under section 3(1) before the prisoner is released under section 4 or 6.

[99] It will be seen therefore that all references to the applicant seeking a declaration under section 3 refer to "the prisoner."

[100] In contradistinction the nomenclature "person" is used in relation to someone who has been released under the statute.

[101] The distinction between an application pre-release and post-release is clearly reflected in the use of the word "prisoner" for the former and "person" for the latter.

[102] We agree with the judge that as per para [33](g)(v):

> "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."

The SRC Rules

[103] Moving on from the statute itself there is some further support for the respondent's interpretation in the Northern Ireland (Sentences) Act 1998 (Sentences Review Commissioners) Rules 1998. Rule 17(1) provides in relation to applications for release that "hearings shall be held at the prison where the person concerned is detained."

[104] The information in Part 1 of Schedule 3 to the Rules also states that the Secretary of State must provide details of the "prison" in which the prisoner concerned is detained.

[105] It is correct that the Rules cannot be determinative of the proper construction of the statute nor can they alter the meaning and effect of the parent Act under which they are made. That said, secondary legislation can shed light on the meaning of the intention behind its enabling legislation.

[106] The judge referred to *Bennion* on *Statutory Interpretation* (7th ed, LexisNexis) at 24.18 which provides 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 when the delegated legislation is roughly contemporaneous with the Act."

[107] As the judge pointed out the Rules were made on 30 July 1998 two days after the Act was passed on 28 July 1998.

[108] Equally, as the judge recognised, the provisions of the Rules are unsurprising since it was contemplated that in all cases (to our knowledge this case is unique) where release is sought under the 1998 Act, the applicant for release will be incarcerated at the point of the application to the SRC. Therefore, whilst not determinative, the Rules support the interpretation adopted by the respondent.

[109] Thus, on the analysis of the statute having regard to its wording, context and purpose the respondent's interpretation is supported. It does not require the imposition of any additional words such as "a prisoner in confinement" as contended by the appellant. We agree with the judge's conclusion that the scheme itself does not display any ambiguity or uncertainty and as such there is no requirement for recourse to any purposive approach. Furthermore, in light of our analysis a purposive interpretation also supports that adopted by the respondent.

Other sentencing case law

[110] All of that said, it is necessary to consider decisions which also examined the question of licence provisions in the context of overall sentencing.

[111] The appellant places particular significance on the decision of this court in *Re McGuinness (No 1)*.

[112] There the court was dealing with the interpretation of a life sentence under the Life Sentences (Northern Ireland) Order 2001 ("the 2001 Order"). Specifically, Article 5 of the 2001 Order provides in relation to the determination of tariffs:

> "5.-(1) Where a court passes a life sentence, the court shall, unless it makes an order under paragraph (3), order that the release provisions shall apply to the offender in relation to whom the sentence has been passed as soon as he has served the part of his sentence which is specified in the order.
>
> (2) The part of a sentence specified in an order under paragraph (1) shall (subject to Article 5A (serious terrorism cases)) be such part as the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence, or of the combination of the offence and one or more offences associated with it."

[113] *McGuinness (No 1)* concerned the notorious murderer Michael Stone who had been the subject of a life sentence with a tariff of 30 years, due to expire on 21 March 2018 under Article 5 of the 2001 Order.

[114] Stone had been released on licence under the scheme of the 1998 Act. The issue for the court was whether his period on release comprised part of the period to be included in calculating his 30-year tariff period.

[115] Article 2 of the 2001 Order defines a life prisoner as meaning a person serving one or more life sentences. The court held that once convicted the prisoner is always serving his life sentence whether in custody or on licence.

[116] The court concluded that the period the prisoner spent lawfully on licence ought to be included in the relevant part of the tariff he was serving under Article 5 of the 2001 Order. His release under 1998 Act did not stop the tariff period running for the purpose of calculation of his tariff expiry.

[117] The court also considered that the same rationale would apply to a prisoner who was conditionally released from prison for some other reason, for example, pursuant to a temporary release scheme under rule 27 of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995. As to whether such a person would be "a prisoner" within the meaning of section 3 of the 1998 Act the judge anticipated that such a person would indeed meet the test. This is because according to the prison rules such a person remains subject to the jurisdiction of the governor and can be recalled "at any time" whether the conditions of release have been broken or not (see rule 27(3)). For these reasons such a person may be viewed as being in detention and prison or at least in a materially different situation from a prisoner released on licence.

