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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

**KING'S BENCH DIVISION
(JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY DEBORAH McGUINNESS
FOR JUDICIAL REVIEW (No 2)**

**IN THE MATTER OF AN APPLICATION BY DEBORAH McGUINNESS
FOR JUDICIAL REVIEW (No 4)**

Mr Ronan Lavery KC with Mr Michael O'Brien (instructed by McIvor Farrell
Solicitors)
for the Applicant
Mrs Neasa Murnaghan KC with Mr Terence McCleave (instructed by the Departmental
Solicitor's Office) for the Respondent
Mr Donal Sayers KC with Ms Denise Kiley KC (instructed by Carson McDowell
Solicitors) for the Parole Commissioners, Notice Party
Mr Richard McConkey (instructed by McConnell Kelly) for Mr Michael Stone, Notice
Party

McLAUGHLIN J

Introduction

[1] This application for judicial review raises the question of whether rule 22(2) of the Parole Commissioners' Rules (Northern Ireland) 2009 [SR 2009/82] ("the 2009 Rules") is ultra vires its parent statute on the ground that the requirement for oral hearings before the Parole Commissioners ("the Commissioners") to be held in private is not compatible with the common law principle of open justice. The proceedings arise out of a parole hearing before the Commissioners in respect of the notorious murderer Michael Stone. Colton J granted leave to challenge rule 22(2) but refused leave to challenge the decision of the Commissioners to direct Mr Stone's release on licence (*Re McGuinness (No.4)* [2021] NIQB 102). The rule

22(2) challenge has therefore become academic on the facts of the case but is of considerable wider importance.

Background

[2] The applicant is the sister of Thomas McErlean, who was murdered on 16 March 1988 at Milltown Cemetery in Belfast during a notorious murderous attack perpetrated by Michael Stone. In his leave judgment, Colton J set out the background to the murder, offending and sentencing of Michael Stone as follows:

“[3] The applicant is the sister of Thomas McErlean who was murdered on 16 March 1988 at Milltown Cemetery in Belfast. On that day, the funeral was being held for three [people] who had been killed in controversial circumstances in Gibraltar. Mr McErlean had attended the funeral and was also in attendance at the burial when those present were subject to an attack by Michael Stone with firearms and grenades. Mr McErlean was one of three victims who died during the attack. On 3 March 1989 Mr Stone was subsequently convicted of Mr McErlean’s and two other victims’ murders. He was also convicted of three other troubles related murders of which he made a voluntary confession to police. He was sentenced to life imprisonment.

[4] Mr Stone was released on 24 July 2000 under licence as part of the Early Release Scheme provided for under the Belfast/Good Friday Agreement in 1998 and the Northern Ireland (Sentences) Act 1998.

[5] Mr Stone was subsequently arrested on 24 November 2006 after an attack at the Parliament Buildings, Stormont, Belfast. On 14 November 2008 he was convicted of attempted murder arising out of this attack and on 8 December 2008 he was sentenced to serve 16 years in custody. On 29 July 2013, the Lord Chief Justice of Northern Ireland determined that the tariff in respect of the life sentence imposed on 3 March 1989 should be 30 years’ imprisonment.”

[3] The litigation history which has followed is complex and is summarised in the judgment of the Supreme Court in *Re McGuinness* [2020] UKSC 6 (at [5]-[16]). On 20 September 2017, the Northern Ireland Prison Service referred Mr Stone’s case to the Parole Commissioners and notified them of a tariff expiry date of

21 March 2018. On 16 April 2018, the Commissioners made a formal determination not to release Mr Stone.

[4] In November and December 2018, the applicant commenced two sets of judicial review proceedings. The first was a challenge to the decision to set a tariff expiry date in March 2018. The applicant contended that the period spent on licence between Mr Stone's release under the Northern Ireland (Sentences) Act 1998 and his November 2006 attack at Parliament Buildings, Stormont, Belfast, should be excluded from the tariff calculation (*Re McGuinness (No.1)* [2019] NIQB 10). The second was pleaded as a challenge to "rule 22" of the Parole Commissioners' Rules 2009 insofar as it required oral hearings to be held in private and also included a challenge to a separate decision of the Commissioners not to provide the applicant with information about the proceedings.

[5] The hearing of *Re McGuinness (No.1)* proceeded before McCloskey J and Colton J sitting as a Divisional Court on the basis that the issue of tariff calculation was a "criminal cause or matter." In January 2019, the court held that the tariff calculation was incorrect and that it ought to have excluded the period of six years which Mr Stone spent on licence. A further challenge was then commenced against the decision of the Sentence Review Commissioners to accept a further application by Mr Stone for release (*Re McGuinness (No.2)* [2019] NIQB 85). In a judgment delivered on 1 August 2019, McCloskey J and Keegan J decided that the issue raised by this challenge was not a criminal cause or matter (*Re McGuinness (No.3)* [2019] NIQB 76). On appeal to the Supreme Court in *Re McGuinness (No.1)*, it was held that the question of tariff calculation was not a criminal cause or matter and that the Supreme Court had no jurisdiction to hear the appeal (*Re McGuinness* [2020] UKSC 6; [2020] NI 324). Appeals then proceeded to the Court of Appeal in the ordinary way.

[6] On 6 November 2020, the Northern Ireland Court of Appeal overturned the decision of McCloskey J and Colton J and held that the period of six years which Mr Stone spent on licence should be included within the calculation of the tariff expiry date (*Re McGuinness (No.1)* [2020] NICA 54). On 29 October 2021, the Supreme Court refused permission to appeal against that decision.

[7] Following the decision of the Court of Appeal and pending a decision by the Supreme Court on the permission application, the Parole Commissioners proceeded with a hearing in Mr Stone's case. On 25 January 2021, it decided to release Mr Stone.

[8] On 27 January 2021, the applicant commenced these proceedings (*Re McGuinness (No.4)*) challenging, inter alia, rule 22(2). At that time, the challenge in *Re McGuinness (No.2)* was still outstanding and had not progressed while the No.1 and No.3 cases progressed through the appellate courts. The target of the No.2 challenge was identified in the Order 53 statement to be "rule 22." The Order 53 statement in the No.4 challenge was amended between the

commencement of proceedings and the leave hearing. Colton J handed down a leave judgment on 19 November 2021 (*Re McGuinness*) (No.4) [2021] NIQB 102) which related to both the extant No.2 challenge and the No.4 challenge. At para [2] he noted that the two applications were now being progressed as a consolidated application. At paras [8]-[11] he found that the following three broad issues remained outstanding, as between the No.2 and No.4 cases. Both cases have proceeded on the basis that these were the remaining issues:

- (i) The Commissioners' decision not to provide the applicant with information about Mr Stone's application for release;
- (ii) The decision by the Commissioners to conduct the hearing in private and not permit the applicant to attend or participate in the hearing; and
- (iii) The decision to release Mr Stone.

[9] On the first issue, Colton J held that it had become academic in light of amendments which had been made to rule 22(3) of the 2009 Rules during the interim years, in the form of the insertion of a new rule 22A. These amendments were made by the Parole Commissioners' (Amendment) Rules 2021 and 2022 [SR 2021/138 and SR 2022/65]. The first amendments came into force on 21 June 2021 and more recent amendments were introduced on 22 March 2022, following the grant of leave. Rule 22A is set out in full below. It followed amendments which were made to the equivalent rules in England & Wales and makes provision for a summary of the reasons for a decision of the Commissioners to be provided to a registered victim upon request. Information is therefore provided to victims after a decision has been reached. Colton J considered that this addressed the proposed challenge to the failure to provide the applicant with information about the hearing. Leave was therefore refused on this issue. At para [18] Colton J noted that the applicant "agreed that it was not necessary to pursue his arguments in relation to the provision of information." On the third issue, Colton J refused leave on all proposed grounds of challenge to the decision to release Mr Stone.

[10] On the challenge to the requirement for a private hearing, Colton J reached a nuanced decision. He refused leave for a broad challenge to rule 22 which involved a contention that victims and their families had a right to intervene in proceedings before the Commissioners, to become notice parties and to participate in full in those proceedings. However, he granted leave on the narrower challenge to the rule 22(2) requirement for oral hearings before the Commissioners to take place in private. The court concluded:

"[22] The applicant contends that the principle also applies to the question of whether the proceedings should be held in private. The court takes the view that it is arguable that a blanket ban on public hearings

in relation to Parole Commissioners is unnecessary and that some form of 'public hearings' should be possible.

[23] For this reason, as indicated at the hearing, the court grants leave to the applicant to challenge the lawfulness of the 2009 Rules insofar as they prohibit public hearings. Further, the court grants leave to the applicant to challenge the failure of the Parole Commissioners to make provision for the applicant to attend at the hearing."

