Neutral Citation No: [2020] NICA 40 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **McC11307** ***Delivered:*** **15/09/2020**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY KIELAN ALLEN FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

v

NORTHERN IRELAND PRISON SERVICE

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Before: McCloskey LJ and Huddleston J

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McCLOSKEY LJ (delivering the judgment of the court)

Introduction

[1] Kielan Allen ("*the Appellant*"), a sentenced prisoner, appeals to this court against the decision and order at first instance of the Lord Chief Justice, sitting as vacation duty judge, dated 17 August 2020, whereby his application for leave to apply for judicial review challenging a sentence calculation decision of the Respondent, the Northern Ireland Prison Service (the "*Prison Service*") was dismissed. The impugned decision is to the effect that the Appellant's release from sentenced custody will take place on 21 September 2020. The Appellant's case is that as a matter of law he should have been released from prison on 08 August 2020. The resolution of this appeal turns on (a) the construction of section 26(2A)(b)(i) of the Treatment of Offenders Act (NI) 1968 and (b) the application of this statutory provision to the relevant factual matrix.

[2] To the foregoing dates and events we would add the following:

(a) The first instance decision having been made on 17 August 2020, the Notice of Appeal is dated 24 August 2020.

(b) Legal aid for the purpose of prosecuting this appeal was granted to the Appellant on 28 August 2020.

(c) The appeal first came to the attention of this court when the papers were referred to me as duty Court of Appeal judge on 02 September 2020. The appeal was accorded maximum priority thenceforth.

(d) Between 02 September and 04 September the court issued a series of case management directions and on the latter date conducted a comprehensive case management/review hearing (by video link).

(e) The substantive hearing proceeded and was completed on 07 and 09 September 2020. Completion of the hearing on the first of these dates was not possible on account of the twin factors of limited court time and the need to issue further directions to the parties.

[3] A preliminary observation is appropriate. The factual matrix of the case at this, the appeal, stage, differs significantly from that before the court at first instance. This arises *inter alia* because of the generation of further material information following promulgation of this court's initial case management directions. Taking into account that the case involves the liberty of the citizen there was, very properly, no objection by the Prison Service to the adduction of this further evidence. It was admitted by a case management ruling of this court on 04 September 2020. Further, new evidence, of a documentary nature, was also admitted. In this context it is appropriate to record the court's appreciation of the parties' commendable responses to the demands and exigencies arising from the court's directions and their co-operation with the court generally.

Factual Matrix

[4] Summarising and before proceeding to some of the detail, the Appellant was the subject of five separate prosecutions involving a total of 18 offences. These offences fall into two groups of 17 and one respectively. The alleged offences belonging to the first group culminated in the sentencing of the Appellant to seven months' imprisonment (following a successful appeal against sentence) on 31 July 2020 (the "*sentencing date*"). The sole member of the second group, an alleged offence of having inflicted grievous bodily harm with intent contrary to section 18 of the Offences Against the Person Act 1861, gave rise to a free standing charge (the "*GBH charge")* which, ultimately, was formally withdrawn (on 27 July 2020).

[5] The chronology in a little more detail is as follows:

(a) The first eight offences belonging to the first group all allegedly occurred on 10 March 2020. They involved charges of criminal damage, tampering with a vehicle, disorderly behaviour, resisting

arrest, common assault (two) and assaulting police (two). All were the subject of guilty pleas on the sentencing date.

(b) Ditto the 9th and 10th members of this group, namely common assault and criminal damage allegedly committed on 12 March 2020.

(c) Ditto the 3rd free standing component of this group, namely six offences allegedly committed on 02 May 2020 which, ultimately, were reduced to three.

(d) Ditto the 17th and last member of this group, being a free standing charge of resisting police committed on 06 May 2020.

(e) The sole member of the second of the two groups identified above, namely the GBH offence, was alleged to have occurred on 06 May 2020 and as noted, was withdrawn subsequently one week after the sentencing of the Appellant at first instance in respect of the three remaining charges belonging to the first group.

[6] This appeal entails an intense focus factually on the events of 06 May 2020. Those events gave rise to the single charge representing the final member of the first of the groups identified above and the further, single charge comprising exclusive membership of the second of the two groups i.e. the GBH charge. It is necessary to elaborate on the uncontentious facts pertaining to each of these alleged offences.