[118] Ultimately, the judge concluded that *McGuinness (No 1)* did not assist the appellant. There the court was dealing with a different statutory scheme which post-dated the 1998 Act. The question was whether the applicant was serving his tariff period whilst at liberty for the purposes of sentence calculation. That is a separate issue from the one in this case. The implications from *McGuinness (No 1)* for the appellant are that whilst he was released (albeit unlawfully) during the intervening period he has been serving a life sentence of imprisonment. His period at liberty should be calculated as part of his tariff.

[119] It does not mean that he meets the requirements of section 3 of the 1998 Act.

[120] The approach in *McGuinness (No 1)* aligns with that of the Supreme Court in the case of *Morgan & Ors v Ministry of Justice* [2023] UKSC 14. In that case the court was considering a challenge to retrospective legislation which extended the custodial period of a sentence imposed by the Crown Court. There the court held that the

custodial period and licence periods of a sentence were each viewed as separate manners of execution of the sentence.

[121] Again, this is consistent with the approach of the Court of Appeal in *McGuinness (No 1)* to the effect that the appellant in this case is serving a sentence of imprisonment whilst he is on licence. As set out above this is not the issue in this case.

[122] The appellant urged the court to adopt the approach of the House of Lords in *Robinson v Secretary of State for Northern Ireland & Ors* [2002] UKHL 32. Mr Lavery argues that this is authority for the proposition that statutes should be interpreted to give effect to the terms of the Belfast (Good Friday) Agreement. At para [11] of the judgment in the court Lord Bingham outlined the following:

> "The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution. So to categorise the Act is not to relieve the courts of their duty to interpret the constitutional provisions in issue. But the provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody."

[123] As set out above the 1998 Act was introduced to give effect to the provisions in the Agreement relating to the accelerated release of prisoners, provided certain conditions were met.

[124] On this issue the judge indicated at para [41] of his judgment that it was far from clear that *Robinson* has any direct application in relation to the 1998 Act, in respect of which he said it was not immediately apparent that it represented a constitutional statute such as the House of Lords recognised when considering the Northern Ireland Act 1998.

[125] In para [41] of his judgment, he points out that the Belfast (Good Friday) Agreement makes plain that the accelerated release scheme was designed to secure the release of those who were incarcerated. He went on to say:

> "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."

[126] It is important to understand the specific context of the *Robinson* case. As has been pointed out there the court was dealing with a different statute than the one under consideration here. It involved the potential collapse of the entire institutions created by the Northern Ireland Act 1998. It should not be read across for the purposes of interpreting different statutes lacking the constitutional impact of the Act under consideration.

[127] As was said by the same judge, Lord Bingham, at para [5] in *Re McClean's Application* [2005] UKHL 46, the 1998 Act is an "extraordinary scheme" and thus "stands alone." In short, the 1998 Act provides an exceptional limited departure from the norms of criminal justice.

[128] For the avoidance of doubt, although understandably the matter was not argued before us, the court in coming to its conclusion fully takes into account the article 5 ECHR rights of the appellant, in relation to deprivation of his liberty. What is in issue here is the outworkings of a sentence of imprisonment lawfully imposed by the courts. Therefore, no issue of a breach of article 5 arises in light of the court's analysis.

[129] In relation to the argument put forward by Mr Lavery that the interpretation of the respondent offended the principle against "doubtful penalisation" we agree with the judge's interpretation that a "penalty" has not been imposed upon the appellant by the respondent. The respondent was applying the provisions of the statute under which the appellant could apply for a benefit. We agree with the judge's conclusion that:

> "… 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."

[130] Ultimately, we take the view that as per the judge the respondents have correctly construed the section at issue properly in its full statutory context. The interpretation does not require the importation of additional terms such as "in custody" as contended for by the appellant. The words, both in their ordinary meaning and when interpretated in their full context, clearly envisage that someone applying for accelerated release will be in custody at that time.

[131] Someone ostensibly released on licence under the 1998 Act cannot apply for another licence under the same scheme whilst released.

[132] It would be an absurdity for a declaration of eligibility for release of a prisoner to be provided when that person was not actually in custody. The intention of the scheme underpinning the 1998 Act was for the early release of those in custody. Otherwise, declarations would not be required.

Disposal

[133] The cumulative effect of our decision is as follows:

(i) Both appeals are dismissed.

(ii) The court affirms the order of certiorari granted by the judge quashing the decision to release the appellant from custody pursuant to the declaration of 13 November 2012 by the SRC that the appellant was eligible for release under the 1998 Act and further quashing the licence upon which the appellant was released.

(iii) The court affirms the judge's decision to dismiss the appellant's application for judicial review in respect of the SRC's decision of 4 September 2024.