[11] Following the grant of leave, an amended Order 53 statement was filed on 27 November 2024 in which the subject of the challenge was identified as "3.2. Rule 22(2) ... insofar as it prohibits public hearings." Notwithstanding the refusal of leave in respect of the first issue, the amended Order 53 statement also included a challenge to the decision to refuse to provide information to the applicant about the proceedings in advance of the hearing and "... the failure to make provision for the applicant to attend the hearing." These pleadings gave rise to some debate about the permitted scope of the challenge which is addressed below.

Applicant's participation in the Parole Commissioners' hearings related to Michael Stone

[12] In an affidavit sworn on 21 December 2018, for the purposes of the No.2 challenge, the applicant confirmed that she had applied to the Department of Justice ("the Department") to be registered on the Victim Information Scheme with a view to obtaining more information about any parole proceedings involving Mr Stone. She also confirmed that by letter dated 14 August 2018 she had been advised by the Victim Information Unit of the Probation Board that she "... was being registered with the Victim Information Scheme ..." The evidence provided by the parties did not include either that letter or the application for registration.

[13] In November 2020 the applicant's solicitor had a telephone conversation with Mr Steven Allison, an official within the Department regarding future parole hearings for Mr Stone. At that time the No.2 challenge remained extant and the No.4 proceedings had not been commenced. The purpose of the phone call was to discuss possible participation options which might be available for a future parole hearing. A note of the conversation was kept by the applicant's solicitor and was submitted with the consent of the respondent. The note recorded that a policy review was underway to consider future amendment of rule 22 with a view to authorising the provision of information to victims about parole hearings. The note contains the following record of the discussion, which was accepted by the respondent to be accurate:

"[Mr Allison] said that the Rules currently allow for an application for a victim (or their nominated representative) to attend the PC hearing and give evidence or make submissions on behalf of the victim. The PC's have discretion on this. He said the prisoner could object to this. He said the DOJ would back any such application on behalf of a victim and an appeal if the PCs refused the application.

He said the Rules would not allow participation for the entirety of the PC hearing however. He said there was no real argument that Rule needed to be changed, the issue was how. So they did not need to wait for the Burgess review to recommend this, they knew it needed changed anyway. ..."

[14] In January 2021, while the applicant's No.2 challenge remained outstanding, the applicant learned that a parole hearing in relation to Mr Stone was scheduled to take place on 14 January 2021. The applicant requested an urgent review hearing which took place on 11 January 2021. The applicant moved an application for interim relief to restrain the parole hearing pending determination of the No.2 challenge to rule 22. Interim relief was refused. In an affidavit sworn on 18 January 2023 for the purposes of these proceedings, the Commissioners' solicitor, Mr Fergal McGoldrick, obtained transcripts of the interim relief hearing on 11 January 2021 and the subsequent leave hearing on 21 May 2021. In the course of exchanges during the interim relief hearing, Colton J made the following statement:

"I still feel that irrespective of these proceedings that an opportunity should have been taken to write to the Parole Commissioners seeking or asking the chair to exercise his or her discretion to allow a degree of participation. That should happen in any event irrespective of whatever order I make today or whatever decision I make today ..."

[15] In refusing interim relief on 11 January 2021, Colton J stated:

"... So if proceedings do proceed on Thursday they will do so absent of the determination of the judicial review challenge to Rule 22 and that obviously presents a degree of prejudice to the applicant. On the other side of the balance there are some options available to the applicant. Firstly, the applicant can and, in my view should, ask the panel to exercise ...

the chair to exercise his or her discretion under Rule 22 to permit attendance at any hearing.”

[16] In the course of the leave hearing on 21 May 2021, a submission was made on behalf of the applicant that the Parole Commissioners had refused to allow the applicant to attend the hearing. The following exchange was recorded:

“[Counsel]: ... So the Parole Commissioners, we say, were well aware of the fact that we wanted, from the previous reviews, participation. And it was in our Order 53 Statement. I accept, My Lord, that I can’t produce a letter which says specifically we want to, but it was certainly ... aired ...

[Judge]: Well I mean I recall at the review suggesting that you could write to the Commissioner at least asking that you could attend and I don’t believe that was followed up.

[Counsel]: It wasn’t, My Lord.”

[17] It was not disputed in these proceedings that the applicant did not make a request to the Commissioners either to participate in the parole hearing or to make submissions. In her affidavit evidence, the applicant states that she contacted the Commissioners after the hearing to request information about the decision. On 21 January 2021, the Commissioners confirmed to the applicant that the Probation Board for Northern Ireland would inform her of the outcome of the proceedings. She averred that she was also informed that the Commissioners would not publish information about the decision.

[18] On 26 January 2021, the applicant was contacted by the Victims Support Branch of the Probation Board by telephone. She was informed of the outcome of the Commissioners’ decision and that the release date was 25 January 2021.

[19] In an affidavit sworn in these proceedings on 27 August 2025, Mr Paul Mageean, Chief Commissioner of the Parole Commissioners, confirmed that, as of that date, there had been four cases in which Commissioners permitted registered victims to attend oral hearings pursuant to rule 22(4). He stated:

“... In each case, where the registered victim was permitted to attend the oral hearing, the attendance was limited to only part of the hearing. Each victim was permitted to attend for a brief period, of between

15-30 minutes, at the commencement of the hearing, to address the panel. Once that was done, the victim was asked to leave the hearing and remainder of the hearing took place in private. No evidence was called and no substantive submissions were heard in the presence of the victim.”

[20] Mr Mageean also drew the court’s attention to a further application which was made in July 2025 for a victim, her son and an MLA to attend an oral hearing. Details of the forthcoming hearing had appeared in a newspaper before the Commissioner had given any directions about attendance. Mr Mageean considered this to be a breach of the rule 22(3) prohibition on publication of information about proceedings or the parties. He drew the matter to the attention of the Department. It ultimately took the view that the question of whether the publication amounted to a breach of rule 22(3) was a matter of law for a court to decide.

Grounds of challenge

[21] Following the grant of leave, the applicant filed an amended Order 53 statement dated 27 November 2024. It includes a challenge to the *vires* of rule 22(2) on the ground that it is contrary to the principle of open justice and also that it is incompatible with article 10 ECHR. As set out above it also contains a challenge to the alleged refusal of the Commissioners to make available information about the proceedings or to make provision for the applicant to attend those proceedings.

[22] Without an application for leave, the applicant purported to file a further amended Order 53 statement on 16 September 2025. It was in materially identical terms, save that it included the additional contention that the Parole Commissioners had an unspecified duty to provide “notice” to the applicant about the parole hearing.

[23] In light of the complex procedural history and the evolution of both sets of proceedings, it is essential to be clear about the scope of the challenge. Notwithstanding the final proposed amended Order 53 statement, the applicant did not ultimately push the claim that she was entitled to notice of the proceedings. As set out above, she was a registered victim under Prisoner Release Victim Information (NI) Scheme 2003 and was therefore entitled to receive, *inter alia*, notice that discharge was under consideration (see [29]-[31] below). In those circumstances, the applicant was right not to push this point and it is clear to me in any event that it never formed part of either challenge and does not have leave. It is equally clear to me that any reference within the amended Order 53 statement to a claim for provision of information must be a legacy from a pre-leave pleading. Colton J clearly refused leave on that issue in light of the introduction of rule 22A. That position was accepted on behalf of the applicant at the leave hearing and is

recorded at para [18] of the leave judgment. Having considered the leave judgment and the post-leave amended Order 53 statement, it is therefore clear to me that the permitted challenge relates to two issues which overlap considerably:

- (i) Whether rule 22(2) is ultra vires its parent statute in light of the open justice principle.
- (ii) Whether the Commissioners are under a positive duty to make arrangements for a victim to attend parole hearings.

[23] At the hearing, a considerable amount of time was devoted to rule 22(3) and the prohibition upon publication of “information about the proceedings.” It was submitted that this amounted to a prohibition upon reporting by a person who was permitted to attend a parole hearing and hence was also contrary to the open justice principle. Having considered the matter carefully, I am firmly of the view that any such challenge to rule 22(3) is outside the permitted scope of these proceedings. It may be that the issue of reporting restrictions may arise on the facts in a future case. However, it is clear to me that it never formed part of the No.2 challenge and was never granted leave by Colton J. The post leave amended Order 53 statement is limited to a challenge to rule 22(2), which concerns private hearings, not reporting restrictions. Accordingly, I have proceeded on the basis that this composite challenge is limited to the *vires* of rule 22(2) insofar as it requires parole hearings to take place in private.

Relevant statutory and policy framework

Parole Commissioners’ (Northern Ireland) Rules 2009

[24] Pursuant to a combination of Article 46(4) of and Schedule 4 to the Criminal Justice (Northern Ireland) Order 2008 (“the 2008 Order”) the Department has power to make rules governing the conduct of the proceedings of the Parole Commissioners. Pursuant to Article 100(5) of the 2008 Order, any rules may also contain incidental, supplementary, consequential, transitory, transitional or saving provisions.