[7] This exercise in elaboration is enhanced by the availability of the main item of new evidence noted in [3] above. This consists of a document which is more than familiar to those who practice and adjudicate in the criminal justice system, namely a Police Service "*Structured Outline of Case*". Without descending into unnecessary and burdensome detail, the following is drawn from this extensive account of the events alleged to have occurred on 06 May 2020, supplemented by other material documentary records (custody record, charge sheets *et al*). Identification of all protagonists involved, other than the Appellant, is unnecessary and what follows has been devised accordingly:

(a) Shortly following 18.14 hours on 06 May 2020 the police attended a public area in Portrush. There they encountered a male person whom we shall describe as the injured party. He had blood coming from his nose and appeared intoxicated through drink or drugs. He made no complaint of assault. He did, however, allege that the Appellant was in the top floor flat of a nearby property and had a firearm in his possession.

(b) Some minutes later, police arrested the Appellant in an adjacent public place, having observed him flee from the aforementioned property. The reason for his arrest was a suspected breach of one of his extant bail conditions (arising out of the first group of charges) by reason of the consumption of illegal

substances. He violently resisted police during his arrest. This gave rise to the last of the 17 charges belonging to the first group.

(c) *Notwithstanding his arrest, police determined, for a variety of reasons, not to escort the Appellant to a police station. He was, however, arrested very quickly afterwards by virtue of being in breach of the curfew condition of his extant bail.*

(d) *The Appellant, having been arrested, was charged with the resisting arrest offence [which later became the 17th member of the first category of alleged offences (supra)].*

(e) *Having been thus arrested, the Appellant was in police custody until the following day, 07 May 2020, when he first appeared before the Magistrates' Court in respect of the 17th charge and was granted bail.*

(f) *The Appellant perfected his bail on this date and, in consequence, was at liberty until the further events of 09 May 2020 (infra).*

(g) *Later on the same date, i.e. 07 May 2020, the injured party's sister contacted the police communicating an allegation that the injured party had been assaulted by the Appellant the previous evening in the aforementioned flat and was en route to the hospital by reason of his injuries.*

(h) *Two days later, on 09 May 2020, the injured party himself repeated this allegation to the police.*

(i) *Later on the same date, the Appellant was arrested on suspicion of having committed the GBH offence and was detained. When interviewed, the Appellant did not dispute the fact of striking the injured party but contended that he had been acting in self-defence.*

(j) *Later, on the same date, the GBH charge was preferred against the Appellant. He made no reply when charged. He was informed that bail was denied and that he would be brought before the next available court. On 10th May 2020, while still in police detention, the Appellant made a counter allegation statement against the injured party.*

(k) *On 11 May 2020, the Appellant made his first appearance before the Magistrates' Court in respect of the single alleged offence comprising the second of the two groups (the GBH charge). The court remanded him in custody until 01 June 2020 when a further listing was scheduled. The Appellant's grant of bail in respect of those charges belonging to the first group was unaffected. It was not revoked. However, it became practically ineffective by virtue of his remand in custody in respect of the GBH charge.*

(l) *The Appellant next appeared before the Magistrates' Court in respect of the first group of charges on 01 June 2020. The court ordered a remand on continuing bail.*

(m) *On 01 June 2020, the Appellant appeared before the Magistrates' Court in respect of the GBH charge for a second time. The court ordered a remand in custody. On 01 June 2020, therefore, the Appellant was remanded into custody on the GBH charge whilst simultaneously remanded on continuing bail on the first group of charges.*

(n) *On the 08 June 2020, the Magistrates' Court again made further orders remanding the Appellant in custody in respect of the GBH offence and remanding him on continuing bail on the first group of offences.*

(p) *A period of 43 days elapsed between the custody remand order of 11 May 2020 and the Appellant's appearance before the Magistrates' Court on 22 June 2020. We shall describe this as "the contentious period". On the later date, the court formally revoked the Appellant's bail in respect of the offences belonging to the first group. This gave rise to the Appellant being remanded in custody in respect of those offences and a further remand in custody in respect of the GBH charge.*

(q) *Procedurally, the Appellant's prosecution in respect of all charges belonging to the first group remained on a separate free standing track. On 20 July 2020, the Magistrates' Court sentenced him to nine months' imprisonment in respect of these offences.*

(r) *On 27 July 2020, the Appellant had a remand appearance before the Magistrates' Court in respect of the GBH offence. This charge was formally withdrawn.*

(s) *On 31 July 2020, the County Court, on appeal, reduced the Appellant's sentence of imprisonment in respect of the first group of offences from nine months to seven months.*

[8] The narrative recounted above ends on 31 July 2020. The material dates and events thereafter all relate to these proceedings and have no bearing on the court's determination of the issues: see [2] above.

