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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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McVeigh's Application [2014] NICA 23

IN A MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY DAVID McVEIGH

AND IN THE MATTER OF A REFERRAL MADE BY THE MINISTER OF JUSTICE OF ENGLAND AND WALES TO THE PAROLE BOARD OF ENGLAND AND WALES

AND IN THE MATTER OF DECISIONS TAKEN BY THE MINISTER OF JUSTICE OF ENGLAND AND WALES ON 7 DECEMBER 2010 AND 18 JANUARY 2011

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Before: Morgan LCJ, Girvan LJ and Coghlin LJ

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GIRVAN LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal against the order and judgment given on 21 December 2013 by Horner J who stayed the appellant's application for judicial review on the ground that the High Court of Justice in Northern Ireland did not have jurisdiction to hear the appellant's application for judicial review or should decline jurisdiction.

[2] The appellant is a life sentence prisoner who was transferred to Northern Ireland as a restricted transfer prisoner under section 28 of the Crime (Sentences) Act 1997 in June 2010. He sought to challenge the relevant policy now relied upon by the Secretary of State for Justice ("the respondent"). The respondent asked the Parole Board to consider whether or not it would be appropriate to direct the

appellant's release but he did not seek the Parole Board's view on whether the appellant could, if not released, be moved to open conditions. The appellant's solicitor queried why the respondent had not done so and the respondent provided written responses on 7 December 2010 and 18 January 2011. It was the respondent's considered view that the issue of transfer into open conditions was not a matter on which the Parole Board could or should advise in respect of prisoners who had transferred from England to Northern Ireland, this being, in the respondent's view, a matter for the Northern Ireland prison authorities.

[3] Leave to apply for judicial review was granted on 27 June 2012. The Order 53 statement dated 28 February 2011 was filed on 4 March 2011. In his Order 53 statement the appellant asserts that prior to 2010 the respondent had an established practice when referring cases of Northern Ireland restricted transfer prisoners to the Parole Board of asking for advice as to whether those prisoners were suitable for open conditions if it was considered that they should not be released. The appellant further asserts that in 2010 this practice changed with such requests being no longer made. It is alleged that this represents a new policy on the part of the respondent and that the respondent had taken the impugned decisions on the basis of a policy which was unlawful and irrational.

[4] The applicant at the age of 15 murdered and sexually assaulted his step-sister on 20 May 1995. At the time of the offences the appellant was living in England with his father and his father's partner who was the mother of the victim. The appellant was sentenced on 13 December 1996 to a sentence of detention at Her Majesty's pleasure. His tariff, which was initially fixed at 13 years, was reduced by the Lord Chief Justice in England to 12 years on 13 August 2002. That tariff expired on 21 May 2007.

[5] On 15 October 1998 the appellant was transferred to Northern Ireland as a restricted transfer prisoner to be close to his mother and other family members. His case was referred to the Parole Board in 2007. At that time the respondent asked for the views of the Parole Board on the question whether the appellant was suitable for open conditions. The Parole Board considered the case but did not recommend his release or transfer to open conditions. There were two further referrals to the Parole Board. On those occasions the Board was again asked if it would recommend open conditions or their equivalent but it did not do so.

[6] Thereafter no such advice in respect of open conditions was sought by the respondent. On 7 December 2010 the Minister refused a request by the appellant that such a recommendation should be sought from the Parole Board and a further request that an "open conditions" recommendation should be sought was met with a refusal on 18 January 2011. The reason offered was that a recommendation on "open conditions" could not bind the prison authorities in Northern Ireland and, in any event, "open conditions" did not exist under the Northern Ireland prison regime on a basis equivalent to "open conditions" in England and Wales.