[25] Schedule 4, para 4 to the 2008 Order provides in relevant part as follows:

“4.-(1) The [Department of Justice] may make rules with respect to the proceedings of the Commissioners.

(2) In particular rules may include provision -

...

(d) about evidence and information, including provision: ...

- (iii) for the giving of evidence by or on behalf of the [Department of Justice], the Police Service of Northern Ireland and others;
- (iv) about the way in which information or evidence is to be given ...
- (e) for proceedings to be held in private, except where the Commissioners direct otherwise."

[26] The 2008 Order is the parent statute for the 2009 Rules. Rule 22A was first inserted into the 2009 Rules by the Parole Commissioners' (Amendment) Rules (NI) 2021 [SR 2021/138]. A further version was substituted by the Parole Commissioners' (Amendment) Rules (NI) 2022 [S.R. 2022/65]. Rules 22 and 22A now provide as follows:

"22(1) Subject to rule 18(9), oral hearings shall be held at the prison unless the chairman of the panel and the parties agree otherwise.

(2) Oral hearings shall be held in private.

(3) Subject to rule 22A, information about the proceedings and the names of any persons concerned in the proceedings shall not be made public.

(4) The chairman of the panel may admit to the oral hearing such persons on such terms and conditions as the chairman of the panel considers appropriate.

22A.—(1) Where a registered victim or other person makes a request for a summary of the reasons for a provisional direction of a single Commissioner recorded under rule 13(2)(b) that has become final by virtue of rule 13(6), the Chief Commissioner must appoint a Commissioner to consider the request. The appointed Commissioner must then produce a summary of the reasons for that direction, unless the appointed Commissioner decides that there are exceptional circumstances why a summary should not be produced for disclosure.

(2) The Chief Commissioner is not required to appoint a Commissioner to produce a summary under paragraph (1) where the request is made more than 6 months after the date when the direction under rule

13(2)(b) became final, unless the Chief Commissioner decides that there are exceptional reasons to do so.

(3) In a summary produced under paragraph (1) –

- (a) the names of the parties to proceedings under Rule 13(2) may be disclosed;
- (b) the names of other persons concerned in the proceedings must not be disclosed;
- (c) other information about proceedings under these Rules must not be disclosed except insofar as the Commissioner appointed under paragraph (1) directs.

(4) Where a registered victim or other person makes a request for a summary of the reasons for a decision recorded after oral proceedings under rule 24(2), the Chief Commissioner must appoint a Commissioner to consider the request. The appointed Commissioner must then produce a summary of the reasons for that decision, unless the appointed Commissioner decides that there are exceptional circumstances why a summary should not be produced for disclosure.

(5) The Chief Commissioner is not required to appoint a Commissioner to produce a summary under paragraph (4) where the request is made more than 6 months after the date of the decision, unless the Chief Commissioner decides that there are exceptional reasons to do so.

(6) In a summary produced under paragraph (4) –

- (a) the names of the parties to the oral proceedings under rule 24(2) may be disclosed;
- (b) the names of other persons concerned in the proceedings must not be disclosed;
- (c) other information about proceedings under these Rules must not be disclosed except insofar as the Commissioner appointed under paragraph (4) directs.

(7) This Rule does not affect the operation of Rule 9 (Non-disclosure of confidential information).

(8) For the purposes of this rule, “registered victim” means a person who is registered or entitled to receive information under any of –

- (a) the Prisoner Release Victims Information Scheme, 2003;
- (b) the Probation Board for Northern Ireland Victim Information Scheme, 2005;
- (c) the Victims of Mentally Disordered Offenders Information (Northern Ireland) Scheme, 2008.”

Parole Board Rules 2016 & 2019 [England & Wales]

[27] The Parole Board Rules in England and Wales have been revised on a number of occasions in recent years. The Parole Board Rules 2016 [S.I. 2016/1041] made provision for parties to parole proceedings to apply for permission to be accompanied by an observer (rule 21). Rule 22 governed the privacy of proceedings. It provided for observers but otherwise required hearings to be private and was in materially identical terms to rule 22(2) of the Northern Ireland Rules. It provided in relevant part:

“22(3) A hearing must be held in private.

(4) In addition to any witness who has been called under these rules and any observer whose attendance has been approved under rule 21, the panel, chair or duty member may

- (a) admit any other person to the hearing, and
- (b) impose conditions on that person’s admittance.”

[28] The Parole Board Rules 2016 were replaced by the Parole Board Rules 2019 [SI 2019/1038]. In its original format, rule 15 of the 2019 Rules was in materially identical terms to its predecessor, rule 22. Rule 15 was amended in July 2022 and again in November 2024. The current rule 15 provides the Board with discretion to hold some or all of the hearing in public. It provides in relevant part as follows:

“15(3) An oral hearing (including a ... case management conference) must be held in private

unless the Board chair considers, on their own initiative or on an application to the Board, that it is in the interests of justice for the oral hearing to be held in public.

(3A) Any application for an oral hearing to be held in public under paragraph (3) may not be made later than 12 weeks before the date allocated for the oral hearing.

(3B) If an oral hearing is held in public, the panel, chair or duty member may give a direction that part of the oral hearing is to be held in private.” [Emphasis added].

Victim Information Schemes

[29] Pursuant to section 68 of the Justice (Northern Ireland) Act 2002, the Department must make a “Victim Information Scheme” which requires it to make available information about the discharge or temporary release of persons serving sentences of imprisonment, to the victims of those offences “who wish to receive it.”

[30] The relevant scheme is the Prisoner Release Victim Information (Northern Ireland) Scheme 2003 [SR 2003/293]. It provides that a victim must notify the Department in writing that it wishes to receive the relevant information [paragraph 3]. In relation to life sentence prisoners, paragraph 4(4) prescribes the information to which the victim is entitled:

“4(4) The information in relation to the discharge of a relevant imprisoned offender sentenced to life imprisonment or detention ... is:

- (a) the minimum period which he must serve in custody before he can be considered for discharge ...; and
- (b) if his discharge is being considered, that fact;
- (c) that he has been discharged;
- (d) any license conditions, or other conditions imposed under legislation relating to sex offenders, that is known will be imposed on discharge; and

- (e) if he is returned to custody as a result of the revocation of his licence or a breach of any of the conditions referred to in paragraph (d), the fact that this has occurred.”

[31] Paragraph 5 of the 2003 Scheme provides a number of relatively narrow exceptions to the duty to provide the prescribed information to registered victims.

[32] A victim information scheme in similar terms is also available for the victims of offences for which the offender is released under supervision (Article 25 of the Criminal Justice (Northern Ireland) Order 2005 and the Probation Board for Northern Ireland Victim Information Scheme 2005 [SR 2005/432]). A third victim information scheme provides for the disclosure to victims of information about the discharge of detained persons suffering from a mental disorder (section 69A of the Justice (Northern Ireland) Act 2002 and the Victims of Mentally Disordered Offenders Information (Northern Ireland) Scheme 2008 [SR 2008/457]).

Relevant principles of statutory interpretation

[33] Rule 22 of the Parole Commissioners’ Rules (Northern Ireland) 2009 is a measure of subordinate legislation, made pursuant to Schedule 4, para 4 to the Criminal Justice (Northern Ireland) Order 2008. The legal principles governing the *vires* of subordinate legislation were explained by the Supreme Court in *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39; [2016] 3 WLR 387. Lord Neuberger MR stated:

“23. Subordinate legislation will be held by a court to be invalid if it has an effect, or is made for a purpose, which is *ultra vires*, that is, outside the scope of the statutory power pursuant to which it was purportedly made ... Accordingly, when, as in this case, it is contended that actual or intended subordinate legislation is *ultra vires*, it is necessary for a court to determine the scope of the statutorily conferred power to make that legislation.

... The interpretation of the statutory provision conferring a power to make secondary legislation is, of course, to be effected in accordance with normal principles of statutory construction. ...”
[Emphasis added]

[34] The principles of statutory interpretation have been explained most recently in two decisions of the Supreme Court: *R (O) v Home Secretary* [2022] UKSC 3; [2022] 2 WLR 343 (paras [29]-[31], per Lord Hodge) and *R (PACCAR) v Competition Appeal Tribunal* [2023] UKSC 28; [2023] 1 WLR 2594 (paras [40]-[44],

per Lord Sales). These principles have been cited and applied by courts in this jurisdiction on multiple occasions since these decisions, including recently by the Northern Ireland Court of Appeal in *Department of Justice v Parole Commissioners for Northern Ireland* [2025] NICA 63 (paras [22]-[23], per Colton LJ).

[35] In *Re McClure* [2026] NIKB 16, I recently considered these principles and provided the following brief summary:

“[130] ... the court must focus upon the language used in the statute and identify the meaning of the words by reference to the context of the provision. This should include an analysis of the objectives which the measure was intended to address. For this purpose, external aids to construction such as explanatory notes or official pre-legislative policy reports/papers may be of assistance. However, they cannot override clear language within a statute. The relevant statutory provisions should also be read in the context of the entire statutory scheme. In certain circumstances and in accordance with the principles in *Pepper v Hart* [1992] 3 WLR 1032, statements made in the legislature by the promoter of a Bill may be admissible aids to construction in order to resolve an ambiguity.”