The Material Statutory Provision

[9] Section 26 of the Treatment of Offenders Act (NI) 1968 (the "*1968 Act*"), under the rubric of "Duration of Sentence" provides so far as is material:

> *"(2) The length of any sentence of imprisonment or term of detention in a young offenders centre or sentence of detention under Article 14(5) of the Criminal Justice (Northern Ireland)*

Order 2008 imposed on or ordered in relation to an offender by a court shall be treated as reduced by any relevant period, but where he was previously subject to a probation order, a community service order, an order for conditional discharge or a suspended sentence or order for detention in respect of that offence, any such period falling before the order was made or the suspended sentence or order for detention was passed or made shall be disregarded for the purposes of this section.

(2A) In subsection (2) "relevant period" means –

(a) any period during which the offender was in police detention in connection with the offence for which the sentence was passed; or

(b) any period during which he was in custody –

(i) by reason only of having been committed to custody by an order of a court made in connection with any proceedings relating to that sentence or the offence for which it was passed or any proceedings from which those proceedings arose; or

(ii) by reason of his having been so committed and having been concurrently detained otherwise than by order of a court; or

(c) any period during which he was in custody in a category 1 territory with a view to his being extradited to the United Kingdom to be tried or sentenced for that offence (and not for any other reason).

In paragraph (c) "category 1 territory" means a territory designated under the Extradition Act 2003 for the purposes of Part 1 of that Act.

(3) For the purpose of this section a suspended sentence or order for detention shall be treated as a sentence of imprisonment or, as the case may be, an order for detention in a young offenders centre when it takes effect under section 19 and as being imposed or made by the order under which it takes effect.

(4) No period of custody shall be taken into account for the purpose of reducing a term of imprisonment under this section unless the whole of that period begins after the commencement of this Act.

(5) Any reference in this Act or any other enactment (whether passed before or after the commencement of this Act) to the length of any sentence of imprisonment or order for detention in a young offenders centre shall, unless the context otherwise requires, be construed as a reference to the sentence or order pronounced by the court and not the sentence or order as reduced by this section.

(6) A person is in police detention for the purposes of this section –

(a) at any time when he is in police detention for the purposes of the Police and Criminal Evidence (Northern Ireland) Order 1989; and

(b) at any time when he is detained under section 41 of the Terrorism Act 2000.

(7) No period of police detention shall be taken into account under this section unless it falls after the coming into operation of Article 49 of the Police and Criminal Evidence (Northern Ireland) Order 1989."

[Words in s. 26(2) inserted (15.5.2009) by Criminal Justice (Northern Ireland) Order 2008 (Consequential Provision) Order 2009 (S.R. 2009/158), **art. 2(2)**

1989 NI 12

1980 NI 6

Words in s. 26(2A) inserted (21.7.2014) by Anti-social Behaviour, Crime and Policing Act 2014 (c. 12), **ss. 173(2)**, 185(1); S.I. 2014/1916, art. 2(r)

2000 c.11]

It is appropriate to observe at this juncture that the Appellant's case is based exclusively on section 26(2A)(b)(i).

The Impugned Decision

[10] It is the court's understanding that, pursuant to a long established practice, the Prison Service calculates every sentenced prisoner's earliest date of release (or "EDR") at a very early stage of the relevant period and communicates this to the person concerned. One of the virtues of this commendable practice is that it enables

prisoners to question or challenge the calculation and, where appropriate, to initiate judicial review proceedings.