[7] As the judge noted, there are no "open conditions" under the Northern Ireland prison regime as such, but there is a power to recommend a prisoner for the Prisoner Assessment Unit ("PAU") which, it is asserted, is broadly equivalent. This seems to be accepted. Both "open conditions" and the PAU offer a stepping stone between prison and release into the community. They afford a prisoner an opportunity to demonstrate by his behaviour in conditions similar to those existing in the community that he can apply the lessons he has learnt in closed conditions. In April 2011 the PAU closed in Northern Ireland but has been replaced by a bespoke, pre-release scheme.

The judicial review challenge

[8] The grounds on which the appellant seeks relief can be summarised as follows. Firstly, it is alleged that the decisions were unreasonable by reason of:

(a) treating Northern Ireland restricted transfer prisoners differently from ordinary Northern Ireland lifer prisoners and ordinary English lifer prisoners without substantial justification;

(b) being justified by reference to the fact that decisions on open conditions in Northern Ireland are made locally and local decisions are not bound by the advice of the Parole Board when this is not a point of relevant distinction between the relevant cases;

(c) breaching his legitimate expectation induced by previous practice of requesting advice from the Parole Board as to his suitability for open conditions; and

(d) failing to recognise the previous established practice of asking the Parole Board for advice as to suitability for open conditions and asserting any such previous referrals were made in error.

Secondly, it is alleged that the decisions were discriminatory and contrary to the appellant's rights under section 6 of the Human Rights Act 1998 as read with Articles 5 and 14 of the ECHR in that the appellant is being treated differently to other English lifer prisoners and Northern Ireland lifer prisoners on grounds related to a status as a restricted transfer prison without any objective justification.

[9] The application for judicial review was set down for hearing on 27 November 2012. Shortly before the hearing the respondent raised a jurisdictional issue for the first time in the respondent's skeleton argument. It appears clear from counsel's submissions that the case was not fully argued before Horner J who did not receive detailed submissions in relation to the material authorities and, in particular, on the case of Spiliada Maritime Corporation v Cansulex Limited [1986] 3 All ER 843 which was not referred to in detail in argument before the court below.

The judge's conclusion

[10] The judge ruled that the English High Court had exclusive jurisdiction in respect of the challenge raised by the appellant. In his view, the source of the authority under which the respondent had acted in permitting the transfer of the appellant to Northern Ireland, namely section 28 of the 1997 Act, did not apply to the whole of the United Kingdom in general or to Northern Ireland in particular. It applied only to those restricted transfer prisoners from England and Wales who remained exclusively under the control of the Westminster Minister for the purposes of detention and release. He concluded, accordingly, that the English courts had exclusive jurisdiction in respect of decisions as to the release of restricted transfer prisoners taken by the Westminster Minister on the basis of the Parole Board's advice. On an alternative basis, the judge considered that while the respondent was in constitutional theory domiciled in the whole of the United Kingdom, despite the devolution of policing and justice powers to the Northern Ireland Minister, nevertheless the appropriate forum for the dispute lay in England. This was because section 28 of the 1997 Act applied to English prisoners and English restricted prisoners only who were serving out their sentence in Northern Ireland. The Parole Board is based in England and its members are exclusively made up of persons living in that jurisdiction. The Westminster Minister is advised by the Parole Board and the advice is given to him in England where the Minister makes his decision. It is likely, given the nature of the proceedings, that it would be more convenient that the proceedings take place in England, given that the place of residence of the staff advising the Westminster Minister and the Parole Board are resident there. Furthermore, the policy attacked was devised in England and applies only to prisoners sentenced in England but who are restricted transfer prisoners under the transfer regime. The judge accepted that if there were a dispute about a decision in respect of a transfer prisoner's actual conditions of detention that dispute should take place in Northern Ireland only. If the Northern Ireland court had concurrent as opposed to exclusive jurisdiction, then the judge considered that the more convenient jurisdiction to challenge a governor's decision on, for example, discipline was Northern Ireland. In relation to the appellant's claim for breach of Convention rights and damages for those breaches, the judge recognised that he had not heard detailed submissions on the issue but his provisional view on the skeleton arguments was that the Convention rights were not engaged because the treatment complained of did not fall within the ambit of Article 5(4). Furthermore, it did not appear to the judge that the appellant had been able to establish that he had been treated less favourably. His preliminary conclusion was that Northern Ireland lifers and English lifers were not comparable for the purposes of Article 14. While he accepted that an appellant was entitled to bring a claim for damages in Northern Ireland for infringement of Convention rights, the claim in respect of the breach of Convention rights was secondary to the main claim which related to the attack on the decisions made by the Westminster Minister. He remained of the view that England was the more convenient forum for the hearing of the case.