[36] In the *R (O) v Home Secretary* case, the Supreme Court emphasised that ascertaining the “intention of Parliament” is an objective concept. It means the interpretation which the court can reasonably attribute to Parliament, as a result of the language used. In *R (PACCAR)* Lord Sales cited two authorities where the court had emphasised the importance of understanding the purpose of a statutory provision, together with the historical and other circumstances which resulted in its enactment. The first authority was *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, Lord Bingham said:

“[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.”

[37] The second authority was *Bloomsbury International Ltd v DEFRA* [2011] UKSC 25, in which Lord Mance stated:

“[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 ... and certainly not as a starting point, before identifying the legislative purpose and scheme.”

[38] The applicant’s primary submission in this case is that rule 22(2) is unambiguous in its terms. It creates an absolute rule requiring proceedings before the Commissioners to take place in private. The applicant described it as a “blanket ban” on public hearings. It was submitted that such an absolute rule was not mandated by the parent provisions of the 2008 Order and that the 2009 Rules could not properly be construed to provide the Commissioners with a discretion to allow a public hearing based upon the facts of a particular case. The applicant contends that rule 22(2) requires a private hearing in every case and therefore goes further than is necessary. Comparison was drawn with the amended 2019 Rules in England & Wales where the original requirement for private hearings has been amended and Commissioners are now provided with a discretion to permit some or all parts of hearings to be in public. Hence, the applicant claims that rule 22(2) is ultra vires the enabling powers in the 2008 Order.

[39] In response, the respondent does not dispute the relevant principles of interpretation but contends that rule 22(2) should be read in light of rule 22(4) which empowers a Commissioner to permit “such persons” to attend as he considers appropriate, subject to terms and conditions. The respondent submits that this should be interpreted to mean that the Commissioner may admit “every person” which, in substance, amounts to a power to permit a public hearing.

[40] Resolution of these competing submissions requires consideration of both the relevant principles of interpretation and the principle of open justice. While the parties did refer to the relevant Parole Board Rules and enabling provisions in England & Wales, none of the parties referred to the Northern Ireland statutory predecessors to the 2009 Rules and 2008 Order, namely the Life Sentences (Northern Ireland) Order 2001 (“the 2001 Order”) and the Life Sentence Commissioners (Northern Ireland) Rules 2001 (“the 2001 Rules”). As set out below, I consider those statutory provisions to be of importance to the exercise of statutory interpretation.

The interpretation of primary and secondary legislation which curtail or authorise curtailment of fundamental common law rights

[41] The principles governing the interpretation of a statute which curtails or authorises the curtailment of fundamental common law rights are an outworking

of the principle of legality. In *R v Secretary of State for Home Department, ex p Simms* [1999] 3 WLR 328, Lord Hoffman famously explained the principles in the following terms:

“Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were enacted to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.”

[42] In *R (UNISON) v Lord Chancellor* [2017] UKSC 51; [2020] AC 869, the Supreme Court applied the same principles when considering whether secondary legislation which prescribed fees for employment tribunals were ultra vires their parent statute on the ground that they provided an excessive impediment to the fundamental common law right of access to a court. Lord Reed cited a series of cases in which the *vires* of restrictions on rights of access to courts or tribunals were considered by reference to a parent statute containing a general enabling power to make rules for the management of prisons. In *Raymond v Honey* [1983] 1 AC 1, the general enabling power was “quite insufficient to authorise hindrance or interference with so basic a right” as unimpeded access to a court and that “a citizen’s right to unimpeded access to the courts can only be taken away by express enactment” (*Raymond v Honey*, at p14). In *R (Leech) v Secretary of State* [1994] QB 198 and *R (Daly) v Secretary of State* [2001] 2 AC 532 the parent provisions appeared to authorise some curtailment of the relevant common law rights. In both cases the court explained that the first stage of the *vires* analysis required consideration of the scope of the relevant restriction and secondly, a consideration of the policy justification for curtailment which underpinned the parent statute. In the *Daly* case, Lord Bingham identified the relevant common law rights of prisoners to access courts and stated:

“[5] ... Such rights may be curtailed only by clear and express words and then only to the extent reasonably necessary to meet the ends which justify the curtailment.”

After examining the justification in that case, he concluded:

“[21] the policy provides for a degree of intrusion into the privileged legal correspondence of prisoners which is greater than is justified by the objectives the policy is intended to serve and so violates the common law rights of prisoners.”

[43] In *UNISON*, Lord Reed summarised the key principles of interpretation as follows:

“[80] Even where a statutory power authorises an intrusion upon the right of access to the courts, it is interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question. ...

[88] As appears from such cases as *ex p Leech* [1994] QB 198 and *Daly* [2001] 2 AC 532, even where primary legislation authorises the imposition of an intrusion on the right of access to justice, it is presumed to be subject to an implied limitation. As it was put by Lord Bingham in *Daly*, the degree of intrusion must not be greater than is justified by the objectives which the measure is intended to serve.”

[44] In *Kennedy v Charity Commission* [2014] UKSC 20; [2015] AC 455, the Supreme Court applied these principles of interpretation in the context of the common law right to open justice. The central issue in that case was the scope of the absolute exemption under the Freedom of Information Act 2000 from disclosure of documents placed into the custody of a person conducting an inquiry or arbitration. However, the Supreme Court also considered the availability of powers of disclosure under the common law principle of open justice. Lord Toulson examined the principle of open justice in detail and explained the following principles regarding the interpretation of a statute which may restrict open justice:

“[117] As the Court of Appeal said ... although the sovereignty of Parliament means that the responsibility of the courts for determining the scope of the open justice principle may be affected by an Act of

Parliament, Parliament should not be taken to have legislated so as to limit or control the way in which the court decides such a question unless the language of the statute makes it plain beyond possible doubt that this was Parliament's intention.

[118] ... The Administrative Court's observation that no good reason had been shown why the checks and balances contained in the [Freedom of Information] Act should be overridden by the common law was to approach the matter from the wrong direction. The question, rather, was whether the Act demonstrated unequivocally an intention to preclude the courts from determining in a particular case how the open justice principle should be applied."
[Emphasis added]

[45] From the above case law, it is clear that where an instrument of secondary legislation or other executive order/policy purports to restrict the exercise of a fundamental common law right, it will be lawful only to the extent that it is unequivocally authorised by statute. The process of statutory interpretation will require a two-stage analysis of both the enabling provision and the secondary instrument. The more general the enabling power, the more readily it will be read subject to an implied restriction authorising only such limitation of common law rights as is justified by the policy objectives of the restriction. Similarly, the secondary instrument must be interpreted in light of the restrictions which have been authorised by the primary statute, whether by clear express language or necessary implication.

What are the requirements of open justice?

[46] The modern understanding of the open justice principle was expressed most clearly by the House of Lords in *Scott v Scott* [1913] AC 417; [1911-13] All ER Rep 1. The case concerned a petition for a decree of nullity of marriage. The judge had ordered the proceedings be heard in camera. After the proceedings concluded, one of the parties published a transcript of the evidence and was the subject of a motion for contempt. The House of Lords held that court proceedings should be heard in public and that the judge had no power to order an in camera hearing. The court recognised the possibility of exception, if publicity may prevent a proper determination of the issues and hence would risk a denial of justice. Viscount Haldane LC described the basic principles and the possible grounds for exception in the following terms:

"As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies

on those seeking to displace its application in the particular case to make out that the ordinary rule must, as of necessity, be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience but on necessity. ... But unless it be strictly necessary for the attainment of justice, there can be no power in the court to hear in camera either a matrimonial cause or any other where there is a contest between parties. He who maintains that by no other means than by such a hearing can justice be done may apply for an unusual procedure. But he must make out his case strictly and bring it up to the standard which the underlying principle requires. He may be able to show that the evidence can be effectively brought before the court in no other fashion. He may even be able to establish that subsequent publication must be prohibited for a time or altogether. But this further conclusion he will find more difficult than in the case of secret process, where the objection to publication is not confined to the mere difficulty of giving testimony in open court. In either case he must satisfy the court that by nothing short of the exclusion of the public can justice be done. The mere consideration that the evidence is of an unsavoury character is not enough, any more than it would be in a criminal court and still less is it enough that the parties agree in being reluctant to have their case tried with open doors. ... ([1911-13] All ER Rep 1 at pps 9-10).