[11] The pre-litigation events in this case followed a familiar course. The Appellant's solicitors enquired about their client's EDR, receiving the following response (dated 04 August 2020) from the Prison Service:

> "*…. Your client was sentenced on 4 IPCs on 20-7-20. Bail for appeal granted – no release. Appeal heard on 31-7-20 and substantive sentence reduced on appeal from 9 months to 7. Your client was credited with the following remand time:*
>
> *Police custody: 13-3-20*
> *Remand: 14-3-20 to 23-3-20*
> *Remand: 2-5-20 to 4-5-20*
> *Remand: 6-5-20 to 7-5-20*
> *Remand: 22-6-20 to 19-7-20*
>
> *Seven months equates to 215 days. 50% remission applied = 108 days to serve. 108 days minus 44 remand days = 64 days to serve. 64 days from 20-7-20 gives an EDR of 21-9-20.*"

This communication was the stimulus for these proceedings, which were initiated ten days later, on 14 August 2020.

[12] As appears from the Prison Service calculation forming the impugned decision, considered in conjunction with the chronology set forth in [7] above, the calculation of the Appellant's EDR left out of account what we have described as the contentious period namely the 43 days which elapsed between the order of the Magistrates' Court of 11 May 2020 remanding him in custody following his first appearance in respect of the GBH charge and the further order of the Magistrates' Court of 22 June 2020 revoking the Appellant's bail in respect of the offences belonging to the first group and remanding him in custody in respect of both groups of charges.

Section 26 Analysed

[13] The scheme of section 26 of the 1968 Act is to credit sentenced prisoners with certain periods of detention accumulated prior to the date of their sentencing. Section 26 distinguishes carefully between a "*sentence of imprisonment*" on the one hand and, on the other, pre-sentencing "*police detention*" or "*committal to custody*" by order of a court. Section 26, in this way, reflects the dichotomy in the criminal justice system of Northern Ireland of police custody and so-called remand custody (on the one hand) and sentenced custody (on the other). In short, section 26 prescribes the circumstances in which the latter form of custody is to be reduced by the former.

[14] As already noted, these proceedings are not concerned with the "*police detention*" element of the statutory regime, i.e. section 26(2A)(a). This case is concerned exclusively with court ordered remand custody, i.e. section 26(2A)(b) – and, in the present case (b)(i) only.

[15] As observed during the hearing, the court considers that section 26(2A)(b)(i) encompasses the following three disjunctive scenarios regarding sentenced prisoners:

(i) The custody of an offender solely by reason of a committal order of a court made in connection with any proceedings giving rise to the sentence of imprisonment under consideration.

(ii) The custody of an offender solely by reason of a committal order of a court made in connection with the offence giving rise to the relevant sentence.

(iii) The custody of an offender solely by reason of a committal order of a court made in connection with any proceedings from which the proceedings concerning either (i) or (ii) arose.

Where any of the aforementioned three scenarios applies, the period of custody constitutes a "*relevant period*" within the meaning of section 26(2). The effect of this is that any such period "*shall be treated as reduced*" (i.e. shall be credited to the sentenced prisoner) in calculating the length of any sentence of imprisonment or other form of detention specified in section 26(2).

[16] It will be evident that in formulating the three scenarios set forth above, the court has adhered strictly to the language of section 26(2A)(b)(i). We consider that scrupulous and consistent adherence to the statutory language is indispensable in every case. This discipline applies to the whole of section 26. It should, furthermore, reduce the possibility of error arising out of what may <u>subjectively</u> appear to be fair or unfair, just or unjust, in any given case.

[17] We consider that above all in every section 26 case, the court must be scrupulously faithful to every part of the interlocking and cumulative requirements prescribed by the words of the statute. This injunction is performed, firstly, by formulating the potentially applicable statutory scenarios in the precise and specific terms of the legislation, as we have done in [15] above. This exercise has the supreme merit of identifying the statutory requirements which must be satisfied. The next step is to consider, and determine, whether they are so satisfied on the facts of the individual case. This is the approach which we have adopted in determining the present appeal. In passing, the relevant facts should be largely uncontroversial in every case.

[18] As the hearing progressed, the court formulated the three scenarios rehearsed in [15] above and invited the parties to provide a supplementary written submission focusing on each. This had the beneficial effect of telescoping the contours of the Appellant's case and the issues to be determined by the court in the context noted in [3] above, namely that of a considerably expanded factual matrix.

