Judicial Communications Office

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COURT DISMISSES APPEALS AGAINST RELEASE UNDER NI (SENTENCES) ACT 1998

Summary of Judgment

The Court of Appeal[1] today, dismissed two appeals relating to the outworkings of a life sentence imposed on Robert Clarke for the murder of Alfred Fusco on 3 February 1973.

Factual background

On 2 February 1976, Robert Clarke ("the appellant") was convicted of the murder in 1975 of Margaret O'Neill and received a life sentence. He was released on life licence in July 1990 having served approximately 15 years in prison.

On 28 February 2011, the appellant was convicted of the murder of Alfred Fusco in 1973 together with ancillary offences of possession of firearms with intent. He was sentenced at Belfast Crown Court on 8 April 2011 with a minimum term of 25 years (tariff expiry date 27 February 2036). The appellant appealed against his sentence, but this was dismissed.

On 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"). This Act gave effect to the early release of prisoners convicted of scheduled offences under the terms of the Belfast (Good Friday) Agreement. On 13 November 2012, the SRC issued a declaration that the appellant was eligible for release under the 1998 Act and on 27 February 2013 he was served with a notice of release having served two years in custody for the murder of Mr Fusco.

On 4 December 2019, the Public Prosecution Service raised a query with the SRC as to whether the appellant was in fact eligible for release under the 1998 Act. On 30 November 2021, a pre-action protocol letter on behalf of the Secretary of State for Northern Ireland ("the respondent") was served on the SRC asserting that the SRC did not have the power to grant the appellant's early release. In response, the SRC agreed that the appellant was not eligible to apply to the SRC for a release under the 1998 Act and 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 as his offending preceded the earliest relevant emergency legislation (the Northern Ireland (Emergency Provisions) Act 1973) and could not therefore have been a scheduled offence when committed, as required by 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 respondent to pursue. On 1 May 2024, the appellant made a further application to the SRC to be released under the 1998 Act which had by that time been amended by the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 to extend the time frame for offending and meant that the offence for which he had been convicted (the murder of Mr Fusco) was now a qualifying offence for the purposes of the 1998 Act.

[1] The panel was Keegan LCJ, Treacy LJ and Colton LJ. Colton LJ delivered the judgment of the court.

On 20 June 2024, a High Court judge granted a declaration in respect of the judicial review proceedings issued by the respondent to the effect that the SRC's decision was unlawful, having been taken in error of law. 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. On 4 September 2024, the SRC determined that the appellant'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 (having been released on licence in 2013) and was, therefore, not eligible to apply.

The appellant issued judicial review proceedings against the respondent and the SRC challenging the lawfulness of the decision on eligibility. On 18 December 2024, the judge dismissed the application for judicial review in respect of the SRC's decision that the appellant was not eligible for release under section 3(1) of the 1998 Act. On 30 May 2025, after a remedies hearing in relation to the original judicial review application brought by the respondent, the court granted an order of certiorari quashing the SRC's decision and quashing the licence upon which the appellant had been released. The combined effect of the judge's decisions was 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. The appellant appealed both decisions.

Appeal against the decision of judge dated 30 May 2025[2] to grant an order of certiorari quashing the SRC's decision declaring that the appellant was eligible for release under the 1998 Act and his subsequent release on 27 February 2013

The appellant's core propositions were that the judge was wrong to grant the remedy of certiorari and that he failed to place adequate weight on the following factors:

- Culpable delay on the part of the respondent and SRC in bringing the proceedings.
- The fact that the breach was technical in nature and caused by a statutory lacuna which has now been remedied.
- The appellant is now aged 73 and in ill health.
- 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.

The court said 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 a heinous crime such as murder. It said 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 [Northern Ireland (Emergency Provisions)] 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. 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

[2] [2025] NIKB 32

> 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."

The judge had rejected the appellant's suggestion that the legal error on the part of the respondent was merely "technical" in nature. The court agreed. It said the error related to a fundamental issue namely whether the appellant was eligible for release.

The court then considered the question of delay. There were two significant periods of delay. The first related 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. The second related to the delay between 4 December 2019 and the issue of proceedings on 14 April 2022. The question was how the delay should affect the exercise of the judge's discretion in relation to remedy. In relation to the first period of delay, the judge took the view that the respondent could not reasonably have been expected to act when he was unaware of the issue giving rise to these proceedings. However, he described the delay from 4 December 2019 until the initiation of the proceedings as "more problematic", pointing 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.

A primary focus of the approach to the question of delay was that of good administration and the principle of upholding the rule of law. The implications of granting certiorari mean that the appellant would be compelled to return to prison at which stage the SRC would consider an application for his release. The appellant focussed on the prejudice this caused to him as he lost an opportunity to apply for the Royal Prerogative of Mercy ("RPM") when he was granted release on licence. The judge expressly addressed this issue and 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. The court, however, said the best that can be said is that the outcome of any application for the exercise of the RPM would be speculative. 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.