... A mere desire to consider feelings of delicacy, or to exclude from publicity details which it would be desirable not to publish, is not, I repeat, enough as the law now stands. I think that to justify an order for hearing in camera it must be shown that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made. Whether this state of the law is satisfactory is a question, not for a court of justice, but for the legislature ...” ([1911-13] All ER Rep 1, at p 10). [Emphasis added]

[47] Lord Shaw explained in somewhat dramatic and colourful terms how the principle of open justice formed an important part of the liberties of the subject in a democratic society. He also explained that the principle included a right to report upon and to publish details about the proceedings. He stated:

“I am of opinion that the order to hear this case in camera was beyond the power of the judge to pronounce. I am further of the opinion that, even on the assumption that such an order had been within his power, it was beyond his power to impose a suppression of all reports of what passed at the trial after the trial had come to an end. But in order to see the true gravity of what has occurred these two things must be taken together. So taken, they appear to me to constitute a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties and an attack upon the very foundations of public and private security. ... The court had passed judgment in private and the case was at an end; and now judgment has been passed upon the appellant, in respect of disclosing what occurred in court by exhibiting an accurate transcript of what had actually transpired, and the appellants are enjoined to perpetual silence. Against this, which is a declaration that the proceedings in an English court of justice shall remain forever shrouded in impenetrable secrecy, there is, it is said no appeal. I candidly confess that the whole proceeding shocks me. ... This result, which is declared by the courts below to have been legitimately reached under a free constitution, is exactly the same result which would have been achieved under, and have accorded with, the genius and practice of despotism. What has happened is a usurpation – a usurpation which could not have been allowed even as a prerogative of the Crown, and most certainly must be denied to the judges of the land. To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand. ...”

[48] In *AG v Levenson Magazine Ltd* [1979] AC 440; [1979] 2 WLR 247, contempt proceedings were brought against the defendant for publishing the name of a witness in criminal proceedings for whom the judge had granted anonymity. The identification of the witness was based upon unchallenged evidence given in open court during the course of the proceedings. No separate reporting restriction had

been ordered. The House of Lords dismissed the contempt proceedings. Explaining the principles of open justice, Lord Diplock stated:

“As a general rule the English system of administering justice does require that it be done in public: *Scott v Scott* [1913] AC 417. If the way that courts behave cannot be hidden from the public ear and eye, this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court, the principle requires that nothing should be done to discourage this.

However, since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule. Apart from statutory exceptions, however, where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice ...” ([1979] AC 440, at p450).
[Emphasis added]

[49] In *R (Guardian News and Media) v City of Westminster Magistrates’ Court* [2013] QB 618; [2012] EWCA Civ 420, the Court of Appeal (Neuberger MR, Hooper, Toulson LJ) considered an application by journalists for disclosure of materials referred to (but not read) in open court during extradition proceedings, after their conclusion. The court allowed the application by reference to the open justice principle. Lord Toulson stated:

“[73] More fundamentally, although the sovereignty of Parliament means that the responsibility of the courts for determining the scope of the open justice principle may be affected by an Act of Parliament, Parliament should not be taken to have legislated so as to limit or control the way in which the court decides such a question unless the language of the statute makes it plain beyond possible doubt that this was Parliament’s intention.”

[74] ... The Administrative Court’s observation that no good reason had been shown why the checks and balances contained in the [Freedom of Information Act] should be overridden by the common law was, in my respectful view, to approach the matter from the wrong direction. The question, rather, was whether the Act demonstrated unequivocally an intention to preclude the courts from determining in a particular case how the open justice principle should be applied.”

[50] Lord Toulson returned to the same theme in *Kennedy v Charity Commission* [2014] UKSC 20; [2015] AC 455 as set out above. In his concurring judgment which analysed the common law principles, Lord Toulson explained the requirements of open justice in the following terms:

“[110] It has long been recognised that judicial processes should be open to public scrutiny unless and to the extent that there are valid countervailing reasons. This is the open justice principle. The reasons for it have been stated on many occasions. Letting in the light is the best way of keeping those responsible for exercising the judicial power of the state up to the mark and for maintaining public confidence ...

[113] ... The principle has never been absolute because it may be outweighed by countervailing factors. There is no standard formula for determining how strong the countervailing factor or factors must be. The court has to carry out a balancing exercise which will be fact-specific. Central to the court’s evaluation will be the purpose of the open justice principle, the potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others.

[114] There may be many reasons why public access to certain information about the court proceedings should be denied, limited or postponed. The information may be confidential; it may relate to a person with a particular vulnerability; its disclosure might impede the judicial process; it may concern allegations against other persons which have not been explored and could be potentially damaging to them; it may be of such peripheral, if any, relevance to the judicial process that it would be disproportionate to require its disclosure; and these are only a few examples ...

[115] The court held in *Guardian News* that the open justice principle applies, broadly speaking, to all tribunals exercising the judicial power of the State ... The fundamental reasons for the open justice principle are of general application to any such body, although its practical operation may vary according to the nature of the work of a particular judicial body." [Emphasis added]

[51] The application of the open justice principle to parole proceedings was considered by the Divisional Court in *R (D) v Parole Board* [2018] EWHC 694 (Admin); [2019] QB 285. The case concerned a challenge to the substantive decision of the Parole Board to release a notorious offender. It included a challenge to the *vires* of the then rule 25 of the Parole Board Rules 2016. At that time, rule 25 was materially identical to the original rule 22(3) of the Parole Commissioners' Rules (NI) 2009 and contained an absolute prohibition upon publication of "information about proceedings under these rules and the names of persons concerned in the proceedings." Both rules have subsequently been amended, as a result of the decision in *R (D)*. In Northern Ireland, rule 22A now provides victims with a right to receive a summary of the decision, if requested. The Divisional Court concluded that since the function of the Parole Board was to determine whether an individual should remain confined after the expiry of his minimum term, it involved an adjudication upon individual liberty and was a "paradigm example of the exercise of a judicial function" (para [171]). Accordingly, it held that the open justice principle applied to parole proceedings. After an analysis of the authorities, it summarised the open justice principle to involve the following rights/obligations (at para [170]):

- (i) The obligation to hold hearings in open court to which the public has access;
- (ii) The right of the press and others to report on legal proceedings;

- (iii) The placing into the public domain of judicial decisions, even in cases involving a closed material procedure; and
- (iv) The obligation to ensure that evidence or information communicated to a court is presumptively available to the public.

[52] I consider that there is a further essential aspect of the open justice principle, which runs through all of the above authorities. The starting position in any court proceedings is that they are held in public. It is for a party who seeks an exception to that principle to establish the grounds for doing so. There is no limitation upon the circumstances in which an exception might be justified. However, in every case, a departure must be justified by reference to the facts and circumstances of the individual case and must be no more extensive than is required by those circumstances. Crucially, in each case, it is for the court or tribunal with carriage of the case to determine whether an exception should be permitted. Accordingly, the ability of a court or tribunal with carriage of proceedings to decide for itself whether an exception to open justice is justified is an essential element of the principle itself. To put the matter another way, determining whether or not there should be an exception to open justice in any particular case is a judicial function. Like other aspects of the principle, the power of a court to decide on exceptions should only be curtailed by express statutory language and only to the extent necessary to give effect to the relevant policy objective of the statute.

[53] At the time of the *R (D)* decision, the parent provision for the Parole Board Rules was section 239(5) Criminal Justice Act 2003. It conferred a general power to “make rules with respect to the proceedings of the Board ...” Applying the principles of interpretation set out above, the Divisional Court in *R (D)* considered that section 239(5) contained general and ambiguous words “which do not expressly authorise any trammelling of fundamental rights.” By contrast, it noted that the then rule 25 required a “blanket ban” on the provision of information about the proceedings (at paras [191]-[192]). It considered that the parent statute authorised rules which would permit the withholding of certain types of confidential information or whose publication might affect private rights, whereas rule 25 imposed a broader restriction than was necessary. No objective justification for such a wide-ranging prohibition had been advanced and it therefore concluded that rule 25 was *ultra vires* (at paras [197]-[199]). Importantly, the court analysed the statutory predecessors to both section 239(5) and to rule 25. While there had been no material change in the parent provision, previous versions of rule 25 had been in qualified terms. The predecessor rule contained a prohibition upon disclosure of information about the proceedings “except in so far as the chairman of the panel otherwise directs.” After considering this statutory history, the Divisional Court concluded:

“[176] There are no obvious reasons why the open justice principle should not apply to the Parole Board

in the context of providing information on matters of public concern to the very group of individuals who harbour such concern, namely the public itself. Indeed, it seems to us that there are clear and obvious reasons why the Parole Board should do so. This information can readily be provided in a fashion which in no way undermines the Article 8 rights of the prisoner and the confidentiality which attaches to it.
...

[199] In our judgment, the [rule 25] clearly does go too far. There is no objective necessity for a rule which stifles the provision of all information relating to the proceedings of the Parole Board, regardless of the justified public interest in any particular set of proceedings and of the fact that not all information needs to be safeguarded. These obvious propositions are vouched by a brief examination of the earlier versions of the Parole Board Rules containing discretionary language ...”