The Appellant's Case

[19] On behalf of the Appellant, Mr Ronan Lavery QC (with Mr Sean Mullan of counsel) formulated their written submission relating to the aforementioned three scenarios in the following way:

> "Committed to prison custody on 07/05/20 by Order of Court relating to Resisting Police and is later sentenced for Resisting Police:
>
> Clearly no period of time should count towards it when he was on bail but when he was returned to prison custody time begins to run again.
>
> It should not be incumbent on a prisoner to make any form of 'bring forward' application or notify the prison authorities that he is back in prison again.
>
> The Order committing him to custody has not been superseded by a subsequent bail order, rather under Article 47(1) of The Magistrates' Court (NI) Order 1981 the default position is custody subject to meeting the requirements of bail.
>
> We refer further to this below.
>
> Committed to prison on 10/5/20 on GBHWI offence which relates to the sentence which was subsequently passed for the Resisting Police offence:
>
> Sufficient connection in terms of date and time and locality.
>
> The Resisting Police offence flows from and is subsequent to the GBHWI allegation.
>
> They are in substance the same incident.

> Committed to prison on the GBHWI proceedings on 10/5/20 which were proceedings arising from the Resisting Police proceedings:
>
> Had the alleged GBHWI allegation never occurred the police would never have been at the scene and the police would never have gone to look for the accused and he would never have resisted police.
>
> Had the complainant not been so intoxicated at the time and had he been able to properly verbalise any form of an assault the police would have arrested the Applicant at the time and so charged him alongside the Resisting Police offence.
>
> If the complainant's version of events is accepted he was assaulted by the Defendant and directly thereafter resisted police, who had attended on foot of the complaint made by the complainant in the GBHWI offence."

[20] Mr Lavery, elaborating, explained that the primary case made on behalf of his client involves outright disregard of the GBH charge. He contended that the contentious period overlapped (or, in the language suggested by the court, "fused") with a custodial period relating to the first group of offences. Mr Lavery helpfully clarified that the Appellant's secondary case is that the "*in connection with*" test enshrined in section 26(2A)(b)(i) is satisfied. He acknowledged that, in substance, the third of the three submissions reproduced above does not add to the second. In this context he agreed with the court that the statutory test of "*in connection with*" entails *a sufficiency of connection* or *a sufficient connection*. (In passing this became common case.) He submitted that this connection was established by a combination of the "Structured outlined of case" (noted above) and the police custody record generated on 09 May 2020 by the Appellant's arrest in respect of the GBH charge.

The Prison Service Riposte

[21] On behalf of the Prison Service, Mr Sean Doran QC (with Ms Ashleigh Jones of counsel) addressing the aforementioned three scenarios, formulated the following submissions in commendably clear terms:

> "Q1: Was the commitment of the Appellant to custody by the order made by the Court on the charge of grievous bodily harm with intent made "in connection" with any proceedings relating to the sentence passed for the offence of resisting arrest?

A1: No. The commitment of the Appellant to custody on the charge of grievous bodily harm was entirely independent of the proceedings relating to the sentence passed for the offence of resisting arrest.

Q2: Was the commitment of the Appellant to custody by the order made by the Court on the charge of grievous bodily harm with intent made "in connection" with the offence of resisting arrest for which the sentence was passed?

A2: No. The commitment of the Appellant to custody on the charge of grievous bodily harm was entirely independent of the offence of resisting arrest for which the sentence was passed.

Q3: Was the commitment of the Appellant to custody by the order made by the Court on the charge of grievous bodily harm with intent made "in connection" with any proceedings from which the proceedings relating to the sentence passed for the offence of resisting arrest arose?

A3: No. The commitment of the Appellant to custody on the charge of grievous bodily harm was entirely independent of any proceedings from which the proceedings relating to the sentence passed for the offence of resisting arrest arose."

Decided cases

[22] Both section 26 of the 1968 Act and its English equivalent, section 67(1A) of the Criminal Justice Act 1967, have stimulated a body of jurisprudence in the two jurisdictions. We have considered all of these decisions. In this exercise, we have been concerned with the identification of legal principles, in particular any decision on principle or statutory construction binding on this court by the doctrine of precedent, to be contrasted with the inappropriate exercise of comparing and contrasting the factual matrix of the present case with that of other cases.

[23] This exercise has entailed considering the following decided cases:

- *Re Rea's Application* [2008] NIQB 24
- *Re McAfee's Application* [2008] NIQB 142
- *Re Rea's Application* [***No 2***] [2010] NIQB 63

- *Re Millar's Application* [2013] NIQB 132
- *R v Governor of Brockhill Prison, ex parte Evans* [1997] QB 443
- *R v Governor of Wandsworth Prison, ex parte Sorhaindo* [1999] 96 (4) LSG 38.