Grounds of appeal

[11] In summary the grounds of appeal are that the judge erred in finding that the High Court in England had exclusive jurisdiction or alternatively was the appropriate forum. The judge was wrong to decline jurisdiction to hear the application, was wrong to stay the application and was wrong not to find that the policy and decisions impugned were unreasonably discriminatory contrary to the Convention rights. However, this appeal as it was presented related entirely to the question of the jurisdictional ruling by the judge and the latter grounds of appeal do not arise at this stage since the substantive judicial review hearing has not taken place.

The relevant statutory provisions

[12] Section 41 of the Crime (Sentences) Act 1997 provides that the transfer of prisoners within the British Isles is provided for in Schedule 1. In paragraph 1 of Part I of Schedule 1 (Powers of Transfer) it is provided:

> "1(1) The Secretary of State may, on the application of –
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> (a) a person remanded in custody in any part of the United Kingdom in connection with an offence; or
>
> (b) a person serving a sentence of imprisonment in any part of the United Kingdom,
>
> may an order for his transfer to another part of the United Kingdom or to any of the Channel Islands, there to be remanded in custody pending his trial for the offence or as the case may be, to serve the whole or any part of the remainder of a sentence, and for his removal to an appropriate institution there."

[13] Paragraph 6(1)(a) of Schedule 1 defines when a transfer under Part I of Schedule 1 is a restricted transfer:

> "For the purposes of this part of this Schedule, a transfer under Part I of this Schedule –
>
> (a) is a restricted transfer if it is subject to a condition that the person to whom it relates is to be treated for the relevant purposes as if he

were still subject to the provisions applicable for those purposes under the law of the place from which the transfer is made; and

(b) is an unrestricted transfer if it is not so subject.

(2) In this part of this Schedule 'the relevant purposes' means –

….

(b) in relation to the transfer of a person under paragraph 1(1)(b) or (2)(b) or (2A)(b), 2(1)(b) or (2)(b) or 3(1)(b) or (2)(b) above, the purposes of his detention under and release from his sentence, and where applicable, the purposes of his supervision and possible recall following his release.

…."

[14] It follows that a prisoner transferred from England and Wales to Northern Ireland under a restricted transfer pursuant to paragraph 1(1)(b) of Schedule 1 will be treated as if he is still subject to the provisions relating to detention under and release from sentence that are applicable under the law of England and Wales. In the present case, this means that the appellant, as a restricted transfer prisoner, is to be treated in law as an English prisoner regarding the question of his release from prison. The question of release is to be determined as if the appellant had remained serving his sentence in England.

[15] Section 28 provides that it is the Parole Board in England which has a duty to give directions in relation to the release of certain life prisoners:

"(5) As soon as –

(a) a life prisoner to whom this section applies has served the relevant part of his sentence,

(b) the Parole Board has directed his release under this section,

it shall be the duty of the Secretary of State to release him on licence.

(6) The Parole Board shall not give a direction under sub-section (5) above with respect to a life prisoner to whom this section applies unless –

(a) the Secretary of State has referred the prisoner's case to the Board; and

(b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.

(7) A life prisoner to whom this section applies may require the Secretary of State to refer his case to the Parole Board at any time –

(a) after he has served the relevant part of his sentence;

(b) where there has been a previous reference of his case to the Board, after the end of the period of two years beginning with the disposal of that reference;

….

and in this sub-section "previous reference" means a reference under sub-section (6) above or section 32(4) below."