Is rule 22(2) of the Parole Commissioners (NI) Rules 2009 ultra vires the 2008 Order?

[54] The first issue is whether the principle of open justice applies to proceedings before the Parole Commissioners in Northern Ireland. I consider that there is no material difference between the purposes, statutory foundation for or the powers of Parole Commissioners in Northern Ireland and England and Wales. Like England and Wales, the purpose of those parole proceedings in Northern Ireland is to determine a question which affects the liberty of a prisoner and hence I consider it is a judicial function. For the same reasons set out by Lord Toulson in *Kennedy* and by the Divisional Court in *R (D)*, I am therefore satisfied that the open justice principle applies to proceedings before the Parole Commissioners in Northern Ireland.

[55] The ultimate task for the court is to determine whether rule 22(2) of the 2009 Rules has been authorised, whether expressly or by necessary implication, by Article 46 of and Schedule 4 to the 2008 Order. The first stage of the statutory interpretation process is to understand the context, history and purposes of the parent legislation.

[56] The 2008 Order introduced significant changes in sentencing policy in Northern Ireland and conferred new sentencing powers. The policy initiatives which led to the making of the 2008 Order were the 2000 report on the Review of the Criminal Justice System in Northern Ireland and the March 2005 public consultation on the Review of the Sentencing Framework for Northern Ireland.

The 2008 Order introduced important new provisions for the sentencing and post-release management of prisoners sentenced to determinate custodial sentences ("DCS"). Part 2 of the Order introduced a requirement for a sentencing court to specify the period of time spent in custody and the period spent under licence, replacing the provisions for automatic remission. Chapter 3 introduced new measures for the assessment and sentencing of dangerous violent and sexual offenders convicted of specified offences. Dangerousness is determined by the sentencing judge on the basis of whether there is a "significant risk of serious harm to members of the public." Dangerous offenders may now be sentenced to extended custodial sentences ("ECS") which carry extended periods of post release supervision on licence. Courts were also granted new powers to make indeterminate custodial sentences ("ICS"). Release of prisoners subject to an ICS or ECS may only take place following the decision of the Commissioners. Pursuant to Article 18(4) of the 2008 Order, the Commissioners shall not give a direction for release unless satisfied that "... it is no longer necessary for the protection of the public from serious harm that [the prisoner] should be confined." The existing Life Sentence Review Commissioners established under the 2001 Order were renamed as the Parole Commissioners for Northern Ireland (Article 46 of the 2008 Order) and the additional functions in relation to ICS and ECS prisoners were therefore conferred on the renamed body. The result was an effective consolidation of the two statutory regimes, with the Parole Commissioners exercising functions to consider the release of life sentence prisoners under the 2001 Order and those serving an ICS or ECS under the 2008 Order.

[57] Since the new powers under the 2008 Order were conferred on a pre-existing but renamed body, the relevant statutory predecessor is the 2001 Order. The enabling provision for making rules governing the procedures of the Life Sentence Review Commissioners was a combination of Article 4 of and Schedule 2 to the 2001 Order. Schedule 2, paragraph 4 provided:

"4. The rules may provide for proceedings to be held in private except where Commissioners direct otherwise." [Emphasis added]

[58] The Life Sentence Review Commissioners' Rules 2001 [S.R. 2001/317] used this precise formulation in relation to the privacy of parole hearings for life sentence prisoners. Rule 9 provided in relevant part as follows:

"9(2) Hearings shall be held in private except in so far as the chairman of the panel otherwise directs.

(3) Information about the proceedings and the names of any persons concerned in the proceedings shall not be made public.

(4) The chairman of the panel may admit to the hearing such persons on such terms and conditions as he considers appropriate.” [Emphasis added]

[59] Accordingly, under the predecessor statutory regime, both the enabling power and the Rules provided for parole proceedings in private except where the Commissioners direct “otherwise.” In my view, the word “otherwise” reflects a clear intention to confer upon the Commissioners a power to do the opposite of hearing cases in private, namely to conduct a public hearing. I also consider it plainly implicit within the breadth of the power that Commissioners may devise bespoke directions regarding public access to some or all parts of the hearing or to impose restrictions which might otherwise fall within the scope of the open justice principle. In my view, the clear meaning of the enabling provision was to confer a power to make rules which operate consistently with the open justice principle. As described by Lord Toulson in *Kennedy*, that includes decision-making by the Commissioners themselves on a case-by-case basis. By following the precise formulation of the parent provision, I consider it clear that the 2001 Rules fulfilled the intention behind the parent provision by enabling the Life Sentence Commissioners to identify and assess the nature and strength of any justification for privacy and to give case-specific directions on privacy in light of the individual facts and evidence likely to be tendered. Accordingly, there can be no question but that arrangements under the predecessor provisions enabled proceedings before the Life Sentence Commissioners to take place in a manner compatible with the common law right to a public hearing. No evidence was adduced to the court about the practices of the Life Sentence Commissioners, nor of any sudden reason for a policy change in the approach to privacy under the 2009 Rules. It may be that the practices of the Life Sentence Commissioners were similar to the current practices of the Parole Commissioners, as described by Mr Mageean in his affidavit. If that was the case, there may well have been cases which were heard in whole or in part in private which ought to have been heard in public. However, whatever the practices of the Life Sentence Commissioners may have been, I consider it to be clear that the 2001 Rules were capable of achieving compliance with the open justice principle.

[60] Upon the introduction of the 2008 Order, the legislature defined the enabling powers in materially identical terms to those under the 2001 Order, namely that rules may provide “for proceedings to be held in private, except where the Commissioners direct otherwise” [Schedule 4, para 4(e) to the 2008 Order]. By contrast, rule 22(2) of the 2009 Rules provides simply that “oral hearings shall be in private”, without any qualification. The discretionary power to “direct otherwise” has been expressly omitted. The 2009 Rules are clearly not as flexible as the enabling provision permits. There is nothing in the statutory history or the evidence in these proceedings, which explains the change in policy. Despite contending that rule 22 should be construed as a whole in a manner which permitted public hearings, the Department did not adduce any evidence to explain the change in approach to private hearings, notwithstanding that the

re-named Commissioners would continue to exercise the same powers under the 2001 Order for release of life sentence prisoners.

[61] The 2009 Rules were accompanied by a detailed Explanatory Memorandum which sheds no light on the issue. The only relevant reference is in para 7.13 which simply recites the rule, rather than explain the policy rationale. It states:

“7.13 Hearings are in private and will be held in prison by and large. A hearing could be held elsewhere – for example if a prisoner was already on licence and it was a licence matter under consideration - if all parties were in agreement ...”

[62] The Explanatory Memorandum to the Rules confirms that they were the subject of consultation with all of the key criminal justice stakeholder bodies and were “endorsed” by the wider criminal justice system in Northern Ireland (para 8.2).

[63] Since rule 22(2) is drafted in terms requiring absolute privacy of proceedings, without express qualification and without an express power to direct a public hearing in whole or in part, the rule is much more restrictive than was previously the case under the 2001 Order.

[64] As set out above, the Department made two broad submissions in defence of rule 22(2). First, it contended that a power to direct a public hearing can be inferred into rule 22(2), when read in conjunction with rule 22(4). In the alternative, it contended that the restriction on public hearings was justified, in light of the particular requirements of proceedings before the Commissioners and the nature of the evidence frequently under consideration.

[65] As regards the Department’s first submission, rule 22(4) provides as follows:

“(4) The chairman of the panel may admit to the oral hearing such persons on such terms and conditions as the chairman of the panel considers appropriate.”

[66] The Department submitted that rule 22(4) confers a broad and unqualified discretion upon the chair of the panel to admit other persons to the hearing. It contended that once any non-party is admitted to the hearing, the proceedings cease to be “private.” It was also submitted that the words “such persons” should be interpreted broadly and could include “every person.” Accordingly, it was submitted that rule 22, when read as a whole, may be interpreted and operated in a manner consistent with open justice. The Parole Commissioners did not support this submission. They maintained that rule 22(2) was unqualified and that the requirement for private hearings was central to the statutory scheme as a whole.

It maintained that the power to admit persons to a hearing did not transform those proceedings into a public hearing. They contended that rule 22(4) authorised Commissioners to admit and to regulate the conduct of specific persons within a hearing. Rather than open the hearing up to the public at large, it was contended that the rule was intended to enable Commissioners to control precisely who was present, the parts of the proceedings to which they may attend, together with any rights of participation by way of submissions or evidence.

[67] On first analysis, I considered that there was substantial force in the interpretation contended for by the Department. I was considerably influenced by the desirability of interpreting the 2009 Rules in a manner consistent with open justice, if it was possible to do so. However, having reflected carefully upon the matter, I am ultimately of the view that rule 22(4) cannot and should not be interpreted so broadly as to confer upon the Commissioners a power to conduct a public hearing. There are several factors which have led me to this conclusion.