[24] The submissions on behalf of the Appellant also drew to the attention of the court certain decided cases addressing legal issues bearing on the grant and revocation of bail, in particular, *Chaos v Kingdom of Spain* [2010] NIQB 68 and *Re BG's Application* [2012] NIQB 13. The court was further reminded of the statutory provisions relating to the remand of a defendant in custody and on bail by Magistrates' Courts, in particular Article 47 of the Magistrates' Courts (NI) Order 1981, together with Article 5 ECHR.

Discussion

[25] We consider the essential principle underpinning the statutory regime to be that a sentence of imprisonment falls to be reduced by an earlier period (or earlier periods) of police detention or court ordered custody if, and only if, the applicable requirements enshrined in the applicable provision/s of section 26 are satisfied. Mr Doran submitted, correctly in our view, that the section 26 regime does not establish any general principle of reduction of sentenced imprisonment by an anterior period, or anterior periods, of police detention or court ordered custody. Section 26 establishes a detailed and highly focused regime, embodying a series of separate scenarios, whereby a sentenced prisoner's period of imprisonment is capable of being reduced. A sentenced prisoner's entitlement to a reduction of any period of sentenced imprisonment arises only where the specific requirements of one or more of the section 26 scenarios are satisfied.

[26] It follows that in every instance the question will be whether the sentenced prisoner's case falls within one or more of the section 26 scenarios, satisfying the discrete requirements. If "yes", the sentence is to be reduced by the appropriate period. If "no", no reduction is to be made.

[27] The general principle which we have formulated in [25] above will be the starting point in every case. The second stage of the exercise will involve identifying whether any of the scenarios specified in section 26 applies. As set forth in [15] above, the provision of section 26 which arises in this case, namely section 26(2A)(b)(i) encompasses three distinct scenarios. Subsection (2A) prescribes a total of six separate scenarios. The other three, none of which arises in the present case, are found in subsection (2A)(a), subsection (2A)(b)(ii) and subsection (2A)(c).

[28] The factor common to the first five of the six scenarios is the phrase "*in connection with*". This phrase is not defined in the statute. This is unsurprising. These words are familiar and uncomplicated members of the English language. They are to be accorded their ordinary and natural meaning. We consider that they denote a

sufficient, or material, connection. They require the court to determine whether the nexus canvassed on behalf of the sentenced prisoner satisfies the requirement of sufficiency. There is a notional spectrum. At one end, there will be cases where there is either clearly no connection or, alternatively, a connection which is at best distant, remote or tenuous. The statutory test will not be satisfied in these cases. At the other end of the notional spectrum, there will be cases where the connection is obvious and unmistakable, thereby satisfying the statutory test. Between these two extremes, there will be cases where there is scope for genuine debate.

[29] The question of whether the sufficiency of connection test is satisfied is primarily one of fact. The exercise to be performed will normally be an unsophisticated one, involving detached, clinical analysis of undisputed (or indisputable) facts and the application of realism fused with common sense. Cases in which the application of the test involves mixed questions of fact and law will include those where, for example, there is debate about the meaning of one of the statutory words, for instance "*proceedings*".

[30] We consider that there is no precedent decision binding on this court confounding either the general principle or the other propositions set forth in the immediately preceding paragraphs. The court took care to express these views, then tentative, in the course of the hearing and the contrary was not argued by either party.

[31] Insofar as authoritative support for our views is required, it is readily found in the opinion of Lord Hope in *R(A) v Secretary of State for the Home Department* [2000] 2 WLR 293. Lord Hope, in the course of considering the equivalent English statutory provision, section 67 of the Criminal Justice Act 1967 as amended, stated at p 294:

> "*The broad principle to which it seeks to give effect is that periods spent in custody before trial or sentence which are attributable only to the offence for which the offender is being sentenced are to be taken into account in calculating the length of the period which the offender must spend in custody after he has been sentenced.*"

Lord Clyde added at p 302:

> "*From the history the policy behind section 67 becomes clear, namely that periods of sentences to custody should be automatically discounted in respect of periods which the offender has spent in custody or in conditions equivalent to custody pending trial or sentence in the case.*"

[32] Decision makers in difficult or borderline section 26 cases should also be alert to the valuable guidance offered by Weatherup J in the first of the *Rea* cases (*supra*) at [15]:

> "*I interpret the requirement that the court order remanding the prisoner be made 'in connection with' the offence for which he is sentenced as meaning that the matter in respect of which the applicant was on remand must relate to circumstances that are in substance those for which he is sentenced. So there may be different charges and dates and legislation but the substance of the matter may be the same.*"

[A reading of the judgment as a whole confirms that the word "*legislation*" in this context denotes the statutory provisions under which the offender was charged/prosecuted.]