[16] Paragraph 5 of Schedule 1 refers to conditions of transfers. In particular paragraph 5(2) provides that a condition imposed under paragraph 5 may be varied or removed at any time:

"(1) A transfer under this part, other than a transfer under paragraph 1(2A), shall have effect subject to such conditions (if any) as the Secretary of State may think fit to impose.

(2) Subject to sub-paragraph (3) below, a condition imposed under this paragraph may be varied or removed at any time.

(3) Such a condition as is mentioned in paragraph 6(1)(a) below shall not be varied or removed except with the consent of the person to whom the transfer relates.

> (4) In relation to a transfer under this part which is the subject of an order or direction made by the Department of Justice in Northern Ireland, any reference in sub-paragraph (1) to the Secretary of State must be read as a reference to the Department of Justice in Northern Ireland."

Paragraph 5(4) of Schedule 1 was inserted by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010.

[17] Under section 239(2) of the Criminal Justice Order 2003 the Parole Board has a duty to advise the Secretary of State with respect to any matter referred to it by him which has to do with the earlier release or recall of prisoners.

[18] Schedule 1 of the Interpretation Act 1978 defines the Secretary of State as "one of Her Majesty's principal Secretaries of State".

Have the English courts exclusive jurisdiction

[19] Mr Hutton on behalf of the appellant contended that the indivisible nature of the office of Secretary of State is such that the office represents a single entity, HM Government, which, like the Crown itself, is domiciled in every part of the United Kingdom. Accordingly, the Secretary of State was to be considered as within the Northern Ireland jurisdiction and subject to the jurisdiction of the Court of Judicature here. She can, accordingly, be properly served and made a party to proceedings in Northern Ireland. Mr McQuitty, on behalf of the respondent, contended that the appellant's reliance on constitutional convention and theory in respect of the UK wide domicile of a Secretary of State was suspect and should not substantially inform the court's reasoning on the issue raised by the appeal. The Secretary of State is acting purely under English legislative provisions and section 28 of the 1997 Act did not apply to the United Kingdom in general or Northern Ireland in particular. He relied on Lord Scott's dissenting opinion in R (BAPIO) Action Limited v Secretary of State for the Home Department [2009] 1 All ER 93. Lord Scott opined that the constitutional indivisibility of the Crown was no basis on which an important issue as to the lawfulness of guidance given by a Minister to institutions for which he had statutory responsibility ought to be decided. He concluded that the concept of a unitary Crown was an imposed rule, in effect a legal fiction, rather than the real state of affairs. Rules, conventions and understandings of law had obscured the reality of the way in which the Executive conducts itself in departmentalised terms.

[20] *Pace* Lord Scott's dissenting view, the authorities do make clear that the office of Secretary of State is indivisible. The Secretary of State is present throughout each part of the United Kingdom. The position is stated clearly by Lord Rodger in BAPIO at paragraphs [33] and [34] as follows:

> "[33] In England the executive power of the Crown is, in practice, exercised by a single body of ministers, making up Her Majesty's government. With the increased range of responsibilities of central government today, there are, of course, more ministries dealing with domestic affairs than once there were, but they all exist to carry out the policies of the government. As this case illustrates, policies adopted in one field often have repercussions in other fields. Indeed, responsibility for government policy in particular fields is frequently transferred from one ministry to another in the hope of achieving the elusive goal of greater overall coherence. In those circumstances Schedule 1 to the Interpretation Act 1978, which declares that the term 'Secretary of State' in a statute means 'one of Her Majesty's Principal Secretaries of State', expresses a principle of constitutional law of considerable practical importance: all Secretaries of State carry on Her Majesty's government and can, when required, exercise any of the powers conferred by statute on the Secretary of State. The same applies, in broad terms, to the exercise of the prerogative powers of the Crown.
>
> [34] I am accordingly satisfied that it would be wrong, not only as a matter of constitutional theory, but as a matter of substance, to put the powers, duties and responsibilities of the Secretary of State for the Home Department into a separate box from those of the Secretary of State for Health. Both are formulating and implementing the policies of a single entity, Her Majesty's government."