[68] First, I consider that the language used in rule 22(4) more naturally reflects a process of personalised and individual admission to proceedings rather than a power to admit the public at large. It is also more consistent with a reading of rule 22 as a whole. The interpretation contended for by the Department would lead to a logical and linguistic conflict between the unqualified requirement in rule 22(2) for a private hearing and rule 22(4) including a power to do the precise opposite. For the Commissioners to have such a power, I consider that it would have been necessary to use much clearer language, such as that which appears in the 2008 Order or as appears in the 2001 Rules. In the absence of clearer language, I consider it to be unlikely that such a conflicting outcome could have been intended. Accordingly, reading rule 22 as a whole does not support the Department's interpretation.

[69] Second, I am reinforced in this view when rule 22 is compared with the statutory predecessor under rule 9 of the 2001 Rules. Rule 9 provided for both a power to direct that the proceedings take place otherwise than in private (rule 9(2)) and that the Commissioner should have the power to admit persons subject to conditions (rule 9(4)). The inclusion of separate powers governing public access and admitting "such persons" as the Commissioner considered appropriate reinforces the different purpose and scope of the two provisions. The retention within the 2009 Rules of the power to admit "persons" but not the power to direct an exception to the requirement for a private hearing must therefore have some interpretative significance. In my view, it reinforces the more restrictive interpretation of rule 22(4) which was contended for by the Parole Commissioners.

[70] Third, I am also influenced by the utility of separate powers. A public hearing is one to which the public has access, without the need to seek permission. I consider that there is a conceptual and practical difference between a Commissioner directing a public hearing and a Commissioner authorising the

admission of specific persons. A power to allow specific individuals to attend on specific terms, is an important additional power by which Commissioners may control the conduct of proceedings, which is different to the binary alternatives of private and public hearings.

[71] Fourth, as set out above, I also consider that the change in rules between 2001 and 2009 is indicative of a clear statutory intention to restrict the power to conduct public hearings. The phrase “such persons” in rule 22(4) must be interpreted in light of that intention and purpose. In those circumstances, I do not consider it is appropriate to interpret it to mean “every person”, as contended for by the Department.

[72] For all of these reasons, I am ultimately of the view that, properly construed, the power of Commissioners under rule 22(4) to authorise the attendance of persons, does not include the power to conduct a public hearing of parole proceedings. However, I do consider that the power might be exercised in a way that authorises more than one or multiple individuals to attend. For example, I consider that it would open to the Commissioners to make a single direction authorising multiple individuals to attend. It may also be appropriate to make a direction in which the authorised persons are identified by means of a more general description, rather than by naming each person individually. It is possible to envisage cases where such an approach may be appropriate. For example, there may be multiple friends and family of the victim who wish to attend. Alternatively, the underlying offence may have generated multiple victims (eg a terrorist atrocity). The precise language used by the Commissioners in any such authorisation will be a matter of fact and degree to be determined by Commissioners in individual cases. However, even in such a case, a “multiple person authorisation” remains conceptually and practically distinct from a public hearing.

[73] In its alternative submission, the Department contended that the requirement for hearings to be in private (subject to rule 22(4)), was justified by reason of the nature of parole proceedings and the evidence which may be under consideration. The relevant policy justification was set out in an affidavit of Mr Steven Allison. No evidence was submitted on behalf of the Commissioners of the types of circumstances which might justify a private hearing, nor to oppose the evidence of the Department. In summary the policy factors highlighted by Mr Allison were:

- (i) Evidence may include deeply personal and private information about the prisoner and third parties. Frequently, parole hearings require consideration of medical evidence, psychological assessments, risk assessments and internal prison assessments about the prisoner. These will also frequently include information about third parties and family members including children and evidence from Social Services. Fully

public hearings could therefore impact significantly upon the prisoner and third parties.

- (ii) The prospect of a public hearing may have a chilling effect upon the prisoner's co-operation. The ultimate object of parole proceedings is to assess the risks posed by prisoners. If they are serving a life sentence or have otherwise been classified as a dangerous offender, the assessment of risk will inevitably involve an analysis of the rehabilitation measures offered while in custody and the work undertaken by the prisoner. For many such prisoners the process is not straightforward, with setbacks and challenges. The Department considers that the prospect of a full public hearing in which all such matters are aired openly, could have a real chilling effect for some prisoners and disincentivise them to engage in essential rehabilitation work. Non co-operation by the prisoner may also impair the ability of the Commissioners to make an assessment of risk and also have a broader adverse impact upon rehabilitation and risk reduction, both of which are in the public interest.
- (iii) Police investigations may still be ongoing. In certain cases, investigations into the prisoner's offending or related offending may still be ongoing. Public disclosure of information which is relevant to the prisoner's risks or material changes in that risk could impact upon those investigations. For example associations and communications which the prisoner has maintained during custody could be relied upon in opposition to release. In certain instances, public disclosure of this type of information could be detrimental to lines of investigation or even to the welfare of the prisoner himself, insofar as it may reveal aspects of his offending past or changes in his associations which were otherwise unknown publicly.
- (iv) Relevant information may have been provided in confidence. Public disclosure of some information which has been disclosed in confidence or gathered using confidential means could be damaging either to those who supplied the information or the information gathering methodology.
- (v) Prison security. Parole hearings will frequently consider evidence about internal prison security and testing regimes, such as drug testing and monitoring. Some of these procedures will have security sensitivities and their effectiveness may be undermined if procedures and methodologies which are otherwise confidential are disclosed or confirmed in public.
- (vi) Confidential information relating to staff. Evidence will frequently include information about Prison Service staff members or other third parties. For example, it could include information about their engagement with the prisoner or their role in incidents which may be relevant to risk assessment (eg adverse incident reports). Public disclosure of the names or actions of those staff members could have obvious security implications.

- (vii) Retraumatization of victims. Not all victims wish to participate in the parole process or to receive information about the offender. Not all victims register under the statutory victims' information schemes. Some victims simply wish to move on with their lives. Public parole hearings with public reporting may have the unwanted effect of retraumatizing some victims.
- (viii) Accommodation. Parole hearings are ordinarily conducted within the prison or in some other controlled environment in which the prisoner will remain confined, without risk of flight or attack. A requirement for public hearings may therefore have a significant resource and/or security implication, whether by removing the prisoner from the prison or allowing members of the public to have access to the prison.

[74] Mr Allison's affidavit concludes:

“At present, and bearing in mind these various considerations, it is the Department's position that the current policy balance reflected in Rule 22 best promotes the pursuit of justice. To that end, and with a view to the proportionate and balanced approach to open justice, the Department is firmly of the view that there are no compelling policy justifications for such a departure. The Department also notes that provision was made in Rule 22(4) of the 2009 Rules so as to allow for the attendance of other persons in circumstances where it is appropriate.”

[75] Mr Allison also acknowledged that the current policy position may change and that a “different approach may be adopted in the future depending upon the circumstances that exist at that time.” The affidavit of Mr Allison is notable for the understanding which he holds about the interpretation of rule 22. He appears to confirm that rule 22(2) is an absolute rule requiring private hearings and also that rule 22(4) provides an exception to allow attendance by individuals. In light of the detailed policy justification which he explains for that interpretation, it is difficult to interpret his affidavit in any other way. To this extent, his evidence appears to stand in contrast to the submissions now advanced by the Department to the effect that rule 22, as a whole, does permit public hearings.

[76] The authorities set out above make clear that the principle of open justice is not an absolute one. There is no common law right or imperative that the entirety of every judicial proceeding must take place in public. The principle is a qualified one in which the right to a public hearing is the starting point and from which departures must be justified both by reference to the nature of the work of the particular tribunal and the particular circumstances of the case in hand. There can

be no doubt that the factors set out in Mr Allison's affidavit by way of justification for private hearings (and supported by the Commissioners) provide a strong and robust explanation for the need for privacy in parole hearings. Those factors also provide insight into the nature of the work of the Commissioners, the practicalities of their hearings and the lasting damage to personal and public interests which could occur if some hearings occurred in public. However, it is difficult to understand how any of those factors are new to the work of Parole Commissioners under the 2008 Order, as opposed to the work of the Life Sentence Commissioners under the 2001 Order and Rules. Indeed, for life sentence prisoners, the Parole Commissioners' powers of release are conferred by the 2001 Order and are the same as those exercised by the Life Sentence Commissioners. The 2001 Order and Rules provided expressly for the possibility of public hearings in whole or in part. While I consider it highly likely that, in the vast majority of cases, a private hearing could readily be justified for many parts of a hearing, it cannot be disputed that rule 22(2), even when read along with rule 22(4) goes beyond that requirement.