The court said it was clear that the judge took into account all the matters raised by the appellant in exercising his discretion on the delay issue. It noted that the appellant had 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. It commented, however, that the respondent had not taken steps to suspend the appellant's licence on the basis that he had broken or was likely to break a condition imposed under the 1998 Act. However, the point remained that it is the function of the SRC, and not the court, to determine whether the appellant should be released under the 1998 Act (as amended). The court considered the judge's reasoning was unimpeachable when he said the onus was on the appellant to show that he qualifies for release under the 1998 Act in a scheme that has at its heart the protection of the public as a fundamental consideration and on which the SRC's judgment and skill is critical.

Finally, the appellant stressed the prejudice arising from his personal mitigation and ill-health. It was 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) was prejudicial, in particular having regard to his ill-health. The court said it was clear from the judge's decision that he fully took this matter into account. He 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 the judge concluded the appropriate course, as a matter of principle to reflect society's abhorrence of the offending, in view of the advantage (rather than prejudice) which has accrued to the appellant during the period when the SRC's error went undetected or unremedied, and to give appropriate effect to the order of the sentencing court, was properly a matter for the SRC to determine. The court agreed with this conclusion and dismissed the appeal against the quashing order made by the judge on 30 May 2025.

Appeal against the decision of 18 December 2024 to dismiss the appellant's application for judicial review in respect of the SRC's decision of 4 September 2024[3]

The appellant challenged the decision of the SRC on 4 September 2024 by which they refused his application for early release under section 3(1) of the 1998 Act (as amended). The case turned on a point of statutory construction namely, whether at the time of his application to the SRC the appellant was a prisoner serving a sentence of imprisonment for life for the purposes of section 3(2) of the 1998 Act. The sentence to which the appellant was subject is now a qualifying offence within the Act as a result of the amendment introduced by the 2023 Act.

The key issue was whether the appellant meets the requirement in section 3(2)(b) and is 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 the court asked if he must be in custody and, is he such a person given that he is presently released on licence, albeit, as the result of a legal error?

The appellant argued that he does meet the requirements of section 3(2)(b), submitting that there should be a purposive interpretation of the section and relying on the interpretation placed on a "life prisoner" in the case of *Re McGuinness' Application for Judicial Review (No 1)* [2020] NICA. He referred 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. It was argued that the requirement for him to be "released" should be interpreted to mean not necessarily that he should be confined in custody but that "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. The respondent 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.

Much of the focus was therefore on the interpretation of "release". The judicial approach to interpretation of a statute is to ascertain the meaning of the words used in the light of their context and the purpose of the statutory provision.

The interpretation provision in section 12 of the 1998 Act describes a life prisoner as "a prisoner serving a sentence of imprisonment for life." The court said section 3 should be read in the context of the purpose of the 1998 Act itself which is about the accelerated *release* of prisoners

[3] *Clarke v SSNI and SRC* [2024] NIKB 110

under 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 two years after the commencement of the scheme." 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." 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. 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." The court said it was also 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* …", and section 10 which deals with accelerated release again refers to the prisoner's "… right to be *released* …"

When asked what the appellant was seeking release from, counsel's response was "released from his current obligation to return to prison". The court commented that given the finding that he had been unlawfully released, he is in effect "unlawfully at large" subject to the stay which was imposed by the judge pending the resolution of these appeals. It considered that 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 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."

The court referred to other provisions of the statute which it said tend to support this interpretation. The use of the word "prisoner" in section 3 stands in contradistinction with the use of the word "person" elsewhere in the Act. All references to an applicant seeking a declaration under section 3 refer to "the prisoner". In contradistinction, the nomenclature "person" is used in relation to someone who has been released under the statute. The court said 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. It agreed with the judge that the consistency in relation to this was striking and in this instance was 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 court said there was 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." The court said the provisions of the rules are unsurprising since it was contemplated that in all cases 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.

The court agreed 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, a purposive interpretation also supports that adopted by the

respondent. The court also considered decisions which examined the question of licence provisions in the context of overall sentencing. Ultimately, it took the same view as the judge that the respondent correctly construed section 3 of the 1998 Act properly in its full statutory context. It said 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. The court concluded that someone ostensibly released on licence under the 1998 Act cannot apply for another licence under the same scheme whilst released:

> "It would be an absurdity for a declaration for 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."

Conclusion

The cumulative effect of the court's decision was:

- Both appeals are dismissed.
- The court affirmed 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.
- The court affirmed the judge's decision to dismiss the appellant's application for judicial review in respect of the SRC's decision of 4 September 2024.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available shortly on the Judiciary NI website (https://www.judiciaryni.uk/).

ENDS

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