[21] Since the Secretary of State must be considered as domiciled in Northern Ireland her presence, like that of any other respondent present within the jurisdiction, confers jurisdiction on the High Court in Northern Ireland to determine proceedings properly served on her within the jurisdiction. Whether the court should decline to exercise this undoubted jurisdiction raises distinct legal questions, in effect whether the principles of *forum non conveniens* make the English court the proper tribunal for determining such proceedings rather than the Northern Ireland court.

[22] In Re Surgenor [2003] NIQB 62 Weatherup J had to consider, amongst other challenges raised by the applicant, a challenge to the rationality of decisions of the

Scottish Ministers that the applicant be transferred by way of a Scottish restricted transfer order. He challenged on the ground that the decision of the Scottish Ministers was not based on the correct criteria. Weatherup J concluded that the primary supervisory jurisdiction should lie in the Scottish courts. The decision of the Scottish Ministers was purely Scottish. He considered that where issues arose about the outworking of the Scottish transfer decision involving the prison authorities in Northern Ireland those issues would not arise in a purely Scottish context. Weatherup J, however, noted at paragraph [15]:

> "[15] Had the restricted transfer order from Scotland to Northern Ireland been made by the Secretary of State for Scotland then the issue of jurisdiction would not have arisen as in constitutional theory there is an office of Secretary of State throughout the United Kingdom. So in Grogan's Application [1993] 10 NIJB 18 the jurisdiction issue did not arise in relation to a challenge to a decision of the Secretary of State for the Home Department for refusing to order the applicant's permanent transfer to a prison in Northern Ireland under the provisions of the Criminal Justice Act 1961, being the relevant legislation that preceded the 1997 Act. In Peart's Application [2003] NICA 26 the Court of Appeal quashed a decision of the Parole Board of England and Wales. The issue of jurisdiction does not appear to have been raised. In any event the Parole Board is a statutory body connected to the decisions of the Secretary of State as it was established by section 32 of the Criminal Justice Act 1991 to advise the Secretary of State."

This passage in Weatherup J's judgment recognises the jurisdictional competence of the Northern Ireland court over decisions made by a Secretary of State as being a consequence which follows from the Secretary of State's deemed presence in Northern Ireland as part of the United Kingdom. This is a point also recognised in the authorities he cited.

[23] We conclude accordingly that the judge was in error in concluding that the English courts had exclusive jurisdiction in relation to the issues raised in the appellant's judicial review challenge. We must thus turn to consider the question of *forum non conveniens*.

The *forum non conveniens* issues

[24] As noted the judge accepted the respondent's alternative argument that the English court was the proper court for determination of the issues raised and that

the Northern Ireland courts were not the convenient forum. Mr Hutton challenges that conclusion, contending that the judge should have recognised the preference to be afforded to the forum chosen by the appellant in circumstances where the choice was between two jurisdictions within the United Kingdom. The appellant was entitled to bring the proceedings in Northern Ireland and his choice should only be rejected where the balance of factors was strongly in favour of the respondent. The respondent had not discharged the onus on her to show that the English jurisdiction was clearly and distinctly more appropriate. England was not demonstrated to be the natural forum as the one with which the proceedings had the most real and substantial connection. The Northern Ireland proceedings were brought within time. If a new and separate application had to be launched in England the appellant would face time issues rendering it unjust to stay the present Northern Ireland application.

[25] Lord Goff in his speech in Spiliada Maritime Corporation v Cansulex Limited [1986] 3 All ER 843 provides a helpful and lucid analysis of the guiding principles which can be summarised as follows:

(a) A defendant must persuade the court that it should stay the proceedings. The burden resting on the defendant is not just to show that Northern Ireland is not the natural and appropriate forum for the trial but that there is another available forum which is clearly and distinctly more appropriate. If it is not demonstrated that there is another available forum clearly more appropriate, then the proceedings should not ordinarily be stayed.