[77] Rule 22(2) provides that all hearings shall be private in their entirety in all cases. To adopt the language of Lord Reed in *UNISON* and Lord Bingham in *Daly*, the degree of intrusion in the right to a public hearing is greater than is justified by the objectives. The prohibition upon a public hearing of any part of any proceeding has the effect of denying the Commissioners themselves the power to determine the requirements of open justice in any particular case and in light of its particular evidence. While the applicant in this case may not have had a right to have a full public hearing for the entirety of the proceedings, I consider that her right to open justice, included a right for the tribunal itself to determine the requirements of privacy, in light of the particular facts in this case. I consider that the right in question is broader in scope than that conferred under rule 22(4) which would have enabled her to request her own personal admission to some or all of the proceedings. That is very different from the possibility of a hearing to which the public have access as of right and to which no reporting restrictions apply. For all of these reasons, I consider that rule 22(2) amounts to a restriction on open justice which goes further than is justified by the factors put forward by the Department.

[78] The factors relied upon by the Department to justify a private hearing are likely to carry a very great weight in many if not most cases in respect of large portions of those cases. To that extent, I acknowledge that there are likely to be some if not many cases in which the effect of the current requirement for privacy would be fully justified and will not go further than the facts of the case require. However, I consider that the fundamental flaw in the current arrangements is the absence of any mechanism by which those requirements can be assessed on a case-by-case basis, rather than by reference to general principles and concerns. It is for this reason that I consider the absolute requirement for privacy goes beyond what can be justified from the objectives which the requirement seeks to pursue.

The effect of rule 22(2) is therefore not authorised by the 2008 Order and I find that rule 22(2) is ultra vires.

Obligation to make provision for the applicant's attendance

[79] As the analysis above makes clear, the principle of open justice requires that court proceedings take place in public, unless an exception is justified. A public hearing is one to which the public have a right to attend. The applicant has adduced no authority or identified any equivalent common law principle to the effect that a court or tribunal has a positive legal obligation to secure the attendance of any particular party. It is in the nature of the principle of open justice that individuals have a right, but not an obligation to attend. Accordingly, I find that the Commissioners are not required by the principle of open justice to make positive arrangements for the applicant's attendance.

[80] It is also clear from a consideration of the plain language of rule 22 that none of its provisions place a statutory obligation upon Commissioners to make positive arrangements for the attendance of any person or party. Rule 22(4) provides a mechanism by which a person can request the right to attend, but it does not impose a positive obligation upon the Commissioners to authorise attendance of their own motion or even to authorise attendance of a victim in every case. Similarly, even where attendance is authorised, there is nothing in rule 22 which requires the Commissioners to make positive arrangements to facilitate attendance.

[81] The applicant has not identified any alternative legal basis to support the second ground of challenge. In any event, on the facts of this case, it is clear that the applicant did not make a request to attend the parole hearing. In the circumstances, even if I had found that a duty to arrange for attendance existed, I can see no basis for the grant of any relief.

Article 10 ECHR

[82] In the course of the hearing, the applicant accepted that since neither article 10, nor the principle of open justice were absolute principles and since departures from both could be justified by reference to principles of proportionality (or similar principles) the challenge under article 10 would add little, if anything, to the analysis under common law. In light of my conclusions on the common law, the article 10 claim is not decisive to the outcome of these proceedings. Nevertheless, I consider that the applicant has not established either a breach of article 10 or that rule 22 is incompatible, in light of the facts of the case. There are three relevant features of rule 22: the requirement for a private hearing (rule 22(2)); the prohibition upon publication of information about the hearing (rule 22(3)) and the power to admit persons to the hearing (rule 22(4)). This challenge related only to rule 22(2). The applicant might have been permitted to attend some or all of the hearing but did not make a request to attend. Insofar as this may have resulted in

her not receiving or being able to impart information about the proceedings, I consider that it was a consequence of her own inaction, not a restriction imposed by either the 2009 Rules or by the Commissioners. The failure to make a rule 22(4) request has also resulted in the court having no evidence about the portions of the hearing which she might have been permitted to attend or the reasons for any exclusion. These are essential factual details for determining whether and to what extent the applicant might have been subject to any restriction at all in receiving or imparting information about the proceedings and whether it could be justified. Accordingly, I am satisfied that the applicant has not demonstrated that she is a victim for the purposes of an article 10 claim under the Human Rights Act.

[83] In order to establish victim status, the applicant relied upon the decision of the Court of Appeal in *Re Close* [2021] NI 276 and contended that the applicant was not required to make an application to the Commissioners as the legislation required a private hearing in every case and hence there was no point in making an application to attend the hearing. I do not consider that the analogy with *Re Close* is applicable in this case. *Re Close* concerned a challenge to a statutory prohibition upon same sex marriage. The Court of Appeal held that the applicants were victims, notwithstanding a failure to lodge a notice of intention to marry with the Registrar, as the legislation clearly prohibited acceptance. Lodging the notice therefore served no purpose and the failure to do so did not prevent the applicants demonstrating victim status. *Re Close* is an example of well-established Strasbourg jurisprudence on the victim status. Where the convention rights of individuals are placed in jeopardy by means of clear statutory provisions, the court has consistently held that those provisions may be challenged on an *ab ante* basis, without the need to wait for the legislation to be enforced, if the individual is directly affected by the measure or would be required to modify their behaviour to avoid possible enforcement. In *Ramadan v Malta* [2016] ECHR 76136/12 the court stated that the person may “run the risk of being directly affected” by the measure. Examples include *Norris v Ireland* [1988] ECHR 10581/83 (criminalisation of consensual homosexual sex); *A, B C v Ireland* [2010] ECHR 25579/05 (restriction upon abortions in certain circumstances); *Sejdic v Bosnia and Herzegovina* (2009) 28 BHRC 201 (eligibility for elected office) at [28]-[29]. A recent domestic example is *Re Ewart* [2021] NI 60 (abortion restriction). I consider this case falls outside this principle for two related reasons. First, article 10 does not provide a guarantee of a public hearing of legal proceedings. It protects the right to impart and receive information and can include information held by public authorities. The two concepts are different. Accordingly, it is not inevitable that rule 22(2) will require an individual to “run the risk” of a violation or inevitably place their article 10 rights in jeopardy. Second, rule 22(4) could have provided the applicant with an opportunity to attend some or all of the hearing and therefore receive information about the case. Unlike the circumstances in *Re Close*, the outcome of such an application was not foreclosed by the legislation. Accordingly, I consider that the failure to request permission to attend some or all of the hearing deprives the applicant of demonstrating that she has been directly affected in the exercise of article 10 rights and hence that she is a victim.

[84] Even if I was wrong about her victim status, her failure to make an application to attend some or all of the hearing has resulted in an absence of any decision by the Commissioners under rule 22(4). Accordingly, there cannot be any claim against the Commissioners for a breach of her article 10 rights and the challenge can only be directed towards rule 22(2) on an *ab ante* basis. It is clear from the authorities that the test in such a challenge is that the applicant must be able to demonstrate that in “all or almost all” cases, the requirement for a private hearing will give rise to a breach of convention rights (see eg. *Re Dillon* [2026] UKSC 15 [2026] 2 WLR 932 at [161]). I have concluded above that the rights protected by article 10 and the principles of open justice are conceptually different, even if they may overlap. The rule 22(2) requirement for a private hearing in every case deprives the Commissioners of a discretion to determine the requirements of open justice on a case-by-case basis and is *ultra vires* the 2008 Order. I do not consider that it follows from that conclusion that rule 22(2) will give rise to a breach of article 10 in all or almost all cases. The factors relied upon by the Department to justify the rule may very well be sufficient in many cases to justify holding some or all of the hearing in private. In light of that possibility, it cannot be said that that rule 22(2) will give rise to a breach in all or almost all cases. For all of these reasons, the article 10 challenge to rule 22(2) must fail.

[85] Finally, I also consider it appropriate to observe that the scope of this challenge was also likely to be insufficient to consider an article 10 challenge to rule 22. This applicant limited her challenge to rule 22(2), which restricts public access to parole hearings, but not individual access. An important potential issue arising from the rule 22 is the extent to which an individual who is permitted to attend is also prohibited from reporting upon the proceedings which they did observe. This raises the question of whether the rule 22(3) restriction on publishing information about parole proceedings, should be modified in cases where a non-party has been permitted to attend under rule 22(4). The applicant in this case did make some submissions on this issue. However, not only did the issue not arise on the facts, but there was no challenge to rule 22(3). Any restriction upon an individual’s ability to receive or impart information about a parole hearing would require consideration of rules 22(2), (3) and (4) in light of how they were applied to the facts of the case. These issues did not arise on the facts of this case, nor did they form part of the permitted challenge. However, they may arise for consideration in some future case.

Conclusions

[86] For all of the above reasons, I find that rule 22(2) of the 2009 Rules is *ultra vires* the 2008 Order. I am conscious that rule 22 has been in force for many years and has been interpreted by the Commissioners to include a statutory prohibition on public hearings. The Department has also explained in its evidence that further policy change may be considered. While the reasoning and conclusions of

this decision will speak for themselves, I will hear the parties on whether any additional relief is appropriate in the circumstances.

[87] The application for judicial review is therefore granted.