[33] A further notable formulation of principle is found in the decision of the Divisional Court in *Re McAfee's Application* [2008] NIQB 42, per Kerr LCJ at [15]:

> "*The purpose of section 26 is to ensure that periods of pre-trial custody can be taken into account in reducing the sentence of the court but there is no obvious policy reason that this reduction should be augmented where an offender has been convicted in circumstances that lead to his being sentenced* (in respect of) *freestanding offences.*"

And further at [20]:

> "*The purpose of the legislation is to ensure that offenders do not spend longer in prison than is warranted by the pronounced sentence. It is not designed to allow a prisoner convicted of multiple offences to be the undeserving beneficiary of a reduction in a series of sentences because of a single period of detention on remand.*"

[34] The earlier decisions of this court which we have considered include *Millar* (*supra*). This, in common with the other decisions featuring particularly in the Appellant's submissions, confirms resoundingly the fact sensitive nature of the enquiry to be conducted by the court in every section 26 calculation case. We have identified no expression of legal principle in *Millar* inconsistent with what we have stated above.

Our Conclusions

[35] Giving effect to our construction of section 26 set forth above, we make the following conclusions in respect of the application of the three section 26(2A)(b)(i) scenarios to the facts of this case:

(i) Was the committal of the Appellant to custody in respect of the GBH charge by the order of the Court made "in connection" with any proceedings relating to the sentence passed for the offence of resisting arrest? No. The court order

committing the Appellant to custody in respect of the GBH charge was a free standing event, with discrete legal effects and consequences, which unfolded in separate proceedings unconnected both factually and procedurally with the proceedings relating to the sentence imposed for the offence of resisting arrest. As submitted by Mr Doran, the commitment of the Appellant to custody on the GBH charge was entirely independent of the resisting arrest proceedings. Thus the test of sufficient connection is not satisfied: there is no connection of the kind required by the statute. Furthermore, we fail to see how *disregarding the GBH charge entirely,* as contended by Mr Lavery, brings the Appellant's case within this discrete statutory scenario.

(ii) Was the committal of the Appellant to custody by the order of the Court in respect of the GBH charge made in connection with the offence of resisting arrest for which the sentence for the resisting arrest charge was passed? No. The court order committing the Appellant to custody in respect of the GBH charge was entirely independent of the offence of resisting arrest for which the sentence was passed. Our primary conclusion is that there is no connection between the custody committal order and the offence of resisting arrest. The latter offence formed no part whatsoever of the legal, factual or procedural matrix giving rise to the GBH custody committal order of the court. If this primary conclusion is incorrect our secondary, alternative conclusion is that any connection between the GBH custody committal order and the resisting arrest charge was of the most tenuous kind on the facts. This is our evaluative judgement relating to the several factual scenarios which unfolded at different times and different locations on the date in question. The dates of all of these scenarios coincided. However, there was no coincidence of time, location or protagonists. The Appellant's case is that the GBH offence and resisting arrest offence are "*in substance the same incident*". We reject this contention. They plainly were not committed in the same incident and did not arise out of the same incident. Nor do the separate incidents to which these two offences relate converge sufficiently to satisfy the statutory "*in connection with*" test. Insofar as there is any nexus between the two, it is simply too remote. Full coincidence, or convergence, is not, of course, the statutory test, but it provides a useful tool as cases where full coincidence, or convergence, is demonstrated will necessarily satisfy the less exacting statutory test of sufficient connection. The test of sufficient connection is not satisfied.

(iii) Was the committal of the Appellant to custody in respect of the GBH charge by the order of the court made in connection with any proceedings from which the proceedings relating to the sentence imposed for the offence of resisting arrest arose? No. The court order committing the Appellant to custody in respect of the GBH charge was a free standing event which unfolded in separate proceedings unconnected both factually and procedurally with the proceedings relating to the sentence imposed for the offence of resisting arrest.