(b) The court hesitates to disturb a plaintiff's choice of forum when the plaintiff has the right to institute proceedings in the jurisdiction. (As demonstrated, the appellant was entitled to bring the present application in this jurisdiction against the respondent in view of her domicile in every part of the United Kingdom).

(c) The court will look to factors in favour of the other potential forums. They must be factors indicating that justice can be done at substantially less inconvenience and expense. These include factors affecting convenience and expense such as the availability of witnesses and other factors such as the law governing the relevant transaction and the place where the parties reside.

(d) In cases where the court will ordinarily grant a stay there may be circumstances by reason of which a stay would produce injustice and should be refused.

[26] In Tehrani v Secretary of State for the Home Department [2007] 1 All ER 559 the applicant, an asylum seeker, entered the United Kingdom staying, firstly, in London and then being accommodated in Glasgow. Having been refused asylum he

appealed to the adjudicator who as a matter of convenience was sitting in Durham. Having been unsuccessful before the adjudicator, he sought leave to appeal to the Immigration Appeal Tribunal (based in London). Having been refused leave he presented a judicial review petition to the Court of Session. The Secretary of State, contrary to previous past practice, challenged the jurisdiction of the Court of Session. That challenge was upheld by the Outer House and the applicant appealed to the House of Lords. The question arose as to whether the supervisory jurisdiction was available when the United Kingdom body had made a decision affecting persons in Scotland but the decision had been made in England. The House of Lords held that the Court of Session had jurisdiction at common law. Adverse consequences to the applicant arose from a decision taken in England under a jurisdiction that was exercisable throughout the United Kingdom. There was a sufficient connection with Scotland to bring the decision within the supervisory jurisdiction of the Court of Session although the English courts had concurrent jurisdiction. While as a general rule the appropriate forum for the judicial review of a refusal of leave to appeal by the IAT would be England if the decision by the adjudicator had been made in England, it would not be appropriate in that case to require the issue to be resolved in England because the applicant had been acting in accordance with the usual practice when he sought the advice of a Scottish solicitor who had acted in accordance with the usual practice at the time. The application would be out of time in England when the petition was presented in Scotland (where it was not out time). It would be unfair to deprive the applicant of that advantage.

[27] Lord Nicholls points out that in the ordinary course the courts of England and Scotland (and we may add the courts of Northern Ireland) apply the common law Spiliada principles of appropriateness in deciding to exercise jurisdiction where the courts of more than one country have jurisdiction. In the Tehrani case the relevant statute indicated the basis on which the courts of Scotland and England had jurisdiction in respect of appeals, the determining factor being where the adjudicator made his decision. Normally the venue of the adjudicator's decision should be determinative of where the appropriate forum was. However, he considered that there were exceptional circumstances applicable. The applicant and his solicitors followed usual practice which up to then had been accepted and now faced a time bar in England. It would be unconscionable if the applicant were to be deprived of a remedy. Lord Hope noted that the respondent did not seek to argue the doctrine of *forum non conveniens* but asserted that the Court of Session had no jurisdiction. He considered it clear that the Court of Session did have jurisdiction at common law (as is the case in the present instance). Lord Rodger stated that in an appropriate case the Court of Session would have jurisdiction to judicially review a decision of the Home Secretary which affected a party in Scotland even if the decision was taken elsewhere in the United Kingdom. Wherever the order is made or the decision taken, whether by a Minister or by an official, it is a decision of a Minister of the Crown who is subject to the jurisdiction of the Court of Session. It was his view that in considering whether there was some more appropriate alternative forum in the choice between two different forums within the UK, absent any other consideration,

there would be a strong case for giving preference to the forum chosen by the petitioner.