Article 5 ECHR

[36] The possible amendment of the Appellant's grounds to make a structured case based on Article 5 ECHR arose on the occasion of the case management listing which the court conducted on the eve of the first two substantive listings. At this stage, a draft amended Order 53 Statement was presented and a further incarnation materialised thereafter. The burden of the proposed amendment was that section 26 of the 1968 Act does not satisfy the ECHR quality of law principles. The draft amendments also incorporated an Article 14 ECHR dimension. The court acknowledges that Article 5 (but not Article 14) featured in the Appellant's pleaded case from the outset. The pleading, however, was entirely un-particularised and it is evident from the transcript of the first instance decision that Article 5 did not feature in the case advanced. This is precisely the kind of phenomenon which surfaces in many high speed priority judicial review cases and no one is to be criticised for this.

[37] The approach which this court devised was to defer adjudicating on the proposed amendment until it had received the parties' arguments in full. The Appellant's case is that he should have been released from sentenced custody on 08 August 2020. The asserted "overholding" period of 43 days began on this date. The case management listing before this court and its ensuing directions unfolded on the 27th day of this period. The substantive hearing was conducted and completed on the 30th and 32nd days. On the latter date the court pronounced its decision orally.

[38] The foregoing timetable, dictated at all stages by the overarching consideration of the liberty of the citizen, had two principal effects as regards the proposed amendment. First, neither party had sufficient time to compose detailed argument on the Article 5 issues. Indeed, the submissions on Article 5 were, in the circumstances, sparse in the extreme. We emphasise that neither party is to be faulted for this. The second main effect of significance is that the proposed amendment raised (a) a Human Rights Act compatibility issue and (b) a "*devolution issue*" under Schedule 10 to the Northern Ireland Act 1998. Thus, the procedural requirements of Order 120 and 121 of the Rules of the Court of Judicature would have arisen. These requirements entail the giving of notice to specified third parties in prescribed terms. The procedural requirements specified in the Rules include time limits. All of the foregoing was signalled by this court on the occasion of the case management listing on the first of the three hearing dates noted above.

[39] The court was conscious of its power to abridge time limits prescribed by the Rules under Order 3, Rule 5 and the related dispensing provisions of Order 2, Rule 1. However, the exercise of these powers would still have required the provision of reasonable notice to the prescribed non-parties and a reasonable opportunity to respond. The court concluded that, realistically, this would not have been feasible within the highly compressed timescale prevailing. The court further took into account its assessment – unavoidably tentative – that the Appellant's Article 5 ECHR case, if permitted to flourish, did not appear persuasive.

[40] From this, it followed that the prosaic conundrum confronting the court would not have been solved by adopting Mr Lavery's proposed solution which would have entailed permitting the proposed amendment and granting the Appellant interim relief in the form of release from sentenced custody, fundamentally because the requirement of establishing a good arguable case, applying the *American Cyanamid* principles, would not have been satisfied. We further took into account the intrinsic undesirability of the Appellant being released from custody via an order of interim relief and being returned to custody on some future date. The final factor which the court weighed was that of the mechanism whereby the Appellant could be released from sentenced imprisonment by interim relief and, in certain eventualities, lawfully returned to prison to complete the relevant custodial period. Once again, the factor of time did not permit detailed consideration of this important issue. It suffices to observe that it was not clear to the court that any statutory power to re-arrest and detain the Appellant afresh would be engaged. While it may be that the answer to this would have lain in the terms of the court's interim relief order, sufficiently detailed argument on this issue was not feasible in the circumstances prevailing. For these reasons, we refused leave to amend and interim relief.

Order

[41] Our order is as follows:

(i) We consider that the threshold for the grant of leave to apply for judicial review has been overcome by the Appellant, albeit by a narrow margin, in respect of the second of the three scenarios identified in [15] above. Leave to apply for judicial review is granted in these terms and we dismiss the appeal substantively.

(ii) In all other respects the order at first instance whereby leave to apply for judicial review was refused comprehensively is affirmed.

(iii) The application to amend the Appellant's grounds of challenge to incorporate Article 5 ECHR is refused.

(iv) The application for interim relief is refused.

(v) The Appellant will pay the Respondent's reasonable costs above and below, to be taxed in default of agreement, but not without further order of the court.

(vi) The Appellant's costs shall be taxed as an assisted person.