[28] Applying the principles emerging from Spiliada and Tehrani we conclude that the respondent has not established that the present proceedings should be stayed in Northern Ireland and that the appellant should pursue his case before the English courts. We reach this conclusion for the following reasons:

(a) The decision of the Secretary of State clearly affects the interests of the appellant who is physically present and resident in Northern Ireland. Indeed, the appellant is a prisoner physically confined to Northern Ireland and he does not have the freedom to attend a solicitor or counsel outside this jurisdiction. Access to the court and to legal advisers is easier for the appellant in Northern Ireland.

(b) There are no real factors of convenience or expense which favour effectively stopping the present proceedings and requiring fresh proceedings to be recommenced in England if they are to be pursued. The proceedings fall to be determined on the basis of sworn affidavits and a consideration of documentation readily available in this jurisdiction (and presumably all of which is presently before the court in the affidavits and exhibits). The cessation of the present proceedings in Northern Ireland and the recommencement of similar proceedings in England rather than leading to a saving in cost and convenience will increase both cost and inconvenience.

(c) The appellant will face, at least, the substantial risk of fresh proceedings failing in England because of the delay involved in their commencement in that jurisdiction. The respondent took the jurisdictional point late in the day in the present proceedings, defending the proceedings up to the moment when the issue of jurisdiction was raised. This time issue produces potential unfairness to the appellant.

(d) The appellant chose to issue proceedings in the jurisdiction where he could have much easier access to a Northern Ireland solicitor and counsel. He did so at a time and in circumstances in which he had a choice of forum. The jurisdictional point raised by the respondent was apparently not one previously taken in such cases (see Weatherup J's comments at paragraph [15] in Surgenor).

(e) The law and the legal principles which fall to be applied by the courts in Northern Ireland and England are the same. The decisions of either set of courts would be subject ultimately to the jurisdiction and oversight of the Supreme Court which would apply the same legal principles whether the case came from Northern Ireland or England.

(f) The Crown (Sentences) Act 1997 is a Westminster statute relevant provisions of which apply in Northern Ireland. Once transferred to Northern Ireland a prisoner is clearly subject to the disciplinary rules and regime applicable in the Northern Ireland prisons and issues about his status as a prisoner raise mixed issues involving provisions of the local prison regime and his status as a restricted transfer prisoner subject to an English sentence. In the present case the consequence of the respondent's policy is to preclude the Northern Ireland Prison Service from having the benefit of advice from the English Parole Board (which they can provide in relation to a prisoner based in England). Nor can it have the benefit of the advice of the Northern Ireland Parole Commissioners (because they do not have jurisdiction over a transfer prisoner in the present case). The respondent asserts that it is a matter entirely for the Northern Ireland Prison Service (unadvised by either body) to decide on the provision of the equivalence of open conditions. The rationale of the respondent's approach appears, at least arguably, to put a restricted transfer prisoner based in Northern Ireland in a special and disadvantageous position because he is no longer in England and is in Northern Ireland. The issues raised in the present judicial review thus have a distinctly Northern Ireland aspect.

(g) The judge laid weight on the fact that the members of the Parole Board were English and based in England, that the Westminster Minister had made his decision in England on advice given in England and that it was likely that the nature of the proceedings would be more conveniently pursued in England given the place of the residence of departmental staff and Parole Board members. The place of the decision cannot be a relevant consideration, as demonstrated by Lord Rodger in Tehrani. Nor is the fact that the policy was decided in England a matter of real substance. In the context of a judicial review which involves an analysis of documentation based policy and decision-making processes the convenience of the location of departmental staff is not a matter of any great substance and must in any event be balanced against the lack of freedom of movement and the limitations in respect of communication inherent in the prisoner status of the applicant, who is confined to Northern Ireland.

[29] Accordingly, we conclude that the appeal should be allowed and the matter remitted to the High Court to hear and determine the substantive issues raised in the application.